IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35313

LORI SPANO,
Plaintiff,

SHANNON MASSEY, and CHARLES BURR,
Plaintiffs-Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA, SAFECO INSURANCE CO. OF OREGON, SAFECO INSURANCE CO. OF ILLINOIS, and AMERICAN STATES INSURANCE CO.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act ("FCRA" or "Act"), 15 U.S.C. § 1681 *et seq*., seeks to ensure the "[a]ccuracy and fairness of credit reporting," § 1681(a), which Congress recognized as important not only to the interests of individual consumers but also to the efficient functioning of the banking system. Congress has entrusted the Federal Trade Commission ("FTC" or "the Commission") with primary responsibility for governmental enforcement of the FCRA, while also affording consumers the right to bring private actions under the Act. §§ 1681n, 1681o, 1681s. The Commission regularly brings enforcement actions pursuant to this authority.[1] It has issued interpretive guidance regarding various aspects of the Act's requirements, 16 C.F.R. Part 600, and as directed by the Act, promulgated a Summary of Consumer Rights, Notice of User Responsibilities, and Notice of Furnisher Responsibilities, 16 C.F.R. Part 601. In addition, Congress recently passed the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), P.L. 108-159, 117 Stat. 1952. This law adds

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[1] *See, e.g., United States v. Imperial Palace, Inc.*, No. CV-S-04-0963-RLH-PAL (D. Nev. July 16, 2004) (employer failed to provide adverse action notices to job applicants who were denied employment based on information in consumer reports); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 JTC (N.D. Ga. May 2003) (lender obtained consumer reports for impermissible purpose); *United States v. Equifax Credit Information Servs., Inc.,* No. 1:00-CV-00087 (N.D. Ga. Jan. 26, 2000) (failure to provide adequate consumer access for inquiries regarding consumer report errors); *United States v. NCO Group, Inc.*, No. 04-02041-TON (E.D. Pa. May 20, 2004) (debt collection company violated FCRA by furnishing consumer reporting agencies with inaccurate delinquency dates).

numerous provisions to the FCRA and gives the Commission significant rulemaking responsibility in connection with the implementation of those amendments. In light of the Commission's key role administering the FCRA, this Court has found it appropriate to defer to the Commission's analysis of the Act's provisions. *See Ollestad v. Kelley*, 573 F.2d 1109, 1111 (9th Cir. 1978).

To further the FCRA

[2] Consumer reporting agencies are commonly known as "credit bureaus," and consumer reports are commonly known as "credit reports," although, as demonstrated by this case, the reports are used not only by creditors, but by employers, insurers, and others. *See* § 1681b (setting forth those persons who have a "permissible purpose" for receiving a consumer report from a consumer reporting agency).

In

ISSUE PRESENTED FOR REVIEW

Whether an insurance company takes "adverse action" against a consumer, as that term is defined in the FCRA, when, based on information in a consumer report, the insurance company sets a price for an offer of new insurance that is higher than the price it would have offered to the consumer if the information in the report had been more favorable.

STATEMENT OF THE CASE

1. The Fair Credit Reporting Act

Congress passed the FCRA in 1970 after extensive hearings. Those hearings showed the importance of credit reporting to the economy but revealed certain crucial abuses. Primary among these was that the consumer reporting industry was cloaked in a shroud of secrecy:

> One problem which the hearings * * * identified is the inability at times of the consumer to know he is being damaged by an adverse credit report. Standard agreements between credit reporting agencies and the users of their reports prohibit the user from disclosing the contents of the report to the consumer. In some cases, the user is even precluded from mentioning the name of the credit reporting agency. Unless a person knows he is being rejected for credit or insurance or employment because of a credit report, he has no opportunity to be confronted with the charges against him and tell his side of the story.

S. Rep. No. 91-517 at 3 (1969).

2. Factual Background

The relevant facts as found by the district court are as follows: in January 2001, plaintiff Shannon Massey purchased renter's insurance from defendant SAFECO Insurance Company of Illinois ("SAFECO Illinois"). D. 178 at 3-4.[3] When SAFECO Illinois evaluated Ms. Massey's application for the insurance, it obtained a copy of her consumer report, and based on information in that report, charged her a premium rate that was higher than the rate it would have charged if the information in her report had been more favorable. *Id.* at 13. SAFECO Illinois did not send Ms. Massey a notice of adverse action under the FCRA.

In July 2001, Plaintiff Charles Burr purchased automobile insurance from American States Insurance Company ("American States"). *Id.* at 4. Based in part on information in his consumer report, American States charged Mr. Burr a higher premium than it would have charged if the information in the report had been more favorable. *Id.* at 13. Mr. Burr's American States policy lapsed in July 2002. *Id.* at 4. In October 2002, he purchased automobile insurance from SAFECO Insurance Company of Oregon ("SAFECO Oregon"). SAFECO Oregon relied on information in Mr. Burr's consumer report to set the amount of his initial premium, and based on that information, SAFECO Oregon charged him a premium rate that was higher than

[3] Documents on the district court's docket are referred to as "D.xx."

the rate it would have charged if the information had been more favorable. *Id.* at 13. Neither American States nor SAFECO Oregon provided Mr. Burr with an adverse action notice unde

[4] In an earlier version of the complaint, the plaintiffs had also named as a defendant SAFECO Insurance Company of America ("SAFECO America"), an insurance company affiliated with the other defendants. On April 22, 2003, the court dismissed all claims against SAFECO America based on its conclusion that, because SAFECO America did not enter into insurance contracts with any of the plaintiffs, it could not, as a matter of law, have taken any adverse action against them. D.131. Plaintiffs have appealed this dismissal. We take no position as to this portion of the appeal.

it held that, when an insurance company sets the initial price for an insurance policy it will offer a consumer, there is no "adverse action," as that term is defined in the FCRA, no matter what price the insurance company sets, because "an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report." D.178 at 13-15. Accordingly, the court held that defendants were entitled to summary judgment because the initial setting of insurance premiums did not constitute "adverse action," as that term is defined under FCRA.[5]

SUMMARY OF ARGUMENT

When an insurance company uses information in a consumer report to set the initial price it will charge for insurance, and when, as a result of that information, it charges the consumer a higher price, the insurance company has taken an "adverse action" with respect to that consumer, as that term is defined in § 1681a(k)(1)(B)(i)

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[5] However, the court denied defendants' summary judgment motion with respect to the claims of plaintiff Lori Spano. D.178 at 15-17. According to the court, in August 2001, SAFECO Illinois cancelled Ms. Spano's automobile insurance policy. She requested that the company reinstate the policy, but the company refused, based in part on information that it obtained from her consumer report. The company failed to provide her a notice of adverse action after denying her request for reinstatement. The court held that denial of reinstatement was a denial of a request for insurance, and that any such denial constituted adverse action under the FCRA. Thus, SAFECO Illinois was required to provide her with an adverse action notice. On March 8, 2004, the court entered a final judgment pursuant to Fed. R. Civ. P. 54(b) with respect to the claims of plaintiffs Massey and Burr. D.181.

of the FCRA. Pursuant to § 1681a(k)(1)(B)(i), adverse action encompasses "an increase" in the price charged for insurance. The district court, adopting the reasoning in its decision in *Mark v. Valley Ins. Co.*, *supra*, limited the term "increase" to an enlargement of a price previously charged the same consumer. But a price that a consumer pays is also "increased" when the consumer is charged more than other consumers are charged at the same time. The court's narrow interpretation of § 1681a(k)(1)(B)(i) is inconsistent with common parlance, and with § 1681a(k)(1)(B)(iv), which demonstrates that the definition of "adverse action" should be interpreted broadly. (Part A, *infra*.)

A broad interpretation of § 1681a(k)(1)(B)(i) is also consistent with the Act's legislative history. That history shows that, for the first 26 years of the Act, from 1970 to 1996, setting higher initial rates for insurance constituted adverse action triggering an adverse action notice. There is no indication that, when Congress amended the Act in 1996 to add a definition of "adverse action," it intended to contract the Act's coverage. To the contrary, that history shows that Congress wanted to expand the range of situations in which unfavorable action based in whole or in part on a consumer report would lead to an adverse action notice. (Part B, *infra*.)

[6] The district court's opinion also conflicts with dicta in *Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455, 467 (W.D. Ky. 2003), where the court held that the term "adverse action" "should be read broadly" and should apply to any action whenever a consumer report is obtained for a permissible purpose and the user takes an action that is adverse to the consumer's interests.

[7] Pursuant to the court's reasoning, although an insurance company would have to provide a consumer with an adverse action notice if, based on a consumer report, it denied an application for insurance (because § 1681a(k)(1)(B)(i) specifically states that a denial of an application constitu

insurer cannot 'make greater' something that did not exist previously." 275 F. Supp. 2d at 1316. In the court's view, its interpretation of this section comported with "the plain meaning of the language Congress chose to employ." *Id.*

In fact, the meaning of this section is not nearly so "plain." Although the court focused on the fact that "[a]n insurer cannot 'make greater' something that did not exist previously," it ignored that the insurance companies' more favorable rates *did* exist at the time Ms. Massey and Mr. Burr applied for insurance, and, presumably, the companies would have offered those lower rates but for the information contained in Ms. Massey's and Mr. Burr's consumer reports. The unsupported premise of the district court's opinion is that the word "increase" refers only to an enlargement of a price previously offered to the specific consumer. But the district court was

more favorable rates

such premium in TILA disclosures. In discussing the issues, the court of appeals consistently referred to the allegations of "increased" prices, even though there was no alleged *change* in prices over time. *See, e.g.*, 272 F.3d at 327 ("An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers TILA's disclosure requirements" (emphasis in original)). Similarly, if an insurance company charges higher rates than it would charge if the consumer's credit report had contained more favorable information (in other words, a higher price than the company offers consumers with better credit ratings), that higher price would be an "increase" over more favorable treatment. Such an increase should trigger an adverse action notice under the FCRA.

The district court's analysis artificially cabins the term "adverse action," and leads to a completely illogical result. In particular, § 1681a(k)(1)(B)(i) provides that "adverse action" encompasses "an increase in any charge for * * * any insurance * * * *applied for* * * *." (Emphasis added.) To avoid reading "applied for" out of the statute entirely, the court was forced to create a hypothetical sequence of events that defies common sense. Thus, it held that an insurance company increases the price of insurance "applied for" when it offers insurance "at one price and then raise[s] that price after it review[s]" the consumer report. *Mark v. Valley Ins. Co.*,

275 F. Supp. 2d at 1317. This sequence of events hypothesized by the court is absurd because it assumes that an insurer would make a formal offer of insurance to a consumer and then, *after* making that offer, would evaluate the consumer's insurability. But when interpreting a statutory provision, a court should "not assume that Congress intended a statute to create odd or absurd results." *Rucker v. Davis*, 237 F.3d 1113, 1119 (9th Cir. 2001). This Court should avoid the district erydttvoid th

report, trigger an "adverse action" notice.[8] By contrast, recognizing a broader reading of the former subpart harmonizes the two, resulting in a coherent application of the principle that consumers should receive notice whenever information in a consumer report results in a detriment to them.[9] As this Court has recognized, proper statutory construction requires analyzing particular "provision[s] in the context of the governing statute as a whole, presuming congressional intent to create a 'symmetrical and coherent regulatory scheme.'" *Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 875 (9th Cir. 2003) (citation omitted; quoting *FDA v. Brown & Williamson Tobacco*

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[8] Section § 1681a(k)(1)(B)(iv) states:

(k) Adverse Action.
  (1) Actions Included. The term "adverse action" -- * * *
    (B) means -- * * *
      (iv) an action taken or determination that is
        (I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer * * * and
        (II) adverse to the interests of the consumer.

[9] In *Mark v. Valley Ins. Co.*, the district court rejected the plaintiff's contention that the insurance company's conduct also constituted "adverse action" under § 1681a(k)(1)(B)(iv). The district court held that, because § 1681a(k)(1)(B)(i) specifically applies to insurance, § 1681a(k)(1)(B)(iv) does not. 275 F. Supp. 2d at 1315. Although we do not rely on § 1681a(k)(1)(B)(iv) as an independent basis for a claim regarding insurance applications, it is nevertheless relevant to a proper reading of § 1681a(k)(1)(B)(i) for the reasons explained in the text.

Corp., 529 U.S. 120, 132-33 (2000)). The district court improperly ignored that maxim of statutory construction.

Even if the foregoing considerations do not themselves dictate adoption of plaintiffs' interpretation of the statute, they certainly show that the district court's restrictive approach is not the only plausible reading of the statute's text. Accordingly, the court should have gone beyond its truncated "plain meaning" analy

This provision, like the current Act's definition of adverse action, refers to an "increase" in the charge for insurance. The original version of § 1681m(a) was adopted, virtually verbatim, from the Senate version, S.823, 91st Cong. (1969).[10] The committee report accompanying S.823 explained the breadth of the obligation imposed by the section on users of consumer reports: "Those who reject a consumer for credit, insurance or employment *or who charge a higher rate for credit or insurance* wholly or partly because of a consumer report must * * * so advise the consumer and supply the name and address of the reporting agency." S. Rep. 91-517, at 7 (1969) (emphasis added). Thus, this committee report shows it was Congress's intent that, under the original version of the Act, whenever an insurer charged a higher rate for insurance based on information in a consumer report, that insurer would have "increased" the charge for insurance, and thereby taken adverse action. There is no indication that the "increases" that trigger an adverse action notice are limited to those situations where the insurer increases a rate that had been previously charged or offered to the consumer.

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[10] As originally proposed, the Senate's version required the consumer, upon learning of adverse action, to request the name of the consumer reporting agency. When it adopted the FCRA, Congress made it mandatory for a user of a consumer report to notify the consumer of the name of the consumer reporting agency. This was the only change that was made to the Senate version. *See* H.R. Conf. Rep. 91-1587 (1970), *reprinted at* 1970 U.S.C.C.A.N. 4411, 4416.

Although the original Act's adverse action requirements applied when insurance companies use consumer reports to set initial prices, they did not apply in every situation in which a report user makes a decision unfavorable to the consumer. This was made clear by the Commission's Commentary on the Fair Credit Reporting Act. 55 Fed. Reg. 18804 (May 4, 1990, codified at 16 C.F.R. Part 600). This Commentary consolidated the Commission's interpretations with respect to each section of the FCRA and serves as guidance for consumer reporting agencies, users of consumer reports, and consumers. *See* 55 Fed. Reg. 18804. In the Commentary section discussing the obligations imposed by the Act on users of consumer reports, § 1681m, the Commission stated that:

> The Act does not require that a [consumer] report user provide any notice to consumers when taking adverse action not relating to credit, insurance or employment. For example, a landlord who refuses to rent an apartment to a consumer based on credit or other information in a consumer report need not provide the [adverse action] notice. Similarly, a party that uses credit or other information in a consumer report as a basis for refusing to accept payment by check need not comply with this section. Checks have historically been treated as cash items, and thus such refusal does not involve a denial of credit, insurance or employment.

55 Fed. Reg. 18826. Thus, the Commission recognized that, as of 1990, there were entities who had a permissible purpose for receiving consumer reports under § 1681b (*e.g.*, landlords or merchants accepting checks) but who were not required by

§ 1681m to notify consumers when they made decisions based on those reports that were unfavorable to consumers.

The definition of "adverse action," which was added to the FCRA by the Consumer Credit Reporting Reform Act of 1996, P.L. 104-208, Title II, Subtitle D, Chap. 1, 110 Stat. 3009-426 - 3009-454 ("CCRA"), was Congress's response to the Commission's 1990 Commentary. Although there were no committee reports issued in conjunction with enactment of the CCRA, reports were issued in connection with several earlier versions of the statute,[11] and these make clear that the definition was added to the FCRA to expand the coverage of § 1681m. The first relevant committee report was issued in connection with the Consumer Reporting Reform Act of 1992. H.R. 3596, 102d Cong (1992). That bill proposed the following:

> The term "adverse action" -- * * *
>
> (2) includes --
>
> (A) any denial of, increase in any charge for, or reduction in the amount of, insurance for personal, family, or household purposes made in connection with the underwriting of insurance* * *.
>
> (C) any action taken, or determination made --

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[11] Because the earlier versions were similar to the CCRA, it is appropriate for this Court to consider those reports. *See Exxon Mobil*, 217 F.3d at 1251-53.

(i) with respect to a consumer for -- (I) an application for an extension of credit; (II) a report for the cashing of a check drawn by the consumer; * * * (IV) an application for the leasing of real estate; and

(ii) which is adverse to the interest of the consumer.

H.R. 3596, § 102(a). The report accompanying the bill explained that:

> [t]he definition makes clear that, in addition to denials of credit, insurance or employment, refusals to cash a check [or] lease real estate * * * based on a consumer report constitutes an adverse action. This definition overturns a prior interpretation by the Federal Trade Commission ("FTC"), 55 Fed. Reg. 18826 (May 4, 1990), that refusals to cash a check or rent an apartment based on a consumer report do not trigger adverse action notices under the FCRA.

H.R. Rep. 102-692, at 21 (1992). The committee report also stated that:

> [t]he definition section provides a list of transactions that are considered to constitute examples of adverse action. This list is illustrative and not definitive. It is the Committee's intent that, whenever a consumer report is obtained for a permissible purpose under [§ 1681b(a)(3)] * * *, a denial of a benefit based on the report triggers the adverse action notice requirements under [§ 1681m].

Id.

The 103d Congress also considered adding a definition of adverse action to the FCRA. The House version, H.R. 1015, 103d Cong. (1994), included the following definition of adverse action:

> The term "adverse action" -- * * *
>
> (2) includes --

(A) any denial of, increase in any charge for, or reduction in the amount of, insurance for personal, family, or household purposes made in connection with the underwriting of

> (3) Insurance -- A denial or cancellation of, or an increase in any charge for, or reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

S.783, § 101(1994). Although this version contained introductory language that is not in the version ultimately adopted, its insurance provision is identical to § 1681a(k)(1)(B)(i). The committee report does not specifically mention the Commission's Commentary, but does note that "the consumer protections in current law are not uniformly provided in all cases where an action that is not in the interest of a consumer is taken based on a consumer report." S. Rep. 103-209, at 4 (1993). According to the report, the proposal "seeks to ensure that the definition [of adverse action] parallels the permissible purposes for accessing the report and to provide adverse action protections any time the permissible use of a report results in an outcome adverse to the interests of the consumer." *Id.* The report further explains that, "[w]hile the Committee bill contains examples of adverse actions, the Committee intends the definition to be inclusive and to parallel the permissible purposes under which a consumer report may be obtained pursuant to [§ 1681b]." *Id.* at 8.

Finally, during the 104th Congress (the Congress that ultimately enacted the CCRA), the Senate considered S.650, which contained a definition of "adverse action" identical to the one ultimately adopted. The committee report explained that

the definition was intended to overturn the Commission's Comm

states that adverse action means "an increase in any charge for * * * any insurance." There is no indication in any of the legislative history of the 1996 amendments of the FCRA that Congress intended to narrow the range of actions that would trigger the adverse action notice requirement. To the contrary, there is every indication that Congress intended the addition of a definition of "adverse action" to expand the range of actions triggering the notice requirement and to fill any gaps that the earlier version may have left. Thus, the current version, like the original one, applies to the actions

[12] The court's opinion in *Mark v. Valley Ins. Co.* does not mention S.650 or S. Rep. 104-185.

[13] The district court gave no weight to the Commission's March 1, 2000, informal staff opinion letter, which explained that, based on the Act's legislative history, the term "adverse action" should be interpreted broadly. In particular, the court stated that the letter was contrary to the "plain meaning" of the Act. 275 F. Supp. 2d at 1318. As explained above, the court misinterpreted the Act. The court also rejected the letter because it was a staff opinion, not the product of formal agency action. *Id.* However, the staff opinion letter is in complete accord with the Commission's Notice of User Responsibilities, 16 C.F.R. Part 601, App. C, which is the product of formal agency action (*i.e.*, notice and comment rulemaking, *see* 62 Fed. Reg. 35586 (July 1, 1997)), and which states the Commission's view that the term "adverse action" is defined "very broadly" by the FCRA. In any event, the present brief has, in accordance with standard Commission practice regarding *amicus* [illegible] explained above, the court misinterpreted the Act.)Tj304.3200 0.000lk0 Tc(i.

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[14] Section 311 of FACTA, which Congress passed in 2003, amends § 615 of the FCRA (15 U.S.C. § 1681m) to require that, when, based on information in a consumer report, a creditor grants credit on terms that "are materially less favorable than

CONCLUSION

For the reasons set forth above, this Court should hold that, when an

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