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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE FEDERAL TRADE COMMISSION .....	1
ISSUE PRESENTED FOR REVIEW .....	3
STATEMENT OF THE CASE .....	4
1. The Fair Credit Reporting Act .....	4
2. Factual Background .....	5
3. Proceedings Below .....	6
SUMMARY OF ARGUMENT .....	9
ARGUMENT .....	11
THE DISTRICT COURT ERRED IN HOLDING THAT RADIAN WAS NOT REQUIRED TO PROVIDE THE WHITFIELDS WITH AN ADVERSE ACTION NOTICE .....	11

# TABLE OF AUTHORITIES

Page

*Brantley v. Republic Mortgage Insurance Co.*,  
424 F.3d 392 (4th Cir. 2005) ..... 6

*Brossel v. Triad Guaranty Insurance Corp.*

No. 1:04 CV-4-M, 2005 U.S. Dist. LEXIS 20361  
(W.D. Ky., Sept. 15, 2005) ..... 3, 7

*Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004) ..... 2

U.S. DISTRICT COURT FOR THE DISTRICT OF KENTUCKY  
Case No. 03-226 E+M JCS/DC

*United States v. Equifax Credit Information Services, Inc.,*  
No. 1:00-CV-00087 (N.D. Ga. Jan. 26, 2000) ..... 1

*United States v. Far West Credit Inc*

**FEDERAL STATUTES**

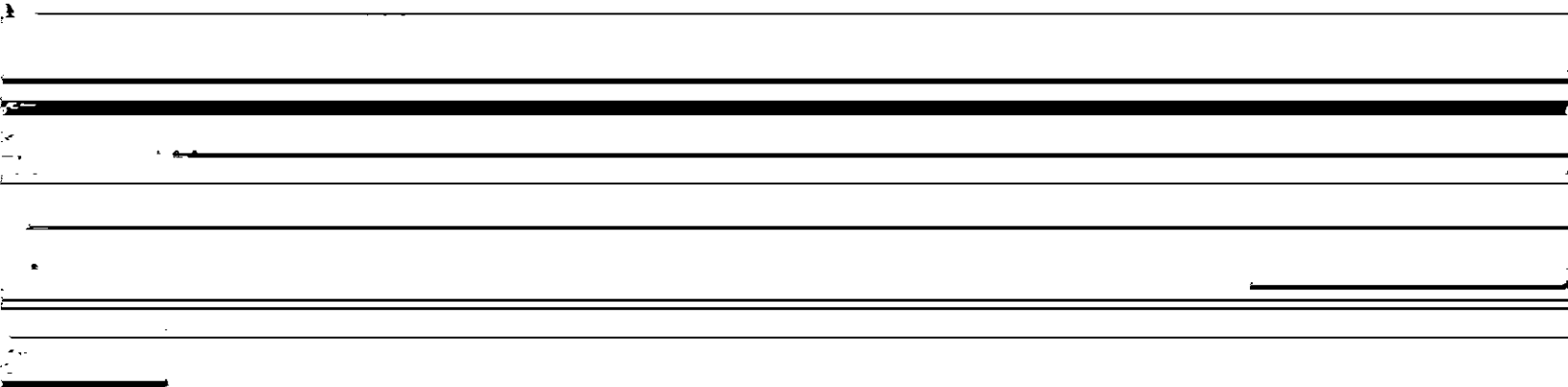
15 U.S.C. § 1691(d)(6) ..... 12

The Fair Credit Reporting Act , 15 U.S.C. § 1681 - § 1681x ..... 1

§ 1681 ..... 1, 2, 23

16 C.F.R. Part 698 ..... 1, 3, 19

C. D. No. 01 517 (1060) ..... 4



## INTEREST OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act ("FCRA" or "the Act"), 15 U.S.C. § 1681-§ 1681x,<sup>1</sup> 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

1. 15 U.S.C. § 1681(a) ("FTC" or "Commission") with primary

light of the Commission's key role administering the FCRA, courts have relied on the





## STATEMENT OF THE CASE

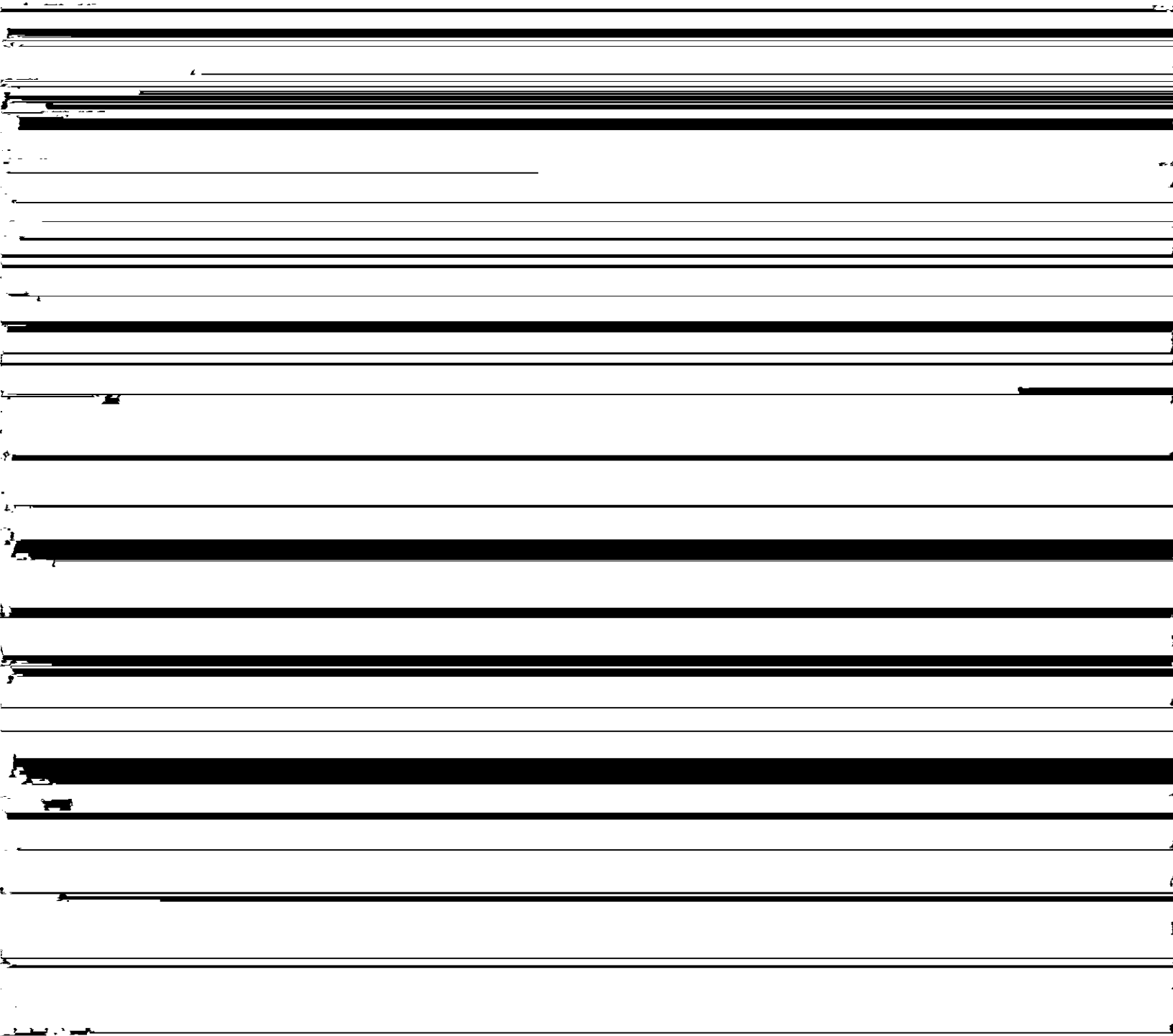
### 1. The Fair Credit Reporting Act

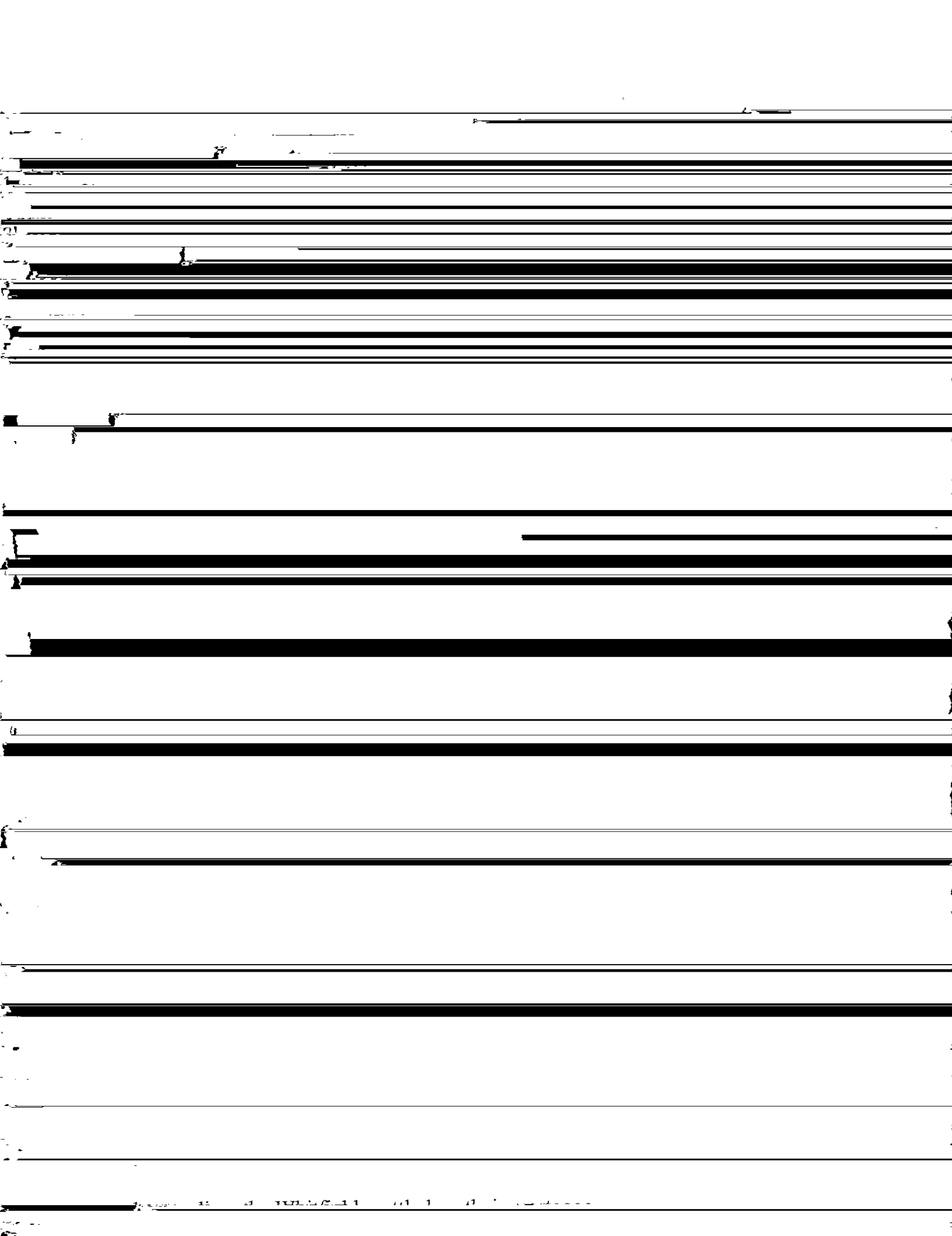
Congress passed the FCRA in 1970 after extensive hearings. Those hearings showed the importance of credit reporting to the economy but revealed certain

... that the consumer reporting industry

the consumer with the name and address of the consumer reporting agency that was the source of the report. § 1681m. The person that took the adverse action must also inform the consumer that the FCRA allows the consumer to dispute the accuracy or completeness of information in the consumer report. *Id.* The Act further requires a consumer reporting agency, upon request, to provide a consumer with a copy of the

\_\_\_\_\_





adverse action notice, as required by the FCRA. On October 25, 2004, Radian filed its answer. Although it denied most of the allegations of the complaint, it admitted that it had not provided the Whitfields an adverse action notice. On July 7, 2005, Radian moved for summary judgment.

The court (per Judge Sánchez) granted Radian's motion on October 21, 2005, and entered judgment in favor of Radian. D.61.<sup>6</sup> After reviewing the undisputed facts, the court noted that it disagreed with the decisions of three other district courts.

all of which had held that, in situations similar to the Whitfields', the insurance company owes an adverse action notice to the consumer. D.61 at 7. However, the court indicated that it agreed with the holding of one of those cases, *Broessel v. Triad*, to the extent that it held that the central issue in this case (*i.e.* whether Radian

missing what it considered to be the crucial issue: “whose risk was insured.” D.61

at 9. The court then focused on the fact that:

[t]he insurance transaction was one between Radian and Countrywide. The insurance transaction had the effect of determining what a mortgage would cost the Whitfields only to the extent Countrywide is risk averse. The premium paid allowed the Whitfields to obtain a mortgage, but the

beneficiary of the insurance was Countrywide.

*Id.* at 10. The court then observed that the FCRA’s adverse action notice requirement

“adverse action notice is not insignificant.” *Id.* at 11. Moreover, the court was

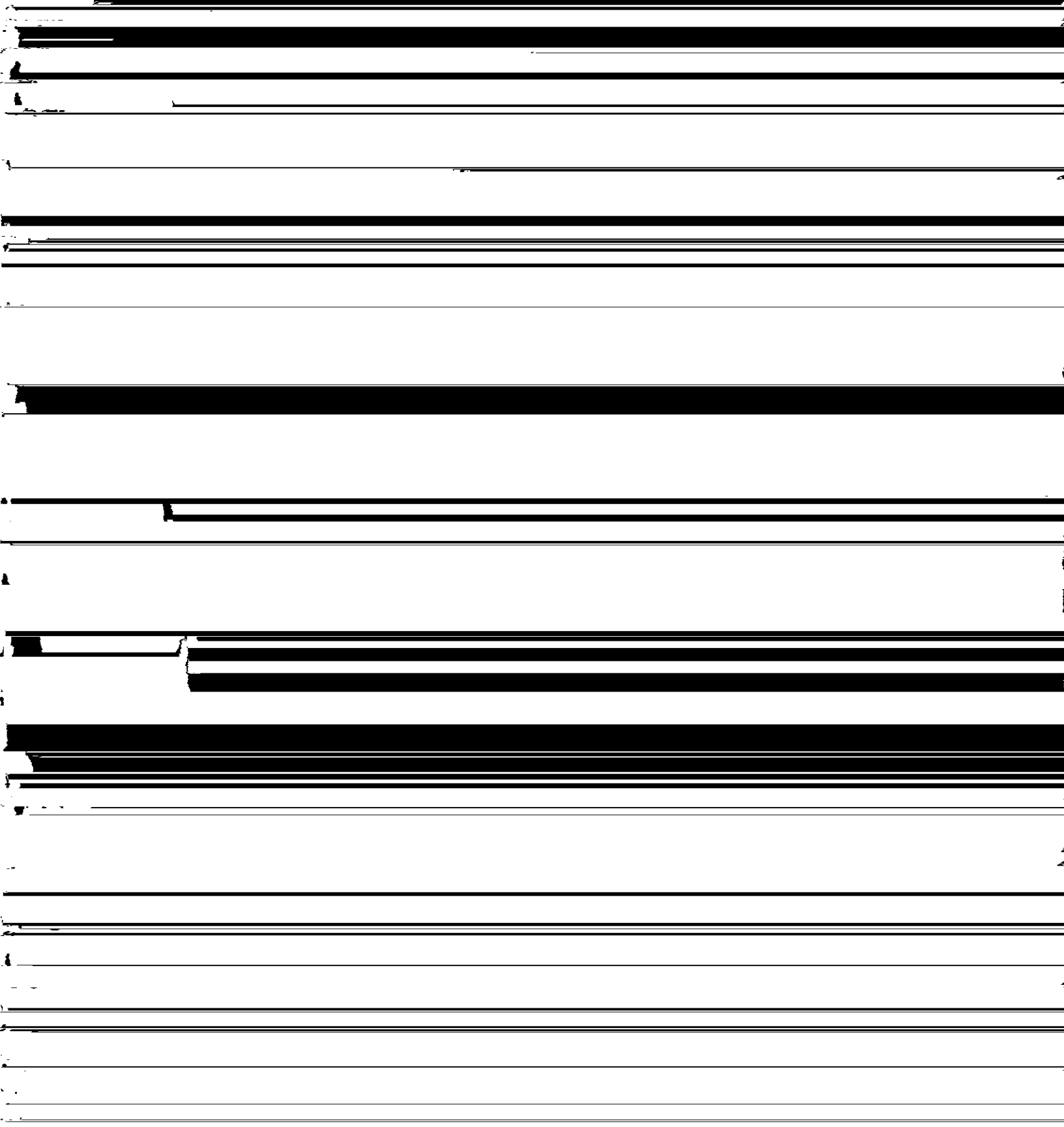
opportunity to correct their credit report, fulfilling the purpose of the

*Id.* at 11-12 (emphasis in original).

**SUMMARY OF DOCUMENT**

However, after resolving these two initial issues correctly, the court then went astray. In particular, the court's holding that Radian had no obligation to provide the

\_\_\_\_\_ FOIA



...not necessarily led to a higher price for insurance. And

1

...the complete information could continue



actions” that users of consumer reports may take in connection with various types of

§ 1681a(k)(1)(B)(i); employment transactions, § 1681a(k)(1)(B)(ii); transactions involving licenses or government benefits, § 1681a(k)(1)(B)(iii); and a catch-all provisions for transactions initiated by a consumer, § 1681a(k)(1)(B)(iv). The

been offered if the information in the consumer's report had been more favorable. See 12 C.F.R. § 202.2(c)(1)(i). As explained in Part B, *infra*, under the insurance subpart, setting a higher initial rate for insurance based on information in a consumer report constitutes "adverse action" regardless of whether as in this case, the

consumer accepts the higher rate.

The court below correctly concluded, citing *Broessel*, that the transaction at issue in this case is one of insurance. See D.61 at 5. This conclusion is amply supported by the undisputed facts of this case. Although the mortgage insurance

9. Spreading risk is the quintessential element of the business of insurance. *See*

purpose for obtaining Mr. Whitfield's consumer report, it most certainly had an insurance-related permissible purpose pursuant to § 1681b(a)(3)(C) -- it used that information from that report in connection with the underwriting of insurance that

§ 1681b(a)(3)(C) -- it used that information from that report in connection with the underwriting of insurance that

[REDACTED]

F.3d 1081 (9th Cir. 2006), the Ninth Circuit held that the definition of “adverse action” encompasses an increase in the initial rate for insurance because nothing in

action” when, based on information in Mr. Whitfield’s consumer report, it charged

the consumer, the notice provides information on how to obtain a copy of a report and the existence of the right to dispute the report's contents, and allows the consumer, for a 60-day period following the notice, to receive a free copy of the consumer report.<sup>11</sup> However, if the consumer does not receive an adverse action notice, there often is no reason for the consumer to know that information in the report led to an adverse action, nothing to alert the consumer to check the report, no information as to how to check a report, and, in many situations, nothing to let the consumer know that adverse action was taken.

The district court ignored the plain language of § 1681m(a), and, as a result, failed to recognize that the Act expressly required Radian to provide the Whitfields with an adverse action notice. The FCRA requires that, if any user of a consumer report “takes any adverse action *with respect to* any consumer” based on information in a consumer report, that user must provide the consumer with an adverse action notice. § 1681m(a) (emphasis added). Thus, the crucial question in this case is

whether Radian took any adverse action “with respect to” Mr. Whitfield. The prepositional phrase “with respect to” means “relates to or pertains to.” *Phoenix Leasing Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1388 (D. Nev. 1994), *aff’d without opinion*, 89 F.3d 846 (9th Cir. 1996). Radian’s adverse action, charging a higher price for the mortgage insurance, relates or pertains directly to Mr. Whitfield because, as a result of that action, the Whitfields were required to pay more for mortgage insurance. In fact, it is hard to imagine how the adverse action that Radian







requirement with respect to the time when the user must provide the consumer with

notice of the extent of underlying insurance, and users routinely provide the

notice after the transaction has been consummated. What the district court failed to

appreciate was that the notice is intended to advise the consumer that adverse action

111 111 111 "111" 111 111 111 That notice would have

alerted the Whitfields to Radian's adverse action, and might have spurred them to

## COMBINED CERTIFICATIONS

1) Bar membership -- Because this brief is filed on behalf of an administrative

~~attorney, I certify that I am a member of the State Bar of Texas, which is a requirement~~

2) Word count -- I certify that this brief complies with Fed. R. App. P.

~~and contains no more than 11,900 words, including the cover sheet and containing 5702 words, as counted by the~~

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4) Identical compliance of briefs -- I certify that the text of the electronic brief, which was submitted to this Court, is identical to the paper copies that were served on this Court and on appellants.

5) Virus check -- I certify that I have run a virus check on this brief and no virus was detected. I used Symantec AntiVirus Corporate Edition 8.1 (updated to March 8, 2006).

*Joseph C. Kohn*