IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35848

JULIE WILLES,
Plaintiff-Appellant,

v.

STATE FARM FIRE AND CASUALTY CO. and STATE FARM MUTUAL AUTOMOBILE 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* SUP5Y2TINGAPPEALLANTAND CURGINGAREVERSL

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MISCELLANEOUS

INTEREST OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act ("FCRA" or "the Act"), 15 U.S.C. § 1681 *et seq*., seeks to ensure the "[a]ccuracy and fairness of credit reporting," § 1681(a). The Federal Trade Commission ("FTC" or "the Commission") has primary responsibility for governmental enforcement of the FCRA. § 1681s. Consumers may also bring private actions. §§ 1681n, 1681o. The Commission has issued interpretations regarding the Act, 16 C.F.R. Part 600, and has promulgated a Summary of Consumer Rights, Notice of User Responsibilities, and Notice of Furnisher Responsibilities, 16 C.F.R. Part 601. Recent amendments, P.L. 108-159, 117 Stat. 1952, give the Commission significant rulemaking responsibility in connection with the implementation of those amendments. In light of the Commission's key role, this Court has found it appropriate to defer to the Commission's analysis of the Act. *See Ollestad v. Kelley*, 573 F.2d 1109, 1111 (9th Cir. 1978).

The FCRA imposes distinct obligations on the entities that compile and use consumer reports: consumer reporting agencies that assemble and disseminate reports[1] (§ 1681(b)); "furnishers," who provide the data to be compiled (§ 1681s-2); and those who use consumer reports to make decisions regarding credit, employment,

[1] Consumer reporting agencies are often called "credit bureaus," and consumer reports are called "credit reports," although, as demonstrated by this case, the reports are used not only by creditors, but by employers, insurers, and others.

insurance, or other matters (§ 1681m). The requirements imposed on "users" -- *i.e.*, that they notify consumers of "adverse actions" taken on the basis of information from a consumer report -- serve a pivotal function in assuring the fairness and accuracy of the consumer reporting system. Such notices are often the only way in which consumers learn of inaccurate or incomplete information in their reports -- and thus provide them an opportunity to take steps to correct such information.

In the present case, a district court has improperly dismissed a private lawsuit against one of the defendants based on its conclusion that an insurance company does not violate the FCRA when it fails to inform the consumer that, based on information in her consumer report, the insurance company has provided her with insurance on less favorable terms than the terms it would have offered if the information in the report had been more favorable. The decision we

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 higher price or less favorable terms for andverse

person must notify her that adverse action was taken, and must identify the consumer reporting agency that was the source of the report. § 1681m. The person must also inform her that the FCRA allows her to dispute the accuracy or completeness of information in her consumer report. *Id.* The Act further requires a consumer reporting agency, upon request, to provide her with a copy of the report, § 1681g(a), to reinvestigate any information in the report that she disputes, § 1681i(a), and to delete information that is inaccurate or cannot be verified, § 1681i(a)(5). These provisions make the credit reporting system more open and reliable -- the consumer must be notified when adverse action is based on a consumer report, and then

Automobile Insurance Co. ("Mutual"). D.107 at 2.[2] The two companies are separate, although apparently affiliated, and both sell insurance. Mutual sells insurance on more favorable terms than F&C. D.125 at 10. Ms. Willes told the agent that she hoped to get the best coverage possible under a State Farm policy, but she did not mention either F&C or Mutual. D.125 at 8. In response to a question from the agent, Ms. Willes stated that she had recently received a speeding ticket. *Id.* The agent then submitted the information regarding Ms. Willes to F&C, the State Farm company that offered insurance on less favorable terms, in order to obtain a rate for the insurance. The agent submitted the information only to F&C because the agent knew that, as a result of the speeding ticket, Ms. Willes would not, absent an exception, be eligible for insurance from Mutual. *Id.* F&C provided the agent with a quote for insurance, and Ms. Willes completed her application for insurance from F&C. *Id.*

After the agent submitted Ms. Willes' application, the agent obtained a consumer report regarding Ms. Willes. *Id.* The report included a "consumer credit report." *Id.* If the information in Ms. Willes's consumer report had been sufficiently favorable, she would have qualified for an exception to Mutual's normal rules. That is, despite her speeding ticket, Ms. Willes would have been eligible for Mutual's more favorable insurance, and her application would have been referred to Mutual.

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

Id. at 8-9. The information was not sufficiently favorable, however, and Ms. Willes's application was not forwarded to Mutual. *Id*. at 9. Ms. Willes purchased insurance from F&C. D.83 at 5.

3. Proceedings Below

Ms. Willes's complaint, which she amended several times, alleged that, in connection with the underwriting of her insurance, both Mutual and F&C took "adverse action," as that term is defined in the FCRA, but failed to provide her with an adequate adverse action notice, as required by the FCRA. D.35. In particular, Willes argued that Mutual took adverse action when the agent determined, based on information in her consumer report, that she was not entitled to an exception to Mutual's speeding ticket policy. D.125 at 11, 12. She argued that F&C took adverse action because, based on information in her credit report, it provided her with insurance on less favorable terms than were otherwise available to consumers with better credit histories. Both Mutual and F&C moved for summary judgment. D.82, D.84. Mutual argued, *inter alia*, that, because (based on the speeding ticket) Ms. Willes never submitted an application to Mutual, it could not possibly take any "adverse action" with respect to her, and it therefore had no obligation to provide her with an adverse action notice. D.83 at 9-10. F&C argued that it was separate from Mutual, that it did not sell Mutual insurance, and that it did not take any adverse

[3] F&C also argued that, to the extent it took any adverse action with respect to Ms. Willes's application, it complied with the adverse action notice requirement because it sent her a letter informinvr0000 TD(uirem)T55000 0.59D(ent)TjET1.adve00 0.0000

insurance. Without an application, the court held, there could be no denial of coverage and, accordingly, no adverse action. D.125 at 14. The court entered judgment dismissing all of Ms. Willes's claims. D.126.

ARGUMENT

In this brief, the Commission presents the same argument it advanced in its brief to this Court in *Rausch v. The Hartford Financial Services Group, Inc.* , No. 03-35695 -- *i.e.*, that the district court erred in holding that an insurance company does not take adverse action when, based on information in a consumer report, it charges the consumer a higher initial price for insurance or provides insurance on less favorable terms. Although the factual context of the present case is somewhat more complicated, the lower court's disposition of plaintiff's claims against F&C is based entirely on the same legal error it made in *Rausch*, and in *Mark v.*

information been more favorable. For the reasons discussed below, the court's legal premise was incorrect. If in fact F&C would have taken actions more favorable to plaintiff

[4] The Commission takes no position as to whether F&C's failure to refer Ms. Willes's application to Mutual would necessarily constitute adverse action.

[5] The Commission also takes no position as to the lower court's dismissal of claims against Mutual. The court's ruling on those claims was not based on the same mistake about the meaning of "adverse action" under the FCRA, but rather on its conclusion that, under the facts of this case, plaintiff never "applied" for coverage with Mutual. D.125 at 11-13.

previously made an offer to Ms. Willes and subsequently made an unfavorable modification (from Ms. Willes's point of view) to that offer based on information in her consumer report. D.121 at 4; D.125 at 10. According to the court's logic, even if a consumer requests's made an offer to

[7] Pursuant to the court's reasoning, although F&C 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 constitutes adverse action), F&C would not have to provide a notice if it effectively achieved the same result by offering insurance to the consumer at a prohibitive price or on unreasonable terms.

employ." *Id.* Because the court concluded in *Mark* that an insurer cannot "increase * * * any charge" for insurance when it is setting initial rates, it held in this case that an insurer also "cannot 'reduce' or 'unfavorably change' the terms of insurance unless such terms previously existed and the insurer subsequently alters those terms in an unfavorable manner." D.121 at 4.

The court's decision in *Mark* is based on a misinterpretation of the phrase "increase in any charge." Thus, its interpretation in this case of the phrase "reduce or unfavorably change the terms of insurance," which relied on its *Mark* analysis, is also in error. The unsupported premise of *Mark* is that the word "increase" refers only to an enlargement of a price previously offered to the specific consumer. 275 F. Supp. 2d at 1316. But the district court was incorrect in supposing that reference to an "increase

automobiles than cash customers, without any reference to 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 F&C was willing to offer Ms. Willes insurance, but only at higher rates or on other less favorable terms than would have been the case if her consumer report had contained more favorable information, then that offer would constitute an "increase" in the price or an unfavorable change in the terms over more favorable treatment. Al

leads to a completely illogical result. In particular, § 1681a(k)(1)(B)(i) provides that "adverse action" encompasses "an increase in any charge for, or a reduction or other adverse or unfavorable change in the ter

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

However, the requirements did not apply when consumer reports were used in connection with transactions that did *not* involve credit, insurance, or employment. The bills and committee reports leading up to the 1996 amendments (which added the definition of adverse action) show that the purpose of the amendments was to expand the adverse action notice requirements, not to contract them. However, just as the court misunderstood the relevant provisions of the FCRA, it also misunderstood the Act's legislative history.

For the first 26 years of its existence, the FCRA clearly applied to adverse actions taken in connection with the setting of initial rates for insurance. As originally enacted, the FCRA contained no definition of "adverse action" even though the term appeared in § 1681m(a). That section set forth the obligations imposed on users of consumer reports, and provided:

> Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because

[9] As originally proposed, the Senate's version put the burden on 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

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 co

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,[10] 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 --
> > >
> > > (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:

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[10] 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.

> [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 insurance; [and] * * *
>
> (C) any action taken or determination ma

* * *

is adverse to the interest of the consumer.

H.R. 1015, § 102. According to the House committee report, the definition "is intended to overturn a prior interpretation by the Federal Trade Commission" regarding the obligation of users of consumer reports who take adverse action. H.R. Rep. 103-486, at 26 (1994). The report also states that:

> Although the definition section provides a list of transactions that are considered to constitute examples of adverse actions, 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 [§ 1681a(a)], any action taken based on that report that is adverse to the interests of the consumer triggers the adverse action notice requirements of [§ 1681m].

Id.

The Senate version, S.783, 103d Cong. (1994), proposed adding the following definition to the FCRA:

> (a) Adverse Action * * * The term "adverse action," * * * means an action that is adverse or less favorable to the interest of the consumer who is the subject of the report. Without limiting the general applicability of the foregoing, the following constitute adverse actions: * * *
>
> > (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

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 F&C's actions.

The *Mark* decision also erred by concluding that, because the definition of "adverse action" uses the verb "means," Congress intended the definition to be a narrow one. *Id.* at 1318. According to the court, "[e]ach of the prior versions of the bill defined adverse action more broadly to 'include' specifically enumerated actions." Thus, the court held that the committee reports from 1992 through 1994 "do[] not clearly indicate that Congress meant something other than the plain meaning of the statutory language in § 1681a(k)(1)." *Id.*[11] In fact, although in the 103d Congress, the Senate's bill, S.783, used expansive language in the introductory portion of its definition, it did not use the verb "include" to introduce the subpart relating to actions taken by insurers. Nonetheless, the committee report that accompanied the bill made clear that the proposed amendment of the FCRA was intended as an enhancement to, not a narrowing of, preexising protections. S. Rep.

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

[12] The district court in *Mark* 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 rejec

[13] An amendment to § 1681m enacted in 2003 requires that, when, based on information in a consumer report, a creditor grants credit on terms that "are materially less favorable than the most favorable terms available to a substantial proportion of consumers" from the creditor, that creditor must provide the consumer with a "risk-based pricing notice." This amendment was necessary because § 1681a(k)(1)(A) defines adverse action in the context of a credit transaction as having "the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act ["ECOA", 15

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's interpretation of the term "adverse action," as that term is defined in § 1681a(k) of the FCRA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6922 words. I relied on my word processor and its WordPerfect 10 software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2004, I served two copies of a copy of the Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Appellant and Urging Reversal on appellant and appellees by express overnight delivery directed to:

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