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IS RECKLESS DISREGARD OF THE CIVIL PROVISIONS OF THE FAIR CREDIT REPORTING ACT EQUIVALENT TO THE WILLFULNESS STANDARD?[†]

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I. INTRODUCTION

In two consolidated cases[1] the Supreme Court[2] will resolve a dispute in the Ninth Circuit regarding whether the civil, statutory *willfully* committed conduct requirement of the Fair Credit Reporting Act (hereinafter referred to as FCRA) can be violated absent a showing of actual knowledge or conduct by the defendant. The Ninth Circuit, in contrast to at least five other Circuit Courts, ruled that conduct rising to the level of *reckless disregard* was sufficient to meet this civil willfully committed standard, and the petitioner insurance companies contend that this position is in direct contradiction to Congressional intent underlying the FCRA. The insurance applicants argue that significant civil law case precedent exists for the Ninth Circuit, holding that the willfulness requirement can be met by reckless behavior or conduct. Lastly, Safeco and Geico contend that this Circuit Court's ruling will require them to err on the side of needless, extreme caution when communicating with customers regarding approval or disapproval for various tier placement insurance and insurance policy variable payment rates.

In 1970, Congress enacted the FCRA to promote efficiency in the nation's banking system and to protect consumer privacy. The coverage of the FCRA included institutions that create consumer credit reports as well as those companies or individuals that use this information in making decisions regarding the provision of consumer credit. At issue in these consolidated cases is the requirement contained in the FCRA that all users of consumer report information who take an *adverse-action* against the consumer based on the information contained in the credit report, which includes the individual's credit score, notify the consumer in writing. This adverse-action usually takes the form of an insurance company offering a tiered placement within an affiliated company that offers a higher policy premium payment due to the credit risks presented by the consumer-applicant. These variable risk-based pricing options represent a significant departure from the manner in which insurance was offered and sold when FCRA was enacted. At that time there were fewer policy term or rate options and an applicant was either approved or denied

[†] A brief case summary version of this article first appeared in Volume 34, Issue No. 4 (January 8, 2007) of the "Preview of United States Supreme Court Cases" which is published by the Division for Public Education of the American Bar Association, 321 N. Clark Street, Chicago, IL, 60610-4714. Two consolidated cases were argued before the Supreme Court on January 16, 2007, and portions of the original published summary are reproduced in this article with the express permission of Mr. Charles F. Williams, Editor-in-Chief of the "Preview of United States Supreme Court Cases." The original case summary as it appeared in the Preview was entitled "Can 'Reckless Disregard' Satisfy the FCRA's 'Willful' Conduct Requirement?" and was authored by Dr. Jack E. Karns.

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[1] Geico Insurance Company v. Edo, Docket No. 06-100; Safeco Insurance Company v. Burr, Docket No. 06-84.

[2] The cases were argued before the Court on January 16, 2007.

coverage based on the same fixed set of information. However, that system has changed dramatically with the individual's credit score now serving as the key component of today's risk-based insurance pricing scheme.

The current sophisticated credit scoring models provide a numerical ranking that uses factors contained in the credit report along with a host of other underwriting factors, many of which are included in the application. Credit history and credit exposure are two factors that are used to calculate this numerical rating which is a model for predicting the applicant's future behavior or performance as a credit risk. The rating is not merely a grading or report of the individual's credit performance to date. This model revolves around an individual's credit score that generally ranges from 300 for the highly risky individual to 850 for those people who are the best credit risks.

Geico, Safeco, and most other insurers use one of varying forms of the standard credit score to decide the credit risk presented by a particular applicant as well as existing policyholders. These insurance scores are calculated using information from the consumer's credit report along with a mathematical model designed by The Fair Isaac Corporation, a company which is considered the market leader when it comes to providing viable scoring systems for today's commercial insurance marketplace. While insurance scoring is not the same as credit scoring, it is useful in predicting the risks that an applicant or existing policyholder may pose based on their individual credit history. Most importantly, insurance scoring allows insurers to make more informed decisions regarding the proper risk classification for an individual and to establish policy pricing schemes that are not only efficient and reflective of the insured's likelihood of paying, but which also allow the companies to meet the consumer protection requirements set forth by the FCRA.

Insurers use more than just insurance scores or credit scores in determining the insurance tier placement of an insured. They are likely to rely on proprietary factors or models, driving history, age, gender, reported claims, policy cancellations due to failure to pay premiums, among other indicia that can reliably predict whether the insurance candidate represents a good customer prospect. Given that the use of credit reports and scores relative to determining customer applications and the setting of policy premiums is regulated by state law, most states presently do not allow an insurance company to overly rely on this information unless steps are taken to make these mathematical formulas fair for customers who have very little or no credit history. Without this requirement the lack of a credit history would almost certainly render an individual a high credit risk even though he or she may be young with no other basis than that for having what is referred to as a *thin* credit history.

The states, working in concert with the FCRA, assure these individuals of fair treatment in the credit distribution market and that no adverse-action will result from merely this one factor. Most states permit insurers to include in their modeling formulas a factor that will neutralize the adverse impact of this type of inherently negative risk factor. A few states, skeptical about the overwhelming importance that credit reports and credit scores play in establishing these insurance scores, and ultimately whether their citizens may or may not receive insurance, have banned the use of credit reports and scores completely. Rather than rely on the insurers to neutralize these inherently unfair factors in their mathematical models, these state legislatures have opted to ban use of the credit report and score and thereby achieve automatic neutralization through regulation. In the end, what matters primarily under the FCRA is the manner and extent to which insurers inform applicants or existing customers of any adverse impact that the reliance on credit scores in particular had in the insurer's decision-making process regarding tier placement and the policy terms ultimately offered.

Since credit scores are an inherent part of the credit report this means that use of the full report is derivatively regulated to some degree, as well. As these consolidated cases will factually demonstrate, whether an insured exercised willful conduct resulting in an adverse-action relative to an applicant or existing customer is crucial under the FCRA Section 1681n since it requires that all affected customers receive a statutory notice of the action taken by the insurer. Although these cases purportedly involve adverse-action decisions without follow-up statutory notices, they are not typical in the respect that the insurance applicants contend insurers can violate the civil provisions governing *willful* conduct under the FCRA by a showing of reckless disregard and without consideration of whether the insured knew or had actual knowledge of the adverse-action

when it occurred. Finally, despite the specific allegations and rebuttal arguments in these cases, an understanding of the previously discussed contemporary commercial insurance market decision-making tools is critical to understanding the key issues presented in the Geico and Safeco cases. Accordingly, these consolidated cases can be summarized as presenting the question of whether a defendant can violate the civil, statutory *willful* conduct requirement of FCRA Section 1681n without proof of actual knowledge or conduct but with a lesser showing of reckless disregard.

II. FACTUAL BACKGROUND

Geico sells automobile insurance through four affiliated companies. Geico General sells most of its preferred insurance to customers who have the lowest risk profiles. The Government Employees' Company sells preferred auto insurance only to government employees or military personnel, while Geico Indemnity sells standard insurance for moderate risk customers. Finally, Geico Casualty sells non-standard policies with higher premiums to consumers who have a greater risk rating.

In 1998, Geico contracted with Trans Union and the Fair Isaac Corporation in order to gain access to information related to an applicant's credit report and rating. The arrangement did not provide that Geico would have unfettered access to an applicant's complete credit record, but rather provided Geico with the applicant's credit score and no more than four factors that were considered to most prominently affect the credit score. The following year Geico began to use these credit scores as a factor, in addition to other pertinent risk factors, in making initial decisions regarding the individual's risk category along with the type of insurance to be offered, if any. Operation of the system was initiated when a customer called Geico's toll-free number, and a sales representative gathered basic applicant information with the individual's permission including the authority to obtain a copy of the appropriate credit score.

Geico's Computer-Assisted Underwriting (CAU) was used to create a weighted factor and then combine additional underwriting factors that determined which Geico company and tier placement the customer would be offered. At that time Geico did not have the technical ability to determine whether credit information had adversely affected the company and tier rate recommendation made to a customer, and therefore, sent FCRA adverse-action notices to all applicants who received offers with either Geico Indemnity or Casualty. In short, if the customer did not receive a preferred tier rating and policy offer, Geico erred on the side of caution by sending a notice to ensure there could be no possible violations of Section 1681n. This early system simply did not have the sophistication necessary to detail the impact a credit score had on an applicant's tier placement, and as a result, the company chose to send adverse-actions notices to all applicants who were not offered preferred tier rates and placement. Geico knew that it was sending far more statutory notices than was absolutely required by the FCRA; nevertheless, it chose the option that would best minimize any potential negative and legal liability impact from this lack of scoring certainty.

A few months later The Fair Isaac Corporation developed a method incorporating an individual's credit score that allowed insurance companies to isolate the score from all other underwriting decision factors. This permitted the users of the methodology to measure the specific impact that use of the credit score had on the applicant's tier placement and policy premium as opposed to the score not being used at all in favor of other more traditional factors. This particular methodology was known as *neutralizing* an applicant's credit score and allowed users of Fair Isaac's information to make more precise decisions about when an applicant was required to receive an adverse-action notice. By incorporating this neutralization information into its CAU system, Geico was now enabled to delineate between applicants where consideration of the credit score actually resulted in a tier placement with higher premiums. In short, Geico was now able to identify those customers with a credit score that clearly had a negative impact on the tier placement decision and who must receive statutory notices as required by the FCRA. This move allowed Geico to eliminate a substantial number of the notices that had previously been sent merely as a caution and not because they were absolutely required by the FCRA.

In December 2000, Ajene Edo telephoned Geico for a personal automobile rate quote. Using the newly revised CAU system that relied on Edo's credit score and other underwriting factors, the decision was made that he was eligible for a policy with Geico Indemnity, the firm that sells policies to moderate risk individuals. The question was whether or not Edo should receive an adverse-action notice based on the impact that his credit score would have had on his tier placement had it not been considered in the underwriting decision. Although his weighted credit score was higher than the neutral credit score, it was not sufficiently high to improve his Company insurance option(s) or tier placement. Very simply, the CAU system recognized that Edo would have paid the same policy premium notwithstanding the fact that his credit score had been used in Geico's underwriting determination. So, with or without consideration of the credit score, Edo would have received the same tier placement policy premium quote with Geico Indemnity, which is the very distinction the improved CAU system was designed to make.

Edo conceded as much when he admitted that he suffered no actual damages since he would have been offered a policy through Geico Indemnity regardless of any use of his credit score. The fact that Geico did not send him an adverse-action notice was a statutory violation based on the theory that regardless of the Company's CAU system it willfully violated the FCRA by not informing Edo that he was being denied preferred coverage by Geico General and instead being offered a policy through Geico Indemnity. Geico's position is that since Edo would have been offered a policy through its Indemnity Company regardless of consideration of his credit score, he suffered no adverse-action as contemplated by the FCRA. More simply, Edo was not going to qualify for the preferred rates of Geico General with or without consideration of his credit score; therefore, there was no adverse-action sufficient to warrant a Section 1681n notice. The District Court dismissed Edo's claims against all four Geico companies and appeal was taken to the Ninth Circuit. Through a series of three chronologically separate opinions the Ninth Circuit ultimately held that Geico had willfully and through reckless disregard committed an adverse-action with respect to Edo, thereby violating FCRA Section 1681n requiring statutory notice by the insurer. The Supreme Court then granted certiorari to determine the proper meaning of the willfully conduct provision of the FCRA, whether an adverse-action had actually occurred, and whether the statute anticipates the use of a reckless disregard standard of conduct for violation of its civil statutory provisions.

In the Safeco case, Lori Spano filed against the insurance company for allegedly violating the FCRA's adverse-action notice requirement. Spano's automobile insurance policy was cancelled four times for failure to pay the premium, but each time upon her request, the company's Oregon affiliate (Safeco-Oregon) reinstated the policy without any reference to Spano's credit information. However, when the policy was cancelled for the fifth time Spano again requested reinstatement, but Safeco-Oregon declined to do so—a decision based at least in part on information contained in the customer's credit report that was ordered specifically to assist in making the ultimate decision. Spano alleged that this decision not to reinstate was an adverse-action under FCRA Section 1681n, entitling her to statutory notice.

Later, two other plaintiffs were named to the case, Massey and Burr. Burr had likewise applied for auto insurance and was issued a policy by another insurance company. Due to his poor driving record he was placed in the highest risk category with the greatest policy premiums, with his credit report playing a part in the rendering of this decision. However, even if Burr had had the most favorable credit score possible based on his total record, this would not have improved his placement above the highest risk category nor reduced his policy premium. When this policy lapsed for failure to pay the premium, Burr purchased another policy from Safeco-Oregon with that favorable decision and initial policy payment amount made partly due to information contained in his credit report. The impact of his credit score on the tier or cost of insurance that he was offered by Safeco was not altered from the time of his dealings with the previous company; consequently, Safeco did not view the credit score as having any adverse impact on their decision and Burr was offered low tier, high premium insurance with no statutory notice of any adverse-action.

Massey, on the other hand, applied for renter's insurance from Safeco-Illinois which also used a consumer credit report in deciding that the insured should be placed in the third tier which had the highest premium rate. The District Court dismissed the complaints of Burr and Massey on

the grounds that no adverse-action had been taken against them as alleged under the FCRA. The court agreed that an adverse-action occurs only when the insurance *increases* a premium that the company has previously charged that policyholder. Given that both Burr and Massey were not existing policyholders, they were not entitled to any adverse-action notice with regard to Safeco's initial rate quotes to new policy applicants. The court then denied Safeco's request that Spano's complaint also be dismissed because she was an existing policyholder. Most importantly, the decision not to reinstate the policy a fifth time was based in part on information found in her credit report. This reliance on the credit report, however small, constituted an adverse-action as that term is used within the FCRA and Spano was entitled to statutory notice. Finally, Spano dropped her claim for punitive damages seeking only the statutory remedies offered by Section 1681n. The District Court dismissed Spano's claim based on the argument that the FCRA does require an adverse-action notice at the point where an insurer uses credit information to set an initial premium. The Ninth Circuit reversed and the Supreme Court then granted certiorari to determine the proper meaning of the willfully conduct provision of the FCRA and whether an adverse-action had actually occurred when Safeco did not send Edo a statutory notice as allegedly required by the FCRA.

III. THE CIRCUIT COURT SPLIT

A. THIRD CIRCUIT

In *Cushman v. Trans Union Corporation*[3] (hereinafter referred to as TUC), the Third Circuit was presented with an issue involving the FCRA that was not precisely on point with that presented by the Ninth Circuit in Geico and Safeco; nevertheless, it raised the issues of *knowingly and willfully* as that conduct is specified under the FCRA. In this case, Cushman was attending college in Vermont during the summer of 1993 when an unknown person, possibly a member of her Philadelphia household, applied for three credit cards using her name, social security number, mailing address, and other personal identifying information.[4] The credit cards were issued to the individual in question who proceeded to accumulate balances totaling approximately twenty-four hundred dollars during the period from June 1993 to April 1994. All of this activity occurred without Cushman's knowledge.[5] In August 1994, a bill collector contacted Cushman and notified her "that TUC was publishing a consumer credit report indicating that she was delinquent on payments to these three credit grantors."[6] Cushman immediately notified TUC that the three credit cards had been obtained under fraudulent circumstances, and the TUC clerk asked if Cushman had opened a fraud investigation with the credit card grantors.[7]

Since Cushman's personal information matched that information contained in the credit grantors' records, the information remained in the Trans Union's report.[8] The Third Circuit took notice of the fact that TUC did not take the necessary steps required to gain access to pertinent documents from the credit grantors that would have enabled the company to perform a handwriting comparison.[9] Cushman took numerous steps to correct her credit record including writing additional letters to TUC "reiterating her disagreement with the facts contained in the report and offering to sign affidavits for TUC to the effect that the delinquencies were not hers."[10] TUC subsequently decided to perform another investigation identical to the first reinvestigation that

[3] 115 F.3d 220 (3rd 1997).
[4] *Id.* at 222.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

managed to accomplish nothing further. The credit report had not changed, and therefore, at no time did TUC provide Cushman with any evidence or indication of its reinvestigation procedures.[11]

Cushman brought an action in district court alleging negligent and willful failure to reinvestigate various violations of the FCRA. The connection with the Safeco and Geico cases centered on whether or not the company's conduct was not only unreasonable relative to its contravention of the rights protected by various provisions of the FCRA, but also whether TUC's conduct constituted a reckless disregard of those rights sufficient to allow statutory damages. The District Court concluded that Cushman had not made a case of negligent non-compliance with FCRA, but the Third Circuit disagreed holding that there was sufficient evidence for a reasonable jury to "find willfulness on the part of TUC pursuant to the standards" as set forth in the consumer protection provisions of the FCRA.[12] As a result, the Court remanded the case for further proceedings.[13] The Third Circuit evidently wanted the Trial Court to determine whether TUC's unreasonable conduct rose to the level of a "knowing and willful violation of the statutory provision protecting consumers from this type of fraudulent conduct."[14]

B. FOURTH CIRCUIT

In *Dalton v. Capital Associated Industries, Inc.*[15] (CAI), the Fourth Circuit Court of Appeals was faced with a situation that involved an alleged violation of the FCRA, Section 1641k.[16] This section deals with how consumer reports are handled in the employment context.[17] In this case, CAI incorrectly reported to Dalton's prospective that he (Dalton) had been convicted of felony assault.[18] Dalton sued CAI under the FCRA and specifically included Section 1681k for failure to follow proper procedures in reporting his criminal history.[19] All of Dalton's claims, both state and federal, were dismissed by the District Court either under Rule 12(b)(6) or on a summary judgment ruling based on Rule 56.[20] An appeal was taken to the Fourth Circuit based on the summary judgment and that court acknowledged that it focused mainly on the "triable issues on Dalton's claims that CAI's failure to follow FCRA-mandated procedures led it to issue a false report on his criminal record."[21] The Fourth Circuit vacated the summary judgment that had been awarded to CAI on the FCRA claims due primarily to the fact that he had offered evidence that revealed "disputed issues of material fact" to the District Court.[22] As to all other claims made by Dalton and dismissed by the District Court, the Fourth Circuit affirmed the grant of summary judgment.[23]

In May 1998, Dalton had a job interview with Sumitomo Electric Lightwave Corporation (hereinafter referred to as Sumitomo) at its North Carolina Research Triangle Park offices.[24] Dalton was seeking a position within the firm of West Coast Regional Sales Manager and completed an employment application during his interview in North Carolina.[25] Specifically, the application asked Dalton whether he had been convicted of a felony during the past seven years.[26] Dalton had been charged in Colorado with second degree assault, a felony, in 1993; however, he plead guilty to third degree assault, a misdemeanor.[27] As a result he truthfully noted on the

[11] *Id.*
[12] *Id.* at 227.
[13] *Id.*
[14] *Id.* at 226.
[15] 257 F.3d 409 (Fourth Cir. 2001).
[16] *Id.* at 412-13.
[17] *Id.* at 417.
[18] *Id.* at 412.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

Sumitomo application that he had not been convicted of a felony during the last seven years.[28] At the end of the North Carolina interview Sumitomo offered Dalton the sales manager position contingent upon the satisfactory completion of his education, employment and criminal background investigations.[29] Sumitomo hired CAI, a North Carolina employers' association that provided "a variety of services for its members, including background investigations on job applicants."[30] Clearly, Sumitomo was specifically interested in whether Dalton had a criminal record anywhere in the Denver, Colorado, area where he had lived just prior to his interview, and accordingly, ask CAI to investigate this particular issue.[31] CAI did not perform the actual criminal records investigation, but rather sub-contracted the job to SafeHands, Inc., a company that it had been using to do similar investigations and checks for approximately a year.[32]

Unfortunately, SafeHands also subcontracted the records check investigation to Guaranty Research Services which from it own offices conducted a state-wide computer check of criminal records for all Colorado counties.[33] This search indicated that Dalton did have a criminal record in Jefferson County, Colorado, but because the computer database did not indicate the nature of the charge, a GRS employee contacted the Jefferson County clerk's office to make a specific inquiry.[34] A clerk in that Colorado office informed GRS that Dalton had been "convicted of third degree assault" and then the clerk erroneously stated that this conviction was a felony under Colorado law.[35] GRS dutifully communicated this information regarding the alleged third degree assault felony conviction to SafeHands which did not conduct any due diligence in order to ascertain the veracity and accuracy of this report.[36] SafeHands then sent the report to CAI which forwarded it to Sumitomo.[37] As the Fourth Circuit noted, "neither CAI nor SafeHands took any independent steps to verify the substance of GRS's criminal report on Dalton."[38] While Sumitomo awaited the criminal records check result its company employees proceeded to verify the employment history that Dalton had provided on the interview application.[39] The company discovered that Dalton had significantly misstated his periods of employment with two prior employers.[40]

Not surprisingly, Sumitomo withdrew its conditional offer of employment to Dalton based on the preliminary results of both the criminal records check delegated to CAI and the employment history check that the firm had conducted.[41] The company indicated that further investigation was necessary before the offer would be resurrected, and on May 14, 1998, a Sumitomo employee contacted Dalton and informed him that the conditional offer was being withdrawn permanently due to the fact that he had been convicted of a felony in Colorado.[42] Dalton responded immediately by denying any felony conviction and the Sumitomo employee agreed to contact CAI in order to confirm that the results of the criminal records check it conducted were accurate.[43] Approximately thirty minutes later the same Sumitomo employee contacted Dalton again and

[28] *Id.*
[29] *Id.* at 412-13.
[30] *Id.* at 413.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* On his application Dalton noted that he had worked for Fiber Optic Network Solutions from the period January 1991 through January 1992. In reality, he had worked for this firm from June 1992 through December 1992. Dalton also indicated on the application form that he had worked for Telect, Inc., during the period 1989 through 1991; however, he had only worked for this firm for the period February 1991 through December 1991.
[41] *Id.* at 413.
[42] *Id.* The Fourth Circuit made special note of the fact that the Sumitomo employee "did not note mention the inaccurate employment history appearing in Dalton's application."
[43] *Id.*

informed him that CAI was "standing by its report that he [Dalton] had a felony conviction."[44] Although it is not certain whether Sumitomo was informed as to the decision CAI was about to make, CAI nevertheless conducted a re-investigation of Dalton's criminal record to ascertain the veracity of the report that it had been provided by SafeHands.[45]

On May 15, 1998, Dalton contacted CAI personally in order to challenge the accuracy of this criminal records check.[46] CAI claimed that at the time of Dalton's call it had already discovered that he was not a convicted felon as it had previously reported to Sumitomo.[47] Further, CAI stated that it would notify Sumitomo that a mistake had been made.[48] To the contrary, Dalton contended that CAI informed him that it stood by the report given to Sumitomo which included the notation that Dalton was a convicted felon.[49] Despite this controversy sometime that same day CAI acknowledged that it became aware of the records check mistake and contacted Sumitomo in order to correct the initial report.[50] A CAI employee called the Jefferson Country, Colorado, clerk's office and talked to an employee at that location who indicated again that Dalton had been convicted of third degree assault, a felony under Colorado law.[51] But this time the CAI employee inquired further and more strenuously regarding the classification of this assault conviction and asked specifically whether it was actually a felony.[52] At this point, the CAI employee was directed to another court clerk employee who correctly informed CAI that third degree assault was a misdemeanor in Colorado and not a felony.[53]

Following this conversation CAI immediately telephoned Sumitomo and advised the company that a mistake had been made regarding the original criminal records check report and that Dalton had been convicted of a misdemeanor and not a felony in Colorado.[54] Dalton contended that no one from Sumitomo or CAI ever contacted him regarding the correction of this particular error.[55] Understandably, Dalton sued CAI and three of its employees contending that they had violated the FCRA and committed libel per se, as well as making other legal claims against the defendants.[56] The District Court dismissed Dalton's unfair trade practices claim and FCRA claims against the three employees of CAI.[57] At a later date the lower court also granted a summary judgment to CAI on Dalton's FCRA claims against the company and a summary judgment to all four defendants relative to Dalton's claims for libel and interference with prospective economic advantage.[58] Dalton appealed the summary judgment order but not the order dismissing the unfair trade practices claim or his FCRA claims against the individual employees.[59] The Fourth Circuit chose to review the District Court's summary judgment *de novo*.[60]

The relevant portion of this particular case was Dalton's second FCRA claim that CAI had violated Section 1681k of the statute which deals with consumer reports as they are used in an employment context.[61] Given that Section 1681k creates heightened standards that must be followed for any procedure that collects information for employment purposes, a consumer report

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* Dalton's claims included an allegation that CAI had intentionally interfered with his prospective economic advantage and had violated the North Carolina Trade Practices Act. The District Court dismissed Dalton's trade practices claim and FCRA claims as against CAI.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* (citing Higgins v. E.I. de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988)).
[61] *Id.* at 417. *See* FCRA Section 1681e(b).

must contain "matters of public record that are likely to have an *adverse effect* upon a consumer's ability to obtain employment in order to fall within the purview of this particular section."[62] Any consumer reporting agency that is completing this type of report must do one of two things: 1) notify the consumer when the report is transmitted to the user, or 2) "maintain strict procedures designed to insure [that the information] . . . is complete and up to date."[63] Accordingly, the disputed issue of fact in this case revolves around whether CAI implemented "strict procedures" in order to be certain that Dalton's criminal record was both complete and current.[64] As a result of this finding, the Fourth Circuit ruled that there was a factual dispute regarding CAI's alleged "reasonable procedures" and that this question was sufficient to determine that the District Court erred in granting the summary judgment to CAI relative to the issue of whether the company had followed the strict procedures as set forth by the FCRA in conducting its investigation of Dalton's criminal record.[65]

The Fourth Circuit next addressed the fact that it was not necessary that Dalton make a showing of "malice or evil motive" in order to establish that the willfulness requirement of the FCRA had been violated.[66] In this particular case, Dalton must only demonstrate that CAI "knowingly and intentionally committed an act in conscious disregard for the rights" to which he is entitled under the FCRA.[67] The Fourth Circuit stated that even though summary judgment is rarely appropriate regarding the issue of whether a party possessed a particular state of mind, Dalton failed to demonstrate any evidence that CAI acted willfully in this case.[68] As an example, Dalton did not show that CAI was aware that its sub-contractors relied on any informal legal opinions from the Colorado court clerks.[69] Likewise, there was no evidence proffered that other consumers had lodged complaints comparable to Dalton's against CAI.[70] In fact, CAI had used SafeHands for almost a year with nearly perfect reliability standards, and therefore, no reason existed to question their reports.[71] Finally, CAI took steps to correct its mistake a mere one day after Dalton questioned the accuracy of the criminal records report, and as a result it is not possible that a reasonable jury could conclude that CAI acted willfully in violating Sections 1681e(b) or 1681k of the FCRA.[72] That having been said, however, the Fourth Circuit did note that CAI could possibly be held accountable for negligence relative to the fact that it had no established procedures to instruct its sub-contractors on how to handle sources providing sensitive information regarding criminal records.[73] Any reasonable jury might have concluded that CAI's conduct amounted to only a negligent violation to FCRA thereby entitling Dalton to certain, but limited and actual, damage awards, excluding punitives.[74] The Appellate Court vacated the grant of summary judgment as to CAI on the FCRA Section 1681k claims on the grounds that Dalton had every right to pursue a negligence misconduct action and accompanying actual damages under this provision, and that CAI procedures would necessarily have to be scrutinized relative to the statutory provisions of FCRA, including Section 1681k.[75] Consequently, the most important point made by

[62] *Id. See* FCRA Section 1681k (emphasis added).
[63] *Id. See* FCRA Section 1681k(a)(1), (2). CAI did not dispute that its report of Dalton's criminal history falls within the purview of this particular section of the FCRA. *Id*. Additionally, CAI conceded that the company did not provide any notification to Dalton at the time his criminal history information was reported to Sumitomo. *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 418 (citing Stevenson v. TRW, Inc., 987 F.2d 288, 294 (5th Cir. 1993); Yohay v. City of Alexandria Employees' Credit Union, 827 F.2d 967, 972 (4th Cir. 1987)).
[67] *Id*. (citing Pinner v. Schmidt, 805 F.2d 1258, 1263 (5th Cir. 1986)). *See also* Stevenson, 987 F.2d at 294; and Yohay, 827 F.2d at 972.
[68] *Id*. *See also* Magill v. Gulf & W. Indus., Inc., 736 F.2d 976, 979 (4th Cir. 1984).
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*.

this particular case relative to the reckless disregard provision of the FCRA was the finding that a "knowing and intentional" commission of an act done in a conscious state of mind and for the disregard of the consumer is necessary in order to violate Section 1681k.[76] This particular finding by the Fourth Circuit is in accord with all other circuit courts that have ruled on this issue but in direct contradiction to those opinions of the Ninth Circuit in the Safeco and Geico cases. The other circuit court decisions summarized in this section bring additional clarity to this glaring contradiction, as well as the need for the Supreme Court to address this Circuit split and to sanction only one approach to interpreting Section 1681k.

C. Fifth Circuit

The Fifth Circuit dealt with this same issue in *Stevenson v. TRW, Inc*.,[77] a 1993 case in which a consumer filed an action under the FCRA for both actual and punitive damages based on both negligent and willful violations of the statute.[78] In its opinion, the Fifth Circuit summarized the purpose of the FCRA as "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information…."[79] The FCRA requires that reasonable procedures be followed in order to assure the maximum possible accuracy regarding the information that is provided about a particular individual.[80] The Fifth Circuit noted that any reporting agency that is negligent with regard to the FCRA's requirements can be held liable for actual damages, costs, and attorney's fees, while any willful non-compliance can result in a finding in favor of punitive damages.[81] The District Court had ruled that TRW had violated the FCRA when it responded to Stevenson's complaints, and held TRW to have been both negligently and willfully responsible for violations of the FCRA by virtue of its failure to delete "inaccurate or unverifiable on Stevenson's credit report."[82] TRW appealed the lower court's finding of both negligence and willfulness regarding its violations of FCRA, and the Circuit ultimately agreed with TRW's claims.

This particular dispute involved numerous telephone calls from bill collectors that Mr. Stevenson began receiving in late 1988 with regard to account arrearages that were not his.[83] Stevenson immediately contacted TRW to seek a resolution of the problem and eventually obtained a copy of his credit report dated September 6, 1989, on which he found numerous errors regarding his financial accounts and credit status.[84] In fact, there were two John Stevensons, in addition to Stevenson's son, John Stevenson, Jr., and the father's credit report included accounts that belonged to both of these other individuals.[85] In total, Stevenson disputed "approximately sixteen accounts, seven inquiries, and much of the identifying information."[86] By February 9, 1990, TRW completed its investigation and contended that all disputed accounts which included negative credit information for Plaintiff Stevenson had been removed from his credit report.[87] Unfortunately, Stevenson's credit report continued to include inaccurate information or information that was improperly re-entered on his account after TRW had initially deleted it. Ultimately, Stevenson felt that there was no choice but to file suit against TRW in which he alleged that TRW had failed to maintain "reasonable procedures to insure maximum possible

[76] *Id*.
[77] 987 F.2d 288 (5th Cir. 1993).
[78] *Id*. at 298.
[79] *Id*. at 292 (citing 15 U.S.C. (hereinafter referred to as FCRA) § 1681(b)).
[80] *Id*. *See* FCRA § 1681e(b).
[81] *Id*. *See* FCRA §§ 1681o and 1681n.
[82] *Id*.
[83] *Id*. at 290-91.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*.

accuracy" of this credit report.[88] More importantly and like the plaintiffs in other comparable cases, Stevenson argued that TRW had negligently and willfully violated provisions of the FCRA by failing to act properly and reasonably as to the continued corrections of the inaccurate information in his report and to provide sufficient, conspicuous notice to his creditors of all of the foregoing account errors.[89] The District Court found that Stevenson had suffered no out-of-pocket monetary losses, but that he had suffered mental anguish and was entitled to receive $30,000 in actual damages and $100,000 in punitive damages for TRW's "willful violations of FCRA."[90] From this decision, TRW filed a timely appeal.

The Fifth Circuit affirmed the District Court's finding of negligence with regard to TRW's conduct under FCRA but similarly ruled that there was no evidence to support the attendant conclusion of any willful noncompliance.[91] The Court held that there was insufficient evidence to reach a decision that TRW *knowingly and intentionally* obscured any statutorily required information "in conscious disregard of the consumer's rights."[92] In defining *willful violation* of the FCRA, the Fifth Circuit ruled that there must be "willful misrepresentations or concealments" and that only this type of conduct was sufficient to entitle a plaintiff to punitive damages under FCRA §1681.[93] The Court gave several examples of what could constitute this type of conduct including a concealment of certain portions of a consumer's credit report or some exhibition of ill-will toward the plaintiff, both of which were lacking in this particular case.[94] Although the Fifth Circuit noted TRW's slow movement in completing its internal investigation and the firm's acknowledgement that it was negligent with regard to its FCRA compliance provisions, there was insufficient evidence from this activity to conclude that there had also been a willful noncompliance of the statute adequate to allow a punitive damages award to stand.[95] Just as other Circuit Courts of Appeal had found, this Court's finding was clearly at odds with the Ninth Circuit's rulings in Safeco and Geico. The Fifth Circuit looked very carefully at the disclosure requirements of the FCRA and the obligations that are owed to a consumer when credit report information is involved, and concluded that there simply was no evidence to support the District Court's finding of willful noncompliance.[96]

D. Sixth Circuit

In 1998, the Sixth Circuit of Appeals dealt with the same issue regarding a knowing and willful violation of Section 1681 of the FCRA.[97] In *Duncan v. Handmaker*[98] (hereinafter referred to as *Duncan*), James and Annette Duncan purchased residential property located in Bullitt County, Kentucky, in 1992.[99] The mortgage loan, which was provided by Bankers Mortgage Corporation as a private lender, was guaranteed by the Federal Housing Authority, and less than a year following the closing on the property the Duncans learned that the water well "was contaminated with fecal coliform."[100] The purchasers filed suit against a number of parties that were involved in the buy-sell transaction, including Bankers Mortgage, alleging that the defendants had been negligent with regard to failing to ensure that the water supply had been properly inspected prior to the closing date.[101] The mortgage company hired Kenneth Handmaker of the law firm Middleton

[88] *Id*. (citing FCRA § 1681e(b)).
[89] *Id*.
[90] *Id*. at 291-92.
[91] *Id* at 293, 296.
[92] *Id* at 296.
[93] *Id*. at 294 (citing FCRA § 1681n; Pinner, 805 F.2d at 1263).
[94] *Id*.
[95] *Id*.
[96] *Id*. at 296.
[97] Duncan v. Handmaker, 149 F.3d 424, 426 (6th Cir. 1998).
[98] *Id*.
[99] *Id*. at 425.
[100] *Id*.
[101] *Id*.

& Reutlinger to represent it during the legal proceeding.[102] During the deposition phase of the case, Handmaker posed questions to Annette Duncan that resulted in the plaintiffs suspecting that Handmaker had "in fact, reviewed their individual consumer reports as part of the preparation for the deposition."[103] At a later date, Handmaker affirmed that this suspicion was true and that the law firm had requested and received the credit reports from Trans Union Corporation, a consumer reporting agency.[104] This request was fulfilled as the result of a prior service agreement between the law firm and Trans Union.[105]

The Duncan complaint alleged violations of FCRA Section 1681 and sought civil liability based on the argument that their consumer credit reports had been obtained under false pretenses.[106] Generally, the law recognizes that a person proceeds under false pretenses when he or she knowingly and willfully requests and obtains an individual's credit report for any purpose not sanctioned specifically by the FCRA and subsequently fails to disclose the true motivation to the consumer reporting agency.[107] When the events that gave rise to *Duncan* occurred, Section 1681n allowed for a civil cause of action against a "consumer reporting agency or user of information which willfully fails to comply with any requirement under [the FCRA]."[108] Under these older rules the Sixth Circuit held in *Kennedy v. Border Sav. & Loan Ass'n* [109](hereinafter referred to as *Kennedy*) that a violation of the FCRA that criminalizes "the act of knowingly and willfully obtaining information under false pretenses from a consumer reporting agency constitutes a basis for civil liability under §1681n."[110] More importantly, in 1996 Congress amended FCRA Section 1681n to specifically allow for a cause of action against a party for "obtaining a consumer report under false pretenses or knowingly without a permissible purpose."[111] This particular amendment does not apply in this case because it became effective a year after September 30, 1996, and there were no circumstances sufficient to bring *Duncan* within the grandfather provision of the amendment so as to permit application of this revised language.[112]

The Sixth Circuit noted that this amending language codified the holding in the *Kennedy* case by making it clear that a civil action was available whenever a party proceeded under false pretenses.[113] More importantly, this language suggested that an individual could incur civil liability if: 1) he or she obtained a report for a permissible purpose but for some reason failed to properly and legally disclose the true motivation to the agency, or 2) the requestor knowingly obtained without a permissible purpose, regardless of whether or not the purpose was disclosed to the consumer reporting agency.[114] The Court correctly pointed out that although the language and its consequences were certainly interesting relative to the instant case, it did not apply to *Duncan*, and therefore it was not necessary to speculate regarding the statutory meaning.[115] The District Court had granted Handmaker's motion for summary judgment based on the ground that they had obtained the consumer reports for a permissible purpose under the FCRA.[116] Of course the question was whether or not the defendants' intended purpose of preparing for the lawsuit against their client was, in fact, a permissible purpose for requesting the consumer report as envisioned by

[102] *Id*. at 425-426.
[103] *Id*. at 426.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id*. (citing Northrup v. Hoffman of Simsbury, Inc., 134 F.3d 41, 46 n. 6 (2d Cir. 1997); Samora v. Valley Fed. Sav. & Loan Ass'n, 811 F.2d 1368, 1370-71 (10th Cir. 1987)).
[108] *Id*. at 426.
[109] 747 F. 367 (6th Cir. 1984).
[110] *Id*.
[111] *Id*. (citing Consumer Credit Reform Act of 1996, Pub. L. No. 104-208, § 2412, 110 Stat. 3009, *3009-446 (1996)).
[112] *Id*. (citing, § 2420, 110 Stat. at *3009-453).
[113] *Id*. at 2.
[114] *Id*. (citing § 2412, 110 Stat. at *3009-446, which provides that a cause of action is permissible where a consumer report is obtained under false pretenses or "knowingly" without a permissible purpose. *Id*.)
[115] *Id*.
[116] *Id*. at 426.

the FCRA.[117] The Duncans argued to the lower court that their property was "virtually unmarketable and uninhabitable" due to the contamination of the water well.[118] In answering the interrogatories the Duncans further contended that the value of their property had been reduced to zero because of the lack of portable water and that at Annette Duncan's deposition Handmaker was armed with information from the consumer reports that permitted him to ask her whether she described the property as worthless on various applications for loans that had been made outside the context of the instant lawsuit.[119]

Based on this particular factual information from the District Court proceeding and holding the Sixth Circuit then reviewed the circumstances under which the FCRA permits a consumer reporting agency to provide a consumer credit report to a requesting party.[120] The FCRA provides that a consumer report can be provided to a person who the agency has reason to believe intends to use the information in regard to a credit transaction, primarily involving the extension of credit or the collection of an account.[121] The FCRA also allows a report to be provided for use in employment purposes, in connection with the underwriting of insurance, for use in decisions determining a consumer's eligibility for a license, or in any other situation where the requesting party has a "legitimate business need for the information in connection with a business transaction involving the consumer."[122] Handmaker contended that the law firm had a legitimate business need for the consumer reports in preparing for the litigation that the Duncans had initiated, and further that this need was connected to the underlying business transaction that involved the mortgage loan for the real property.[123] At this point the Circuit Court concluded that Handmaker had no reasonable basis for interpreting the FCRA provisions regarding acquisition of a credit report in this manner in the discovery phase of this lawsuit.[124] In fact, the Court concluded that if it were to agree with Handmaker's position relative to the proper application of the FCRA statutory provision that this interpretation would effectively render Section 1681b(3)(E) much too broadly and would practically render the specificity of Section 1681b(3)(A) meaningless.[125] Similarly, the Court held that if it were to agree with the attorney's interpretation of the FCRA it would, in fact, be interpreting a provision of the FCRA that would for all practical purposes circumvent the very restrictions that were intended to protect consumers.[126]

Essentially, the Sixth Circuit refused to regard the initiation of a lawsuit as a "legitimate business need" for which a consumer credit report could be legally requested from an agency for trial preparation purposes under Section 1681b.[127] It is only when the lawsuit involves the collection of a debt that a lawyer is likely to be in a legitimate position to request a consumer report for any purpose analogous to those enumerated in FCCRA Section 1681b.[128] But when the lawsuit moves beyond the debt collection area it is far less likely, if not improbable, that an attorney will be able to meet the specificity requirements set forth in the FCRA.[129] In this case, however, the Sixth Circuit concluded that Handmaker requested both Duncan reports for a purpose insubordinate to the spirit and the letter of the law as enumerated in Section 1681b.[130] As a result, the Court concluded in these circumstances "we cannot deem preparation for a negligence suit [to

[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 427.
[121] *Id*.
[122] *Id*. (citing FCRA § 1681b).
[123] *Id*.
[124] *Id*.
[125] *Id*. (citing Mone v. Dranow, 945 F.2d 306, 308 (9th Cir. 1991). Interestingly, this cited case was from the Ninth Circuit and its holding was effectively overturned by the same Court's rulings in Safeco and Geico, the very subject of this article.)
[126] *Id*.
[127] *Id*. (citing Spence v. TRW, Inc., 92 F.3d 380 (6th Cir. 1996)).
[128] *Id*.
[129] *Id*.
[130] *Id*.

constitute] a legitimate *business* need . . . in connection with a *business* transaction."[131] Most importantly, the Sixth Circuit ruled that the District Court had erred in granting summary judgment on the basis that the defendants had obtained the Duncans' reports in a manner that was permissible under the FCRA.[132] To achieve this end it was necessary that the Duncans identify genuine questions of fact with regard to two material issues as specified by the FCRA. First, anytime an individual is operating under false pretenses and obtains a consumer credit report for an impermissible purpose and does not disclose the true purpose to the reporting agency, this is a per se FCRA violation.[133] Second, in order to establish the right to a claim for civil liability for improperly obtaining a credit report under false pretenses, a complaining party must prove that the defendant acted knowingly and willfully.[134]

At this point the Circuit Court advanced its analysis and stated that this particular case included genuine issues of fact with respect to whether or not the defendant law firm had the requisite state of mind.[135] This finding was further supported by a Ninth Circuit decision prior to Safeco and Geico which commented "that a user cannot . . . obtain consumer information for a purpose not permitted under §1681b without a false pretense."[136] Again, the Circuit acknowledged the civil liability requirement under the FCRA that an individual act knowingly and willfully in order for a false pretense to be sufficient to successfully contend that the party acted "with a motivation to injure."[137] The Sixth Circuit also recognized that Handmaker could be held civilly liable if the firm obtained the credit reports "under what is believed to be a proper purpose under the statute but which a court . . . later rule[s] to be impermissible legally under §1681b."[138] Complicating the situation for Handmaker, according to the Circuit Court, was the fact that the defendants were lawyers, and their failure to "make a more specific disclosure at the time they requested the Duncans' consumer report may suggest that they knowingly obtained the report for an impermissible purpose."[139] The bottom line in this case was that the Sixth Circuit was not prepared to affirm a summary judgment dismissing the FCRA claims that would thereby preclude the plaintiff Duncans from an opportunity of having their day in civil court to prove that Handmaker had acted willfully and knowingly, as well as in direct violation of the FCRA so as to justify statutory damages. The summary judgment was reversed and the case remanded for proceedings consistent with the Circuit Court's opinion.[140]

E. Seventh Circuit

In the Seventh Circuit case, *Wantz v. Experian Information Solutions*,[141] Brian Wantz faced a situation very similar to that encountered by Barbara Cushman in the Third Circuit case previously discussed. The FCRA creates a private right of action against any consumer reporting agency for the "negligent"[142] or "willful"[143] conduct of any violation for a duty imposed under the statute "including the duty to reinvestigate under section 1681i(a)."[144] In any case where either a negligent or willful violation of any duty under the FCRA is established, the consumer reporting agency is liable for the consumer's "actual damages" as well as the cost of the action together with

[131] *Id*. at 428 (citing § 1681b(3)(E) (emphasis in original)).
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*. at 429.
[137] *Id*. (quoting and citing Kennedy, 747 F.2d at 370).
[138] *Id*. (quoting and citing Kennedy, 747 F.2d at 370).
[139] *Id*.
[140] *Id*.
[141] 386 F.3d. 829 (7th Cir. 2004).
[142] FCRA § 1681o.
[143] FCRA § 1681n.
[144] *Id*. at 834.

reasonable attorney fees.[145] Furthermore, the agency is similarly liable for punitive damages for those acts proved to have occurred in a situation where the facts indicate that the credit reporting agency acted both knowingly and willfully to the detriment of the consumer.[146]

This case came to the Seventh Circuit following a summary judgment in Experian's favor and was concluded in August 2000 with a Virginia state court entering a civil judgment against Wantz.[147] Even though Wantz satisfied the civil judgment on September 14, 2000, Experian and at least one other consumer reporting agency continued to report that the judgment was delinquent in direct contradiction to the factual record as well as in direct violation of the FCRA.[148] When Wantz became aware that the judgment was still being reported as delinquent he filed a request with Experian asking that a reinvestigation be conducted and filed a dispute verification form that was then handed over to a third party vendor, Superior Information Services (SIS), which undertook the investigation of whether or not Wantz had in fact paid the judgment in full.[149] For some reason SIS investigated Wantz's request and reported to Experian that the judgment had not been satisfied which in turn led to Wantz contacting Experian in September 2002 asking that SIS reinvestigate the case. Experian forwarded the request to SIS, who did not respond within the thirty-day period that the Act allows for reinvestigation.[150]

As a result of SIS's failure to comply with the statutory provision of FCRA, Experian decided that the wiser course of action would be to update all Wantz's formal credit records to indicate that the Virginia judgment had been satisfied and notified him of this change.[151] Based upon Experian's failure to consult the reinvestigation in a business-like manner and to exert proper supervision over its agent, SIS, Wantz filed a complaint against Experian in the District Court. The complaint alleged the conduct of the company during the reinvestigation process was negligent at a minimum and at the worst a "knowing and willful" disregard of his rights under the FCRA.[152] The District Court granted summary judgment in favor of Experian emphasizing its reasoning that Wantz had "no competent evidence that he was entitled to damages."[153]

The Seventh Circuit undertook a de novo review of the summary judgment construing all facts in favor of Wantz as is required by the common law and which is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[154] This is the standard under the federal rules that is used to uphold a summary judgment holding. However, case law has ameliorated this procedural rule by holding that a summary judgment may not be appropriate if the record as a whole could be held to find a reasonable basis to rule otherwise.[155] In general, the FCRA requires a consumer reporting agency to follow reasonable procedures to ensure that the consumer is provided the maximum possible accuracy of any information that concerns him or her and which is reported to the agency as relevant to the report.[156] In this situation the FCRA brings into play a number of duties required of the reporting agency, the most important of which is the obligation to "reinvestigate when a consumer contends that his consumer report is inaccurate or incomplete."[157]

As mentioned in the Third Circuit case, the reporting agency has a thirty-day period to conduct reinvestigation, which must be done at no charge to the consumer, and if any mistakes are

[145] *Id*. (citing, FCRA §§ 1681n and 1681o).
[146] *Id*.
[147] *Id*. at 832.
[148] *Id*.
[149] *Id*. SIS acted in every respect as Experian's agent in conducting the reinvestigation.
[150] *Id*., *see* FCRA § 1681i(a).
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*., *see* Fed R. Civ. P. 56(c).
[155] *Id*., *see* Commercial Underwriters Ins. Co. v. Aires Envtl. Servs., Ltd., 259 F.3d 792, 795.
[156] *Id*., *see* FCRA § 1681e(b).
[157] *Id*.

found they must immediately be deleted from the consumer's credit report.[158] Given that Wantz felt that Experian had been more than delinquent and had willfully disregarded his rights under the FCRA, he asserted that a jury could possibly find that he was entitled to both actual and statutory damages under the statute.[159] The Seventh Circuit was not persuaded that Wantz had presented sufficient evidence to establish that he had suffered any actual damages based on what it termed as mere unsupported statements that he had endured emotional distress.[160]

With regard to the matter of punitive damages, the Court as in all of the other cases mentioned in this article regarding the right to statutory damages, noted that a defendant must knowingly and intentionally violate the FCRA, and that it must be conscious that its own act impinges upon the rights of these individuals.[161] Unfortunately for Wantz, even though there was significant evidence to indicate negligent misconduct on the part of Experian, the Seventh Circuit was not persuaded that the strict requirements of §1681n had been met in order to prove that there had been a knowing and willful violation of the FCRA. Despite the fact that Wantz failed to carry the day with regard to his claim the important aspect of this case is that it upheld the standard enunciated in §1681n with regard to proving when a knowing and willful violation of the FCRA has occurred.[162]

F. EIGHTH CIRCUIT

In the Eleventh Circuit case *Phillips v. Grendall*,[163] Mary Grendall became suspicious that her intended son-in-law was not telling the truth regarding his past, especially regarding his claims that he was an attorney and had done legal work in Washington, DC.[164] Her preliminary investigation, done on her own time, failed to yield any satisfactory results. As a result, she employed a family friend who worked for the McDowell Agency, Inc., and asked him to do a "background check" on Lavon Phillips.[165] Fitzgerald initiated a search by procuring Phillips' social security number from a computer database and then proceeded to search public records in Minnesota and Alabama where he had previously lived.[166] At that point Fitzgerald then supplied the social security number information to ECON Control, Inc., which was doing business as Sherlock Information System.[167] He asked that ECON Control produce finder's reports on Phillips, later testifying that he personally believed the finder's reports were "not consumer reports" subject to the FCRA.[168] ECON Control's business involved the furnishing of credit reports and credit scoring for various credit grantors, as well as providing information for private investigators.[169]

The president of ECON Control, William Porter, testified during his deposition that he had been advised by a representative of Computer Science Corporation (hereinafter referred to as CSC) that one of CSC's products referred to as a *finder's report* could be "obtained without authorization of the person who was the subject of the report because the finder's report contained no information on credit history or credit worthiness."[170] Despite this statement, Porter also testified that a Credit Report does require authorization from the subject. He also testified that Fitzgerald had learned of ECON Control from a presentation that Porter had given at a Minnesota meeting of the private investigators' association.[171] At that meeting, Porter commented to the investigators

[158] *Id*. at 832-33.
[159] *Id*. at 833.
[160] *Id*. at 834.
[161] *Id*. at 834 (citing Phillips v. Grendahl, 312 F.3d 357, 368 (8th Cir. 2002)).
[162] *Id*. at 834.
[163] 312 F.3f 357 (8th Cir. 2002).
[164] *Id*. at 360.
[165] *Id*.
[166] *Id*.
[167] *Id*.
[168] *Id*. at 360-61.
[169] *Id*. at 360.
[170] *Id*.
[171] *Id*.

that no authorization was required to obtain a finder's report and that the information contained in it could prove to be very useful in locating people during private investigations.[172] Porter went so far as to hand out sample finder's reports "which showed information on a fictional consumer, including address, aliases, birth date, employer addresses, and the identity of firms with which the consumer had credit accounts and firms that had made inquiries about the consumer."[173]

This background information is important because it sets up the relationship between Fitzgerald, the direct employee of Grendall, and his subcontractors used to collect the consumer reporting information on Kevin Fitzgerald.[174] Robert McDowell had signed an agreement with ECON Control on behalf of the McDowell Agency which was entitled "Agreement for Consumer Credit Services"[175] (hereinafter referred to as "the Agreement"). The pertinent clause of the Agreement stated that McDowell certified that he would order "consumer reports, as defined by the FCRA, only when they are intended to be used as a factor in establishing a consumer's eligibility for new or continued credit, collections on an account, insurance, licensing, employment purposes, or otherwise in connection with a legitimate business transaction involving the consumer."[176] The Agreement went on to state that any reports generated by the investigation would be "used for no other purposes and that any request would be used for "employment purposes" only and that McDowell would "specifically identify" to ECON Control this particular purpose.[177] To get the information on Phillips, Fitzgerald faxed ECON Control a request that listed his name, date of birth, address and social security number.[178] Interestingly, ECON Control did not ask why McDowell wanted the report, McDowell did not tell them the reason for wanting the report, and perhaps most importantly, McDowell did not comply with Paragraph 3 of the registration agreement that stated he would identify the employment purposes for which any report was requested.[179]

As expected, ECON Control obtained a report from CSC on Grendall's intended son-in-law and forwarded it to McDowell. Fitzgerald then met with Grendall and provided the results of this investigation that included the finder's report.[180] An unknown person had written on Levon Phillips' finder's report the words "Credit Inquiry Report and Employment Trace."[181] It did not take long before Phillips learned that his future mother-in-law had initiated an investigation into his past and not too surprisingly he brought a law suit against Grendall, the McDowell Agency and ECON Control in which he alleged "Capital Defendants *willfully and maliciously* obtained the Plaintiff's Credit Report for impermissible and illegal purposes in violation of the FCRA Section 1681q."[182] This contention was based on the fact that the report contained highly sensitive information that was "of no legitimate concern to the public" and which Phillips contended had unreasonably intruded upon his seclusion."[183] The District Court entered summary judgment against Phillips with regard to his FCRA claims relative to all defendants holding that there was "no evidence that Grendall or the other defendants had obtained a credit report on Phillips by false pretenses."[184]

In its opinion, the Eight Circuit provided a very detailed and extremely well-written informational review of the original language of the FCRA and how those provisions had been amended to combine allegations for both willful and negligent noncompliance into one clause of

[172] *Id*.
[173] *Id*.
[174] *Id*. at 361.
[175] *Id*.
[176] *Id*.
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *Id*. at 362 (emphasis added).
[183] *Id*.
[184] *Id*.

action.[185] However, Phillips' attorney chose to plead the case under the two previous distinct clauses of action, that the finder's report was not a consumer report within the meaning of FCRA and that it had not been relied upon in this regard to §1681q of the FCRA.[186] This forced the Circuit Court to see if there was any way that these allegations could be found to fall within the purview of the newer FCRA language. At this point, it was clear that the Eighth Circuit was sympathetic to Phillips's situation, and that there were at least judicial overtones that Grendall had overstepped legal boundaries with regard to misusing the consumer credit report information that could be obtained under the FCRA.[187] Clearly, the defendants attempted to rely on the argument that the finder's report was not a consumer report within the meaning of the FCRA, and it had not been relied upon in this regard with respect to §1681q of the FCRA.[188]

This case required that Phillips prove there was a consumer report involved and that the defendants not only obtained the report but also used it in a way that fell outside the permissible statutory use or purpose provision of the FCRA.[189] The Court also held that "he [Phillips] must also prove that the defendants acted with a specified level of culpability, which is *willfulness* under Section 1681n and negligence under Section 1681o."[190] At this point the Court noted again that the amended complaint did not specifically point out or plead that the defendants lacked any permissible purpose with regard to the credit report and the reasons for obtaining it.[191] However, the Court gave Phillips the benefit of notice pleading and moved to the steps required in order to establish when the "consumer report" requirement is fulfilled in a pleading.[192] The Circuit noted that to establish statutory liability under either Section1681n or Section 1681o for obtaining any consumer report "without a permissible purpose is to show the document at issue was a 'consumer report.'"[193]

Most importantly, the consumer report has to contain information that bears on a consumer's credit worthiness, his or her credit standing, credit capacity, character, general reputation, possible personal characteristics, or mode of living.[194] Even though the Eight Circuit acknowledged that the second question posed by the FCRA relative to whether or not the credit report was used for an employment decision was a more difficult issue in this particular case, the Court overlooked many of the factual arguments made by the defendants and instead focused on the sophistication of the finder's report product and the reasons that collections professionals use the report.[195] This allowed the Court to draw the conclusion that the finder's report was prepared by CSC with the understanding that it would be used for a statutory purpose, and therefore was a consumer report, "even though the requestor never used or intended to use it for a statutory purpose."[196]

Of overwhelming concern to the Eighth Circuit was that each of the defendants had experience in dealing with credit reports and knew that the FCRA imposed substantial legal requirements as to when such reports could be obtained.[197] Therefore, to make the claim that there was no evidence that any of the defendants believed that their conduct was covered by the FCRA was at the least disingenuous given their professional expertise and knowledge of the FCRA.[198] As a result, the Eight Circuit ruled that the District Court had erred in entering a summary judgment on the FCRA claims because the plaintiff had shown that the defendants "knowingly and intentionally committed an act in conscious disregard for the rights of others" even though there

[185] *Id*.
[186] *Id*. at 364.
[187] *Id*.
[188] *Id*.
[189] *Id*.
[190] *Id*. (underlining in original) (emphasis added).
[191] *Id*. at 366.
[192] *Id*.
[193] *Id*. at 365 (underlining in original).
[194] *Id*. (citing FCRA §1681a(d)).
[195] *Id*. at 366.
[196] *Id*. (citing Bakker v. McKinnon, 152 F.3d 1007, 1002 (8th Cir. 1998)).
[197] *Id*. at 371.
[198] Id. at 370-71.

was no showing of "malice or evil motive" which was not required under the FCRA.[199] The Circuit Court brought this line of reasoning full circle to incorporate all of the previously mentioned cases by noting that the *knowingly and willfully* language had its origination in the Fifth Circuit's case of *Pinner*.[200]

The Court concluded its agreement with the other federal Circuits' FCRA interpretation by stating that "under this formulation the defendant must commit the act that violates the FCRA with knowledge that he has committing the act and with intent to do, and he must also be conscious that his act impinges on the rights of others."[201] In perhaps what can only be categorized as the capstone statement made in this opinion, the Eight Circuit noted that "we conclude that our Circuit precedent that willful noncompliance under Section 1681n requires a knowing and intentional commission of an act that the defendant knows to violate the law."[202]

IV. CONCLUSION

The primary importance of these cases is reflected in the Ninth Circuit's view that reckless disregard is sufficient to meet the FCRA requirement of willful conduct. By doing so, this Circuit distinguishes itself from nearly a half dozen comparable appellate courts, all of which require a showing of actual knowledge in order to violate the adverse-action wording of Section 1681n.[203] This FCRA section states that an adverse-action means "a denial or cancellation of, an increase in any charge for, or a 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."[204]

The insurance companies contend that this language requires an affirmative act on their part to take action that places respondents in an inferior position financially or in respect to tier classification as a direct result of the impact the individual's credit score had on the insurer's decision. Applicants counter that such a dramatic change in position is not mandated by the statute and that if the insured would have placed higher in his or her credit ranking but still received the same credit policy offer and attendant premium, then this constitutes an adverse-action sufficient to trigger the statutory adverse-action notice requirement and accompanying civil statutory penalties. In fact, an insured may be offered a policy by the same affiliated company, but if his or her credit score was higher than the weighted score used in the mathematical model, then he or she is the victim of an adverse-action entitled to notice or at least statutory civil penalties (which range between $100 and $1,000 per violation) as prescribed by the FCRA.

The insurance companies also argue that the Ninth Circuit's logic and rationale will compel all insurance firms to send adverse-action notices in situations where not only did nothing adverse occur, but the wording of the notice itself will do nothing but confuse the individual as to exactly what has occurred. This will result in an endless stream of letters, telephone calls, and administrative costs borne by the insurers simply to be absolutely certain that no part of the Ninth Circuit's position is violated. At the same time, multi-national firms will have to deal with the

[199] *Id*. at 368 (citing and quoting Bakker v. McKinnon, 152 F.3d 1007 (8th Cir 1998); Cushman v. Trans Union Corp. 115 F.3d 220, 226 (3rd Cir. 1997)).

[200] *Id*. (citing Pinner v. Schmidt, 805 F.2d 1258, 1263 (5th Cir. 1986)).

[201] *Id*. at 368 (citing Dalton v. Capital Associated Industries, Inc., 257 F.3d at 418 ((("knowingly and intentionally committed an act in conscious disregard for the rights" of a consumer); Duncan v. Handmaker, 149 F.3d at 429 (stating that the liability under FCRA §1681n requires that a defendant act "willfully and purposely with motivation to injure" and holding that the belief was impermissible would or could negate liability.))

[202] *Id*. at 370 (underlining in original).

[203] Safeco II, at 1040 (noting that the Circuit agrees with the Third Circuit conclusion that "willful" conduct is that done either intentionally or with reckless disregard.) *See* Safeco III at 1097-99, for a lengthy dissection and refutation of the other Circuit opinions as well as the Court's own misplaced emphasis on the *Cushman v. Trans Union Corporation,* 115 F.3d 220 (3rd 1997), case.

[204] *Id*.

question of whether to adopt alternate notice methods in the states falling under the other Circuit Courts' jurisdictions or to adopt one standard for all fifty states, a standard dictated by the opinions rendered in the Geico and Safeco cases.

Applicants are not persuaded by this argument and contend that the Ninth Circuit's civil statutory view equating reckless disregard with willful conduct is correct based on a multitude of case law.[205] Actual knowledge is not a primary factor in determining whether an adverse-action has taken place. What matters is that the consumer be properly informed of the impact that his or her credit score had in the rendering of a particular insurance decision regardless of whether the individual suffered actual harm or damages. The major problem facing the applicants with regard to their arguments is the contradictory position taken by other Circuit Courts and the impact that a favorable ruling by the Supreme Court would have on maintaining a smoothly operating stream of commercial transactions in the insurance industry. The Ninth Circuit's opinions in these cases present a significant departure in the interpretation of the appropriate FCRA provisions from those established by other Circuits.

Additionally, the Ninth Circuit's reliance on the Third Circuit's interpretations of the same provisions is arguably not as firm or sound as the Court believes; this alliance of opinions is certain to be tested before the Supreme Court. In a nutshell, there is no significant federal civil case law that explicitly supports the applicants' views of the FCRA provisions at issue. To achieve agreement with them, the Supreme Court will have to reach to the civil law jurisprudence that involves other federal statutes and not the FCRA. Admittedly, this case law exists, but the key question is whether the Supreme Court will choose to alter an interpretational scheme for the FCRA that has well-established judicial precedent across federal courts.

[205] Safeco III at 1097-99. *See also* Safeco II at 1040.