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* SUPPORTING APPELLANT AND URGING REVERSAL

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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 will, if upheld, significantly undermine the Act's protections in connection with the underwriting of insurance. The court's decision conflicts with the decision of another district court (*Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455 (W.D. Ky. 2003)), and this Court will likely create the first appellate precedent on this issue. Thus, this case is important to the Commission. The Commission has filed a brief *amicus curiae* supporting the appellants in *Rausch v. The Hartford Financial Services Group, Inc.*, No. 03-35695 (9th Cir.), in which the same issue arises.

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 an offer of new insurance than it would have offered if the information in the consumer's report had been more favorable.

STATEMENT OF THE CASE

1. The Fair Credit Reporting Act

Congress passed the FCRA in 1970 after extensive hearings, which showed that the consumer reporting industry was cloaked in a shroud of secrecy:

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

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

The FCRA addresses this problem by requiring that, when any "person" (which includes an insurance company, *see* § 1681a(b)) takes any "adverse action" with respect to a consumer based even in part on information in her consumer report, that

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 the consumer may assess the report's accuracy or completeness. Absent the notice, the consumer may never know to invoke the Act's protections, and, in a case like this one, may never even learn if adverse action occurred.

2. Factual Background

This case was brought by Julie Willes who purchased automobile insurance from State Farm Fire and Casualty Co. ("F&C"). The essential facts are not in dispute. On August 1, 2001, Ms. Willes contacted a State Farm agent to apply for automobile insurance. The agent was an independent contractor who, through separate contracts, acted as an agent for F&C and also for State Farm Mutual

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

action with respect to the insurance that it sold her. D.85 at 9, 18-19.[3]

The district court (per Judge Brown) granted both F&C's and Mutual's motions. D.121, D.125. With respect to F&C's motion, the court held that:

> Willes's claims are based solely on Fire and Casualty's initial setting of her premium rates. This Court previously concluded an insurer cannot "increase" a charge for insurance unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report. *See Mark v. Valley Ins. Co.*, [275 F. Supp. 2d 1307 (D. Or. 2003)]. The Court similarly concludes an insurer cannot "reduce" or "unfavorably or adversely change" the terms of insurance unless such terms previously existed and the insurer subsequently alters those terms in an unfavorable manner. Based on this Court's decision and analysis in *Mark*, the Court concludes Fire and Casualty is entitled to summary judgment as to Willes's FCRA claim because the initial setting of her insurance premiums did not constitute "adverse actions" under FCRA.

D.121 at 4.

In granting Mutual's motion, the court repeated its analysis of F&C's motion. D.125 at 9-11. It then held that Mutual was also entitled to summary judgment because the court did not believe that Willes had ever applied to Mutual for

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[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 informing her that it obtained her consumer report during the course of its consideration of her application. D.85 at 22-25. It is the Commission's view that, because the notice merely informed Ms. Willes that F&C had procured her consumer report, but did not tell her that F&C took any adverse action, the notice failed to "provide * * * notice of the adverse action to the consumer" and was therefore inadequate to satisfy the FCRA's adverse action notice requirement. *See* § 1681m(a)(1); *see also* D.103 at Ex. 1 (copy of the letter).

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. Valley Ins. Co.*, *supra*.

In its order with respect to F&C, the district court began and ended its analysis with the proposition that, because plaintiff's claim was based on F&C's initial offering of insurance, there could be, as a matter of law, no "increase" in rates or "adverse change[]" in the terms of insurance. D.121 at 4 (citing *Mark*). Based on this legal premise, the court ignored as irrelevant plaintiff's allegations that F&C's actions toward her were less favorable than the actions it would have taken, had the

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 had her consumer report information been better -- *i.e.*, offering her insurance at better rates, or on more favorable terms -- then the action it took was "adverse," within the meaning of the FCRA, and it was required to provide her with an adverse action notice. Because the court below misapprehended the legal standard, it did not address the actions that F&C would have taken if information in Ms. Willes's consumer report had been more favorable.[4] Accordingly, the Commission urges this Court to reverse the lower court's ruling as to F&C, and to remand for further proceedings under the correct legal standard.[5]

AN INSURANCE COMPANY THAT, BASED ON INFORMATION IN A CONSUMER REPORT, PROVIDES A CONSUMER WITH INSURANCE AT A HIGHER PRICE OR ON MORE ONEROUS TERMS THAN IT WOULD HAVE PROVIDED HAD THE INFORMATION BEEN MORE FAVORABLE, HAS TAKEN "ADVERSE ACTION" WITH RESPECT TO THAT CONSUMER

When an insurance company provides insurance at a higher price or on less

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[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.

favorable terms based on information in a consumer report, it takes "adverse action," as that term is defined in § 1681a(k)(1)(B)(i) of the Act. The district court misinterpreted this section of the Act. Thus, its opinion is at odds with both the central purpose of the FCRA, and the Act's legislative history.[6] This Court should reverse the district court's decision on this issue.

A. The district court misinterpreted § 1681a(k)(1)(B)(i)

The district court misinterpreted § 1681a(k)(1)(B)(i). That section states:

> (k) Adverse action.
>
> (1) Actions Included. The term "adverse action" -- * * *
>
> (B) means --
>
> (i) 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 * * *.

The court held that F&C did not take adverse action, because, in the context of a sale of new insurance, it could not, as a matter of law, "'increase' the charge" for or "'reduce' or 'unfavorably or adversely change' the terms of insurance" unless it had

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

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 insurance on terms and at a price that have been specifically advertised, but the insurer refuses to offer insurance on those terms or at that price as a result of information in a consumer report, the insurance company has not taken adverse action.[7]

The court's only support for this conclusion was its own decision in *Mark v. Valley Insurance Co.* *See* D.121 at 4; D.125 at 10. In that case, the plaintiff alleged that the insurance company had taken adverse action when it charged him a higher initial rate based on information in his consumer report. The court observed that the dictionary definition of "increase" is "to make something greater or larger," and then it concluded that "[a]n insurer cannot 'make greater' something that did not exist previously." 275 F. Supp. 2d at 1316. In the court's view, its interpretation of this section comported with "the plain meaning of the language Congress chose to

[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 "increased" price "plainly" refers only to a price that is different from what it was at another point in time. In fact, the meaning of "increase in any charge" is not nearly so "plain" as the court thought. Both in common parlance and in legal discussion, one might well refer to one customer paying an "increased" price if he is offered a higher price than is offered to other consumers at the same time -- as was allegedly the case in *Mark*. For example, in *Cornist v. B.J.T. Auto Sales, Inc.,* 272 F.3d 322 (6th Cir. 2001), a consumer claimed a violation of the Truth in Lending Act ("TILA") because she and other credit customers were quoted a higher base price for

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. Although the court relied on its conclusion that "an insurer cannot 'reduce' or 'unfavorably change' something that did not exist previously," it failed to consider whether more favorable terms *did* exist at the time Ms. Willes applied for insurance. It also failed to consider whether Ms. Willes might have qualified for those terms but for the contents of her consumer report. If, as a result of her consumer report, F&C failed to provide her with insurance on more favorable terms, this should have triggered an adverse action notice under the FCRA.

The district court's analysis artificially cabins the term "adverse action," and

leads to a completely illogical result. In particular, § 1681a(k)(1)(B)(i) provides that "adverse action" encompasses "an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of * * * any insurance * * * *applied for* * * *." (Emphasis added.) To avoid reading "applied for" out of the statute entirely, the court in *Mark* was forced to create a hypothetical sequence of events that defies common sense. Thus, it held that an insurance company increases the price of insurance "applied for" when it offers insurance "at one price and then raise[s] that price after it review[s]" the consumer report. 275 F. Supp. 2d at 1317. This is absurd since it assumes that an insurer would make a formal offer of insurance to a consumer and then, *after* making that offer, would evaluate the consumer's insurability. But when interpreting a statutory provision, a court should "not assume that Congress intended a statute to create odd or absurd results." *Rucker v. Davis*, 237 F.3d 1113, 1119 (9th Cir. 2001). This Court should avoid the district court's assumption that Congress included a provision in the FCRA solely to address an absurd situation, and should instead give the words of § 1681a(k)(1)(B)(i) the far more natural meaning by interpreting them to encompass the situation where an insurance company charges a higher initial price based on information in a consumer report.

The text of § 1681a(k)(1)(B)(i) itself is, at worst, ambiguous regarding its

application to the terms of the initial offering of insurance. Such ambiguity may be resolved, however, by reading that provision contextually. The district court's restrictive interpretation of that section would render it jarringly inconsistent with § 1681a(k)(1)(B)(iv), which reflects Congress's overarching intent that all actions "adverse to the interests of the consumer," if based on information in a consumer report, trigger an "adverse action" notice.[8] By contrast, recognizing a broader reading of the former section harmonizes the two, resulting in a coherent application of the principle that consumers should receive notice whenever information in a consumer report results in a detriment to them. As this Court has recognized, proper statutory construction requires analyzing particular "provision[s] in the context of the governing statute as a whole, presuming congressional intent to create a 'symmetrical and coherent regulatory scheme.'" *Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 875 (9th Cir. 2003) (citation omitted; quoting *FDA v. Brown & Williamson Tobacco*

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

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

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

Even if the foregoing considerations do not themselves dictate adoption of plaintiff's interpretation of the statute, they certainly show that the district court's restrictive approach is not the only plausible reading of the statute's text. Accordingly, the court should have considered the policies and legislative history behind the statute. As explained below, that legislative history indicates that § 1681a(k)(1)(B)(i) should be interpreted to encompass actions unfavorable to the consumer taken in connection with the setting of the initial rates for the insurance.

B. The district court improperly ignored the FCRA's legislative history

The district court's analysis ignored the legislative history of the FCRA's definition of "adverse action." This history demonstrates that Congress intended that the definition be given an expansive interpretation, not the narrow one imposed by the court. Where, as here, a statutory provision is ambiguous, "it is necessary to investigate the legislative history to discover the intent of Congress." *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1251 (9th Cir. 2000). As described in detail below, this history shows that, when the FCRA was first enacted in 1970, its adverse action notice requirements applied to insurance companies when, based in whole or in part on information in a consumer report, they charge a higher initial price for insurance.

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 of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

This provision, like the current Act's definition of adverse action, refers to an "increase" in the charge for insurance. The original version of § 1681m(a) was

adopted, virtually verbatim, from the Senate version, S.823, 91st Cong. (1969).[9] The committee report accompanying S.823 explained the breadth of the obligation imposed by the section on users of consumer reports: "Those who reject a consumer for credit, insurance or employment *or who charge a higher rate for credit or insurance* wholly or partly because of a consumer report must * * * so advise the consumer and supply the name and address of the reporting agency." S. Rep. 91-517, at 7 (1969) (emphasis added). Thus, under the original version of the Act, an insurer "increases" the charge for insurance, and thereby takes adverse action, when that insurer charges a higher rate for insurance based on information in a consumer report. There is no indication that the "increases" that trigger an adverse action notice under the original version of the Act were limited to those situations where the insurer increased a rate that had been previously charged to the consumer.

Although the original Act's adverse action requirements applied when insurance companies used consumer reports to set initial prices, they did not apply in every situation in which a report user made a decision unfavorable to the consumer.

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[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 consumer reporting agency. This was the only change that was made to the Senate version. *See* H.R. Conf. Rep. 91-1587 (1970), *reprinted at* 1970 U.S.C.C.A.N. 4411, 4416.

This was made clear by the Commission's Commentary on the Fair Credit Reporting Act. 55 Fed. Reg. 18804 (May 4, 1990, codified at 16 C.F.R. Part 600). This Commentary consolidated the Commission's interpretations with respect to each section of the FCRA and serves as guidance for consumer reporting agencies, users of consumer reports, and consumers. *See* 55 Fed. Reg. 18804. With respect to § 1681m, the Commentary stated that:

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

55 Fed. Reg. 18826. Thus, the Commission recognized that, as of 1990, there were entities who had a permissible purpose for receiving consumer reports under § 1681b (*e.g.*, landlords or merchants accepting checks) but who were not required by § 1681m to notify consumers when they made decisions based on those reports that were unfavorable to consumers.

The definition of "adverse action," which was added to the FCRA by the Consumer Credit Reporting Act of 1996, P.L. 104-208 ("CCRA"), was Congress's

response to the Commission's 1990 Commentary. Although there were no committee reports issued in conjunction with enactment of the CCRA, reports were issued in connection with several earlier versions of the statute,[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 made -- (i) in connection with an application which was made by, or a transaction which was initiated by, any consumer; and (ii) which

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

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

Finally, during the 104th Congress (the Congress that ultimately enacted the CCRA), the Senate considered S.650, which contained a definition of "adverse action" identical to the one ultimately adopted. The committee report explained that the definition was intended to overturn the Commentary. S. Rep. 104-185, at 31-32 (1995). It further explained that it intended for adverse action to:

> include[] 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 any amount of, any insurance, in connection with the

> underwriting of insurance. This portion of the definition applies to adverse determinations with respect to existing insurance or applications for new insurance.

Id. at 32. Again, there is no indication that S.650 was intended to narrow the coverage of the Act's adverse action requirements.

The district court made two errors in its analysis of the legislative history. *See Mark v. Valley Ins. Co.*, 275 F. Supp. 2d at 1317-18 (setting forth that analysis). First, it ignored the fact that, under the FCRA as it was originally enacted, an insurance company's decision, based on information in a consumer report, to charge a higher price would clearly have constituted adverse action, triggering the notice requirement of § 1681m. *See id.* Thus, the court's analysis failed to take into account that, when it added a definition of "adverse action" to the FCRA, Congress was not writing on a clean slate. The original version of the Act states that an adverse action notice is triggered when "the charge for such * * * insurance is increased." That version mandated an adverse action notice whenever an insurer charged a higher rate based on information in a consumer report. S. Rep. 91-517, at 7. The current version states that adverse action means "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. § 1681a(k)(1)(B)(i). There is no indication in any of the legislative history of the 1996 amendments of the FCRA that Congress intended to narrow the range of actions

that would trigger the adverse action notice requirement. To the contrary, there is every indication that Congress intended the addition of a definition of "adverse action" to expand the range of actions triggering the notice requirement and to fill any gaps that the earlier version may have left. Thus, the current version, like the original one, applies to 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.

103-209, at 5. In addition, the committee report accompanying S.650, which contained a definition of adverse action identical to the one that was adopted, explained that it applied to "'adverse action' with respect to * * * applications for new insurance." S. Rep. 104-185, at 32. Given the court's failure to conduct a careful examination of the statute's language, its claim to have found the "plain meaning" of the Act (a "plain meaning" that is in conflict with the clear intent of four committee reports) is simply wrong.[12]

Charging a higher initial price for insurance as a result of information in a consumer report would have triggered the FCRA's adverse action notice requirement as it existed from 1970 until 1996. The legislative history of the 1996 amendments gives no indication whatsoever that Congress intended to narrow the coverage of the

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[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 rejected the letter because it was a staff opinion, not the product of formal agency action. *Id.* However, the staff opinion letter is in complete accord with the Commission's Notice of User Responsibilities, 16 C.F.R. Part 601, App. C, which is the product of formal agency action (*i.e.*, notice and comment rulemaking, *see* 62 Fed. Reg. 35586 (July 1, 1997)), and which states the Commission's view that the term "adverse action" is defined "very broadly" by the FCRA. In any event, the present brief has, in accordance with standard Commission practice regarding *amicus* briefs, been approved by a vote of the Commission. The vote to approve the brief was unanimous.

adverse action notice requirement. To the contrary, it shows that Congress's goal was to expand coverage.

* * * * *

Thus, this Court should hold that the district court erred in its interpretation of the FCRA, and hold that an insurance company may take adverse action when it sets the terms for new insurance. It should also hold that the court erred by failing even to consider whether, based on information in Ms. Willes's consumer report, F&C offered her insurance at higher rates or on less favorable terms, or otherwise took adverse action.[13]

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[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 U.S.C. § 1691(d)(6)]." Section 701(d)(6) limits the definition of adverse action taken by a creditor to "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested." This definition is further limited by the ECOA's implementing regulations to exclude counter-offers that the consumer accepts. 12 C.F.R. § 202.2(c)(1). Because, as explained above, the FCRA contains a much broader definition of adverse action in the context of insurance transactions, no similar amendment to expand that definition was necessary.

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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Lawrence DeMille-Wagman

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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