IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5017

WHITNEY WHITFIELD and CELESTE WHITFIELD,
Plaintiffs-Appellants,

v.

RADIAN GUARANTY, INC.,
Defendant-Appellee.

ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

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INTEREST OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act ("FCRA" or "the Act"), 15 U.S.C. § 1681-§ 1681x,[1] seeks to ensure the "[a]ccuracy and fairness of credit reporting," § 1681(a), which Congress recognized as important not only to the interests of individual consumers but also to the efficient functioning of the banking system. Congress has entrusted the Federal Trade Commission ("FTC" or "Commission") with primary responsibility for governmental enforcement of the FCRA. The Commission regularly brings enforcement actions pursuant to this authority.[2] It has issued interpretive guidance regarding various aspects of the Act's requirements, 16 C.F.R. Part 600, as directed by the Act, has promulgated a Summary of Consumer Rights, Notice of User Responsibilities, and Notice of Furnisher Responsibilities, 16 C.F.R. Part 698, and has also promulgated a variety of rules necessary to implement various requirements under the Act, *see* 16 C.F.R. Parts 602-604, 610-611, 613-614, 682. In

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[1] Sections of the FCRA will hereinafter be referred to by their section number in Title 15 of the United States Code.

[2] *See, e.g., United States v. ChoicePoint, Inc.*, 1:06-cv-00198-JTC (N.D. Ga., Feb. 15, 2006) (consumer reporting agency provided consumer reports to users who did not have a permissible purpose); *United States v. Far West Credit, Inc.*, No. 2:06 CV 00041 TC (D. Utah, Jan. 17, 2006) (consumer reporting agency failed to follow reasonable procedures to assure accuracy of consumer reports); *United States v. Equifax Credit Information Servs., Inc.*, No. 1:00-CV-00087 (N.D. Ga. Jan. 26, 2000) (failure to provide adequate consumer access for inquiries regarding consumer report errors).

light of the Commission's key role administering the FCRA, courts have relied on the Commission's analysis of the Act's provisions. *See Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 722 n.2 (7th Cir. 2004); *Ollestad v. Kelley*, 573 F.2d 1109, 1111 (9th Cir. 1978); *see also Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1152 & n.2 (3d Cir. 1986) (Sloviter, J., concurring).

To further the FCRA's goals of fairness and accuracy, Congress imposed distinct obligations on the various entities involved in the compilation and use of consumer reports: the consumer reporting agencies that assemble and disseminate the reports (§ 1681b); "furnishers," who provide the data to be compiled (§ 1681s-2); and those who use consumer reports to make decisions regarding credit, employment, 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 obtained 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 any such information.

In the present case, a district court has dismissed a private lawsuit based on its conclusion that a mortgage insurance company does not violate the FCRA when it fails to inform the consumer that, based on information in a consumer report, the

insurance company has set the price that the consumer must pay for mortgage insurance higher than the price it would have charged if the information in the report had been more favorable. The district court's holding conflicts with the Commission's Notice of User Responsibilities, 16 C.F.R. Part 698, App. H, and with the decisions of at least three other district courts, *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04 CV-4-M, 2005 U.S. Dist. LEXIS 20361 (W.D. Ky., Sept. 15, 2005); *Glatt v. The PMI Group, Inc.*, No. 2:03-cv-326-FtM-29SPC, 2004 U.S. Dist. LEXIS 28927 (M.D. Fla., Sept. 7, 2004); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-cv-111-Oc-10GRJ (M.D. Fla., Dec. 19, 2003). Because this Court's ruling will likely be the first appellate precedent, and because this case could have a significant impact on consumers, the outcome is of great importance to the Commission.

ISSUE PRESENTED FOR REVIEW

Whether the fact that mortgage insurance is procured by a consumer's lender, and the lender is the policy's sole beneficiary, obviates the mortgage insurance company's obligation to provide the consumer with an adverse action notice when, as a result of information in that consumer's report, the company charges a higher price for the mortgage insurance, and that higher price is paid by the consumer.

STATEMENT OF THE CASE

1. The Fair Credit Reporting Act

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

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

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

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 any consumer," based even in part on information in a consumer report[3], that person must notify the consumer that adverse action was taken, and must furnish

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

the consumer with the name and address of the consumer reporting agency that was the source of the report. § 1681m. The person that took the adverse action must also inform the consumer that the FCRA allows the consumer to dispute the accuracy or completeness of information in the consumer report. *Id.* The Act further requires a consumer reporting agency, upon request, to provide a consumer with a copy of the report, § 1681g(a), to reinvestigate information in the report that the consumer disputes, § 1681i(a), and to delete information that is inaccurate or cannot be verified, § 1681i(a)(5). Thus, these provisions of the FCRA dovetail to make the credit reporting system more open and reliable -- the consumer must be told when adverse action is based on a consumer report, the consumer may obtain a copy of his report, and then the consumer may determine whether the report contains inaccurate information. Absent the notice, the consumer may never know to invoke the Act's accuracy protections, and, as in a case such as this one, may never even learn that adverse action has occurred.

2. Factual Background

The facts in this case are not in dispute. Whitney and Celeste Whitfield sought a home mortgage from Countrywide Home Mortgage. When Countrywide evaluated the Whitfields' mortgage application, it obtained information from Mr. Whitfield's consumer report. Countrywide agreed to provide the Whitfields with a mortgage, but

only on condition that the Whitfields pay for private mortgage insurance.[4] With this understanding, the Whitfields settled on their mortgage.

Three days after the settlement, Countrywide contacted appellee Radian Guaranty, Inc., to request that it provide mortgage insurance. Radian agreed to do so at a price of $903.58 per month. Radian based this price on the loan-to-value ratio of the Whitfields' mortgage, and on Mr. Whitfield's credit score, which was obtained from his consumer report. Radian conceded that, if Mr. Whitfield's credit score had been higher, Radian would have charged a lower price for the mortgage insurance. Each month, the Whitfields paid the premium for the mortgage insurance to Countrywide, and Countrywide forwarded that amount to Radian. Countrywide was the beneficiary of the policy. Neither Radian nor Countrywide provided the Whitfields with an adverse action notice under the FCRA.

3. Proceedings Below

The Whitfields filed their complaint against Radian on January 12, 2004. D.1.[5] They alleged that Radian had, in connection with setting the rate for the mortgage insurance, taken adverse action against them, but had failed to provide them with an

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[4] Private mortgage insurance covers credit risk. It is obtained to reduce the lender's loss if the borrower defaults on the mortgage. *See Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 394 n.1 (4th Cir. 2005).

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

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

The court (per Judge Sánchez) granted Radian's motion on October 21, 2005, and entered judgment in favor of Radian. D.61.[6] After reviewing the undisputed facts, the court noted that it disagreed with the decisions of three other district courts, all of which had held that, in situations similar to the Whitfields', the insurance company owes an adverse action notice to the consumer. D.61 at 7. However, the court indicated that it agreed with the holding of one of those cases, *Broessel v. Triad*, *supra*, to the extent that it held that the central issue in this case (*i.e.*, whether Radian should have provided the Whitfields with an adverse action notice) must be analyzed "under the insurance prong of the FCRA [§ 1681a(k)(1)(B)(i)], not the catch-all [§ 1681a(k)(1)(B)(iv)] or credit provisions [§ 1681a(k)(1)(A)]." The court also agreed with *Broessel*'s holding that "a higher initial rate [for the mortgage insurance] would be an adverse action," and that "privity between the parties is not a condition precedent to triggering" the FCRA's adverse action notice requirement. *Id.* at 7-8.

However, the court faulted *Broessel* and the other district court decisions for

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[6] The court's decision is reported at 395 F. Supp. 2d 234 (E.D. Pa. 2005).

missing what it considered to be the crucial issue: "whose risk was insured." D.61 at 9. The court then focused on the fact that:

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

Id. at 10. The court then observed that the FCRA's adverse action notice requirement "while not onerous, is not insignificant." *Id.* at 11. Moreover, the court was concerned that, if Radian were obliged to provide the Whitfields with a notice, such an obligation "would require Radian to enter into correspondence with consumers with whom the company had no direct contact." The court was also apparently concerned that, if Radian were to provide the Whitfields with an adverse action notice, this would somehow permit the Whitfields to avoid their mortgage: "[a]n adverse action notice from Radian could have the effect of interfering with a contractual relation between Countrywide and Whitfield." Finally, the court believed that the purpose of the adverse action notice was to provide the consumer with information in advance of the consumer's entering into a transaction, and that a notice from Radian would not serve that purpose:

> Radian did not become Countrywide's mortgage insurer until three days *after* the Whitfields settled on their house. * * * [If they had received notice prior to settlement] the Whitfields would have had a meaningful

> opportunity to correct their credit report, fulfilling the purpose of the FCRA. Notice from Radian after settlement would be meaningless.

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

SUMMARY OF ARGUMENT

The district court erred when it held that Radian had no obligation to provide the Whitfields with an adverse action notice. Nonetheless, along the way the district court resolved several other issues correctly. It correctly recognized that Radian's transaction involved the underwriting of insurance. This is so because Radian was providing insurance. Indeed, Radian did not become involved in the transaction until three days *after* the credit portion of the transaction had been consummated. Moreover, Radian's justification for obtaining information from Mr. Whitfield's consumer report was to evaluate an insurance transaction. Thus, its obligation to provide an adverse action notice must be analyzed pursuant to the insurance subpart of the FCRA's definition of adverse action. Part A, *infra*.

The court also correctly held that, pursuant to the insurance subpart of the definition of adverse action, an insurance company takes adverse action when it sets a higher initial price for insurance based on information in a consumer report. This is consistent with the wording of the definition and with the FCRA's goals. Part B, *infra*.

However, after resolving these two initial issues correctly, the court then went astray. In particular, the court's holding that Radian had no obligation to provide the Whitfields with an adverse action notice was based on its misreading of the FCRA, and its misunderstanding of the central purpose of the adverse action notice. Instead of assessing whether Radian's setting of a higher initial price constituted "adverse action with respect to" the Whitfields, which is what the FCRA requires, the court focused only on the fact that the Whitfields were not the beneficiaries of the mortgage insurance. The court also based its conclusion on a balancing test of its own devise -- it was unwilling to impose on Radian what it assessed to be the burden of providing the Whitfields with an adverse action notice because, in its view, the Whitfields would not benefit from a notice received after the consummation of the credit transaction. Not only is there no basis in the FCRA for such a balancing test, but also the court's application of that test showed that it misunderstood the purpose of the adverse action notice. The notice is not, as the court mistakenly believed, intended to assist the consumer in qualifying for the underlying transaction. Instead, its purpose is to inform the consumer that a user took adverse action based on the consumer report, and to advise the consumer how to check the contents of the report to assure its accuracy or completeness. Absent such a notice, consumers such as the Whitfields might never know that potentially incorrect or incomplete information in

Mr. Whitfield's consumer report may have led to a higher price for insurance. And, absent such a notice, that same incorrect or incomplete information could continue in the future to have an adverse impact on them. Part C, *infra*.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT RADIAN WAS NOT REQUIRED TO PROVIDE THE WHITFIELDS WITH AN ADVERSE ACTION NOTICE

At the outset of its decision, the district court correctly held that Radian's transaction, the underwriting of mortgage insurance, was an insurance transaction for purposes of applying the FCRA's definition of adverse action. The court also held that the setting of a higher initial rate for insurance constitutes adverse action. But after resolving these two issues, the court ignored the express language of the FCRA and held that Radian had no obligation to provide the Whitfields with an adverse action notice. This Court should reverse this decision, which, if upheld, would undermine the goals of the FCRA.

A. The district court correctly determined that the transaction at issue involved the underwriting of insurance

The district court correctly held that Radian's sale of mortgage insurance constitutes the underwriting of "insurance" under the FCRA. D.61 at 7. The FCRA's definition of "adverse action" has five subparts, each of which sets forth "adverse

actions" that users of consumer reports may take in connection with various types of transactions: credit transactions, § 1681a(k)(1)(A); insurance transactions, § 1681a(k)(1)(B)(i); employment transactions, § 1681a(k)(1)(B)(ii); transactions involving licenses or government benefits, § 1681a(k)(1)(B)(iii); and a catch-all provisions for transactions initiated by a consumer, § 1681a(k)(1)(B)(iv). The insurance subpart specifies that the term "adverse action" includes:

> 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 credit subpart specifies that "adverse action" includes:

> 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 .[7]

The difference between the two subparts, while subtle, is potentially quite important in a case like the present one. For example, under the credit subpart, an increase in the charge for a new loan would not constitute "adverse action" if the consumer applied for the loan and, based on information in a consumer report, the consumer were offered, and accepted, less favorable initial terms than the consumer would have

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[7] The credit subpart of the FCRA's definition of "adverse action," § 1681a(k)(1)(A), states that "adverse action" "has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act [15 U.S.C. § 1691(d)(6)]." The FCRA definition set forth above quotes 15 U.S.C. § 1691(d)(6).

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

The court below correctly concluded, citing *Broessel*, that the transaction at issue in this case is one of insurance. *See* D.61 at 5. This conclusion is amply supported by the undisputed facts of this case. Although the mortgage insurance Radian underwrites is provided in connection with a credit transaction (*i.e.*, the Whitfields' mortgage), Radian is selling insurance, not credit.[8] Indeed, Countrywide did not even contact Radian until three days *after* it had settled on the Whitfields' mortgage, and it was not until that time that Radian obtained access to information from Mr. Whitfield's consumer report. That means that the credit transaction had been completed before Radian became involved. Moreover, the reason Radian became involved in the transaction was to spread risk, not to provide a loan. D.61 at

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[8] Accordingly, the conclusion of the court below that the credit subpart of the "adverse action" definition was inapplicable (D.61 at 7) is also correct. However, that conclusion is not necessary in order to conclude that Radian's actions fell within the overall statutory definition. Even if it were concluded that Radian's actions also involved "credit" so as to make the credit prong of the definition relevant, they *also* involve insurance, and the analysis under the insurance subpart plainly shows that Radian's actions come within the statutory definition of "adverse action."

9. Spreading risk is the quintessential element of the business of insurance. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127 (1982). Thus, regardless of Radian's connection to the credit transaction, its involvement was most certainly "in connection with the underwriting of insurance." *See* § 1681a(k)(1)(B)(i). Accordingly, its actions with respect to the Whitfields must be analyzed under the insurance subpart of the definition of "adverse action."

This conclusion is further supported by Radian's purpose for obtaining the information from Mr. Whitfield's consumer report, which was to use it in connection with an insurance transaction. The FCRA allows persons to obtain consumer reports only for permissible statutory purposes. § 1681b(f)(1). Among the permissible purposes set forth in the FCRA, the one that is most pertinent to Radian is the insurance permissible purpose, which permits a user to obtain a report to use "in connection with the underwriting of insurance involving the consumer." § 1681b(a)(3)(C).[9] Regardless of whether Radian had a credit-related permissible

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[9] A person may also obtain a consumer report in connection with a credit transaction, § 1681b(a)(3)(A); in response to a court order, § 1681b(a)(1); in response to a consumer's written instructions, § 1681b(a)(2); for employment purposes, § 1681b(a)(3)(B); to evaluate a consumer for a license or government benefit, § 1681b(a)(3)(D); to evaluate, for investment purposes, a lender's loan portfolio, § 1681b(a)(3)(E); for certain other business transactions initiated by the consumer, § 1681b(a)(3)(F); or in connection with the administration of enforcement of a child support order, § 1681b(a)(4), (5).

purpose for obtaining Mr. Whitfield's consumer report, it most certainly had an insurance-related permissible purpose pursuant to § 1681b(a)(3)(C) -- it used that information from that report in connection with the underwriting of insurance that involved the Whitfields. Since it had an insurance-related permissible purpose for obtaining Mr. Whitfield's consumer report, its use of that report should, as the district court correctly recognized, be evaluated pursuant to the insurance subpart of the definition of adverse action.

B. The district court correctly held that setting a higher initial rate for insurance constitutes "adverse action"

As the district court correctly recognized, an insurance company takes "adverse action," as that term is defined in the FCRA, when, based on information in a consumer report, that insurance company charges a higher initial price for the insurance than it would have charged if the information in the report had been more favorable. D.61 at 7.

In the context of an insurance transaction, such as the one in which Radian was involved, the FCRA defines "adverse action" as:

> 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 * * *.

§ 1681a(k)(1)(B)(i). In *Reynolds v. Hartford Financial Services Group, Inc.*, 435

F.3d 1081 (9th Cir. 2006), the Ninth Circuit held that the definition of "adverse action" encompasses an increase in the initial rate for insurance because nothing in the definition implies that the term "increase in any charge for" should be limited to increases in the cost of previously existing insurance. *Id.* at 1091. The Ninth Circuit then noted two important goals of the FCRA: 1) encouraging consumers to check the accuracy of, and correct any errors in, their consumer reports; and 2) providing consumers with important information about the benefits of improving their credit ratings. *Id.* at 1092. The court held that, if an increase in the initial rate for insurance were not considered adverse action, it would:

> seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives.

Id. Accordingly, the district court correctly held in this case that "a higher initial rate [for insurance based on information in a consumer report] would be an adverse action." D.61 at 7.

C. The district court incorrectly held the FCRA's adverse action notice requirement did not apply to Radian

Although the district court apparently recognized that Radian took "adverse

action" when, based on information in Mr. Whitfield's consumer report, it charged a higher initial price for the mortgage insurance, the court then erred by failing to hold that the FCRA required Radian to provide the Whitfields with an adverse action notice. The district court's decision was based on its misunderstanding of the plain wording of the FCRA, and on its failure to appreciate the goals and purposes of that Act. If upheld, the district court's decision would undermine the FCRA's statutory scheme.

The FCRA requires that:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall (1) provide oral, written, or electronic notice of the adverse action to the consumer.

§ 1681m(a).[10] The purpose of the adverse action notice is to alert the consumer that adverse action has been taken, at least in part, as a result of information in his or her consumer report. Having received such an alert, the consumer may choose to check the contents of the report to make sure that it is both accurate and complete. To assist

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[10] Section 1681m(a) also requires that the notice of adverse action provide the consumer with the name, address, and phone number of the consumer reporting agency that furnished the report, § 1681m(a)(2)(A); a statement that the consumer reporting agency did not make the decision to take the adverse action, § 1681m(a)(2)(B); notice that the consumer is entitled to receive a free copy of his consumer report, § 1681m(a)(3)(A); and notice that the consumer has the right to dispute the completeness or accuracy of any information in his report, § 1681m(a)(3)(B).

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

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

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[11] A recent amendment to the FCRA provides that a consumer may receive one free copy of his or her consumer report each year from each of the nationwide consumer reporting agencies. *See* § 1681j(a). However, when Radian took adverse action with respect to the Whitfields, no such right existed, and, absent an adverse action notice, the Whitfields would have had to pay to obtain a copy of Mr. Whitfield's report. Moreover, even under the amended version of the Act, unless the consumer receives an adverse action notice, the consumer will have to pay if he wants to view his report within a year of having received a free copy.

whether Radian took any adverse action "with respect to" Mr. Whitfield. The prepositional phrase "with respect to" means "relates to or pertains to." *Phoenix Leasing Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1388 (D. Nev. 1994), *aff'd without opinion*, 89 F.3d 846 (9th Cir. 1996). Radian's adverse action, charging a higher price for the mortgage insurance, relates or pertains directly to Mr. Whitfield because, as a result of that action, the Whitfields were required to pay more for mortgage insurance. In fact, it is hard to imagine how the adverse action that Radian took could be more directly "with respect to" Mr. Whitfield.[12]

However, instead of focusing on the FCRA's requirements, the district court focused instead on "the relationship between the consumer and the mortgage insurance issuer." D.61 at 7. Instead of looking to see whether Radian's adverse action, the price increase, was "with respect to" Mr. Whitfield, the court looked to see "whose risk was insured." To the district court, what was significant was that

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[12] In addition, a Commission Staff Opinion letter, available on the Commission's website, explains that the FCRA's adverse action notice requirement applies to mortgage insurance companies that take adverse action with respect to consumers. Letter from Clarke W. Brinckerhoff to Paul H. Scheiber, March 3, 1998 (http://www.ftc.gov/os/statutes/fcra/schieber.htm); *see also* Letter from Clarke W. Brinckerhoff to William F. Hall, October 26, 1998 (http://www.ftc.gov/os/statutes/fcra/hall.htm) (adverse action notice requirement applies to company selling credit insurance); *Notice to Users of Consumer Reports: Obligations of Users Under the FCRA*, *supra* (this notice, which, pursuant to § 1681e(d), must be provided to all users of consumer reports, specifically advises that "adverse action" "is defined very broadly" by the FCRA).

"[p]rivate mortgage insurance does not protect a borrower against his own inability to pay; mortgage insurance protects the lender against a default by the borrower." D.61 at 9. Even though the impact of Radian's adverse action fell completely on the Whitfields, *i.e.*, they had to pay the higher price, the court was concerned solely with the fact that "the beneficiary of the insurance was Countrywide." D.61 at 10.[13]

Not only did the district court ignore the plain words of the FCRA, it also concluded its opinion with a completely inappropriate balancing test that it believed justified its decision to abrogate the FCRA's adverse action notice requirement. D.61 at 10-12. The court began the balancing by observing that the FCRA's adverse action notice requirement "while not onerous, is not insignificant." D.61 at 11. The court next attempted to assess what it believed would be the benefits of the notice. The court noted that Radian did not take adverse action until after the Whitfields had already settled on the mortgage. Thus, the court believed that "[a]n adverse action notice from Radian could have the effect of interfering with a contractual relation

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[13] In addition, as explained in Part A, *supra*, Radian had a permissible purpose to obtain information from Mr. Whitfield's consumer report "in connection with the underwriting of insurance involving" the Whitfields. *See* § 1681b(a)(3)(C). That is, even though the Whitfields were not parties to, or beneficiaries of, Radian's mortgage insurance policy, the underwriting of that policy "involv[ed]" them. Since the underwriting of the policy involved the Whitfields, *a fortiori* the setting of the premiums for that policy, which the Whitfields were required to pay, was "with respect to" them.

between Countrywide and Whitfield." *Id.* The court also believed that the purpose of the notice would only be served if it were received by the Whitfields in time for them to correct any inaccuracies prior to consummation of the transaction in which adverse action was taken. Thus, the court concluded that "[n]otice from Radian after settlement would be meaningless," D.61 at 12, and that the "not insignificant" burden imposed on Radian would outweigh any benefit to the Whitfields.

The court erred because the FCRA contains no balancing test. If a user takes adverse action with respect to a consumer, that user's obligation to provide the notice is absolute. It is not for the user, or for the district court, to determine whether, in its view, the notice would be of value to the consumer. Congress already made that determination.

Moreover, when it weighed the benefits of any adverse action notice to the Whitfields, the court demonstrated a grave misunderstanding of the purpose of the adverse action notice. The notice is not, as the court mistakenly believed, intended to provide the consumer with a means of avoiding the adverse action that triggered the notice. Although the court believed that the notice would benefit the Whitfields only if they received it prior to consummation of their mortgage, the court failed to recognize that the FCRA does not require an insurance company such as Radian to provide the notice prior to taking adverse action. Indeed, the FCRA contains no

requirement with respect to the time when the user must provide the consumer with the notice in the context of underwriting insurance, and users routinely provide the notice after the transaction has been consummated. What the district court failed to appreciate was that the notice is intended to advise the consumer that adverse action *has been taken* based on information in the consumer's report. It is then up to the consumer to decide what to do next. If the consumer is aware that information in his or her report justifies the user's decision to take adverse action, the consumer may choose to do nothing. However, if the consumer believes that the report contains only favorable information that would not justify the adverse action, the consumer may choose to obtain a copy to check its accuracy. Within 60 days of receiving the adverse action notice, the consumer may obtain that copy free of charge. § 1681j(b). The consumer may then take action to correct any inaccuracies, § 1681i(a), and, once those inaccuracies are corrected, the consumer may choose to have recent recipients of the report notified of the correction, § 1681j(d). There is, however, no requirement under the FCRA that such recent recipients reevaluate any action they took based on the incorrect report.

Thus, the adverse action notice is an important component of the FCRA's statutory scheme for assuring the accuracy of consumer reports. Although the district court believed that any adverse action notice that Radian would have provided the

Whitfields would have been "meaningless," it was wrong. That notice would have alerted the Whitfields to Radian's adverse action, and might have spurred them to check the accuracy of Mr. Whitfield's report. A central purpose of the FCRA is to promote the accuracy of consumer reports, § 1681(b), but the Act does so not through any direct intervention but by encouraging each consumer to police his or her report. Radian's adverse action notice, which would have furthered that all-important goal, would hardly have been "meaningless."

CONCLUSION

For the reasons set forth above, this Court should reverse the district court and hold that the FCRA required Radian to provide the Whitfields with an adverse action notice.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1) Bar membership -- Because this brief is filed on behalf of an administrative agency of the United States, there is no bar membership requirement.

2) Word count -- I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 5792 words, as counted by the WordPerfect word processing program.

3) Service upon counsel -- I hereby certify that on March 14, 2006, I served ten copies of the Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Appellants and Urging Reversal on this Court by express overnight delivery. On the same day, I served two copies of the same brief on appellants and appellees by sending those copies by express overnight delivery to:

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