News Release

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COURT URGED TO CRACK DOWN ON FRIVOLOUS INSURANCE SUITS

(Radian Guaranty, Inc. v. Whitfield, No. 07-834)

The Washington Legal Foundation yesterday urged the U.S. Supreme Court to crack down on frivolous lawsuits filed by plaintiffs' attorneys against the insurance industry, alleging technical violations of the Fair Credit Reporting Act (FCRA) but seeking billions of dollars in damages. In a brief filed in *Radian Guaranty, Inc. v. Whitfield*, WLF argued that attorneys for plaintiffs in FCRA suits rarely claim that their clients suffered any real damages for alleged violations of FCRA disclosure provisions, and are simply trying to extort settlements from deep-pocketed defendants. WLF argued that the plaintiffs in this case cannot show that any alleged violations were committed "willfully" and that the suit must be dismissed in the absence of such a showing. WLF also argued that the issue of willfulness is an issue of law to be determined by judges, not (as the appeals court held) as an issue of fact to be determined by juries.

WLF filed the brief on behalf of itself and three insurance industry trade organizations: the American Insurance Association, the National Association of Mutual Insurance Companies, and the Property and Casualty Insurers Association of America.

In its 2007 *Safeco* decision, the Supreme Court made clear that whether a FCRA defendant acted "willfully" in violating the FCRA (thereby opening itself up to punitive damages and potentially crippling statutory damages) is an issue of law that generally can be determined by the courts. Just three months later, the U.S. Court of Appeals for the Third Circuit issued a decision in this case that directly conflicts with *Safeco*, holding that willfulness is an issue of fact to be determined by the jury. Rather than granting plenary review, WLF urged the Supreme Court to summarily reverse the appeals court decision.

"The point of the FCRA is to protect consumers from false information contained in their credit records," said WLF Chief Counsel Richard A. Samp after filing WLF's brief. "Insurance companies are particularly inappropriate targets of these lawsuits, because none of them are in the business of compiling credit reports on consumers; here, the plaintiffs actually saw a copy of their credit report, and had a chance to respond, well before the defendant insurance company saw it," Samp said.

Adopted in 1970, the FCRA is a law designed to allow consumers to find out what information is in their credit reports and to correct errors. To ensure that consumers are alerted when their credit reports contain negative information, the FCRA requires companies (such as insurers) that use credit reports in connection with pricing their products to notify a consumer whenever they take "adverse action" against the consumer based on information contained in the consumer's credit report. If a user negligently fails to provide such notice, the consumer can sue to recover any actual damages. If the failure is deemed "willful," the consumer is entitled to

recover punitive damages as well as statutory damages of between $100 and $1,000 without regard to whether he has actually been damaged.

Plaintiffs' lawyers recently began seeking to exploit the statutory damages provision in an effort to "shake down" large insurance companies. There will always be instances in which there is disagreement over whether an insurance company's response to a request for insurance should be deemed "adverse action" that triggers the FCRA's notification requirements. In those instances in which an insurance company decides that no "adverse action" has occurred, plaintiffs' lawyers will file suit on behalf of one of the affected insurance policy holders, alleging that the insurance company "willfully" failed to send notice, and then seek to have the case certified as a class action. If a large class is certified, the potential damages can run into the billions of dollars.

This case involves mortgage insurance issued by Radian Guaranty to a mortgage lender. Its rationale for not sending an "adverse action" notice to the borrower was identical to the rationale espoused by the defendant in *Safeco*. The Supreme Court ultimately held in *Safeco* that notice *was* required, but held that Safeco had not acted "willfully" because its rationale was "objectively reasonable" as a matter of law. Only three months later and in defiance of *Safeco*, the Third Circuit refused to decide the "willfully" issue in Radian's favor. Instead, the appeals court remanded the case for a jury trial on the issue of willfulness. WLF argued that the Supreme Court should summarily reverse the Third Circuit's decision; the decision not only directly conflicts with *Safeco* but also could cause havoc in the insurance industry, WLF said. WLF argued that if allowed to stand, the decision likely would lead to the filing of most FCRA cases in the Third Circuit to take advantage of the *Radian* ruling. WLF argued that in the absence of Supreme Court intervention, FCRA defendants would be forced to settle even the most insubstantial lawsuits rather than risk multi-billion dollar jury verdicts.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared in the federal courts to support tort reform efforts.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.