Litigation Update

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SUPREME COURT VACATES TROUBLING INSURANCE PRECEDENT

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

The U.S. Supreme Court yesterday vacated a troubling appeals court decision that threatened to expose the business community to crippling liability awards under the Fair Credit Reporting Act (FCRA).

The decision was a victory for WLF, which filed a brief in the case, *Radian Guaranty, Inc. v. Whitfield*, urging the Court to grant review and overturn the appeals court decision. 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.

WLF had argued that review should be granted 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. 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 could not show that any alleged violations were committed "willfully" and that the suit must be dismissed in the absence of such a showing.

In an effort to avoid review of his victory in the U.S. Court of Appeals for the Third Circuit, the plaintiffs' lawyer responded to the defendant's petition for Supreme Court review by dismissing his underlying FCRA lawsuit. He apparently hoped that the Supreme Court would respond by denying review on grounds of mootness. Instead, the Supreme Court granted the petition and ordered that the appeals court decision be vacated because of mootness -- effectively wiping that decision off the books and preventing plaintiffs' attorneys from using the decision for their benefit in future cases.

At issue here were the circumstances under which a FCRA defendant could be held to have acted "willfully" in violating the statute (thereby opening itself up to punitive damages and potentially crippling statutory damages). In its 2007 *Safeco* decision, the Supreme Court made clear that whether a FCRA defendant acted "willfully" in violating FCRA is an issue of law that generally can be determined by the courts. Just three months later, the Third Circuit issued a decision in this case that directly conflicted with *Safeco*, holding that willfulness is an issue of fact to be determined by the jury. In its brief urging the Court to grant review, WLF argued that if the Third Circuit's view were to prevail, defendants would be forced to settle even frivolous FCRA suits rather than take the chance that a jury might decide the willfulness issue against them.

"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 reviewing the Court's order vacating the Third Circuit decision. "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.

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.