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# *Safeco Insurance Company of America v. Charles Burr:* The Supreme Court and the Business of Consumer Background Information

**Granted, another instance of the Supreme Court reversing the Ninth Circuit may hardly seem cause for inspection. In its ruling in Safeco v. Burr, however, the Supreme Court did much more than dress down its least favorite appeals court. The case also gave the Roberts Court its first major opportunity to address the Fair Credit Reporting Act (FCRA).**

Enacted in 1970, the FCRA represents the federal government's most far-reaching effort to regulate the increasing use of background investigations for a wide variety of corporate purposes. Whereas most people understandably associate the FCRA with credit reporting, the act regulates a much larger group of "consumer reports"—from criminal histories to verifications of social security number—used for pre-employment screenings, loan approvals, and so forth.

To put it simply, the widespread availability of personal information allows businesses to scrutinize potential employees, business partners, and customers more closely. The way in which this information is used has tremendous consequences for the subjects as—for example, a reported criminal conviction can keep a person from gainful employment. For this reason, accuracy and openness are absolutely essential for ensuring the background investigation process is fair to the subject.

Understanding this, Congress (through the FCRA) requires those who use consumer reports to conspicuously disclose to the subject that such reports will be procured and also to alert the subject when the information in a report is the basis for an "adverse action." Under the statute, adverse action in the context of determining insurance premiums is defined as "an increase in any charge for … any insurance, existing or applied for." The notice must also inform the subject how to contact the agency that gathered the information. Armed with this information, Congress reasoned, consumers can better protect themselves against the dangers of inaccurate consumer reports.

The unspoken conflict is that compliance with the law costs businesses time and money; in essence, companies do not want every decision that is based in part on personal information that has been gathered to turn into a time-consuming and expensive mini-trial. For this reason, companies using such information tend to construe requirements narrowly—to the frustration of consumer advocate groups. The question often turns on the existence of an adverse action and, as we will see shortly, the Roberts Court appears willing to allow businesses wide latitude in the formulation of their narrow interpretations.

The questions considered by the Supreme Court in *Safeco v. Burr* involved the insurance industry's use of credit reports, among other things, to determine how much to charge each insurance customer. The justices actually considered two consolidated cases: one involving GEICO and the other involving Safeco Insurance Company.

In the first case, GEICO reported that part of its risk assessment program involved using a variety of information, including credit scores, to place consumers into "tiers" with progressively higher insurance premiums. For the purpose of FCRA's requirements related to adverse actions, GEICO would conduct a "neutralization" analysis, comparing the subject's actual tier placement with that person's placement if the credit score had not been considered at all. Only if this comparison revealed a lower placement on the basis of the credit score would GEICO consider it an adverse action triggering the FCRA's relevant notice requirements.

The Ninth Circuit was not convinced by GEICO's creative interpretation of the FCRA's adverse action requirement. The appeals court pointed out that, by focusing on neutrality as the benchmark for comparison, GEICO failed to consider the possibility that the subject could have received a *more favorable* credit score. This, ruled the Ninth Circuit, is the comparison that the drafters of the FCRA had in mind. In other words, the question is not whether the subject would have paid lower premiums if credit had not been considered; rather, the proper question is whether a lower premium would have been awarded if the subject had a *better* credit score. If the answer is yes, continued the court, then an adverse action has taken place.

In reviewing the facts presented by GEICO, the Supreme Court first accepted the insurance company's assertion that, in order for a credit report to be the foundation of an adverse action, it must be a "necessary condition" of the increased premium. Next, the justices moved to the more complicated question of the proper baseline of comparison in determining the occurrence of an adverse action under the FCRA. The Court overruled the Ninth Circuit, reasoning that "Congress was … more likely concerned with the practical question whether the consumer's rate actually suffered when the company took his credit report into account than the theoretical question whether the consumer would have gotten a better rate with perfect credit."

As discussed above, many companies worry about the costs associated with more inclusive definitions of "adverse action." The majority on the Court put great weight on this consideration, noting that an expansive definition not only would make compliance onerous but also would ultimately defeat the purpose of the FCRA: "Since the best rates … presumably go only to a minority of consumers, [an expansive interpretation] would require insurers to send slews of adverse action notices. … We think that the consequences of sending out notices on this scale would undercut the obvious policy behind the notice requirement, for notices as common as these would take on the character of formalities, and formalities tend to be ignored."

The second related case that the Court considered involved the Safeco Insurance Company. As discussed above, the FCRA defines "adverse action" in the context of determining insurance premiums as "an increase in any charge for … any insurance, existing or applied for." Safeco argued that a rate quoted initially could not be an increase and, therefore, could not be an adverse action. In other words, according to Safeco, the use of the word "increase" necessarily required a pre-existing relationship between the customer and the insurance company. The Supreme Court disagreed with this interesting (and ultraliteral) interpretation, finding itself in rare accord with the Ninth Circuit. As the Supreme Court put it, "There is nothing about insurance contracts to suggest that Congress might have meant to differentiate applicants from existing customers when it set the notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant."

Even though the justices found that Safeco had clearly violated the statute, the company managed to avoid civil liability. The statute only imposes civil liability on a company that "willfully fails to comply" with the law's provisions. In this instance, the Supreme Court equated willfulness with recklessness, reasoning that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."

Using this standard, the Court ruled that Safeco's interpretation was not objectively unreasonable. Not only did the district court agree with Safeco, the justices pointed out, but the company also lacked the benefit of judicial guidance, Federal Trade Commission opinions, or any other official interpretation. Consequently, the Court ruled that "if Safeco did violate the statute, the company was not reckless in falling down in its duty." Put simply, even though the Supreme Court quickly disposed of the company's interpretation of the statute, the justices somewhat confusingly ruled that the company's reading protected it from liability.

In one sense, the Supreme Court's ruling in *Safeco* is limited to a few (albeit significant) groups of businesses, including the insurance industry. The justices did not have the opportunity to address the FCRA's pivotal "adverse action" requirement in other contexts, such as the background investigation for employment purposes. Still, in the broader, more important debate between the business costs of compliance and consumer protection concerns, the justices appear fairly united in their determination to prevent the FCRA from slowing the wheels of commerce. In *Safeco*, the Court (with no dissenting justices) cleared one company of violating the statute and, much more revealingly, shielded from liability another company that had clearly violated the FCRA.

Even though a concurring opinion by Justice Stevens (joined by Justice Ginsburg) criticized the majority for its reasoning as to the GEICO facts, there is very little doubt that, although the decision did not ignore the importance of the protections provided by the Fair Credit Reporting Act, the Court is very concerned about the statute's potential to hurt business. **TFL**

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