Nos. 06-84, 06-100

In The
Supreme Court of the United States

SAFECO INSURANCE COMPANY
OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AND CONSUMER BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544
*Counsel of Record

NOVEMBER 13, 2006

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Amici Curiae will address the following questions:

1. Whether the Ninth Circuit erred in holding that a defendant can be found liable for "willfully" violating the Fair Credit Reporting Act (FCRA), and thus be subject to punitive and statutory damages under 15 U.S.C. § 1681n, upon a finding of reckless disregard of the FCRA's requirements, which is contrary to the holdings of other circuits that "willfully" requires actual knowledge on the part of the defendant that the conduct violated the FCRA.

2. Whether the Ninth Circuit improperly expanded the FCRA by holding that an "adverse action" occurs within the meaning of Section 615 of the FCRA, 15 U.S.C. § 1681m, thereby triggering the requirement to provide notice to an insurance consumer, whenever such a consumer does not get the best insurance coverage at the lowest rate even when the consumer's credit information had no impact (or had a favorable impact) on the rates and terms of the insurance.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AND CONSUMER BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable, the Chamber of Commerce of the United States of America, the Business Roundtable, the Mortgage Bankers Association, the American Bankers Association, the American Financial Services Association, America's Community Bankers, and the Consumer Bankers Association respectfully submit this brief as *amici curiae* in support of petitioners in these two cases.[1]

INTERESTS OF *AMICI CURIAE*

Amici curiae are a coalition of prominent national financial services and business organizations whose members include various companies that are authorized under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, to obtain and use consumer reports for various purposes. Those purposes include issuance of insurance, extension of credit, and employment and rental

[1] Letters from petitioners and respondents indicating that they consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. Counsel for *amici curiae* provided legal services to petitioners in No. 06-100 regarding this matter at other stages. No person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

decisions. Such companies are charged under the FCRA with providing notice to a consumer when they take an "adverse action" against the consumer based on a consumer report.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country. One of its principal functions is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable is an association of chief executive officers of leading American companies with more than $4.5 trillion in annual revenues and more than ten million employees. Its member companies comprise nearly one-third of the total value of the United States stock market, and represent over forty percent of all corporate income taxes paid to the United States government. Collectively, its member companies returned more than $112 billion in dividends to shareholders and the American economy in 2005. The Business Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Mortgage Bankers Association (MBA) is a nonprofit corporation headquartered in Washington, D.C. The MBA represents the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit.

America's Community Bankers (ACB) is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. ACB members, whose aggregate assets are more than $1.5 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

The Consumer Bankers Association (CBA) is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity, and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry.

The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The substantive and remedial provisions of the Fair Credit Reporting Act (FCRA) govern large sectors of the American economy. The FCRA regulates when consumer reports can be obtained and how consumer reports can be used. The purposes for which a consumer report can be used include not only extensions of credit and underwriting insurance, but also decisions regarding employment, eligibility for a license, and any "legitimate business need for the information * * * in connection with a business transaction that is initiated by the consumer." 15 U.S.C. § 1681b(a)(3)(A)-(F).

The FCRA applies to any person who uses information contained in a consumer report to make such decisions. *See, e.g.*, 15 U.S.C. § 1681m(a). Thus, the FCRA regulates companies regularly involved in finance, such as banks and insurance companies, and also companies involved in a wide range of non-finance related business, such as department stores, landlords, employers, cell phone companies, and even cities and towns.

I.

The interpretation by the Ninth Circuit of the FCRA's "willfully" requirement to trigger uncapped punitive damages and statutory damages not based on actual injury to plaintiffs is erroneous and would have a significant detrimental impact on businesses.

A. The FCRA's punitive and statutory damages are not imposed according to any actual damages that a plaintiff may sustain and, accordingly, are penal in nature. Thus, the "willfully" requirement that triggers them must be strictly construed. The "willfully" requirement also is a necessary finding to trigger the Act's criminal provisions. The rule of lenity therefore applies to require a showing of specific intent to violate a known legal duty on the part of defendants before they can be held liable for "willfully" violating the FCRA. The employment case law cited by respondents is not to the contrary because it involved different statutory schemes that did not provide uncapped punitive damages or statutory damages unrelated to proof of actual injury.

B. Interpretation of "willfully," for purposes of the FCRA, to require a showing of specific intent to violate a known legal duty also is warranted in order to avoid doubt about the constitutionality of the federal statute. Significant doubt about the constitutionality of the FCRA's punitive and statutory damages provision arises under the recklessness standard because of the due process limits on excessive or arbitrary awards.

This Court's earliest cases involving violation of the Due Process Clause's substantive limit on private monetary awards arose where statutes fixed damage awards that had no relationship to any actual damages incurred. *See, e.g.*, *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915). Building on those cases, the Court has held that the Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

When dealing with violations of a technical statute like the FCRA involving reporting of credit, only instances of deliberate lawbreaking could even colorably result in a constitutionally permissible punitive damage award.

Indeed, a prominent factor relevant to the determination of whether a particular award is constitutionally excessive is "the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419. Violations of the FCRA's requirements occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particularly vulnerable persons. Thus, a finding of an unintended, reckless violation of the FCRA, in particular, falls far short of the sort of reprehensible conduct that could support punitive damages. The need for reading the FCRA to require a particularly culpable state of mind is even greater in this situation because statutory and punitive damage awards under the FCRA will generally fail to comply with another significant measure of the constitutionality of such damages: the ratio of those damages to actual damages. *Id*. at 425.

C. A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions of individual claims totaling hundreds of millions (if not billions) of dollars in statutory or punitive damages. Allegations of "willfully" violating the FCRA based on a mere recklessness standard may increase even more that risk because there is a greater likelihood in such cases that a large class will be brought and certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). That is because courts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege willful FCRA violations since the class can seek only statutory damages unrelated to actual individual harm. A recklessness standard such as that adopted by the Ninth Circuit makes it easier for plaintiffs' counsel to make such an allegation of "willfully" consistent with Federal Rule of Civil Procedure 11.

At the same time, the Ninth Circuit's mere recklessness standard for "willfully" violating the FCRA adversely affects the ability of a defendant to estimate accurately the risk of litigation. A business that determines it can prove that it acted in good faith (*i.e.*, non-willfully), and thus would be willing to litigate to conclusion a case making allegations of willfulness, would be under increased pressure to settle a case that relies on some amorphous standard of recklessness to determine the plaintiffs' eligibility for potentially significant punitive and statutory damages unrelated to any actual harm.

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. The defendant companies, however, provide valuable services and may have engaged in unintended technical violations of a complex regulatory statute. Such class action lawsuits could, in the aggregate, cost American businesses billions of dollars that are not tied to any actual injury to plaintiffs.

II.

The Ninth Circuit interpreted the term "adverse action" for purposes of the FCRA insurance provisions in a manner that is contrary to the plain language of the statute. The court's application of that term to the issuance of any insurance coverage that is not the best insurance coverage at the lowest possible rate is unprecedented. It would have unreasonably broad practical implications not intended by Congress.

A. The FCRA's adverse action insurance provision is intended to ensure that an insurer gives notice to a consumer when it charges a consumer an increased rate because of credit information in a consumer report. The plain language of the statute specifies that an adverse action occurs only if consumer report information is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. 15 U.S.C. § 1681a(k)(1)(B)(i).

The FCRA is not concerned about comparisons of a consumer's rate with that of the hypothetical consumer who gets the best coverage at the lowest possible rate. Thus, if a consumer receives the same rate that she would have received if her consumer report information had not been considered (or, of course, a better rate), an adverse action has not occurred within the meaning of the statutory provision. That is because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The court of appeals disregarded critical aspects of the FCRA's text and structure when it attempted to shoehorn into the "adverse action" insurance definition all rates other than the best coverage at the lowest rate. First, the FCRA, as amended in 2003, requires that consumer reporting agencies provide consumers with a free consumer report once each year upon request. *See* 15 U.S.C. § 1681j(a)(1)(A). But under the Ninth Circuit's view, such a provision would have been nearly meaningless because all insurance consumers except those with the very best coverage with the lowest rates already would be receiving such reports with annual renewals under 15 U.S.C. § 1681j(c), which provides that each adverse action entitles the consumer to a free consumer report from the consumer reporting agency.

Second, the Ninth Circuit ignored Congress's amendment of the FCRA in 2003 to require an alternate risk-based pricing notice in the credit area, but not the insurance area, in certain instances when a business provides a consumer with credit on "terms that are materially less favorable." 15 U.S.C. § 1681m(h)(1), (5). Congress did not treat that issue as involving an "adverse action." The Ninth Circuit's interpretation below of the term "adverse action," however, would impose on the insurance industry such a risk-based pricing notice as a matter of judicial fiat.

B. Only a small number of consumers receive the "best" rate for insurance when the rate is based in part on information in consumer reports. The Ninth Circuit ruling thus would result in the issuance of tens of millions of pointless notices to consumers each year who receive good rates based on good consumer reports but do not receive the absolute best coverage at the lowest possible rate. That deluge of additional notices would not only burden significantly insurance companies, but it also would provide consumers with little, if any, appreciable benefit. Such a volume of notices could, in fact, harm consumers by overloading them with information and numbing them to important notices.

ARGUMENT

I. THE FCRA DEMANDS A SHOWING THAT A DEFENDANT SPECIFICALLY INTENDED TO VIOLATE THE STATUTE IN ORDER TO ESTABLISH THAT IT "WILLFULLY" DID SO AND IS THEREFORE SUBJECT TO PUNITIVE AND STATUTORY DAMAGES

In order for a plaintiff to recover punitive damages (which are not capped) and statutory damages (of at least $100 and up to $1,000 per consumer) for violating the FCRA, the plaintiff must establish that the defendant "willfully" failed to comply with the relevant FCRA requirement. 15 U.S.C. § 1681n(a). In the context of the FCRA, "willfully" must be interpreted to require proof that a defendant specifically intended to violate a known legal duty under the FCRA in order to recover punitive or statutory damages. *See, e.g.*, *United States v. Pomponio*, 429 U.S. 10, 12 (1976) ("willfulness in this context simply means a voluntary, intentional violation of a known legal duty").

The Ninth Circuit's misreading of the term "willfully" to include mere recklessness (Pet. App. 128a-129a) is erroneous.[2] Three contextual features of the FCRA are particularly significant in reaching this result: the penal nature of the remedies under the FCRA that are triggered by a "willfully" showing; the need to construe the FCRA's damages provision to avoid doubt about its constitutionality; and the unduly harsh consequences of the Ninth Circuit's lesser standard, particularly in class actions.

A. The Rule Of Lenity Requires That The FCRA's "Willfully" Requirement Be Met By A Showing Of Specific Intent Because It Triggers Imposition Of Punitive And Statutory Damages, And Supports Criminal Sanctions Elsewhere In The Statute

1. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty on the part of businesses who must comply with its varied notice requirements. This fact is reflected in Congress's three-tiered approach to liability for damages.

When a defendant violates the FCRA, but does not do so willfully or even negligently, Congress did not authorize any private plaintiff enforcement. *See Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001) ("FCRA does not impose strict liability"). Congress thereby recognized that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

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[2] References to "Pet. App." are to the Petition Appendix filed by petitioners in No. 06-84.

At the same time, the FCRA ensures that actual damages are available to an individual who has been injured as a result of a *negligent* violation of certain of the FCRA's requirements. 15 U.S.C. § 1681o(a)(1).

Congress set the bar much higher for recovery of money damages in excess of actual damages caused by the FCRA violation. A finding that a defendant "willfully" violated the FCRA is required to allow an award of punitive or statutory damages in suits for all violations of FCRA that can be privately enforced. 15 U.S.C. § 1681n(a). It also is a necessary finding to trigger criminal conviction elsewhere in the statute. *Id*. § 1681q (sentence of up to two years imprisonment for knowingly and willfully obtaining consumer reporting agency information under false pretenses); *id*. § 1681r (sentence of up to two years imprisonment for consumer reporting agency's employee knowingly and willfully providing information to unauthorized recipient).

2. The term "willfully" is, of course, "a word of many meanings," and the correct interpretation of the term "is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (quoting in part *Spies v. United States*, 317 U.S. 492, 497 (1943)). *See* Br. in Opp. 18 (acknowledging relevance of context). The ambiguity of the term "willfully" in the context of the FCRA means that it must be read narrowly not to trigger punishment in order to comply with the rule of lenity. *See Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) ("were we to find [the statute's] 'willfulness' requirement ambiguous * * * , we would resolve any doubt in favor of the defendant"). When Congress uses the term "willfully" in "highly technical statutes" like the FCRA that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a plaintiff must show that the defendant acted with specific intent, knowing "that his conduct was unlawful" in order to hold it liable. *Bryan v. United States*, 524 U.S. at 194-195.

The rule of lenity is not limited to criminal sanctions but applies to statutes in which the civil remedies can be described as "penal." *See* 3 Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 59.1, at 114-116 (6th ed. 2001). In *Steam-Engine Co. v. Hubbard*, 101 U.S. 188 (1879), for example, a statute required that a corporate president file an annual report and provided that if he "intentionally neglects or refuses to comply with that requirement," he would be personally liable for any debts incurred by the corporation contracted during the period of neglect or refusal. *Id*. at 189. This Court held that the private civil action for damages created by the statute "should be strictly construed" because the statute "is penal." *Id*. at 191.

The rule of lenity applies to statutes that authorize punitive damages because those damages are widely recognized to be penal. *See Sutherland*, *supra*, § 59.2, at 119, 121 ("provisions for exemplary damages" are "penal" because "their effects are punitive"). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 417, and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981).

Statutory damages that allow an award of monetary damages against a defendant without regard to the existence or amount of actual injuries sustained by a plaintiff also call for application of the rule of lenity. Such statutes are penal because they "compel obedience beyond mere redress to an individual for injuries received." *Sutherland*, *supra*, § 59.1, at 116. Courts traditionally have held that a civil action providing for such statutory damages is penal, and thus must be strictly construed. *See* 23 *American & English Encyclopaedia of Law* 378-379 (1st ed. 1893) (rule of strict construction "applies not only to statutes relating to criminal offenses, but also to all statutes which impose, as punishment, any penalties, pecuniary or otherwise, * * * or provide for the recovery of damages beyond just compensation to the party injured, whether such penalties, forfeitures, or damages are to be enforced and recovered at the suit of the state or of a private individual."); *Marshall v. Wabash Ry. Co.*, 46 F. 269, 270-271 (C.C.S.D. Oh. 1891) ("where the plaintiff is not required to offer any evidence proving damages, and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal"); *Wood, Walker & Co. v. Evans*, 461 F.2d 852, 855 (10th Cir. 1972) (statutes where "the amount of the damages is fixed on a somewhat liquidated measure without regard to injury suffered" are "strictly construed"). "By this is meant no more than * * * when there is reasonable doubt as to [a word's] true meaning, the Court will not give them such interpretation as to impose the penalty." *Hines & Battle v. Wilmington & W. Ry. Co.*, 95 N.C. 434, 437 (1886).

In *Brown v. Kildea*, 58 Wash. 184 (1910), the court was faced with statutory damages akin to those at issue here. The court held that a statute authorizing a private cause of action against a corporate official for a statutory damage award of not less than $100 nor more than $1,000 should be "strictly construed" because it "subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury." *Id*. at 186-187; *see also Cleveland, C. C. & S. L. Ry. Co. v. Wells*, 62 N.E. 332, 334 (Ohio 1901) ("the right to recover not less than one hundred and fifty dollars, although double the amount of overcharge might not be one dollar, and the right to recover exemplary damages, are severely penal privileges" and thus those provisions "are to be strictly construed"); *Hines*, 95 N.C. at 438 (same for statute authorizing private suit to recover statutory damages of $200 for discriminatory rates). Here, of course, the statutory damages provision of the FCRA allows damages "of not less than $100 and not more than $1,000" regardless of any injury sustained by the plaintiffs and respondents seek such damages for each class action consumer. 15 U.S.C. § 1681n(a)(1)(A).

The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q, 1681r. The fact that the criminal provisions are not applicable in this particular case is irrelevant. There is nothing in the FCRA that suggests, much less demonstrates, that Congress intended the same word to have different meanings in different portions of the same statute. *See Ratzlaf*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *see also Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying the rule of lenity in a civil action premised on a criminal statute).

3. Respondents' attempt to seek refuge in employment law cases that interpret "willful" to mean reckless must be rejected. *See* Br. in Opp. 14 (citing, *inter alia*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). Under the Age Discrimination in Employment Act (ADEA) provision at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permitted a court to award an amount equal to the amount of lost wages as liquidated damages, but this Court has expressly held that such a

double damages remedy is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942) (interpreting similar provision in Fair Labor Standards Act). That remedy also has been viewed as a substitute for prejudgment interest, which is not otherwise available under the ADEA. *See Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). Thus, there was no cause for the Court to apply the rule of lenity in those cases.[3]

Likewise, the third employment case did not involve either uncapped punitive damages or statutory damages without proof of actual injury and thus did not implicate the rule of lenity. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (willfulness finding based on a recklessness standard extended the statute of limitations for bringing suit from two years to three years).

[3] The Court's indication in *Thurston* that the double back-pay provision was "punitive in nature," 469 U.S. at 125, relied on the statement of a Senate sponsor of the ADEA, but that legislative statement was that the double back-pay provision would "furnish an effective deterrent to willful violations," *Ibid*. (quoting 113 Cong. Rec. 2199 (1967) (Sen. Javitts)), and remedial provisions can provide effective deterrence so that statement does not necessarily support the Court's *dictum*. Additional legislative history concluded that the provision was not punitive. *See* H. Conf. Rep. No. 95-950, at 13-14 (1978) (explaining that the "ADEA as amended by this act does not provide remedies of a punitive nature" and quoting *Missel*, 316 U.S. at 583-584).

B. A Specific Intent Standard Avoids The Substantial Constitutional Doubt Raised By A Lesser Standard

A federal statute must be read to avoid doubt about its constitutionality. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).[4]

This constitutional avoidance doctrine supports interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to violate a known FCRA requirement. The contrary interpretation of the term urged by respondents, and adopted by the Ninth Circuit, that establishes a mere recklessness standard raises substantial questions about the constitutionality of any resultant statutory or punitive damages awards because of the Constitution's substantive limits.

This Court's earliest cases involving violation of the Due Process Clause's substantive limit on private

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[4] The Seventh Circuit's recent refusal, in deciding whether a class should be certified, to consider whether subjecting a defendant to "billions of dollars for purely technical violations of the FCRA" could violate the Constitution, *Murray v. GMAC Mortgage Corp*., 434 F.3d 948, 953 (7th Cir. 2006), conflicts with the reality that defendants confronted with a certified FCRA class seeking billions of dollars in damages cannot reasonably rely on the possibility that constitutional limits will be imposed *after* damages are awarded, as the court there suggested. Such circumstances likely would unfairly induce settlement to avoid potential ruinous liability. In any event, *Murray* does not suggest that constitutional doubt can be ignored in determining the scope of the statute.

monetary awards arose where, as here, a statute fixed a damages award that had no relationship to any actual damages incurred. Thus in *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), this Court held that a provision authorizing statutory damages of $100 per day for refusing a customer phone service violated due process when the company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that the conduct was unreasonable. Under these circumstances, this Court held that "inflict[ing] upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id*. at 491; *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging a customer $3 violated due process because the damages were "grossly out of proportion to the possible actual damages").

Building on those early cases, the Court has held that the Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). When dealing with violations of such a technical statute like the FCRA involving reporting of credit, only instances of deliberate lawbreaking could even colorably result in a constitutionally permissible punitive damage award. *Cf. Gore*, 517 U.S. at 576; *see id*. at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists"); *Southwestern Tel. & Tel. Co.*, 238 U.S. at 489-490 (relying on defendant's good faith to find statutory damages unconstitutionally excessive).

Indeed, a prominent factor relevant to the determination of whether a particular award is constitutionally excessive is "the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419.

Violations of the FCRA's requirements occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particularly vulnerable persons. Such violations will thus rarely be sufficiently "reprehensible" to permit any award of punitive damages under the Constitution, under any standard of willfulness. A finding of an unintended, reckless violation of the FCRA, in particular, falls far short of the sort of reprehensible conduct that could support punitive damages. To reduce the likelihood of unconstitutional damage awards, this Court must read the statute to require proof of a particularly culpable state of mind, *i.e.*, at least a specific intent to violate a known legal duty.

The need for reading the FCRA to require a particularly culpable state of mind is even greater in this situation because statutory and punitive damage awards under the FCRA will generally fail to comply with another significant measure of the constitutionality of such damages: the ratio of those damages to actual damages. *State Farm*, 538 U.S. at 425. The ratio is extremely large in virtually all FCRA cases because the actual damages to individuals in such cases, especially those involving failure to provide notice such as here, is almost always quite low. This is true even when, as in these cases, plaintiffs seek only statutory damages. In the cases now before the Court, the actual damages likely would be $0 because receiving the notice would not have altered the results, yet respondents seek $1,000 damages for each of an unquantified number of individuals in the putative class. The only way such damages could survive a constitutional challenge, if at all, is if the plaintiffs are required to prove that defendants possessed the specific intent to violate a known legal duty under the statute. There certainly is no evidence that Congress intended to authorize such damages, unrelated to actual harm, based merely on unintended, reckless violations. In the absence of "firm evidence" to the contrary, it should not be assumed that "Congress intended to press ahead into dangerous constitutional thickets" and the term "willfully" thus should be read in a manner that avoids, or at least reduces, such potentially unconstitutional results. *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989).

C. Awards Of Uncapped Punitive Damages And Statutory Damages Based On Mere Recklessness Would Result In FCRA Class Actions For Billions Of Dollars Not Based On Actual Harm

A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions of individual claims totaling hundreds of millions (if not billions) of dollars in statutory or punitive damages.

Respondents' complaints in the two actions under review are typical of FCRA cases that plaintiffs seek to litigate as class actions. Plaintiffs made no claim that petitioners' actions were negligent or that the named plaintiffs personally suffered any actual damages. Instead, their complaints, at the time they were dismissed by the district court, alleged only willful misconduct and sought statutory and punitive damages on behalf of a class. On remand from the Ninth Circuit, plaintiffs amended their complaints to strike their claims for punitive damages, and now seek $1,000 statutory damages for each member of the putative class. The allegations in the two other FCRA cases in which *certiorari* petitions are pending likewise seek only non-compensatory damages for the putative classes and do not bother to allege any actual harm sustained by the named plaintiffs.

Such allegations of willful FCRA violations based on a mere recklessness standard may increase even more the risk of enormous damage recoveries. There is a greater likelihood that such a case will be brought and certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). That is because courts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege the defendant willfully violated the FCRA. *See*, *e.g.*, *In re Progressive Ins. Corp. Underwriting and Rating Practices Litigation*, No. 1:03-cv-01519-MP-AK, slip op. (N.D. Fla. June 23, 2006) (certifying a FCRA class, for settlement purposes, of "several million" consumers); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (certifying FCRA class of over one million insureds); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387 (N.D. Ill. 2006) (FCRA class of approximately 49,000 members). A recklessness standard for willfulness, such as that adopted by the Ninth Circuit, makes it easier for plaintiffs' counsel to make such an allegation consistent with Federal Rule of Civil Procedure 11.

At the same time, the Ninth Circuit's mere recklessness standard for willful violations adversely affects the ability of a defendant to estimate accurately the risk of litigation. A business that determines it can prove that it acted in good faith (*i.e.*, non-willfully), and thus would be willing to litigate to conclusion a case making allegations of willfulness, would be under increased pressure to settle a case that relies on some amorphous standard of recklessness to determine the plaintiffs' eligibility for potentially significant punitive and statutory damages unrelated to any actual harm.

Under a recklessness standard, such a class action "create[s] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003); *see* Fed. R. Civ. P. 23 advisory committee's note (1998 Amendments) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.) (noting that "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements' "), *cert. denied*, 516 U.S. 867 (1995).

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. The defendant companies, however, provide valuable services and may have engaged in unintended technical violations of a complex regulatory statute. One example of this phenomenon is Mr. and Mrs. Murray, who have sought to be class representatives in dozens of FCRA class actions and, as one district court noted, "greet the arrival of what most people would consider junk mail (*i.e.,* unsolicited offers of credit) with joy and eagerly show their mail to lawyers * * * pursuant to a pre-existing agreement in the hope of finding an offer that presents a colorable FCRA claim." *Murray v. Cingular Wireless II, LLC*, 2005 U.S. Dist. LEXIS 39542, at *7-*8 (N.D. Ill. Dec. 22, 2005); *see also Murray v. Cingular Wireless II, LLC*, 2005 U.S. Dist. LEXIS 39561, at *1-*2 (N.D. Ill. Nov. 2, 2005). The "willfully" requirement should not be read as respondents would have it, to make it easier for the Murrays and their lawyers to obtain class certification and obtain a windfall of non-compensatory damages from a broad range of American businesses.

Counsel who bring such actions are well aware that such allegations increase substantially the pressure for settlement regardless of the merits of the case. In a case described by respondents as involving an "identical" claim (Br. in Opp. 7 n.2), insurance companies settled a class action suit for $280 per person in statutory damages for a class of more than 67,000 members. That settlement totaled nearly $20 million in damages without any proof of actual damages sustained by a class member. *See Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466 BR (D. Or. July 6, 2006) (Stipulation of Settlement). Of that settlement, plaintiffs' counsel has requested nearly $6 million in fees. *Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466 BR (D. Or. Oct. 20, 2006) (Fee Petition).

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE FCRA'S "ADVERSE ACTION" INSURANCE PROVISION IS CONTRARY TO THE STATUTORY TEXT AND STRUCTURE AND WOULD HAVE A SUBSTANTIAL NEGATIVE EFFECT ON THE CONDUCT OF AMERICAN BUSINESSES

The FCRA defines the term "adverse action" for purposes of its insurance provisions 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." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). *See also* page 26, *infra* (discussing other definitions of "adverse action" in the FCRA). The FCRA requires that an insurance company notify a consumer of such an action taken in connection with an underwriting decision when it is based in part on a consumer report obtained under 15

U.S.C. § 1681b(a)(3)(C) in connection with the underwriting. *See id*. § 1681m(a)(1).

The Ninth Circuit held that the phrase "an increase in any charge" in Section 1681a(k)(1)(B)(i) includes the purchase of insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score had been the "top potential score" based on information from his consumer report. Pet. App. 118a. That interpretation would mean that an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid*. The ruling thus applies to issuance of any insurance coverage that is not the best insurance coverage at the lowest possible rate.

A. The FCRA's Text And Statutory Structure Demonstrate That The "Adverse Action" Insurance Provision Does Not Extend To Every Insurance Customer Who Does Not Receive The Best Coverage At The Lowest Possible Rate

1. The plain language of the FCRA insurance provision specifies that an adverse action occurs only if the information from a consumer report is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. 15 U.S.C. § 1681a(k)(1)(B)(i). The provision is intended to ensure that an insurer gives notice to a consumer when it charges a consumer an increased rate because of credit information in a consumer report.

The FCRA is not concerned about comparisons of a consumer's rate with that of the hypothetical consumer who gets the best coverage at the lowest possible rate. Thus, if a consumer receives the same rate that she would have received if her consumer report information had not been considered (or, of course, a better rate), an adverse action has not occurred within the meaning of the statutory provision. That is because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The facts of one of the other FCRA cases currently pending before the Court demonstrate that the Ninth Circuit's contrary interpretation would expand the meaning of the statutory text. In *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, the plaintiff was quoted a price for insurance before she formally applied for automobile insurance. The quote was based only on background information she provided including, for example, the fact that she had received a speeding ticket within the preceding thirty-six months. *See State Farm* Pet. 3. After the plaintiff submitted her formal insurance application, the insurer reviewed her credit history in the consumer report as part of its underwriting process but ultimately issued her insurance policies "at the rates that had been quoted to her without reference to any credit information or other consumer report" information. *Id.* at 3-4. Despite evidence that conclusively demonstrated that the plaintiff received the *same* rate that she would have received if her consumer report information had not been considered, the Ninth Circuit held that the plaintiff had been subjected to an adverse action because she did not get a lower rate.

2. The Ninth Circuit disregarded critical aspects of the FCRA's structure when it attempted to shoehorn into the "adverse action" definition any consideration by a company of a consumer report that does not give a consumer the best possible coverage at the lowest possible rate, regardless of whether consideration of the report made the consumer worse off than if no consideration had been given to the consumer report.

First, each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action insurance provision to generate free consumer reports to nearly all consumers, Congress would not have amended the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id*. § 1681j(a)(1)(A), because all insurance consumers except those with the very best coverage with the lowest rates already would be receiving such reports with annual renewals under 15 U.S.C. § 1681j(c), which provides that each adverse action entitles the consumer to a free consumer report from the consumer reporting agency.

Second, the Ninth Circuit ignored Congress's addition in 2003 of certain provisions to govern risk-based pricing of credit, but not of insurance, when a business provides a consumer with credit on "terms that are materially less favorable." 15 U.S.C. § 1681m(h)(1). Section 1681m(h) requires that federal agencies issue regulations to require a business that extends credit to provide an alternate risk-based pricing notice in certain instances.

Congress added the provisions in response to the growing use of consumer reports to determine the terms of the credit extended, and not just whether to extend credit. The FTC informed Congress in hearings preceding the 2003 amendments that extenders of credit "increasingly are using consumer reports to undertake risk-based pricing of products or services. Many creditors * * * no longer merely approve or deny applications, but, rather, they use credit report data to finely calibrate the terms of their offer." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 6 (2003) (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n).

Congress was also told that the existing definition of "adverse action" for the FCRA's credit provisions was not triggered by such risk-based pricing because the FCRA specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act (ECOA). 15 U.S.C. § 1681a(k)(1)(A).[5] The

[5] The FCRA includes different definitions of the term "adverse action" in the different contexts of insurance, credit, employment, government license and benefits transactions, and a "miscellaneous" definition. *See* 15 U.S.C. § 1681a(k). The so-called miscellaneous definition provides that an adverse action is an action that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress did not intend the FCRA's "miscellaneous" definition to apply to transactions governed by another "adverse action" definition. The transaction-specific structure of the FCRA adverse action definitions demonstrates that the "miscellaneous" definition was intended to ensure that if a person has a permissible purpose to obtain a consumer report for a non-credit, non-insurance, non-employment, non-license or non-benefit transaction and the person uses such report as the basis for an action adverse to the consumer's interest, the person would be required to provide the consumer with an adverse action notice. The legislative history confirms that Congress intended the miscellaneous definition to apply only when the transaction did not fall within another definition. *See Senate Hearings*, *supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n); S. Rep. No. 104-185, at 31-32 (1995); H.R. Rep. No. 103-486, at 26 (1994) (explaining that earlier proposed version of the "miscellaneous" definition was intended to cover "a refusal to cash a check, lease real estate, or open a new transaction account based on a consumer report").

The Seventh Circuit, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004). That decision is wrong and, if followed, could significantly expand the effect of the "adverse action" holding because the Ninth Circuit's interpretation here could similarly expand the "miscellaneous" definition. Moreover, if the "miscellaneous" definition applied to credit transactions, the "credit" definition would be rendered superfluous because it would be subsumed by the broader "miscellaneous" definition – a result that Congress could not have intended.

ECOA defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer. *See* 12 C.F.R. § 202.2(c); *Senate Hearings*, *supra*, at 53 n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (consumers "often receive a counter-offer at a higher price. Under the law, if the consumer accepts that counter-offer, there is no adverse action because the FCRA definition [of adverse action for credit] is coupled to the definition under the [ECOA]."). Courts have relied on these implementing regulations to conclude that "a denial of credit coupled with a counteroffer that is accepted by the applicant does not trigger the FCRA's [adverse action] notice requirement because the applicant has suffered no 'adverse action.'" *Harper v. Lindsay Chevrolet Oldsmobile, LLC*, 212 F. Supp. 2d 582, 591 (E.D. Va. 2002).

The Ninth Circuit, through its interpretation of the term "adverse action," has imposed on the insurance industry its own risk-based pricing disclosure requirement. The details of what terms are material will, apparently, be determined through case-by-case adjudication. It is clear that Congress did not intend such a requirement for insurance, however, because it could have easily extended the amendment to apply the risk-based pricing provision that it created in the credit context to such insurance transactions as well, but did not do so.

B. The Ninth Circuit's Ruling Would Require The Issuance Of Millions Of Useless Notices To American Consumers

The Ninth Circuit's interpretation of "adverse action" in this case would force insurance companies, and possibly other persons subject to the FCRA, to issue tens of millions of pointless notices to consumers each year.[6]

Only a small number of consumers receive the best insurance coverage at the lowest possible rate when the rates are based in part on credit information from consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). But the Ninth Circuit's holding would require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the best scores and receive the best coverage and rates. Because the majority of consumers nationwide must

[6] The Ninth Circuit appears to have found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. Pet. App. 125a. That holding, which finds no statutory basis in the FCRA, could possibly make a bank liable under 15 U.S.C. § 1681s(b), along with a mortgage insurance company, if it selects which mortgage insurance company to underwrite a policy and the rate charged for the mortgage insurance is not the "best" rate and the bank fails to provide an adverse action notice. Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank, based in part on consumer report information, selects the insurance company that will receive the consumer's insurance application, the bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the "best" rate and no adverse action notice is provided.

obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require insurance companies to produce and send tens or hundreds of millions of additional adverse action notices each year.

Congress could not have intended such an absurd result. To the contrary, the Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained that it was important "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *Senate Hearings*, *supra*, at 529 (testimony of Joel Winston, Associate Director, Financial Practices Division, Bureau of Consumer Protection, Federal Trade Comm'n).

The deluge of additional notices would provide consumers with little, if any, appreciable benefit and might, in fact, harm consumers by overloading them with information and numbing them to important notices. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the "best" rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be diluted substantially. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload"). The flood of additional notices will undercut their statutorily intended function to focus consumers on potential material inaccuracies in their consumer reports.

Typical consumers with good credit histories who obtain insurance at a favorable rate but receive adverse action notices, would spend unnecessary time examining consumer reports for material inaccuracies that do not exist.

CONCLUSION

For the reasons set forth above, the judgments of the Ninth Circuit should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

L. RICHARD FISCHER
BETH S. BRINKMANN*
SETH M. GALANTER
NATHAN D. TAYLOR
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

**Counsel of Record*

NOVEMBER 13, 2006