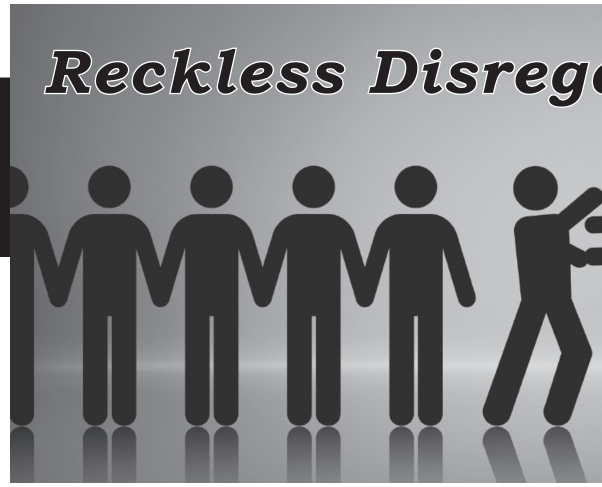
CREDIT CHECK



HELP FOR CONSUMERS


Steve Larson


Mark Friel

By Steve Larson, OTLA President's Club, and Mark Friel

In the summer of 2001, OTLA member Charlie Ringo was approached by consumers who discovered they were being charged more for insurance because of their credit scores and did not think that was fair. Ringo did some research, and learned there was no law preventing this practice. But a federal law called the Fair Credit Reporting Act, 15 U.S.C.1681, et seq. (FCRA) required insurers to tell consumers if they were charging them more for insurance because of their credit scores. The consumers that approached Ringo were not receiving such a notice, so he sought our firm's assistance to help evaluate whether these potential clients had claims under the FCRA that could be asserted in a class action.

Although there was virtually no case law to guide us, it looked like a viable cause of action existed. In October 2001, we filed putative class actions against 8 different insurance companies. After years of hard fought litigation, we were able to settle three class actions alleging violations of the FCRA with Valley Insurance Company, Nationwide Insurance Company and Hartford Insurance Company. Checks were mailed to almost 500,000 class members.

After settling those cases, the United States Supreme Court ruled against us on certain issues in two of our other cases. We are still pursuing the remaining cases.

Classes form

Our firm, with Ringo as co-counsel, filed eight separate putative class actions on behalf of policyholders against Progressive, Hartford, Valley Insurance, Farmers, State Farm, Nationwide, Geico and Safeco in federal district court in Oregon.

The complaints alleged that each company, itself or through its various subsidiaries, had violated the FCRA by charging the policyholders more for insurance because of their consumer credit information, but failing to sufficiently notify them of that fact. The statute at issue, 15 U.S.C. § 1681m(a), provides that any person taking an adverse action against a consumer, based in whole or in part on information in a consumer report (the term "consumer report" includes credit reports, which were the focus of the litigation), must notify the consumer of the adverse action.

The complaints alleged the defendants had willfully violated FCRA, and prayed for statutory damages under 15 U.S.C. § 1681n of $100 to $1,000 per violation.

We conducted extensive discovery to determine how the insurance companies used credit scores, and whether they had any procedures for providing notice. While discovery was underway, the defendant insurance companies began filing dispositive motions.

Adequacy of the notices

Some insurance companies sent no "adverse action" notice to consumers. Others sent notices that did not inform the consumer what was really going on.

Farmers chose to file a motion for summary judgment on the adequacy of its FCRA "notice." The Farmers "notice" (which was included with all new and

See Credit Check p 18

Credit Check
Continued from p 16

renewal policy packets), stated simply that consumer reports were used in setting the premiums, and the rates charged were based at least in part on the information in those reports.

In one of the first major victories for consumers in these cases, the district court held that the notice had to inform the consumer that the action taken was, in fact, adverse:

> On the face of the statute and attempting to give it its plain meaning, I conclude that the statute requires notice in a form that advises the recipient that the action taken by the party giving notice, based in whole or in part on review of information in a consumer report, was in fact adverse action.
>
> Those words "adverse action" need not expressly be used. But the statute requires, in the circumstances of this case, that Farmers provide sufficient information from which it can be concluded that the action it took in response to using the Ashbys' consumer reports was in fact adverse action, as that term is understood in the statute.

Setbacks in the district court

The next round of motions came the following year. This time, the focus was on whether a particular insurance company defendant was a "taker" of adverse action under the statute if that defendant did not actually issue the policy in question, but simply dictated and/or carried out the underwriting of the policies issued. The district court's first decision on this issue came in the case against Nationwide.

On January 21, 2003, the district court held that only the issuing company could "take" adverse action, regardless of whether others (including the named defendant) had participated in the underwriting decision, or even controlled the outcome. The district court proceeded to repeat this holding in several of the other pending cases. As a consequence, in some instances we were forced to narrow the scope of the actions, including as defendants only the companies who actually issued the named plaintiffs' insurance policies.

The defendants gained additional traction with the resolution of the next major issue in the cases: whether FCRA requires an adverse action notice to first-time customers (so-called "new business").

Despite a clear definition of the term "adverse action" provided by FCRA, 15 U.S.C. § 1681a, and extensive Congressional and Federal Trade Commission guidance indicating that an adverse action occurred any time an insurance applicant did not receive the best rate because of his or her credit information, the district court held that only those who had previously purchased insurance from the defendants could ever suffer an "adverse action" and thus have a statutory right to notice. This ruling, initially made in the Valley Insurance case and then subsequently made in several other actions, effectively ended the cases against Hartford, Safeco, GEICO and State Farm, and partially gutted the remaining cases. The only claims left against Valley Insurance, Farmers and Nationwide were the claims of renewal customers.

Each dispositive ruling in favor of the defendants was appealed. In response to the appeals, the defendants included, as an alternative ground for supporting the judgments, the argument that they did not "willfully" violate FCRA by failing to give proper notice, even though that issue was never decided by the trial court.

Classes certified in two cases

While the appeals were pending in the Ninth Circuit, the remnants of the Farmers, Nationwide, and Valley Insurance cases marched on.

In 2004, two positive developments occurred. In the Valley Insurance case, the district court certified a class of 396 renewal consumers over the strenuous objections of Valley Insurance. In the Farmers case, the district court certified a class of renewal consumers. This time, the class certified was much larger with 130,000 class members.

The court was not persuaded by Farmers' cries that certification of a statutory damages class of this size could result in a "horrendous" and "annihilating" judgment in violation of Farmers' due process rights. Farmers filed a discretionary appeal of that ruling, but the Ninth Circuit chose not to review it.

First settlements reached

Approximately three months after the court certified a class in the Valley case, a settlement was reached, resulting in recovery of approximately $500 for each of the class members.

See Credit Check p 20

Credit Check
Continued from p 18

More good news came in early 2005, when part of the Valley Insurance case (the part that had been dismissed) settled. This part of the case (which involved "new business" consumers) settled before a judgment was entered. The new business class was also larger — roughly 2,900 class members in all.

In settlement of their claims against Valley Insurance, each class member received approximately $100. Less (per class member) than the first settlement, but still within the range of statutory damages provided by FCRA. These settlements served as significant negotiating precedents in the next two cases to settle.

Appeals to Ninth Circuit

Arguments in the Ninth Circuit appeals in Safeco, Hartford, Geico, State Farm and Farmers were heard in early March 2005. The Court appeared to be receptive to our arguments, and at times less-than-sympathetic toward the defendants.

The assistance of the FTC was also invaluable. The agency charged with enforcing FCRA, the FTC, had entered the fray on our side as amicus on the issue of whether it was possible under the statute for new business customers to suffer adverse action. The other issues before the court included whether anyone other than the policy-issuing insurance company could "take" an adverse action; what information a proper notice of adverse action had to convey; and the legal standard for willfulness under 15 U.S.C. § 1681n.

Beginning in August 2005, the Ninth Circuit issued its opinion and then modified it twice, with the final opinion coming down on January 25, 2006. Essentially, the only difference in the three opinions was the harshness with which the Court treated the defendants' arguments. The opinion was issued in the *Reynolds v. Hartford* and *Edo v. Geico* appeals.

The Ninth Circuit panel, in a split decision, found in the first two opinions, that Geico and Hartford had willfully violated FCRA as a matter of law because their legal positions were patently unreasonable. The Ninth Circuit panel, in a unanimous decision in its third and final opinion, set the standard for proving willfulness but left open the ultimate question of liability.

The decision was on all fours with plaintiff's arguments. The Ninth Circuit first held that the definition of "adverse action" under FCRA included actions taken against new business consumers.

Specifically, the Court held that a notice of adverse action was required every time a consumer received anything less than the most favorable rate offered by an insurance company because of information in the consumer's credit report.

Second, the Court held that a transmission from a credit reporting agency stating that no credit information or insufficient credit information is available for a given consumer (so-called "no-hits" and "thin files") constitutes a "consumer report," and thus if an insurance company offers less than its best rate because of a no-hit or thin file, an adverse action notice must be given to the consumer.

Third, the Court held that a notice of adverse action must, at the very least, (a) communicate that an adverse action was taken based in whole or in part on a consumer report, (b) describe the adverse action taken, (c) specify the effect on the consumer, and (d) identify the party or parties taking the action.

Fourth, the Court held that a statutory "taker" of an adverse action can include entities in addition to the particular entity that issues a policy of insurance to a consumer.

Finally, the Court held that a person can "willfully" violate FCRA either by knowing that a policy it follows is in contravention of a consumer's rights, or by recklessly disregarding whether or not the policy contravenes those rights. Such a standard, the Court held, "does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.' "

Thus, where "at least some of the [defendants'] interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive."

This particular aspect of the Court's holding regarding the meaning of "willfulness" created significant discomfort for the defendants in the remaining cases. They were now faced with the unpleasant choice between raising an advice of counsel defense and waiving attorney-client privilege, or foregoing the defense and allowing the court to instruct

See Credit Check p 22

Credit Check
Continued from p 20

the jury that the defendants sought no such advice in connection with developing and implementing their FCRA notice policies and procedures.

After the Ninth Circuit's final decision came down in January 2006, the defendants in the GEICO, Hartford, Safeco and State Farm cases all filed petitions for writs of certiorari with the U.S. Supreme Court. Farmers chose not to petition for certiorari, and instead chose to raise an advice of counsel affirmative defense.

Nationwide comes to the table

The Ninth Circuit still had not heard argument in the Nationwide appeal at the time the *Reynolds v. Hartford* and *Edo v. Geico* opinions were handed down. For some procedural reasons, the Nationwide appeal had become disconnected from the other FCRA cases on appeal.

However, after the decision by the Ninth Circuit in *Reynolds v. Hartford*, Nationwide decided it wanted to bring an end to the litigation. In May 2006, during a mediation with the Honorable Edward Leavey, the lead plaintiffs (Ruslan Razilov and Sarah and Derek Lapham) reached a settlement with Nationwide which ultimately netted each of the 65,000 plus class members approximately $200. The court awarded the named class representatives $10,000 as incentive awards.

Hartford agrees to mediate

Shortly after the Nationwide case settled, Hartford agreed to mediate with Randy Wulff, a well known and very effective mediator in the Bay Area. After a mediation extending into the wee hours of the morning, Hartford and the lead plaintiff (Jason Reynolds) reached an agreement in principle on a settlement that would provide money to over 400,000 policyholders if they filed a claim.

Unlike the settlements with Valley Insurance and Nationwide, the Hartford settlement (which involved many times the number of class members) was a national "claims-made" settlement, in which each eligible class member had to file a claim in order to obtain any recovery.

The participation in the claims process by class members was excellent. Over 75% of the eligible class members submitted claims, which was one of the highest participation rates the claims administrators had ever seen. As a result, over 340,000 class members received a check for approximately $175. The court also awarded the class representative, Jason Reynolds, a $10,000 incentive award.

It is hard to tell what caused the extraordinary claim rate, but there were a number of factors that may have come into play.

First, 95% of the addresses were accurate, which was exceptional.

See Credit Check p 24

Credit Check
Continued from p 22

Second, the large majority of class members were AARP members as Hartford sells automobile and homeowners to AARP members through an affinity program. Retired people may move less often, may be more likely to read their mail and evidently were receptive to filing claim forms to recover $175.

Third, as part of the settlement, we negotiated what the claim form would look like, which enabled us to use a very simple claim form with the seal of the federal district court on it. All the policyholder had to do was sign it and send it back.

Fourth, we also negotiated that we would do a preliminary "robo-call" to all class members telling them a claim form was coming and a follow-up mailing reminding them to turn in their claim forms.

Finally, the fact that the defendant was an insurance company may have made class members feel more comfortable filing a claim.

Case stayed pending review

Any discussions of settlement in the other cases came to a screeching halt in the fall of 2006, when the Supreme Court granted the petitions for certiorari in the Geico and Safeco cases. The issues on appeal were:

- Can an insurance company take "adverse action" against a new business consumer?
- When is an adverse action "based in whole or in part" on information in a consumer report for purpose of triggering FCRA's notice requirement?
- What is the proper standard for willfulness under 15 U.S.C. § 1681n? In light of the Supreme Court accepting these cases for review, the District Court exercised its discretion and stayed the remaining cases pending a decision by the Supreme Court.

Supreme Court reverses

The decision by the Supreme Court, issued on June 4, 2007, was disappointing but not totally unexpected given the present court's makeup, and the fact that the court had accepted certiorari of a case from the Ninth Circuit — the most reversed circuit in the country.

While the Court affirmed the Ninth Circuit's holding that new business consumers could suffer adverse action and affirmed the holding that the standard for willfulness included reckless conduct, the Supreme Court reversed the Ninth Circuit decisions and found that there had been no willful violation of the FCRA by Safeco and Geico as a matter of law. The U.S. Supreme Court then granted certiorari in the State Farm case, vacated the judgment and remanded the case to the Ninth Circuit for reconsideration in light of the holdings in Safeco and Geico.

Conclusion

Despite the ruling by the United States Supreme Court, the FCRA class actions we filed in 2001 proved to be fairly successful. Checks were mailed to almost 500,000 insurance policyholders. Most importantly, the class actions changed behavior in the insurance industry. Now, adverse action notices required by the FCRA are being provided by insurers.

Steve Larson handles cases in state and federal courts, with an emphasis on complex business litigation. Larson contributes to OTLA President's Circle at the President's Club level. He is an attorney with Stoll Berne PC, 209 SW Oak Street Ste 500, Portland OR 97204. Larson can be reached at slarson@ssbls.com or 503-227-1600.

Mark Friel is also with Stoll Berne. His practice focuses on securities litigation, class actions and commercial litigation. He can be reached at mfriel@ssbls.com or 503-227-1600.