No. 07-834

In The Supreme Court of the United States

RADIAN GUARANTY, INC.,

Petitioner,

v.

WHITNEY WHITFIELD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CONSUMER DATA INDUSTRY ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW
7th Floor
Washington, D.C. 20036
(202) 223-6930

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Consumer Data Industry Association ("CDIA"), pursuant to Supreme Court Rule 37.2(b), moves this Court for leave to file its brief of *amicus curiae* in support of Radian Guaranty, Inc.'s Petition for Writ of Certiorari. In support of this motion, CDIA states as follows:

1. On January 18, 2008, ten days before the due date for its brief of *amicus curiae*, CDIA served notice of its intention to file a brief of *amicus curiae* on counsel of record for petitioner and respondents by U.S. Mail, facsimile transmission, and electronic mail.

2. As part of its notice to all counsel of record, CDIA requested counsels' consent to the filing of CDIA's brief of *amicus curiae*.

3. On January 18, 2008, petitioner filed its consent to the filing of "all amicus briefs" in this case. Counsel of record for respondents have not consented to the filing of CDIA's brief of *amicus curiae*.

4. CDIA is an international trade association whose membership includes over 300 consumer credit and other specialized consumer reporting agencies operating in the United States and throughout the world.

5. In its more than 100-year existence, CDIA has worked with the U.S. Congress and various state

legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA was a key participant in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments. CDIA also publishes, maintains and updates a manual entitled *How to Comply with the Fair Credit Reporting Act*, that is used by CDIA's member consumer reporting agencies and their clients, the users of consumer reports.

6. CDIA participated as *amicus curiae* when, in *Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201 (2007), this Court considered the appropriate test to be applied in determining whether a defendant "willfully" violates the FCRA.

7. CDIA is vitally interested in the outcome of this case because the decision of the Third Circuit Court of Appeals represents a growing problem, namely, the failure or refusal of some lower courts to apply this Court's recent decision in *Safeco* to claims alleging willful FCRA violations against defendants who have adopted objectively reasonable interpretations of unsettled questions of law in complying with the FCRA.

8. Such lower court actions threaten CDIA's members, as well as all users and furnishers of consumer report information with a very real risk of staggering statutory liability amounting to tens of billions of dollars, or extortionate settlements, in

putative class actions filed in those courts that refuse or fail to apply the threshold "objectively unreasonable" test that this Court articulated in *Safeco* to grant summary judgment for those defendants who have adopted reasonable interpretations of their compliance obligation where "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Safeco*, 127 S. Ct. 2216 n.20.

Because CDIA has been involved in the consumer reporting industry for over a century, participated in the drafting of the FCRA, and was permitted to assist this Court when *Safeco* was decided, CDIA respectfully requests that this Court permit CDIA to file its brief in support of the Radian Guaranty's Petition for Writ of Certiorari to provide this Court with CDIA's unique perspective on the issues raised by the petitioner.

January 28, 2008

Respectfully submitted,

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW
7th Floor
Washington, D.C. 20036
(202) 223-6930

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The Consumer Data Industry Association ("CDIA"), as *amicus curiae*, submits its brief in support of petitioner Radian Guaranty, Inc.[2]

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 300 consumer credit and other specialized consumer reporting agencies operating in the United States and throughout the world.

---

[1] No counsel for any party authored any part of this brief. No person or entity, other than CDIA and its members, made any monetary contribution to the preparation or submission of this brief.

[2] CDIA requested and obtained the consent of petitioner, Radian Guaranty, to the filing of its brief of *amicus curiae*. Petitioner's consent is on file with the Court. CDIA provided counsel of record for respondents with timely notice of its intention to file a brief of *amicus curiae*, as required by Supreme Court Rule 37.2(a), and requested respondents' consent to the filing of CDIA's brief. Respondents have not consented.

In its more than one-hundred-year existence, CDIA has worked with the United States Congress and various state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer-related information, including credit reports. In this role, CDIA was a key participant in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments, including the 2003 amendments under the Fair and Accurate Credit Transactions Act. CDIA has also published, maintained and updated a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by its members and their clients.

CDIA is vitally interested in the outcome of this case because the decision below starkly illustrates a growing problem of enormous concern for all persons subject to the FCRA and for this Court – the failure or refusal of some lower courts to apply this Court's decision in *Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201 (2007) to claims alleging willful FCRA violations against defendants who have adopted objectively reasonable interpretations of unsettled questions of law in developing their FCRA compliance procedures. Such lower court actions threaten CDIA's members, as well as all users and furnishers of consumer report information with a very real risk of staggering liability.

ARGUMENT

I. Application Of The *Safeco* Decision's "Objectively Unreasonable" Threshold Test Is A Critical Safeguard Against Extortionate Settlements And Potentially Ruinous Liability In Putative Class Actions Alleging Willful FCRA Violations.

In its *Safeco* decision, this Court held that evidence of subjective bad faith is irrelevant to a determination of whether a defendant willfully violated the FCRA if "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation" of a defendant's compliance obligation.[3] Moreover, the Court made clear that this required threshold determination should be made as a matter of law, without regard to any evidentiary showing.[4]

The court below, although discussing and citing to the *Safeco* decision, and considering dispositive facts that are indistinguishable from those of the insurer Safeco, held not only that the petitioner's subjective intent must be considered but that no court could decide as a matter of law that the petitioner's conduct was not a willful violation of the FCRA.[5] If the *Safeco* decision is to have any precedential value,

---

[3] *Safeco,* 127 S. Ct. at 2216 n.20.

[4] *Id.*

[5] *Whitfield v. Radian Guaranty, Inc.*, 501 F.3d 262, 271 (3rd Cir. 2007).

this Court must grant certiorari to make clear that the *Safeco* decision means what it says.

It is difficult to overstate the importance of the threshold "objectively unreasonable" test defined in *Safeco* and, conversely, the danger posed by any lower courts' failure or refusal to apply the test. Because the FCRA provides for statutory damages awards of between $100 and $1,000 for each violation, plus potential punitive damages and attorneys' fees, for a willful violation of "any requirement" of the FCRA,[6] it has spawned hundreds of class-action "willfulness" lawsuits seeking monumental statutory damages recoveries.

CDIA's member consumer reporting agencies are a prime target of these lawsuits, largely because they maintain files on hundreds of millions of consumers. A putative class action claim against one or more of the agencies that includes a theory of liability that survives summary judgment can often threaten a defendant with up to $1,000 in damages for each alleged violation. For consumer reporting agencies who maintain files on hundreds of millions of consumers, the potential for ruinous liability of tens of billions of dollars is all too real.[7]

---

[6] 15 U.S.C. § 1681n.

[7] *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner

(Continued on following page)

Consumer reporting agencies are also frequently targeted because they are subject to numerous FCRA requirements, including, in particular, relatively vague requirements such as the obligation to "follow reasonable procedures to assure maximum possible accuracy."[8] The vagueness of these requirements provide wide latitude for putative class action claims alleging novel theories under which well-accepted consumer reporting practices that apply to millions of consumers may be alleged to be willful violations of the FCRA.

The three nationwide consumer reporting agencies, for example, have been sued on behalf of a putative class of tens of millions of Capital One credit card holders on the theory that the agencies willfully violated § 1681e(b) by issuing *accurate* credit reports that do not include the consumer's Capital One credit limit even though no previous court ever found that mere incompleteness violated § 1681e(b) (which requires "accuracy," not "completeness"), and even though it is undisputed that Capital One did not furnish the credit limit information at issue to the consumer reporting agencies.[9] The same defendants have likewise been sued in putative nationwide class

---

faces potential liability [in willfulness class actions] approaching $190 billion.").

[8] 15 U.S.C. § 1681e(b).

[9] *See Harris v. Equifax Info. Servs., LLC*, 2007 WL 1862826 (D.S.C. Jun. 26, 2007); *Harris v. Experian Information Solutions, Inc.*, 2007 WL 1863025 (D.S.C. Jun. 26, 2007).

actions for allegedly willfully violating § 1681e(b) by reporting the status of bankrupts' accounts as they are reported by creditors instead of assuming that all of a consumer's accounts were necessarily discharged in any bankruptcy. Again, there is no statutory text or judicial precedent requiring such a practice by the consumer reporting agencies.[10] These examples are, unfortunately, more illustrative than exhaustive.[11] The willingness and ability of class counsel to manufacture additional novel claims will be limited only by the defendants' ability to defend themselves by establishing that their compliance decisions were, as a matter of law, objectively reasonable and, therefore, not willful violations of the FCRA.

---

[10] *See White v. Experian Info. Solutions, Inc.*, No. CV 05-1070-DOC (C.D. Cal.); *White v. Equifax Info. Servs., LLC*, No. CV 05-7821-DOC (C.D. Cal.); *White v. Trans Union, LLC*, No. CV 05-1073 (C.D. Cal.).

[11] *Klotz v. Trans Union, LLC*, 246 F.R.D. 208 (E.D. Pa. 2007) (putative class action for alleged willful failure to investigate disputes); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377 (C.D. al. 2007) (putative class action for alleged willful inaccurate reporting); *Gardner v. Equifax Info. Servs., LLC*, 2007 WL 2261688 (D. Minn. Aug. 6, 2007) (putative class action for alleged willful violation of disclosure requirements); *Harper v. Trans Union, LLC*, 2006 WL 3762035 (E.D. Pa. Dec. 20, 2006) (putative class action alleging willful failure to comply with accuracy obligations); *Barnett v. Experian Info. Solutions*, 2004 WL 4032909 (E.D. Tex. Sep. 20, 2004) (putative class action alleging willful failure to adopt reasonable procedures to assure maximum possible accuracy in furnishing consumer reports); *Clark v. Experian Info. Solutions, Inc.*, Nos., 2002 WL 2005709 (D.S.C. Jun. 26, 2002) (putative class action alleging willful violation of obligation to assure maximum possible accuracy).

In such lawsuits, the claims are carefully tailored to eliminate objections to class certification. For example, the plaintiffs often waive any negligence claims, thereby eliminating individual actual damages issues that would otherwise preclude class certification, and leaving only class-wide claims for statutory damages.[12] As a result, a successful motion for summary judgment is often the only shield available to a defendant who otherwise faces a potential multi-billion dollar jury trial, a risk that a rational defendant most often cannot take.[13] The result is often a settlement in favor of the class based on a novel theory of liability arising from the defendant's reasonable interpretation of an obligation found in unclear statutory or regulatory language where no prior binding precedent or administrative agency has provided authoritative guidance. This is an outcome that the proper application of the *Safeco* threshold test should prevent.

---

[12] *See, e.g., Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006).

[13] *See, e.g., Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[E]ven when the plaintiff's probability of success on the merits is slight[,] [m]any corporate executives are unwilling to bet their company that they are in the right . . . and a grant of class status can propel the stakes of a case into the stratosphere."); *see also Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 29 (2d Cir. 2003) (Newman, J., concurring) ("[T]he *in terrorem* threat of a massive award" of classwide statutory damages will likely "unfairly induce a large settlement").

Application of the threshold "objectively unreasonable" test required by the *Safeco* decision which precludes a liability determination under the FCRA's willfulness provision if "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation," regardless of the defendant's "subjective intent,"[14] is critical to defendants' ability to respond to meritless willful violation claims at the summary judgment stage, *i.e.*, before the threat of crushing liability necessitates an extortionate settlement. Absent that objective test, even the best-intentioned courts may deny summary judgment believing that a "willfulness" determination turns on the defendant's "state of mind," as to which "summary judgment is seldom appropriate."[15]

II. This Court's Intervention Is Necessary To Prevent Forum-Shopping And To Make Clear That Lower Courts May Not Ignore *Safeco*'s Threshold "Objectively Unreasonable" Test.

Amicus agrees with petitioner that the decision below is flatly inconsistent with *Safeco* in multiple ways, including but not limited to: (1) the Third Circuit's suggestion that the threshold "objectively unreasonable" test turns on "evidence in the record,"

---

[14] *Safeco*, 127 S. Ct. at 2216 n.20.

[15] *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001).

including Radian's actual "belief";[16] and (2) the Third Circuit's unequivocal holding that Radian's willfulness is "a factual issue" that "cannot be decided . . . as a matter of law."[17]

The Third Circuit inexplicably failed to apply, or even to mention, the critical portion of the *Safeco* decision that makes clear that the threshold test *is* a matter of law. Evidence of actual intent, even "subjective bad faith," cannot prevent summary judgment where there has been a reasonable interpretation of the FCRA (as defined in *Safeco* by the absence of contrary authoritative court or agency guidance or "pellucid" statutory text) under which the defendant's conduct was lawful.[18] Because the Third Circuit did not even attempt to apply, and gave no indication of even having considered, this essential holding of *Safeco*, summary reversal or, at a minimum, vacatur and remand for reconsideration in light of *Safeco*, is clearly merited.

Amicus also agrees with petitioner that, given the prevalence of nationwide class actions under the FCRA, the likelihood of forum-shopping by class action attorneys makes this Court's intervention particularly appropriate, and precludes the option of treating the decision below as an aberration that is

---

[16] *Whitfield*, 501 F.3d at 270.

[17] *Id.* at 271.

[18] *Safeco*, 127 S. Ct. at 2216 n.20.

likely to be corrected by further percolation in other Circuits.

In addition, it is important to note that the Third Circuit's failure to apply the key holding of *Safeco* is not an isolated problem. Although most lower courts have applied Safeco faithfully, *amicus* is aware of several courts that have ignored or sidestepped *Safeco* where it was expressly argued to the court and clearly applicable, whether out of a failure to appreciate what *Safeco* requires or out of what has been recognized as the "temp[tation]" of "some district courts" to use the threat of massive class-action liability "to wring settlements from defendants whose legal positions are justified but unpopular."[19]

For example, in the Capital One-related litigation described above, which involves potential statutory damages liability running into the tens of billions of dollars, the defendants argued strenuously that *Safeco*'s threshold objective test mandated summary judgment on the "willfulness" issue in light of the utterly novel nature of plaintiff's theory of liability (a novelty plaintiff did not deny). The district court nonetheless ignored that test; cited *Safeco* as holding only that willfulness includes both knowing and reckless violations; and denied summary judgment on the ground that the defendants' alleged

---

[19] *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 143 (4th Cir. 2001).

willfulness was *"for the jury to resolve."*[20] In particular, the court failed to address whether there was any "guidance from the courts of appeals or the Federal Trade Commission," or "pellucid statutory text," contrary to defendants' interpretation of the statute,[21] and failed to apply this Court's ruling that, in the absence of such guidance, the defendants' interpretation of the statute could not be objectively unreasonable and therefore not subject the defendant to liability for statutory damages under the FCRA's willfulness provision.[22]

Similarly, in the bankruptcy-related litigation described above, another putative nationwide class action, the district court induced the withdrawal of a defense motion for summary judgment by issuing a tentative ruling suggesting that *Safeco*'s objective test does not apply to "reasonable procedures" claims no matter how novel the plaintiff's claim of the procedure the defendant was allegedly required to follow because the general statutory duty to maintain "reasonable procedures" is clearly established.[23]

---

[20] *Harris v. Equifax Info. Servs.*, 2007 WL 1862826, at *2 (D.S.C. June 26, 2007) (emphasis added); *accord Harris v. Experian Info. Solutions, Inc.*, 2007 WL 1863025, at *2 (D.S.C. June 26, 2007).

[21] *Safeco,* 127 S. Ct. at 2216.

[22] *Id.*

[23] By parallel reasoning, the plaintiffs in *Safeco* could have claimed they satisfied the objective test because the statutory duty to provide notice of "adverse actions" is clearly established.

(Continued on following page)

In another post-*Safeco* case, the district court sidestepped *Safeco* by ruling that, contrary to the actual holding of *Safeco*, "the subjective opinions of [defendant's] personnel" could provide the basis for willfulness liability even if the defendant offered an objectively reasonable interpretation under which its actions were lawful.[24]

In sum, this Court's intervention is necessary not only because the opinion below itself warrants such intervention, but because several other lower court opinions evince a level of resistance to applying the critical holding of *Safeco* as written. Such resistance to this Court's precedent so soon after the *Safeco* decision, requires this Court to provide a clear statement that *Safeco* means what it says and may not be ignored or bypassed by casual assertions that willfulness presents a state of mind issue unsuited to summary judgment. Absent such a clear statement, continued pockets of judicial resistance to applying *Safeco,* coupled with class action forum-shopping threatens to drain *Safeco*'s critical safeguard against overreaching willfulness claims of its significance.

Safeco's objective test would be meaningless if the mere existence of an ambiguously-phrased general statutory duty precluded its application.

[24] *Claffey v. River Oaks Hyundai*, 494 F. Supp. 2d 976, 978-79 (N.D. Ill. Jul. 10, 2007).

CONCLUSION

The petition for certiorari should be granted and the court of appeals' judgment summarily reversed or, in the alternative, the judgment should be vacated and the case remanded for reconsideration in light of this Court's decision in *Safeco*.

January 28, 2008

Respectfully submitted,

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW
7th Floor
Washington, D.C. 20036
(202) 223-6930

Counsel for Amicus Curiae