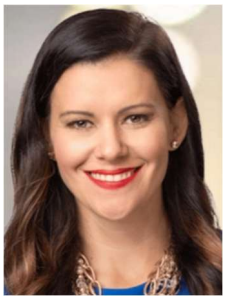
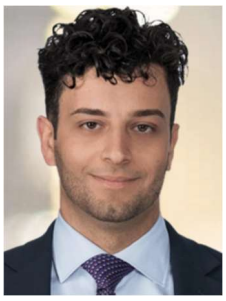
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FCRA Ruling Previews Future Business Transaction Litigation

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On Sept. 22, the U.S. Court of Appeals for the Ninth Circuit reversed a jury verdict of more than $140 million entered against CenturyLink Inc. in a Fair Credit Reporting Act class action.

In Bultemeyer v. CenturyLink, a unanimous panel held that CenturyLink was entitled to judgment as a matter of law under the objective reasonableness safe harbor the U.S. Supreme Court recognized in Safeco Insurance Co. of America v. Burr in 2007. The decision is notable not only for the size of the verdict it erased, but also for what the court declined to decide and for the sharply divided concurrences that preview how the underlying question may be litigated in the future.

Background: A Credit Pull Between Step 4 and Step 5

Under the FCRA, a person may obtain a consumer report if they have a "legitimate business need for the information ... in connection with a business transaction that is initiated by the consumer."[1]

CenturyLink's online ordering process involved five steps. Customers first selected a service and pricing, then customized the selection (for example, whether to lease a modem), then reviewed a shopping cart. Next, at Step 4, they entered their name, birth date and billing address; selected an installation date; and accepted terms and conditions stating that a "credit check is required to complete all online orders." Finally, at Step 5, a checkout page displayed estimated pricing, requested credit card information and offered a "submit order" button.

Within seconds after a visitor clicked "next" at Step 4 and proceeded to Step 5, CenturyLink's automated system obtained identity and credit information, roughly half the time from an outside consumer reporting agency. CenturyLink used the information for two purposes: to score the risk of identity theft and to decide whether to require a deposit, which would be reflected in the price shown at Step 5.

Plaintiff Lydia Bultemeyer completed Step 4 but abandoned the order at Step 5. She argued that she never initiated a transaction with CenturyLink because she never completed her order by clicking "submit."

After more than a decade of litigation — including two prior trips to the Ninth Circuit — the U.S. District Court for the District of Arizona certified a class of 56,075 consumers and rejected CenturyLink's Safeco defense. A jury awarded each class member $500 in statutory damages and $2,000 in punitive damages, for a total award exceeding $140 million.

The Ninth Circuit's Holding

The Ninth Circuit declined to decide whether Bultemeyer had initiated a business transaction when she completed the first four steps of her transaction but abandoned it before completion.

Instead, it exercised its discretion to proceed directly to the Safeco defense. Under Safeco, a defendant's reading of the FCRA (even if erroneous) is not "reckless," and thus not "willful," so long as it is not objectively unreasonable. The court applied Safeco's three-part test and held that CenturyLink satisfied each element.

Foundation in the Statutory Text

"Initiated" is undefined in the FCRA and is not self-defining. Relying on dictionary definitions such as "commence," "begin" and "set going," the court found it reasonable to conclude that a consumer who had selected services, reviewed a cart, provided personal information, chosen an installation date and accepted terms had begun a transaction.

No Appellate Guidance

Although several circuits have construed "business transaction" in Section 1681b(a)(3)(F)(i) of the FCRA, no court of appeals had addressed when a transaction is initiated.

No Authoritative Agency Guidance

The court held that a 1998 Federal Trade Commission staff advisory opinion — the Coffey Letter, which addressed when an auto dealer may pull a report on a showroom visitor — was expressly nonbinding.

The court also assumed without deciding that the FTC's 2011 staff report on 40 years of the FCRA could be authoritative, but concluded that its treatment of the Coffey Letter, which was directed toward face-to-face sales in brick-and-mortar dealerships, was not specific enough to warn an online telecommunications provider away from its interpretation.

Why the Ruling Is Notable

It confirms the strength of the Safeco defense, even after a jury verdict.

Only willful violations carry statutory damages of $100 to $1,000 per consumer and punitive damages. Willfulness is what permits statutory and punitive damages under the FCRA, and those remedies often drive the economics of FCRA class actions.

Bultemeyer shows that the Safeco inquiry remains a question of law that an appellate court will decide de novo, even after a full trial and a nine-figure verdict. The Ninth Circuit reiterated its earlier observation that where the FCRA's language is "less than pellucid," a defendant "will nearly always avoid liability so long as an appellate court has not already interpreted that language."

It sets a demanding standard for authoritative guidance.

The decision adds to a growing body of appellate authority holding that agency materials must be both authoritative and specific to the defendant's conduct to defeat a Safeco defense. FTC informal staff opinion letters are not authoritative. Guidance written for one

industry and sales channel will not necessarily put a business in a different industry or channel on notice.

It leaves the core statutory question open.

The court did not decide when an online consumer initiates a business transaction, and the court did not adopt either side's reading. In practical terms, businesses in the Ninth Circuit still lack a definitive answer, and plaintiffs remain free to litigate the issue.

However, the opinion itself now constitutes appellate authority that CenturyLink's reading is reasonable, which may strengthen Safeco defenses for similar practices going forward.

The concurrences reveal a sharp divide on the merits.

Both concurring judges joined the Safeco analysis in full but disagreed on the merits. U.S. Circuit Judge Richard R. Clifton would have held that CenturyLink's interpretation was not just reasonable but correct: A shopper who voluntarily visits a website and completes all but the final step of a multistep purchase process "went well beyond window shopping" and has initiated a transaction.

U.S. Circuit Judge Jay S. Bybee took the opposite view. Drawing on contract-formation principles, he would have held that no transaction is initiated until the consumer knows the full cost of services, including any deposit, and clicks "submit." He criticized the panel for leaving the question unanswered, warning that the decision may effectively become a "Safeco license" for CenturyLink and other online sellers to continue a practice the court assumed was unlawful. He suggested an obvious solution for businesses: Ask for consent before pulling the report.

Key Takeaways for Businesses

Map exactly when credit is pulled in your customer journey.

Liability under Section 1681b(a)(3)(F)(i) of the FCRA turns on whether the consumer has initiated a transaction at the moment of the pull. Businesses should document each step of online and in-person flows, and the point at which a consumer report is requested.

Consider obtaining express consent.

Written authorization from the consumer is an independent permissible purpose and avoids the initiated question entirely. CenturyLink's terms stated that a credit check was required to complete an order, but that disclosure did not prevent this litigation. A clear, affirmative authorization before the pull is the most conservative approach.

Document the legitimate business need.

CenturyLink tied its credit pull to identity fraud prevention and deposit decisions that affected the price quoted. Businesses should be able to articulate and document why the information is needed at the point it is obtained.

Do not treat Bultemeyer as a safe harbor for the practice itself.

The court assumed, without deciding, that CenturyLink's conduct may have violated the FCRA. A Safeco defense defeats willfulness only; it does not bar claims for negligent

violations and actual damages, and its availability may erode as courts or agencies speak to the issue.

Monitor for new appellate decisions and agency guidance.

The Safeco defense depends on the absence of contrary appellate authority and authoritative agency guidance. A ruling from another circuit adopting Judge Bybee's view, or specific guidance addressing online transactions, could eliminate the defense for practices like CenturyLink's.

Raise Safeco early and preserve it.

Although the Ninth Circuit held that the defense need not be pled as an affirmative defense, the defense will not necessarily be resolved early and has no immediate appeal path. Defendants should raise it at the pleading, summary judgment and trial stages, and assemble the record on statutory text, case law and agency guidance.

Conclusion

Bultemeyer is a significant win for businesses facing FCRA willfulness claims and a strong reaffirmation of the Safeco defense. At the same time, the court's decision not to define when a consumer initiates a transaction, combined with the concurring judges' opposing views, means that the underlying question remains unsettled.

Companies that obtain consumer reports during online application or checkout processes should use this decision as an opportunity to review their practices, rather than as confirmation that those practices are lawful.

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[1] 15 U.S.C. § 1681b(a)(3)(F)(i).