No. 06-4368

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DARRELL BRUCE,

Plaintiff-Appellant,

v.

KEYBANK NATIONAL ASSOCIATION,

Defendant-Appellee.

Appeal from Judgment of the
United States District Court for the Northern District of Indiana
Hon. Rudy Lozano, Presiding

**BRIEF *AMICUS CURIAE* OF THE
AMERICAN FINANCIAL SERVICES ASSOCIATION,
CONSUMER MORTGAGE COALITION, AND
MORTGAGE BANKERS ASSOCIATION
SUPPORTING APPELLEE AND URGING AFFIRMANCE**

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Appellate Court No: 06-4368

Short Caption: Bruce v. Keybank National Association

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

American Financial Services Association, Consumer Mortgage Coalition, Mortgage Bankers Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Goodwin Procter LLP; Ottenheimer Teplinsky Rosenbloom, LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: [signature] Date: September 6, 2007

Attorney's Printed Name: Howard L. Teplinksy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ___

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IDENTITY OF AND INTERESTS OF *AMICI*

This brief is filed on behalf of the American Financial Services Association, Consumer Mortgage Coalition, and Mortgage Bankers Association ("*Amici*"). *Amici* are trade associations whose members, collectively, extend a large percentage of consumer credit in America today, including mortgage loans, automobile credit, and consumer loans.

Amici appear frequently in litigation where the issues raised are of widespread importance and concern to their members. That is the case with respect to this appeal, which presents the question whether appellee KeyBank National Association ("KeyBank") willfully violated the prescreening provisions of the Fair Credit Reporting Act ("FCRA"). Many of *Amici*'s member organizations or their affiliates make prescreened offers of credit as authorized under FCRA. Approximately 250 class actions alleging violations of FCRA's prescreening requirements are pending in this Circuit and elsewhere, *see* Exhibit 1 hereto, and many of *Amici's* members are defendants in these suits. The Court's decision may accordingly affect the interests of *Amici*'s members and the outcome of the lawsuits they are defending.

Amici respectfully refer the Court to their "Motion for Leave to File Brief *Amicus Curiae* Supporting Appellee and Urging Affirmance," where they explain in detail their interests in this appeal and why *Amici* believe their participation would assist the Court in resolving this appeal.

DISCUSSION

The issue before this Court that *Amici* wish to address primarily is whether the district court properly entered summary judgment for KeyBank on the ground that it did not willfully violate FCRA. *Safeco Insurance Co. of America* v. *Burr*, 127 S. Ct. 2201 (2007), issued after the district court's opinion on appeal here, set forth standards for whether a company has not willfully violated FCRA. Among its other holdings, the *Safeco* Court instructed that if the company's interpretation of its statutory duties was objectively reasonable, it cannot be held liable for a willful violation of the law. *Id.* at 2215.[1]

Amici show below that KeyBank did not willfully violate FCRA, under the *Safeco* test, because the statutory language, the case law, the statutory content, and business realities each require the conclusion that it was objectively reasonable to interpret FCRA as KeyBank did. *Amici* first highlight the balanced nature of FCRA as illuminating the reasons Congress requires proof that a violation of the law be willful before substantial damages might be awarded. *Amici* then describe, from the viewpoint of their members' experiences in interpreting FCRA, how the law and cases, and practicalities, plainly support the view that a "firm offer" is compliant with FCRA so long as it ultimately is honored as required and that the content of an introductory mailer need not contain all credit terms. Appellant relies on *Cole* v. *U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004), as not only supporting his contrary view of the legal requirements of FCRA but as making all other interpretations objectively unreasonable, but this contention relies too much on a single case. *Cole* has been interpreted and applied differently, and programs and mailers like KeyBank's have been approved as FCRA complaint by other courts. The result is that there was no clear compliance standard driven by *Cole* that made KeyBank's actions willful (even if KeyBank violated the statute, which KeyBank and *Amici* dispute). A company such as KeyBank which relied on the statute, case law and context did not act willfully under *Safeco,* and the district court's judgment in favor of KeyBank therefore should be affirmed.

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1 This brief does not address all of the implications of *Safeco*, because *Amici* believe this case can and should be disposed of on the ground that the "objectively reasonable conduct" test for willfulness is met here, and because *Amici* believe that they can best provide the Court with helpful information and context on that point.

I. PRESCREENED SOLICITATIONS SERVE VALUABLE PURPOSES AND SHOULD NOT BE RESTRICTED OR DISCOURAGED.

Amici submit that this Court's application of the *Safeco* test should remain faithful to the reasons Congress decided, in the first instance, to limit recovery under FCRA of any amounts beyond actual damages to those instances where the violation is proven to have been willful. The purposes of the prescreening provisions provide important background to understand why Congress chose to limit FCRA liability in this way.

A. Congress Passed Section 1681b To Promote Prescreening.

Congress passed Section 1681b to encourage prescreening. When enacted in 1970, FCRA allowed third parties to access consumer report information only in limited circumstances; prescreening was not expressly addressed. Pub. L. No. 91-508 § 601 (Oct. 26, 1970). After FCRA's passage, consumer reporting agencies sold lists of consumers to creditors and others for use in sale of products and services (*see* S. Rep. No. 103-209, at 13 (1993)), but the Federal Trade Commission ("FTC") adopted a very restrictive interpretation of the circumstances under which creditors could lawfully extend prescreened offers. Specifically, the Commission had stated that "each consumer whose name is on the list after prescreening *will receive* an offer of credit," (55 Fed. Reg. 18,804, 18,815 (May 4, 1990) (emphasis added)), thereby preventing a creditor from fully evaluating the consumer's creditworthiness or application once he or she responded. *Id.* at 18,807 n.15.

In 1996, Congress rejected the FTC's restrictive approach, by (1) expressly authorizing the use of consumer report information for the making of prescreened offers; and (2) enacting a lengthy definition of "firm offer of credit," allowing creditors to take applications from those who respond and to condition or deny credit to responding consumers in the manner set forth in the definition. Pub. L. No. 104-208, Div. A, Title II, §§ 2402 & 2404(a) (Sept. 30, 1996).

Legislative history confirms that Congress amended the statute to "expand[] the ability of consumer reporting agencies [and third parties] to use consumer report information for prescreening. . . ." S. Rep. No. 104-185, at 36 (1995).

B. The Prescreening Provisions Carefully Balance Competing Interests.

Despite appellant's contention to the contrary, FCRA strikes a "balance between consumer privacy and the needs of a modern, credit-driven economy" (*Stergiopoulous* v. *First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045-46 (7th Cir. 2005)), and FCRA's prescreening provisions are no exception. On the one hand, prescreening allows creditors to access some credit information. However, Congress was also concerned that, because of fraud, error or other factors, creditors might extend a "firm offer of credit" to individuals who did not qualify for the credit offered.[2] Accordingly, in amending the statute Congress sought to "balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered." S. Rep. No. 104-185, at 36.

Congress enacted several interrelated provisions to strike that balance. First, the statute allows consumers to "opt out" of prescreening, for all creditors and for all time. 15 U.S.C. § 1681b(e)(1). Creditors must inform consumers of this right, and how to exercise it. 15 U.S.C. § 1681m(d)(1)(D), (E).

Second, Congress strictly limited the type of consumer report information disclosed to creditors who conduct prescreening. Credit bureaus may disclose only the consumer's name and address; an identifier unique to the consumer to verify the consumer's identity; and other

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[2] S. Rep. No. 103-209, at 9 ("the Committee bill seeks to maximize the safety and soundness of the financial system and to minimize fraud by ensuring that the consumer responding to the offer ultimately meets the criteria for creditworthiness originally used to create the list of eligible consumers").

information about the consumer that does not identify the consumer's relationship or experience with respect to a particular creditor or other entity. 15 U.S.C. § 1681b(c)(2). A creditor does *not* have access to the consumer's full credit report when it engages in prescreening.

Finally, Congress defined a "firm offer of credit" to allow creditors to revoke a "firm offer of credit" in certain circumstances. 15 U.S.C. § 1681a(*l*) The statute ensures that credit is not granted to those who do not qualify, and allows creditors to verify and evaluate the consumer's credit and collateral information once the consumer chooses to respond to the solicitation, in some of the same ways creditors evaluate all potential credit extensions.

C. Prescreening Benefits Consumers and Credit Grantors Alike.

In passing FCRA, Congress recognized that the efficient flow of consumer credit information is vital to the national economy. *See* 15 U.S.C. § 1681(a)(1) (Nation's "banking system is dependent upon fair and accurate credit reporting"). The sharing of consumer information permitted under FCRA allows creditors to make more rapid, accurate and individualized credit qualification decisions. H.R. Rep. No. 108-263, at 23 (2003). This sharing may save consumers as much as $100 billion annually. *Id.*

Prescreening confers the same benefits. The Board of Governors of the Federal Reserve System ("Board") recently found that consumers directly benefit from prescreened offers:

> For consumers, prescreened solicitations reduce search costs by providing them with ready information about product availability and pricing tailored more closely to their financial experiences and needs. Such screening also increases the likelihood that consumers responding to such solicitations qualify for the product or service being offered and thereby reduces the possibility that the consumer will be wasting his or her time and effort when responding to a mailing. Because of their advantages to senders and consumers, prescreened solicitations are important in promoting competition and enhancing consumer welfare in the markets for credit and insurance.

Report to the Congress on Further Restrictions on Unsolicited Written Offers of Credit and Insurance," Board of Governors of the Federal Reserve (Dec. 2004) ("Report to Congress"), Exhibit 2 hereto, at 3. Creditors benefit as well. The Board found that prescreening "improves marketing efficiency," "reduc[es] account acquisition costs for creditors and insurers," and allows creditors "to control certain risks relating to the offering of their products." Report to Congress at 10.

Prescreening has become an important part of the credit market. Dissemination of information about credit has increased consumer awareness of what they may qualify for and what products are available. *Id.* at 5. Prescreening also has become more important as the credit market has become increasingly national. Consumers who otherwise have few local resources can be – and are – reached effectively through prescreening. *Id.* at 34-35.

* * *

In considering the parties' positions in this case, *Amici* urge the Court to recognize that a ruling that unnecessarily discourages or curtails prescreening would be contrary to Congressional intent and detrimental to both businesses and consumers. The Federal Reserve Board would agree: "further restrictions on the ability of lenders and insurers to provide written offers of credit or insurance to consumers would on balance result in a less competitive marketplace and thus relatively higher prices and reduced availability." *Id.* at 47.

II. IT WAS OBJECTIVELY REASONABLE FOR COMPANIES SUCH AS KEYBANK TO INTERPRET FCRA AS THEY DID.

This Court is faced with the question whether KeyBank did not violate FCRA willfully because KeyBank's interpretation of the law was "objectively unreasonable" (*Safeco*, 127 S. Ct. at 2215), when KeyBank implemented a prescreened program that was introduced to potential customers with a mailer that did not include every term of the potential loan. KeyBank's interpretation that its program complied with the statute is the same interpretation that many, if not most, of *Amici's* members gave the statute at the time. KeyBank and *Amici* continue to believe it is a correct interpretation. *See infra* at 17. It plainly was an objectively reasonable interpretation, in light of circumstances, the statute and the case law decided at the time, and since.

A. FCRA And Its Prescreening Provisions Are Complex, And There Has Been Little Guidance About Their Meaning.

FCRA is "a complex statutory scheme" because it balances competing interests. *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). The prescreening rules of FCRA in particular contain a careful set of tradeoffs between consumer and creditor interests. *Supra* at 4–5.

To construe these requirements, KeyBank, like any creditor contemplating a prescreened firm offer program in early 2005, faced a formidable challenge. No authoritative agency guidance existed about these provisions. Congress chose not to confer substantive rulemaking authority on the FTC when it enacted FCRA (*Safeco*, 127 S. Ct. at 2216), and it repudiated the FTC's interpretation of the permissible scope of prescreening activities when it passed the 1996 amendments. *Supra* at 3–4. FTC attorneys issued informal staff opinion letters about various aspects of FCRA, but even that limited practice ceased in 2001.

Until recently, there was little case law guidance because the amount of litigation under FCRA generally, and the prescreening rules in particular, was relatively modest. At the time KeyBank sent the prescreened mailer at issue in early 2005, there existed just a handful of district court cases (all of which had been decided in favor of creditors), and two appellate decisions concerning prescreening provisions. *Infra* at 12–13.

A creditor seeking to ascertain the meaning of FCRA's prescreening provisions in early 2005 therefore did not have the benefit of a well-developed body of consistent case law, nor authoritative agency regulations implementing the statute, to provide guidance about how to comply with the Act's requirements. *Amici*'s members commonly face similar situations, where a statute authorizes certain conduct but it arguably may not specify clearly how to implement a complaint business program. But the prescreening requirements presented a peculiar compliance challenge, because of the paucity of guidance other than from the statute and from an understanding of its balanced purpose. This context, *Amici* submit, helps to explain why KeyBank's interpretation of FCRA was objectively reasonable because it is founded on the statute's terms and consistent with the context and was not contrary to any other clear indication of how to follow the law.

B. KeyBank's Interpretation Of FCRA Was (And Is) Well-Grounded In The Text Of The Statute.

KeyBank asserted in the district court that it complied with Section 1681b because the statute contemplates a transaction between a consumer and creditor, so that liability is appropriate under that section only if the creditor dishonors a firm offer of credit when a responding consumer meets applicable conditions on the offer. "Memorandum in Support of Defendant's Amended Motion for Summary Judgment (Redacted)" (Sept. 28, 2006) ("*KeyBank Memorandum*") at 11-16. KeyBank further argued that the mailer it sent to introduce the offer need not contain all particular terms for credit that might ultimately be extended. *Id.* at 14. Those interpretations flow directly from the plain language of FCRA.

FCRA allows creditors to obtain consumer information "in connection with any credit . . . *transaction* . . . if . . . the *transaction* consists of a firm offer of credit." 15 U.S.C. § 1681b(c)(1)(B)(i) (emphasis added). The ordinary meaning of a "transaction" is "to do business with" or "negotiate" with another (*American Heritage Dictionary* 1362 (1980)), and in no sense focuses only on the opening of the transaction, the mailer.

The specialized definition enacted by Congress defines a "firm offer of credit" as "*any* offer of credit . . . that *will be honored* if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer." 15 U.S.C. § 1681a(*l*) (emphasis added). Referring to a "firm offer of credit" as one that "will be honored" reinforces the transactional nature of prescreening: Congress wanted the offer to be "firm," in that the creditor was bound to extend credit if the consumer expressed interest and met established conditions. Congress provided that a creditor could deny credit when certain conditions were not met, and that a creditor could assess those conditions based on "information in the consumer's application" for credit. *Id.* § 1681a(*l*)(1) & (2). Because an application necessarily is submitted after the consumer is alerted to the existence of the "firm offer of credit," the multiple references to the submission and consideration of an application further contemplate that liability would be based on the entire interaction between creditor and consumer, not the contents of any mailer alerting the consumer to the offer. A focus on compliance based on the statute naturally would examine whether the creditor had an appropriate overall process, and honored the "firm offer" as required by the statute.

The statute also supported KeyBank's related interpretation that the mailer did not need to contain all loan terms. As reflected in the definition of "firm offer of credit," receipt and evaluation of consumer information about creditworthiness and collateral are necessary elements to any credit granting decision. Congress anticipated that creditors would act only after that information was received, which is after the mailer was sent. In addition, many loan programs include features that vary in accordance with credit or collateral, so that the risk presented by a particular borrower's application can be taken into account in light of the borrower's stated preferences. As discussed further below (*infra* at 15–17) requiring that a mailer contain all material loan terms before a borrower has applied and before all of the underwriting information is gathered is impractical and not contemplated by the statute. A "firm offer of credit" program contemplates a process, culminating with an extension of credit, which is more than just the mailer which appears at the start of the process.

Apart from the affirmative evidence that the legality of the firm offer of credit depends on the entire transaction, the statute has no requirement that any introductory mailer recite all terms. FCRA does not even require written contact be made about the offer. Report to Congress at 7-9. And Congress only required creditors to disclose one term in the initial communication, any collateral requirements. 15 U.S.C. § 1681a(*l*)(3).[3] Meanwhile, the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA") and, for mortgages, the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 *et seq.* ("RESPA"), always have provided detailed rules for when, and in what format and detail, credit disclosures must be made. Among those requirements are regulations for the timing and content of disclosures early in the loan application process, so that consumer can shop for credit to a number of different providers. *E.g.*, 15 U.S.C. § 1631; 12 U.S.C. § 2604;

[3] Other mandated disclosures, such as the disclosure of the right to opt out from prescreened offers, are not part of the "firm offer" definition.

12 C.F.R. § 226.19. It certainly was objectively reasonable for a creditor to interpret this set of statutory choices to support the conclusion that additional disclosures about credit terms were not required by FCRA to be contained in a mailer.

Although appellant asserts that credit terms must be included in a prescreened mailer, and so show the offer has "value," in order to justify the access to consumer credit information given to the creditor, that viewpoint is not found in the statute or legislative history. When amending FCRA, Congress did not mention including "value" or specific credit terms in prescreened mailers – it instead stressed the transactional nature of the prescreening process. S. Rep. No. 104-185, at 32; H.R. Rep. No. 103-486, at 31-34 (1994). Congress did provide that consumers would be protected in two *other* ways: (1) by provisions allowing them to opt out of prescreening; and (2) by limiting the circumstances in which a creditor could deny a "firm offer of credit." 15 U.S.C. §§ 1681b(e)(1); 1681a(*l*). *See* S. Rep. No. 103-209, at 4, 10. Notably, commentary issued after passage of the 1996 amendments also did not mention any need for mailers to include specific credit terms or to demonstrate value for consumers.[4]

Under *Safeco*, KeyBank need not show its reading of FCRA is the best interpretation of the statute, just that it has "a foundation" in the statutory text. *Safeco*, 127 S. Ct. at 2216. KeyBank's position finds support in multiple aspects of the provisions enacted by Congress, and so meets the *Safeco* test. *Murray* v. *GMAC Mortgage Corp.*, 2007 WL 2317194, at *4 (N.D. Ill.

[4] The FTC issued a press release shortly after the 1996 amendments became effective that discussed only the opt out provisions passed by Congress. FTC Press Release (Sept. 29, 1997), at 3 (Exhibit 3 hereto). Other commentators stressed that the amendments expanded prescreening in response to the FTC's formerly restrictive interpretation, and noted that creditors could deny credit if consumers did not meet initial selection criteria, creditworthiness or collateral requirements. The need for a mailer to state value for a consumer, or include specific terms in the mailer, was not discussed. *See* articles attached as Exhibit 4.

July 23, 2007) (defendant's argument that Section 1681b does not require inclusion of credit terms is "reasonable," court enters summary judgment for defendant).

C. A Number of Federal Courts Have Embraced KeyBank's Interpretation of FCRA As Correct.

Just as in *Safeco*, where the Supreme Court found the insurer not to have willfully violated FCRA where its interpretation was well-rooted in the statute and had been adopted by a federal district court (127 S. Ct. at 2215-16), KeyBank's interpretation of FCRA also has been confirmed as correct by a number of courts. This cascade of authority establishes, at a bare minimum, that it was objectively reasonable for a creditor in KeyBank's position to read FCRA as it did.

In the first appellate decision concerning prescreening, in May 2004, the Fifth Circuit issued *Kennedy* v. *Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004). There, the plaintiffs received prescreened mailings with applications for credit cards, returned the applications, and were denied credit because review of their credit reports showed they failed to meet creditworthiness requirements. *Id.* at 837, 838. The Fifth Circuit analyzed the statutory provisions, including the definition of a "firm offer of credit," and affirmed dismissal of the Section 1681b claim. Citing two Northern District of Illinois decisions,[5] it noted that "a firm offer of credit under the Act 'really means a "firm offer" if you meet certain criteria.' " *Id.* at 841 & n.16. The Fifth Circuit rejected the contention that the prescreened mailers created a unilateral contract offer, and it did not state that the mailing needed to include specific credit terms or show "value" on its face.

[5] *Sampson* v. *Western Sierra Acceptance Corp.*, 2003 WL 21785612 at * 2 (N.D. Ill. Aug. 1, 2003); *Tucker* v. *New Rogers Pontiac, Inc.*, 2003 WL 22078297 at * 4 (N.D. Ill. Sept. 9, 2003). *See also Tucker* v. *Olympia Dodge of Countrywide, Inc.*, 2003 WL 21230604 at * 3 (N.D. Ill. May 28, 2003).

Since *Kennedy*, multiple federal judges have held that Section 1681b imposes liability only in one situation, where a creditor dishonors its "firm offer of credit" when a consumer applies and meets the preestablished conditions. *Sullivan* v. *Greenwood Credit Union*, 2007 WL 2309866, at *3–4 (D. Mass. Aug. 13, 2007); *Gelman* v. *State Farm Mutual Auto. Ins. Co.*, 2007 WL 2306578, at *5–7 (E.D. Pa. Aug. 9, 2007); *Phinn* v. *Capital One Auto Finance, Inc.*, 2007 WL 1675282, at *3 (E.D. Mich. June 11, 2007); *Gross* v. *Washington Mutual, Inc.*, 2007 WL 1404435, at *3–4 (May 10, 2007); *Dixon* v. *Shamrock Financial Corp.*, 482 F. Supp. 2d 172, 176–77 (D. Mass. 2007); *Soroka* v. *JP Morgan Chase & Co.*, 2007 WL 895249, at *4 (S.D.N.Y. Mar. 19, 2007); *Nasca* v. *J.P. Morgan Chase Bank, N.A.*, 2007 WL 678407, at *3 (S.D.N.Y. Mar. 5, 2007); *McFarland* v. *Calusa Investments, LLC*, No. 06-1519, slip op. at 7 (W.D. Pa. July 20, 2007) (attached as Exhibit 5).[6] KeyBank's interpretation that ties FCRA compliance to this question clearly "has been accepted by other courts." *GMAC Mortgage Corp.*, 2007 WL 2317194, at *6.

A number of these courts, and others, also have considered whether FCRA requires a creditor to include all material terms of the "firm offer of credit" in the initial mailing or otherwise show through the mailer that the proposed credit has "value." Although the law in this Circuit has been read by some to require such an approach,[7] there now is substantial case law, including in this Circuit, that sides with KeyBank's interpretation that FCRA creates no obligation to include all loan terms in the content of the initial mailer that introduces the credit

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6 Decisions after KeyBank sent its mailer in early 2005 are relevant in showing that its interpretation of FCRA was objectively reasonable; in *Safeco*, the Supreme Court noted that the district court had ruled in the insurers' favor, a decision that occurred long after the practice at issue was undertaken. *See, e.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

7 *Amici* do not comment on the extent to which this Court's decisions go as far as the district court applied them or on whether this Court's decisions should somehow be revisited.

offer.[8] Other courts attempt to harmonize any "value" requirement with FCRA's relative silence on the requirements for mailers by approving of prescreening programs – similar to KeyBank's (Brief of Appellee, at 40) – where the mailer contained at least one material term and disclosed an intention to make a loan to qualified applicants.[9]

Although the district court held that KeyBank violated FCRA by not including all material terms in its prescreened mailing -- a result *Amici* disagree with (*see infra* at 17) – KeyBank's position has a clear foundation in the statute and enjoys considerable judicial support. KeyBank should not be faulted -- nor found to have acted willfully, and subjected to statutory and punitive damages -- for reaching a contrary conclusion.

D. That KeyBank's Interpretation Of FCRA Was Objectively Reasonable Is Also Supported By The Practical Realities Of The Credit Granting Process.

The view of industry lawyers and compliance professionals that Section 1681b is satisfied so long as a creditor honors its firm offer of credit after a consumer applies and meets creditworthiness and collateral requirements, and that the introductory mailer need not contain

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8 *Cavin* v. *Home Loan Center Inc.*, 469 F. Supp. 2d 561, 569–70 (N.D. Ill. 2007); *Forrest* v. *Universal Savings Bank F.A.*, 2006 WL 3486913, at *3–4 (E.D. Wis. Dec. 1, 2006); *Putkowski* v. *Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053, 1060 (N.D. Cal. 2006); *Murray* v. *New Cingular Wireless Serv., Inc.*, 432 F. Supp. 2d 788, 792 (N.D. Ill. 2006); *Murray* v. *Sunrise Chevrolet, Inc.*, 441 F. Supp. 2d 940, 947 (N.D. Ill. 2006); *King* v. *Commerce Bancshares, Inc.*, 2007 WL 781732, at *3 (N.D. Ill. Mar. 12, 2007); *Price* v. *Capital One Bank*, 2007 WL 1521525, at *3–4 (E.D. Wis. May 22, 2007).

9 *McDonald* v. *Nelnet, Inc.*, 477 F. Supp. 2d 1010, 1013–14 (E.D. Mo. 2007); *Poehl* v. *Countrywide Home Loans, Inc.*, 464 F. Supp. 2d 882, 85–86 (E.D. Mo. 2006); *Klutho* v. *Home Loan Center, Inc.*, 486 F. Supp. 2d 957, 960–61 (E.D. Mo. 2006); *Poehl* v. *Countrywide Home Loans, Inc.*, 2007 WL 2302491, at *5 (E.D. Mo. Aug. 7, 2007); *Klutho* v. *Corinthian Mortgage Corp.*, 2007 WL 2002495, at *2–3 (E.D. Mo. July 5, 2007); *Phinn* v. *Capital One Auto Finance, Inc.*, 2007 WL 167528 (E.D. Mich. June 11, 2007); *Klutho* v. *Shenandoah Valley Nat'l Bank*, 2007 WL 1527074, at *3 (E.D. Mo. May 22, 2007); *Klutho* v. *GE Money Bank*, 2007 WL 162291, at *3 (E.D. Mo. Jan. 17, 2007); *Klutho* v. *Home Loan Center, Inc.*, 2006 WL 3836389, at * 3 (E.D. Mo. Nov. 1, 2006); *Ludditt-Poehl* v. *Capital One Auto Finance, Inc.*, 2007 WL 2428044, at * 3 (E.D. Mo. Aug. 21, 2007).

all loan terms, also was (and is) objectively reasonable because it is consistent with how consumers and borrowers interact when credit is requested.

Congress' choice to allow "firm offer of credit" transactions, which involve prescreening of consumers yet permit offers to be conditional, properly recognized that consumer credit ordinarily cannot be extended based solely on the limited consumer report information supplied to a company through prescreening. Prudent creditors make loans to individuals who are able to repay them, and make secured loans with adequate security in case a borrower defaults. Congress upheld the bedrock principles of creditworthiness and collateral in the definition of a "firm offer of credit," but these matters cannot be assessed fully before a solicitation is sent. A creditor's decision as to whether a particular borrower can repay a loan (creditworthiness) is typically based on review of the consumer's income, employment, assets, expenses, and debt-to-income ratio – but that information is not provided to creditors by the credit bureaus. *Infra* at 16–17. Similarly, information about whether there even is equity available to secure the loan (collateral) is not found in a consumer report. Both types of information must be provided by a consumer only *after* he responds to a prescreened mailer.[10] Moreover, it would be highly impractical to put all material terms in the introductory mailer, so that "value" is shown, because the terms of many loan programs vary depending on creditworthiness and collateral information received and evaluated only through the application and underwriting process. For these reasons, it is natural and appropriate that the compliance focus in the industry was on whether the "firm offers" were honored, not on the content of the mailer.

[10] S. Rep. No. 103-209, at 10 ("The Committee is also aware that certain information used to determine creditworthiness is not contained in consumer reports. Consequently, an individual may meet the criteria used to create the prescreened list, yet not [be] creditworthy").

Requiring that fixed terms be contained in a prescreened mailer also ignores that the loan origination process is not, by its nature, static. During the underwriting process, information in the application is verified, additional information is collected and analyzed from various sources, and the borrower's eligibility under applicable guidelines is established. Throughout this process, it is commonplace for material terms in a prospective loan to vary depending on the results of this analysis. In addition, many borrowers choose to leave material terms of the loan open even after they commit to go forward with the transaction by, for example, not "locking-in" an interest rate. Congress recognized the fluid nature of credit transactions in the TILA and RESPA disclosure rules mentioned above. *Supra* at 10–11.

These real-world circumstances further demonstrate why KeyBank and creditors in its position did not willfully violate FCRA when they concluded that FCRA did not require that all material terms be included in a prescreened mailer. Unfortunately, in the wake of some decisions in the courts that appeared to be to the contrary, some creditors have ceased prescreening activities entirely while others limited the content of their solicitations to quoting specific but very disadvantageous terms that would be justified only for the least creditworthy consumer. Congress could not have intended these results, which harm both creditors who wish to extend credit and consumers seeking access to available credit products.

E. KeyBank Did Not Willfully Violate FCRA Because Its Interpretation Was Not Objectively Unreasonable Even In Light of the *Cole* Case and Other Authority Appellant Now Cites.

Bruce contends that "there was clear guidance as to the law" from courts and federal agencies that not only should have caused KeyBank to adopt a different interpretation of FCRA, but also means KeyBank willfully violated the law when it did not do so. App. Br. at 17. However, no uniform, clear rule existed by which KeyBank (or other of *Amici*'s members) could have concluded that its conduct was illegal.

1. *Cole Did Not Render KeyBank's Position Objectively Unreasonable.*

Bruce places primary emphasis (App. Br. at 18-21) on this Circuit's decision in *Cole* v. *U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004), contending in essence that *Cole* wiped away completely all reasonable grounds – in the statute and its context, based on *Kennedy* and other cases, and in practical realities – for KeyBank to have interpreted FCRA as it did. The contention is unsupportable.

As an initial matter, appellant's reliance on *Cole* to establish willfulness assumes a conclusion that KeyBank's mailer did not satisfy FCRA in the first place. As KeyBank persuasively argues in its brief (Appellee Br. at 43-49), even if the content of the mailer controls liability, the mailer passes muster under this Court's cases and judgment for KeyBank should be affirmed on that basis.

Nothing in *Cole* is to the contrary. Indeed, a powerful argument can be made that *Cole* and its "value" analysis are simply inapplicable to a case such as this where the offer was not a sham to sell another product. *See Donovan* v. *City of Milwaukee*, 17 F.3d 944, 952 (7th Cir. 1994) (facts of earlier decision "too different" from case at issue, and "not sufficiently particularized, to put potential defendants on notice" that conduct was illegal). And *Cole* hardly established a hard-and-fast rule that the content of the mailer dictates liability, for this Court's order was to remand the case for discovery so that the "entire offer" could be considered. 389 F.3d at 728.

This Court should not find in any event that KeyBank should have changed its position solely based on *Cole*, even if its "value" analysis supports appellant's view of KeyBank's liability, because of the decision's limited nature. *Cole* was not a Supreme Court decision setting national guidance, nor an *en banc* ruling unifying conflicting Circuit decisions. Fed. R. App. P. 35(a)(1). Indeed, a Fifth Circuit decision prior to *Cole* (*Kennedy*) interpreted Section 1681b differently and in a manner consistent with a focus on the "transaction" and not on the mailer. *Cole* was not by nature authoritative guidance about the meaning of Section 1681b with any nationwide application such that it settled for all time the proper interpretation of FCRA. *See Colby* v. *J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (court "is not absolutely bound" even by a prior panel decision and "must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision"); *Brown* v. *Nationsbank Corp.*, 188 F.3d 579, 588 (5th Cir. 1999) (law not clearly established in a circuit until *en banc* decision issued on the point). By its nature, *Cole* did not render reliance on the statute and on other case law so unreasonable as to be willful.

Industry compliance officials and lawyers frequently grapple with the patchwork nature of the law as it develops, in light of how statutes are interpreted and clarified over some period of time. As a general legal principle, a company ordinarily is not found to have acted willfully when the applicable law is unclear or unsettled. *See, e.g., EEOC* v. *Westinghouse Electric Corp.*, 869 F.2d 696, 713 (3d Cir.), *vacated on other grounds*, 493 U.S. 801 (1989); *Princeton University Press* v. *Michigan Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996); *Whitfield* v. *City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985). *Cole* was only second circuit court level decision about Section 1681b, and subsequent experience has shown that it hardly settled the law as the proper interpretation of FCRA, even in this Circuit.

Courts have interpreted *Cole* in numerous ways. In a Northern District of Illinois decision issued shortly after *Cole,* the court limited the decision as one that concerned only a "sham" solicitation. *Perry* v. *First Nat'l Bank*, 2005 WL 4709219, at *2 (N.D. Ill. Sept. 13, 2005), *aff'd* 459 F.3d 816 (7th Cir. 2006). Another decision appeared to adhere to an analysis, like KeyBank's, that focuses on the transaction and not on the mailer. *Murray* v. *Household Bank (SB), N.A.*, 386 F. Supp. 2d 993, 995–96 (N.D. Ill. 2006).

Following this Court's *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006) decision, applying *Cole*, the law in cases filed in this Circuit and elsewhere became *less* clear, with decisions fracturing into at least three camps. Some courts have held that FCRA requires a creditor to include all material terms of the "firm offer of credit" in the mailer, and to state those terms with specificity. *See, e.g., Murray* v. *IndyMac Bank, F.S.B.*, 461 F. Supp. 2d 645, 649–52 (N.D. Ill. 2006). Others have held that every credit term need not be stated, and allowed a creditor to satisfy FCRA if only some terms were stated, or if a range of interest rates or credit amounts was indicated. *Supra* at 14 n.9. A third line of authority, discussed above, has assessed the liability question with reference solely to whether the creditor's mailer indicated "nominal" value to the consumer, and dismissed claims when even only one credit term (such as minimum loan amount) indicated nominal value existed. *Supra* at 14 n.11. One creditor has received opposite results from two federal courts, both purporting to apply *Cole,* reviewing the identical prescreened mailer.[11]

It is recognized in other areas of the law that a litigant does not willfully violate the law unless the source of authority (such as statute) clearly proscribed its conduct. As the Supreme Court has held in cases under 42 U.S.C. § 1983, if a governing standard is "general[]" or "abstract," a litigant can too easily be found after-the-fact to have violated that law. *Anderson* v. *Creighton*, 483 U.S. 635, 640 & n.2 (1987). Accordingly, liability cannot be imposed unless "[t]he contours of the right [are] sufficiently clear that a reasonable [person] would understand

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[11] *Compare Walker* v. *Calusa Investments, LLC*, No. 06-508 (N.D. Ind. Feb. 27, 2007) (denying motion to dismiss) *with Dixon* v. *Calusa Investments, LLC*, No. 06-442T (D.R.I. Feb. 20, 2007) (report recommending that motion to dismiss be granted) (Exhibits 6 and 7 hereto).

that what he is doing violates that right." *Id.* at 640. *See also Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (liability only if "it would be clear to a reasonable [person] that his conduct was unlawful in the situation he confronted"); *Lott* v. *Pfizer, Inc.*, 492 F.3d 789, 792–93 (7th Cir. 2007) (considering whether defendant had objectively reasonable basis to remove a lawsuit from state court).[12]

Cole's "value" standard, a gloss on the statutory text, is just such a vague and general rule that is ill-suited as a basis for finding a willful violation of law. Value is a subjective measure, about which reasonable minds often can disagree. *See, e.g., Perry* v. *First Nat'l Bank*, 459 F.3d 816, 826 (7th Cir. 2006) (deciding, in 2-1 decision, that prescreened offer had "value"). At least until some more definitive guidance is given, by some source, about how to evaluate "value" in a prescreened program, reasonable persons -- creditors, regulators, judges and others -- might disagree whether the subject conduct meets such a requirement. For this reason, reliance on the content of the statute itself was plainly not objectively unreasonable.

It is unclear how the various approaches among the federal courts handling prescreening cases will be resolved. What is clear is that, at the very least, the proper interpretation of Section 1681b is "by no means open and shut." *Wilson*, 526 U.S. at 615. In these circumstances, it cannot be said that *Cole* settled the law in a way that made KeyBank's interpretation of FCRA a willful violation of the law because it was objectively unreasonable.

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[12] Qualified immunity is judged by the "objective legal reasonableness" of the defendant's position. *Anderson*, 483 U.S. at 639. In *Lott*, this Court applied that standard because the removal statute (like the immunity doctrine) seeks to balance competing interests (encouraging removal of cases with a federal nexus, while discouraging delay resulting from frivolous removals). Qualified immunity cases therefore are helpful in judging willfulness in this appeal: FCRA, as well and the prescreening provisions at issue, also seek to balance competing interests.

2. *No Authoritative Agency Guidance Existed.*

Appellant also tries to argue that agency guidance existed by which KeyBank should have known its conduct was illegal. The contention is easily dismissed, for it suggests an industry participant should have relied on superseded guidance and a lawsuit brief, rather than the statute, to guide its conduct.

Appellant first cites the FTC's 1990 commentary about FCRA, arguing it should have caused KeyBank to act differently. App. Br. at 23. However, that commentary predated the 1996 amendments at issue here, when Congress *repudiated* the agency's excessively narrow view of prescreening.

His second argument is that the FTC's amicus brief in *Cole* provided authoritative guidance about the meaning of Section 1681b. App. Br. at 23-24. The contention that KeyBank willfully violated FCRA because it did not "follow" the views in an *amicus* brief is frivolous. FTC does not publish briefs in the Code of Federal Regulations or the Federal Register; indeed, FTC does not have regulation writing authority in this area at all. A creditor seeking to assess its legal obligations must review the court's conclusions about the law in a judicial decision, not arguments advanced by parties in their briefs.[13]

[13] In any event, the FTC did not urge this Court in *Cole* to hold that liability should be based on the language of a prescreened mailer alone, or that a creditor needed to include all material credit terms. To the contrary, the FTC argued that liability should turn on "a variety of factual issues," that should be the subject of discovery, including "Did any consumers apply for, or actually get, the credit?" and "If not, why not?" Exhibit 8 at 11, 14, 21.

CONCLUSION

In the end, *Amici* urge this Court to recognize that the statute, the context, the case law, and practical realities require the conclusion that KeyBank's interpretation of the statute was objectively reasonable (if not correct). For these reasons, KeyBank did not willfully violate FCRA, and the Court should affirm the judgment of the district court in favor of KeyBank.

Respectfully submitted,

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Dated: September 6, 2007

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,902 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 SP2 in twelve-point Times New Roman type.

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Mortgage Bankers Association
September 6, 2007

LIBW/1649779.3

CERTIFICATE OF SERVICE

The undersigned attorney certifies that I have, this 6th day of September, 2007, served by first-class mail the "Motion of the American Financial Services Association, Consumer Mortgage Coalition, and Mortgage Banks Association For Leave to File Brief *Amicus Curiae* Supporting Appellee and Urging Affirmance" and "Brief Amicus Curiae of the American Financial Services Association, Consumer Mortgage Coalition, and Mortgage Bankers Association Supporting Appellee And Urging Affirmance" by depositing the same in the U.S. Mail located at 750 Lake Cook Rd., Buffalo Grove, IL 60089 before the hour of 5:00 p.m. with proper postage prepaid:

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