

*Zurich  
American  
Insurance  
Company v.  
Fieldstone  
Mortgage  
Co., Court  
Holds Insurer  
Must Provide  
Coverage for  
Privacy-Related  
FCRA Claims*

OVERVIEW

Under a recent decision by the United States District Court for the District of Maryland, companies sued for allegedly violating the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§1681-1681u, may be able to offset their defense costs and any resulting liability through insurance. That case, *Zurich American Insurance Company v. Fieldstone Mortgage Co.*, No. CCB-06-2055, 2007 U.S. Dist. LEXIS 81570 (D. Md. Oct. 26, 2007), which is one of the few cases to address the availability of insurance coverage for FCRA claims, held that the insurer had a duty to defend its policyholder against the FCRA claims at issue, because the alleged FCRA violations fell within the scope of the “personal and advertising injury coverage” in the policyholder’s commercial general liability (“CGL”) policies.

This holding is significant for several reasons. First, *Fieldstone* likely will have repercussions that extend far beyond the financial services area in which it arose. Although *Fieldstone* involved a financial services company, FCRA is not limited to such companies. To the contrary, virtually any company that handles consumer personal information faces liability risk under FCRA. Second, litigation squarely addressing whether CGL policies provide

coverage for FCRA claims, and other consumer privacy-related claims, is still at a relatively nascent stage, and *Fieldstone* is therefore one of relatively few cases to address the issue. Third, *Fieldstone* confirms that it is crucial for policyholders to evaluate their risks prior to purchasing insurance, and to ensure that the purchased insurance covers those business risks.

CASE BACKGROUND

*Fieldstone* involved a dispute over insurance coverage for defense costs incurred defending a FCRA-based consumer suit. In 2005, Fieldstone Mortgage Company (“Fieldstone”) sent Jeff A. Rhodes (“Rhodes”), among others, a pre-screened offer to refinance his mortgage. *Fieldstone*, 2007 U.S. Dist. LEXIS 81570.<sup>1</sup> Rhodes subsequently filed suit against Fieldstone, alleging that Fieldstone violated FCRA by improperly accessing his and others’ credit reports and then using that information to solicit their business. *Id.* Fieldstone’s insurer, Zurich American Insurance Company (“Zurich”), initially agreed to defend Fieldstone under a complete reservation of rights, but Zurich later filed a declaratory judgment action in federal court seeking a declaration that it had no duty to defend or indemnify Fieldstone for the FCRA claims. *Id.*

<sup>1</sup> Other cases include a 1996 decision by the United States Court of Appeals for the Sixth Circuit, which determined that so long as the defendant did not willfully violate FCRA, “we do not believe that [the insurer] should be excused from providing indemnification.” *Aetna Cas. & Surety Co. v. Sunshine Corp.*, 74 F.3d 685, 688 (6th Cir. 1996). More recently, a court in the Northern District of Illinois held that “the FCRA allegations in the underlying complaint fall within the ‘advertising injury’ provision in the Sentry policy and, therefore, [the insurer] had a duty to provide [the defendant] a defense.” *Pietras v. Sentry Ins. Co.*, No. 06 C 3576, 2007 U.S. Dist. LEXIS 16015, \*11 (N.D. Ill. Mar. 6, 2007).

The CGL policies at issue contained standard-form language providing coverage for “personal and advertising injuries,” which was defined to include, among other things, an “oral or written publication, in any manner, of material that violates a person’s right to privacy.” *Id.* at \*3-4. The availability of coverage therefore turned on the court’s analysis of two issues: (1) whether Rhodes’ FCRA claim alleged a violation of a “right to privacy,” and (2) whether Rhodes’ information was “publicized” through oral or written publication. *See id.* at \*8.

As to the first question, the court held that the FCRA claim asserted against Fieldstone implicated a right to privacy within the meaning of the policies’ “personal and advertising injury” definition. The court noted that FCRA was enacted “to ensure that consumer reporting agencies exercise their grave responsibilities with a respect for the consumer’s right to privacy.” *Id.* at \*9 (internal citation and quotation marks omitted). The court suggested that some privacy rights violations may not be entitled to coverage, but held that privacy rights related to the “content” of a publication are covered. The court concluded that a publication disclosing that a consumer’s personal information was improperly accessed related to the “content” of the publication and therefore fell within the scope of the Zurich policies’ coverage. *Id.* at \*12.

The court also answered the second question in favor of coverage, holding that the solicitation letter allegedly sent by Fieldstone to Rhodes constituted a “publication” within the terms of the advertising injury provision of the policy. The court interpreted “publication” to include “the printing and mailing of written solicitations.” *Id.* at \*13. The court rejected Zurich’s argument that a “publication” must be distributed to third-

parties, holding instead that “publication” does not require mass distribution to the public and “need not be to a third party” in order to implicate coverage under the advertising injury provision of the policies. *Id.* at \*14. To the contrary, a publication can exist even when “the party whose private material was published and the party who received the published information are one and the same.” *Id.* at \*15.

### WHAT THE DECISION MEANS FOR POLICYHOLDERS

*Fieldstone* has broad implications for all companies at risk for FCRA and other privacy-related claims. Although the case involved a mortgage lender, FCRA’s regulatory scheme applies not just to financial services companies, but to all companies who access and use credit information. With FCRA-related lawsuits on the rise, all companies at risk for FCRA claims should carefully review their insurance portfolios to determine if insurance is available to cover the defense and liability costs associated with such claims.

In conducting this review, companies should closely examine *Fieldstone*, which is one of the few cases directly addressing the availability of coverage for FCRA claims. The advertising injury provision at issue in that case is a standard-form provision common in CGL policies, and the analysis and principles set forth in *Fieldstone* can be broadly applied to analyze the availability of coverage. *See Valley Forge Ins. Co. v. Swiderski Elec., Inc.*, 860 N.E.2d 307, 318 (Ill. 2006); see also ISO Form CG 00 01 10 01. However, because some policy provisions provide arguably more limited coverage, policyholders should have their policies reviewed by insurance counsel to determine whether the policies provide adequate protection for potential FCRA violations.

On a going-forward basis, companies should guard against insurers introducing exclusions into their policies that arguably might limit the availability of privacy-related coverage. For example, with the rise of lawsuits based on violations of the Telephone Consumer Protection Act (“TCPA”), the Insurance Services Office introduced a policy expressly stating that its coverage does not apply to “[the TCPA], including any amendment of or addition to such law; or . . . [a]ny statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.” As FCRA lawsuits become more common, insurers may seek to introduce similar exclusions for FCRA claims.

Companies at risk also should consider purchasing supplemental coverage, such as Privacy Liability Insurance Coverage. Such coverage should fill in any arguable gaps in existing advertising and personal injury CGL coverage, such as coverage for the collection, sale, and sharing of private information.

Finally, policyholders should keep in mind that no matter what type of insurance they have, given the rapidly-changing pace of technology and privacy regulation, as well as the continued debate over the existence and scope of privacy-related coverage in CGL and other policies, insurers may still argue that their particular claims are not covered. It is therefore essential that companies, particularly those at known risk for privacy-related claims, consult with insurance coverage counsel to determine whether their risks are currently covered, as well as covered on a going-forward basis.

**FOR MORE INFORMATION**

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