IN THE SUPREME COURT OF THE UNITED STATES

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KAREN L. JERMAN, :

Petitioner :

v. : No. 08-1200

CARLISLE, MCNELLIE, RINI, :

KRAMER & ULRICH LPA, ET :

AL. :

- x

Washington, D.C.

Wednesday, January 13, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:21 a.m.

APPEARANCES:

KEVIN K. RUSSELL, ESQ., Washington, D.C.; on behalf of Petitioner.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

GEORGE S. COAKLEY, ESQ., Cleveland, Ohio; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:21 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-1200, Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich.

Mr. Russell.

ORAL ARGUMENT OF KEVIN K. RUSSELL

ON BEHALF OF THE PETITIONER

MR. RUSSELL: Mr. Chief Justice, and may it please the Court:

Congress rarely makes ignorance of the law a defense to civil liability, and the Fair Debt Collection Practices Act is no exception to that rule. While it may seem unfair to hold defendants in some sense strictly liable for legal mistakes in the civil context, the accumulated wisdoms of generations of legal practice has been that attempting to fix that unfairness through a mistake of law defense causes more harm than it prevents.

And as a consequence, in light of that subtle understanding, courts should not read a Federal statute to establish a mistake of law defense, unless Congress quite plainly makes that intent to do so clear. And in this case, nothing in the text, structure, or the history of the bona fide error provision of the FDCPA

indicates such an intent.

I could begin with the -- the text of the statute. It is not enough under the bona fide error provision that the defendant's violation be in good faith, that it have been bona fide.

There is an additional element, that the defendant has to show that the violation was not intentional. And in common legal discourse, a violation is not rendered unintentional simply because the defendant misunderstood the legal consequences of its actions.

CHIEF JUSTICE ROBERTS: I think -- reading "intentional" the way you just articulated is absolutely right, but when you add -- I don't see what work "bona fide error" does in the statute, if "intentional" should be read in this case to mean what you say.

MR. RUSSELL: Well, I think it captures the circumstance in which somebody makes a mistake of fact, but does so and with -- not in good faith. I think --

CHIEF JUSTICE ROBERTS: But you say: Well, intentional means you meant to send out the document; you meant to serve it; in other words, no specific intent requirement. But if -- a bona fide error, it seems, doesn't make the activity not intentional under the traditional understanding of intentional.

MR. RUSSELL: But I think that's right. I think both provisions do separate work, and so that if all it took to show that something wasn't intentional is that you didn't mean to violate the law, it would be very difficult to understand what work "bona fide" was doing in that circumstance.

And I think Congress included the bona fide requirement in order to capture instances in which people make factual mistakes, but not in good faith.

JUSTICE SCALIA: I really don't think that the -- the word that we're wrestling with here is the -- the word "intentional." It seems to me it's the word "violation," because violation -- when it says the violation was intentional or unintentional, does "violation" mean the act that constitutes a violation of the law, or does "violation" mean the -- the fact of violating the law?

MR. RUSSELL: I think that is the central question here and it is Respondents' best argument. I think that the word "violation" is best understood to refer to the act. That is how this Court has construed that word in the statutory phrase "knowing violation" in a number of cases, and that's how the courts of appeals have construed the term "intentional" -- or "intentional violation" in the Migrant and Seasonal Agricultural

Workers Protection Act, which we cited in our brief.

I did mention in our brief that it is a less usual formulation, "intentional violation," and at the time we wrote our briefs we weren't able to find any cases from this Court construing that particular term.

JUSTICE BREYER: So what -- the part that's worrying me most is where the lawyer is the debt collector. All right? So he's within the act, and he has a client of debt collectors, and the clients all say: Please go collect the debt. And they say: We want to do this, like in this -- suppose in this case, they say: Tell us if you don't owe it; ask them to write a letter to that effect; we won't collect it; now, is that legal?

And the lawyer looks up everything in sight and says, yes, it's legal. And then that's what he thinks. All the circuits have said this. And then he asks the FTC and they say, yes, it's legal. So there he is. Everybody's told him it's legal. And lo and behold, this Court, surprisingly, holds the opposite. Well, he shouldn't be liable. And if he has to worry about that, he can never defend his client. The only answer is: Whatever the man says who is opposed to your client, that's what you have to do. That can't be the meaning of this statute.

MR. RUSSELL: Well, let me address the hypothetical, to make sure I understand it. If we're talking -- well, first of all, if we are talking about a case in which they've asked the opinion of the FTC, they are entitled to the safe harbor defense, because Congress specifically --

JUSTICE BREYER: No, no. What the FTC said is: We won't give you one.

MR. RUSSELL: Okay. Well, in that circumstance, I think it's important to distinguish between lawyers who are simply giving advice to debt collector clients -- they're not covered by the act. It's only when the lawyer engages in debt collection activities himself. And a lot of the time the debt -- the lawyer is simply --

JUSTICE SCALIA: Does litigation constitute debt -- debt collection activity?

MR. RUSSELL: Yes. This Court held in Heintz that litigation can be a form of --

JUSTICE BREYER: So he is a lawyer litigating for a client. That was my hypothetical.

JUSTICE SCALIA: Okay.

JUSTICE BREYER: Yes.

MR. RUSSELL: In that circumstance -- in that circumstance, I think yes, the lawyer can be held

liable for -- for mistakes. But to the extent this Court --

JUSTICE BREYER: It's not a mistake. The point is, in a sense, that any decent lawyer would say that's what the law was; that sometimes lawyers get surprised because courts don't always act the way they think is reasonable.

MR. RUSSELL: And when that happens, their clients are almost never protected from liability, for -- because they did what their lawyers reasonably told them to. And the antitrust --

JUSTICE BREYER: Why aren't they in good faith?

MR. RUSSELL: The lawyer?

JUSTICE BREYER: Both.

MR. RUSSELL: Well, certainly, because there generally is a mistake of law defense.

JUSTICE BREYER: Ah, but that's in your view of it. I am saying that the opposite view of it is that your view of it puts lawyers in an impossible position, let alone the client.

MR. RUSSELL: Well --

JUSTICE BREYER: It -- it's not just that it's unfair. It's worse than unfair. The lawyer is under an obligation to represent his client, and he

cannot do anything but tell the client: Just pay money to this particular plaintiff whose view of the law is totally contrary to every circuit court that's ever decided it. Now, how can you put lawyers in that position?

MR. RUSSELL: I think the lawyers are not in a terribly different position than is, for example, the executive of a company that has a fiduciary duty to its shareholders to maximize profits and is considering a venture that could violate the antitrust laws. And in that circumstance, they have to make a calculated judgment, because the antitrust laws don't have a mistake of law defense. And neither does any other civil --

CHIEF JUSTICE ROBERTS: But you are sort of begging the question there. I mean, the antitrust laws also don't have a bona fide error defense, and the question is whether that includes a legal mistake defense.

MR. RUSSELL: That's right. And my -- my point simply is that you shouldn't read that defense as necessarily creating a mistake of law defense simply because you think it's so unfair, because that unfairness is simply common.

JUSTICE BREYER: But it -- but it suggests

that you would like a -- a sensible interpretation of this that avoids the result I said, if possible. And there is a different way of going about it, which is you could say that a bona fide error in respect to a lawyer imposes much higher standards on that lawyer than it does on most -- and it's simply a client -- that before you can call an error bona fide, that lawyer really has to look into it. He has to have asked the FTC. He has to have gotten -- and made an effort to get a letter back. And if there are one or two circuits that hold the other way, well, where? And if you don't, you are not bona fide.

Now, that would get to virtually the same place but it would protect the lawyer against true legal surprise.

MR. RUSSELL: Well, I do think that if you disagree with us, that's the better reading than the second. That's not the reading most courts have given. It's not the reading that the Sixth Circuit gave in this case.

But I think there is every reason to think that if Congress was concerned about the especially problematic application of this statute to lawyer conduct and particularly to litigation conduct, it would have expected courts to deal with that in different way,

and not through the bona fide error defense, which, after all, applies to lawyer who are engaging in the same conduct as lay debt collectors and to nonlawyers alike. It's a very blunt instrument for dealing with this problem.

CHIEF JUSTICE ROBERTS: One -- one of the things you have to include on this initial communication is the name of the creditor, right?

MR. RUSSELL: Yes.

CHIEF JUSTICE ROBERTS: Okay. So let's say the bank that is the creditor is being sold or taken over. And, you know, you have heard that, well, they have merged, but, you know, the closing date of the merger is two months later or whatever. It's just not clear what the name of the creditor is. So you -- you are not a lawyer, but you are trying to collect the debt, and you go -- you fill in, I -- it's either A or B, and you say: I think it's A, and you fill it in and it turns out that it's -- it's B. Let's say that's a bona fide error. Okay?

But if you are sitting there as the debt collector and you say: I don't know if it's A or B. And you say: I know; I'll call the lawyer. You call the lawyer and the lawyer says: Oh, it's -- it's B -- I mean, it's -- it's A. And you put down A and it turns

out it's wrong, aren't -- you are in a worse position if you ask the lawyer than if you didn't, right?

MR. RUSSELL: No, because in either circumstance it would be a factual error. It would be subject to the bona fide error defense.

CHIEF JUSTICE ROBERTS: No, it's a -- it's a legal -- the lawyer looks at it and says: Well, you know, the merger is not going to close for whatever, but I think it's still this bank. And it turns out his legal analysis of who the creditor is was wrong.

MR. RUSSELL: Well, again, I'm not sure that that's a legal -- but assuming that it is a legal mistake --

CHIEF JUSTICE ROBERTS: Yes.

MR. RUSSELL: -- I think that the client is not -- I mean, if it's a legal mistake, it's a legal mistake for the client as well as the lawyer, and I think either one of them would be in the same position.

CHIEF JUSTICE ROBERTS: But if the client just says: I'm not going to ask the lawyer; I'm just going to make -- I think it's A -- it's a bona fide error, but it's an error -- he gets the benefit of that position. But if he asks the lawyer, he doesn't get the benefit.

MR. RUSSELL: Well, under our view, he

wouldn't get benefit under either circumstance, because it would be a mistake of law and the statute doesn't cover it.

If I could finish my answer --

CHIEF JUSTICE ROBERTS: Who the -- who the creditor is is necessarily a mistake of law, rather than fact?

MR. RUSSELL: No. That's why I -- I initially told you I thought it was a mistake of fact, and that would be a mistake of fact for the lawyer or the client. And I think actually, in that scenario --

CHIEF JUSTICE ROBERTS: Well, is it a mistake of fact if the lawyer does legal research to find it out?

MR. RUSSELL: Well, I don't think --

CHIEF JUSTICE ROBERTS: He looks and he says: Well, it depends upon the date of the closing of the merger, not the announcement.

MR. RUSSELL: Well, if the --

CHIEF JUSTICE ROBERTS: And it turns out that's a legal mistake.

MR. RUSSELL: Then I -- I don't think the defense would apply and I don't think it would apply to the client, either.

But I do think that if you are especially

concerned about applying the law to lawyers and to litigation, it's much more likely that Congress intended the Court to deal with that in a tailored way by interpreting the substantive provisions of the statute with that particular problem in mind.

Knowing that Congress didn't have litigation conduct specifically in mind when it enacted this statute, because at the time lawyers were excluded from the act altogether, and keeping in mind in addition that Congress presumably didn't intend the act to unreasonably interfere with litigation collection methods, and the constitutional aspects --

JUSTICE BREYER: So how -- how do we do that? Because you see, you are quite right. The client runs the same risk in antitrust law in a whole other lot of areas. Absolutely right. But once you bring the lawyer into it, the lawyer has what he doesn't have in an antitrust case under your reading, which is an incentive to distort the law in order to protect his own pocketbook. And that is, to me, a big problem.

So you say there is -- there is a -- a way around that. And what?

MR. RUSSELL: And that is to recognize that, as this Court held in Heintz, that Congress didn't intend for every unsuccessful lawsuit to result in

liability under this statute. Plaintiffs have to point to some particular provision of the statute that was violated by what the lawyer did in litigation.

And for example, the lawyer makes a mistake about the statute of limitations. Some courts have held that that constitutes a violation of the provisions against deceptive practices or unconscionable collection practices --

JUSTICE BREYER: The lawyer writes a letter to the client. The first thing the lawyer tries to do is to settle the case. "Dear Client: Please send me the money, and by the way, if you don't owe it, tell me in writing."

Okay? That's what the lawyer does. That's a legal activity. It's at the heart of practicing law, because nobody goes to court anymore. And -- though he will, if necessary, so he's part of this.

Now, how do we get out of this problem that I'm putting? I'm really looking for an answer to that, because I think it's a big problem.

MR. RUSSELL: Well, typically -- I don't know that that's a uniquely lawyerly activity. Lay debt collectors do that all the time.

But to the extent you think that Congress could not have intended that kind of activity to be

subject to liability when somebody makes a reasonable legal error, I think it's more likely that Congress intended you to look at what provision of the statute are they saying was violated and construe that provision in a way that is consistent with your expectations about what Congress would have meant, rather than providing -- rather than, you know, taking the bona fide error provision to do that work, when the bona fide error provision is much broader and would apply to all kinds of mistakes of law, including having this consequence of basically giving debt collectors the opportunity to take the narrowest possible construction of -- of consumers' rights, as long as the -- the question is unsettled.

The other reason to think that Congress wouldn't have intended this to be the solution to that problem is that at the time they wrote the bona fide error defense, lawyers weren't included, so this could not have been Congress' intended solution to that particular problem.

And at the time Congress used this language, it was borrowing it from the Truth in Lending Act, where it had an established meaning in the circuit courts as not including the mistake of law defense, and that remained the interpretation of the Fair Debt Collection Practices Act provision as well, for -- for nearly

25 years.

It wasn't until 2002 that the court of appeals first suggested that it did not extend to legal mistakes.

JUSTICE SOTOMAYOR: Counsel, if the district court were to say: You violated the act; this was a mistake of law not covered, but I'm not awarding statutory damages because --

MR. RUSSELL: I think they --

JUSTICE SOTOMAYOR: -- in this case, just for the reasons here, you did something the Sixth Circuit -- or that the circuit law said was permissible, so you didn't do it -- you did it intentionally because you did the violation of the act, but it was based on a mistake of law.

MR. RUSSELL: I do think that that's a perfectly permissible exercise of discretion. Congress gave the district court discretion with respect to statutory damages, and that's another way of dealing with this problem.

JUSTICE KENNEDY: Well, what about attorneys' fees?

MR. RUSSELL: No, the attorneys' fees is not discretionary in that sense.

And so there are other structural reasons,

though, to think that Congress knew how to make a mistake of law defense clearly and did not do so here.

Congress did provide, in effect, a mistake of law defense to civil penalties. The civil penalties provision that applies to this statute, which is at 15 U.S.C. 45(m)(1), and that's quoted in relevant part on page 24 of the blue brief, provides for very serious civil penalties for somebody who acts with actual knowledge or knowledge fairly implied that the act was prohibited.

And I think that provision shows two things. One, it shows that Congress knows how to make an express -- how to expressly speak to a defendant's knowledge of the unlawfulness of his conduct.

And in addition, it shows that Congress treated knowledge of unlawfulness as an aggravating circumstance, as something deserving of special punishment, rather than, as Respondents would have it, most of the time being a minimum prerequisite for any liability at all.

JUSTICE SOTOMAYOR: Congress wrote this statute to -- to have a cottage industry of litigation. These were attorneys --

MR. RUSSELL: Well, I -- I would not say that. I would say that Congress wrote this statute, in

a way, to encourage private enforcement, to be sure. It enacted statutory damages and fee shifting because it understood that this was an industry in which there was a particular risk of very aggressive and harmful practices, in part because debt collectors don't rely on the good will of the consumers they deal with in order to prosper. And so all of the economic incentives in the industry push people to aggressive practices, and Congress wanted this statute to be a counterweight to that.

And as in many circumstances, Congress enacts statutory language and puts up requirements and holds people to them civilly because the -- the general rule in our legal system is that the risk and the cost of a legal mistake is generally allocated to the lawbreaker in the civil context and not to the people's whose rights have been violated. And there is no reason to think that Congress was acting particularly differently here.

We were speaking earlier on about the words "intentional violation," and I wanted to bring to the Court's attention the fact that after we filed our brief, and in fact, last night, we -- we did find a case in which this Court construed that term, and we notified Respondents' counsel and the United States. And I just

want to give you the cite so you can look at it. It's Ellis v. United States, 206 U.S. 246. The relevant passage is at page 257. It's a 1907 opinion from Justice Holmes.

And it's consistent with the way that the Court has construed the phrase "knowing violation" in a number of contexts, including in -- in the criminal context, where it's much more common for Congress to make a mistake of law a defense to liability.

I mentioned before that that kind of history of the development of the statute -- I think it's also worth noting, Justice Breyer, that at the time, Congress withdrew the attorney exemption from the act. It was the uniform opinion of the courts of appeals at that time and all the district courts that the language of the bona fide error defense did not create a mistake of law defense. And again, Congress had no reason to expect that in subjecting the attorneys to that statutory regime, that the bona fide error provision would be the solution to any special problems.

And Congress has also shown itself to be attentive to this special area of concern. In 2006, it made a tailored adjustment to the statute to make clear that pleadings are not an initial communication triggering the validation notice requirement. And I

think that demonstrates that Congress is -- is on top of this issue, and it stands at the ready to make adjustments that are necessary to make this legal system operate in a way that both makes sense, but nonetheless gives effect to their intent to treat attorney debt collectors on a par with regular debt collectors who are not attorneys.

I should also mention, Justice Breyer, to the extent there are some really intractable problems with respect to the act application to attorneys, there -- there is ongoing litigation in the lower courts about the Noerr-Pennington doctrine about how the constitutional implications of regulating in-court activity apply to the Court's interpretation of the statutory provisions.

And again, I think it's more likely that that is the solution Congress would have intended, an interpretive solution --

JUSTICE BREYER: Well, maybe your colleague can, but how -- so they define a -- the reasonable error falls in is because he's a person who regularly collects or attempts to collect consumer debts owed to a -- you know, owed to another person. That's pretty broad. That doesn't come about until '86. You are saying the bona fide language there is before, in '77?

MR. RUSSELL: Yes. And at the --

JUSTICE BREYER: Okay. But then what -- how -- but I still can't figure out how we get this thing to work here, and -- and you just came up with a new idea.

MR. RUSSELL: Well, no. It's -- again, it's the same idea, that you construe the provisions in a way that avoid the most troublesome applications of it to attorney conduct. So I was giving the example of state statutes of limitations. I think it's very open to dispute whether attempting to collect a debt on which the limitations period has run constitutes an unfair or deceptive practice, because there's not a -- all it does is gives the -- the debtor the opportunity to raise an affirmative defense.

And I think -- you know, in that circumstance, Congress would not have intended the statute to --

JUSTICE BREYER: So -- I get -- okay.

MR. RUSSELL: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Jay.

ORAL ARGUMENT OF WILLIAM M. JAY

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE SUPPORTING PETITIONER

MR. JAY: Mr. Chief Justice, and may it please the Court:

I would like, if I may, to pick up with a point that Mr. Russell made, which is that the FDCPA is of a piece with most civil regulatory statutes, in that it makes knowledge of the law an aggravating factor and subjects violators who know that they are violating a law subject to substantial civil penalties of up to $16,000 per day. But it doesn't completely excuse violations based on a lack of knowledge of the law. In order to be excused, the violation must have resulted from a bona fide error and meet all three elements of the bona fide error defense.

We think that two of those elements are not satisfied by the Respondents' error in this case.

First, legal errors, for the reason Mr. Russell explained, aren't unintentional. Justice Scalia asked about whether the phrase "the violation is not intentional" is a signal in that respect. We think that the work that that phrase, "the violation was not intentional," does in this circumstance is to show that the portion of the debt collector's conduct that triggers the violation of the statute, it was -- is what must be unintentional.

Let me illustrate that with an example.

Under the statute, a debt collector who places a call to a debtor at home after 9:00 at night may well violate the statute; likely does violate the statute. So what must be unintentional for that debt collector to make out the bona fide error defense is not that the telephone call had been -- had been placed unintentionally, but rather that the debt collector didn't have knowledge, for example, because of an error about what time zone the debtor lives in.

The -- the debt collector didn't know that the call was being placed after 9:00 at night. That is an unintentional error, and it is excused under the statute if the debt collector can also show that it maintains procedures reasonably adapted to prevent any such errors.

JUSTICE GINSBURG: And your example of that couldn't happen, because if you were calling debtors, you should certainly check what time of evening the call is. So you get over the first problem, but then on the second problem, the second -- how could that possibly be careful procedure, if you don't even check to see what time zone the person is in?

MR. JAY: Well, I think, Justice Ginsburg, if -- if you check, but due to a keyboarding error, for example, Arizona is entered as Alabama or an error in

time zone is entered in whatever record is being consulting by the debt collector, that's the kind of factual error, a clerical, bookkeeping type error that -- that Congress had in mind when it created this defense. And it bears repeating that Congress has created this -- this defense in identical terms in a number of other statutes; federal agencies have construed the identical language in a number of other statutes. And never has Congress or a federal agency contemplated that one of these defenses would, in fact, encompass legal errors.

JUSTICE GINSBURG: Do you know why when Congress codified that law errors don't count, codified that for the Truth in Lending Act purposes, it didn't make the corresponding change in the others?

MR. JAY: We don't have a specific indication, Justice Ginsburg, why it didn't go back and revise every other statute that -- that already had such a defense. But I think that the answer is simply that Congress was revising the Truth in Lending Act in a statute called the Truth in Lending Simplification Act, and the -- the statute in which that was passed didn't make any other -- any other changes to non-financial statutes. It didn't reopen the Federal -- Fair Debt Collection Practice Act in any other way. In fact, the

relevant portion of the FDCPA, Section 1692k, hasn't been amended in any way since Congress first enacted it in 1977.

So we think that the relevance of the 1980 amendment to TILA is simply this: It's part of a consistent pattern by Congress and by the agencies such as the Department of Housing and Urban Development and the Federal Reserve Board that interpret statutes with identical or very similar bona fide error provisions to say: Errors of law are not what Congress or the agency had in mind.

JUSTICE ALITO: Even if the -- even if the error of law is completely reasonable? Let's say in this case the Sixth Circuit had a case directly on point. Still, it was just too bad.

MR. JAY: Well, I think, Justice Alito, that that is not uncommon under any civil statute, that when a court of appeals has precedent on point, that there is always a possibility that that precedent will be reversed.

Now, of course, this statute has a very short statute of limitations. It's one year. And if there's some possibility that the law will change down the road, that short statute of limitations will prevent most violations from being reconsidered down the road

after the -- after the law is clarified.

JUSTICE GINSBURG: It also makes it hard to use the safe harbor to get the -- to get advice from the FTC.

MR. JAY: I'm sorry, Justice Ginsburg. You are saying that the statute of limitations makes it difficult?

JUSTICE GINSBURG: That -- that if you have -- you can -- you are home free if you ask the FTC, right?

MR. JAY: That's correct.

JUSTICE GINSBURG: But that's the only -- only way you -- under your reading that you are home free?

JUSTICE SCALIA: If you ask and they answer.

MR. JAY: If you ask and they answer and they say that your view of the statute is the correct one.

CHIEF JUSTICE ROBERTS: How many times have they answered in the past decade?

MR. JAY: In the past decade, Mr. Chief Justice, they have been asked seven times for opinions by the debt collection industry, and they have answered four of them under the criteria that they adopted in the regulations they are cited in footnote 10

of our brief.

CHIEF JUSTICE ROBERTS: So that's not a very realistic procedure to rely on, is it?

MR. JAY: Well, the debt collection industry seems to not have asked very many times, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: And why is that? Because it's a little difficult dealing with the FTC bureaucracy and getting an answer from them in a reasonable time?

MR. JAY: I submit, Mr. Chief Justice, that first, even if this were relevant to what Congress intended the -- how Congress intended the adviser opinion process to work when it wrote this provision in 1977, that the debt collection industry, as we pointed out in our brief -- if you ask the FTC for an adviser opinion, and it sides against the requester, which, incidentally, in none of these four opinions has it ever done -- in each case it sided with the requester -- but if it sides against, then the requester is on notice of the law. And the requester is going to be -- as I mentioned at the outset, the requester is going to be in the category of -- for heightened penalties, because it will be very difficult to suggest that you don't know the law.

CHIEF JUSTICE ROBERTS: So you are saying that the debt collection industry doesn't does ask the FTC, which would be a safe harbor for them, because if they get a bad answer, they may not follow it and then they may be subject to heightened penalties?

MR. JAY: Well, I'm saying, Mr. Chief Justice, that the -- that they would understandably prefer to ask their own lawyer for an opinion if the -- if this Court were to agree with the Respondent's position and affirm the Sixth Circuit. They would be able to ask their own lawyer, get a private opinion, and if the opinion is favorable, then they are home free under the bona fide error defense.

If -- if it's an -- if it's adverse advice, they may need -- even if they disregard the advice, they may never need to disclose the opinion at all, whereas the FTC advisory opinion process clarifies the law for the benefit of the entire field. Those opinions are public. They are published and --

CHIEF JUSTICE ROBERTS: Well, but there are four of them. I don't care how public they are. There are four of them over the past 10 years. It's not a very reliable or usable effort to clarify the law and address the problem that the statute presents.

MR. JAY: Well, Mr. Chief Justice, I submit

that you can't look simply at the number of responses without looking at the number of inquiries. And I am confident that if this Court, as we urge that it do, reverses the Sixth Circuit and makes clear that asking your own lawyer for an opinion is not going to be a safe harbor defense under Subsection C, that there will be increased use of the -- of the safe harbor defense that Congress actually wrote into the statute in Subsection E.

JUSTICE GINSBURG: Do we know what the time interval was? You said there were seven requests for affirmative responses. How long did it take from when the request was made until the FTC responded?

MR. JAY: In the four that were granted, three of them took three to four months. The fourth is an exception, and that -- that's the one cited in the retail collection attorneys' amicus brief.

That is an exception because the request was originally submitted as a comment in a pending rulemaking conducted by the FTC and a number of other agencies. The FTC agreed to take that comment in the rulemaking and act on it an advisory opinion under the FDCPA so that it wouldn't have to wait for the other agencies to agree with its view, and so that one took considerably longer. But the average processing time is

three to four months.

And of course the FTC makes a number of other informal guidance avenues available, if what the debt collector wants is simply a quick answer and not a formal safe harbor with the imprimatur of the Commission. One can -- the Commission staff has published guidance, and indeed, the Commission staff is available over the telephone --

CHIEF JUSTICE ROBERTS: And if that's wrong, it doesn't do you any good.

MR. JAY: If that's wrong, it doesn't confer the safe harbor. But that's up to the debt collector, Mr. Chief Justice. If you -- if you want an informal opinion, you can get one very quickly. If you want the safe harbor, that requires the imprimatur of the commissioners, and that takes a bit longer.

We don't think that's at all inconsistent with what Congress intended, and we do think that Congress intended that this be the primary avenue. And if you look at the advisory opinion provision of the Truth in Lending Act, we think that illustrates it.

At the time Congress enacted the FDCPA, the Truth in Lending Act advisory opinion provision had only been on the books for a couple of years, but it had already filled more than 100 pages of the Code of

Federal Regulations with advisory opinions. And we think that that's how Congress intended for the law under this statute to be clarified as well, not in a way that effectively confers qualified immunity on debt collectors whenever there is an ambiguity in the law.

We think that that is reinforced as well by a substantive aspect of the statute, which is that Congress recognized -- and this is in particular in the legislative history at page 18 in footnote 9 of our brief -- that the debt collection industry is extremely aggressive and looks for loopholes whenever they exist.

So the substantive prohibitions of the statute, especially 1692d, e, and f, are written in such a way that they contain broad, substantive prohibitions that are illustrated by examples, but those examples expressly are illustrative and not exclusive. Congress would not have wanted a debt collector to be able to say: Well, gee, this -- this practice is not expressly addressed by the statute and has not yet expressly been addressed by any judicial opinion, and to say: Well, that law is not clearly established.

We think it's -- may I finish the sentence Mr. Chief Justice? We think, instead, that Congress would have recognized that the purpose of this statute is to protect the unsophisticated debtor, and

that the sophisticated repeat players of the debt collection industry, if they want to clarify the law, should go to the FTC.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.

Mr. Coakley.

ORAL ARGUMENT OF GEORGE S. COAKLEY

ON BEHALF OF THE RESPONDENTS

MR. COAKLEY: Mr. Chief Justice, and may it please the Court:

The starting point for discerning congressional intent is the text of the statute. The Respondents submit that in a review of the text of this statute, all of the components may be read plainly to include the bona fide error defense, to include legal error, starting with the words that the Court was discussing with Mr. Russell and Mr. Jay, "violation not intentional," moving on to "violation resulting from a bona fide error," then "the maintenance of procedures reasonably adapted."

The Sixth Circuit and the trial court and -- have construed this statute in a plain-meaning analysis; that is to say, they start with the plain meaning of each of those words and construe them in their context. They did not find an ambiguity. They did not find an

absurdity. They found that each of those -- each of those components may be squared with a -- with a legal error analysis.

Petitioner even concedes with respect to the element of "violation not intentional" that our interpretation is, quote, "not linguistically impossible," end quote.

What -- what Petitioner has done is to avoid the conventional standards of -- of congressional -- I mean, of statutory interpretation, which is the plain meaning from Lamie, and moving, then, outward if necessary. And they have opted instead for looking at unrelated statutes such as TILA, then going to the safe harbor, and then pulling the words "violation" and "intentional" out of the first prong, taking them out of context, taking them out of order, and then applying them to this maxim, "ignorance of the law." Even --

JUSTICE GINSBURG: And also saying -- and then this sentence is what I would like to have your response on, that there is no statute -- Federal statute that makes mistake of law a defense. So this would be highly extraordinary, and if that's what Congress meant to do, to make something that ordinarily is no defense a defense, we would expect Congress to do so expressly.

MR. COAKLEY: Justice Ginsburg, that is

their argument, that it is unprecedented. But their unprecedented argument gets them nowhere. That is one of the panoply of arguments that is outside the plain meaning that they go to to say well, this is unprecedented; Congress couldn't have intended this.

There are reports that read the TILA bona fide error to mean legal error at one point in time, so it wasn't unprecedented to the extent of that, and what did Congress do with respect to TILA? In 1980, they didn't like the interpretation that they were getting with respect to legal error from the TILA error, which is a totally different statute, and so they reacted by amending TILA to say no legal error in TILA.

They did not correspondingly amend the FDCPA, which shows Congress's intent to distinguish the two statutes.

JUSTICE SOTOMAYOR: Do you think before our Heintz decision, that they intended for debt collectors to have an automatic defense if they just called up a lawyer? And so a lawyer's opinion would give them absolute immunity from liability?

MR. COAKLEY: Absolutely not, Justice Sotomayor. This --

JUSTICE SOTOMAYOR: No, I think part of the difficulty in this case, isn't it, is the -- is our

Heintz decision which made lawyers debt collectors, and so now we are in this quandary about a lawyer's good faith. But -- but if we start with what was understood at the time, do you think that this language was intended to give debt collectors immunity by simply calling a lawyer?

MR. COAKLEY: Well -- it was absolutely meant to protect debt collectors, however, that term was defined in 1977, which included lay debt collectors. In 1986 it went up a level when we added lawyers, and the exemption went out and in 1995 it went up another level when we added litigating lawyers.

But most certainly it went back to 1977 and included lay debt collectors, and lay debt collectors didn't get a "get out of jail free" card here by just pulling up the bona fide error defense and saying I'm done. They are subject to the three rigors of the bona fide error defense. They have to prove that the violation was not intentional -- that the violation --

JUSTICE SOTOMAYOR: Call a lawyer.

MR. COAKLEY: Pardon?

JUSTICE SOTOMAYOR: Call a lawyer.

MR. COAKLEY: How --

JUSTICE SOTOMAYOR: Just have a lawyer sign off.

MR. COAKLEY: No, but --

JUSTICE SOTOMAYOR: Even if the lawyer made a mistake, if the debt collector relies, you know, I have a reputable law firm, they are well educated, they tell me they do legal research, that -- I can assume that, so why don't I have a "get out of jail" card?

MR. COAKLEY: The unfairness of this statute, as Justice Breyer indicated in his commentary with Mr. Russell, is -- is exemplified by your question. If a lay debt collector calls a lawyer in the 1977 to 1986 round and asks a lawyer for an interpretation of this act, and he base -- he relies upon that and acts accordingly, per their interpretation only applying to clerical error, that lay debt collector who relied upon advice of counsel is out of luck if the decision goes against the lay debt collector, because he or she has no error of law as a defense. So it goes up, the levels of unfairness go up as the time goes on.

JUSTICE BREYER: That's true of antitrust defendants, too.

MR. COAKLEY: But in this, Your Honor, there is a -- there is a bona fide error defense that has been crafted into this statute.

JUSTICE BREYER: No, I see that. Is it -- is it -- what do you think of the idea that your

opponent here has suggested that the way to deal with the lawyer's problem that I mentioned is simply read the substantive provisions, so that there is no violation for ordinary legal activity where they have gone and asked the FTC or you know, all the things that are against them? What you would have to do.

That isn't so hard to do as I first thought, because the words that seem to make -- the primary words of what is outlawed are the words "unfair or unconscionable means." Now I -- I doubt -- you would know -- I doubt that there are other words in the statute that forbid lawyers from doing anything that really shouldn't be forbidden. I mean, they shouldn't call people up in the middle of the night and harass them and so forth.

But -- but you could read unfair and unconscionable means to say that where a lawyer is really hit by surprise, you know, all the circuits were against him, the FTC wouldn't give him an opinion, that he no longer is acting unfairly and unconscionably. What about that?

MR. COAKLEY: Justice Breyer, I don't think that gives credence to the 1977 focus when lawyers were not part of the statute. Certainly your example heightens the unfairness of it once lawyers come in in

1995 through Heintz as a litigating lawyer. Certainly a lawyer has -- it creates this irreconcilable conflict of interest that you alluded to in your discussion with Mr. Russell. That puts the lawyer between the proverbial rock and a hard place. He either -- he or she either chooses to follow the law and risk --

JUSTICE BREYER: That's right. I was seeing a special problem with lawyers. Call -- the unfairness problem that you are talking about, call that the antitrust problem, because it is just as much. But I saw the special problem of putting the lawyer in the impossible situation that you've just described.

Now it's with respect to that problem that he offers the cure of reading the words "unconscionable" and what is it? "Unconscionable and unfair means." Read those words to exempt the lawyer when he's in the dilemma I discussed, and therefore the lawyer will not have an incentive to -- to skew his advice.

MR. COAKLEY: I believe that the lawyer would be just subject to the rigors of the bona fide error defense, the way any other debt collector as defined from 1977 forward would be.

CHIEF JUSTICE ROBERTS: I suppose it would make interpretation of the act a little more difficult. The same practice would be unconscionable in -- not

unconscionable in one circumstance, you would have an opinion saying this is not unconscionable; but yet if somebody else does it, you know, two weeks later, that doesn't have the same -- he says, well, look, it's not unconscionable, but it turns out it is, in his case.

And it would have to be -- the opinion would have to clarify the law by saying, this is normally unconscionable but we are going to say it's not here because of this activity that is unlikely to happen.

MR. COAKLEY: Mr. Chief Justice, I believe this would be part of the inquiry that a lawyer would be faced in trying to prove the affirmative defense of bona fide error in a legal situation, and that -- that would be part of the good faith analysis, part of the reasonable procedures that he would present to the court --

JUSTICE GINSBURG: Could we do that in the context of this case? Because we are talking on a highly abstract level. This is a statute that required a validation notice, and for the most part the validation notice that was sent to the debtor is exactly the words of the statute.

But the lawyer added two words that are not in this statute, "in writing." Where did that come from? We are told this was not the model form that was

used by the debt collectors' association.

MR. COAKLEY: There was a case, Graziano, Your Honor, that talked about the -- was construing the statute and specifically section 1692g(a)(3) and determining because g -- the second and third prong of the statute had the words in writing, does the first prong in order to be coherently read remain "in writing"? Graziano says yes, you should put "in writing in order" to make a coherent --

JUSTICE GINSBURG: It says you "should" --

MR. COAKLEY: "Should."

JUSTICE GINSBURG: Rather than "may"?

MR. COAKLEY: No. Well Graziano suggested "in writing" is the only effective way to construe this statute; otherwise, it makes no sense.

CHIEF JUSTICE ROBERTS: That issue is still not settled, is it?

MR. COAKLEY: That's correct, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: We still don't know if the lawyer here was right or wrong.

MR. COAKLEY: That's correct. And that actually points out a -- the unfairness of this whole situation. Because my clients, respondents tomorrow could be sued in the Southern District of Ohio by

somebody for -- because they took the words "in writing" out of their validation notice. Immediately upon being sued in this case, they could be sued in the Southern District of Ohio for not following -- or not following Graziano, because somebody would conclude that that was the more effective way -- reading of that statute, and if they are wrong, then the lawyer has no bona fide error --

JUSTICE SCALIA: Mr. Coakley, one of your earlier statements confused me. You relied upon the fact that TILA was amended in 1980 to provide that legal errors are not covered by the TILA defense, and I think you -- I think you describe that as -- as changing the law to -- to provide that -- that legal errors were not covered.

But as I understood the situation, every court of appeals to have construed TILA prior to 1980 had held that legal errors were not -- were not included, as -- as your opponent says, they are not included here. So the amendment to TILA was just an affirmation of the judicial interpretation of the language similar to the language here.

MR. COAKLEY: Justice Scalia, there were cases, although not court of appeals cases that --

JUSTICE SCALIA: Every court of appeals to

construe it had held that mistakes of law were not covered. Is that accurate or not?

MR. COAKLEY: That's correct.

JUSTICE SCALIA: Well, then -- then your prior statement was very misleading.

MR. COAKLEY: Well, to the extent that there were two different -- two different analyses or interpretations that had emerged before 1980 that led the Congress to -- in 1980, enact or to amend TILA, otherwise, as pointed out in the Herrera case in our brief, if everything was so settled in 1980, why would there be a need to clarify the definition of bona fide error under TILA, and -- and if it was clarified in 1980 under the FDCPA, then why didn't they take the step and clarify it in the FDCPA from 1980 to 2010, especially when Congress --

JUSTICE SCALIA: There is no basis for saying that the amendment was overturning -- changing the prior meaning of TILA. There is no basis for saying that. All you had were just a few district court opinions, and all the courts of appeals have come out the other way.

MR. COAKLEY: Your Honor, the -- the Petitioner's position was that the case law was uniform at the time, and our position is the case law was not

uniform at the time. There were cases that had taken an opposite approach to the court of appeals decision on -- on TILA, and that is what led to Congress reacting in 1980 to specifically exclude legal error from the TILA defense and has -- Congress has --

JUSTICE GINSBURG: But why doesn't that just mean that Congress wants to confirm that the judges -- the majority of judges who -- who had held that it didn't -- that errors of law were not a defense, that they were right, it's not changing -- changing anything. It's just confirming that the majority view is right.

MR. COAKLEY: Well, Justice Ginsburg, the case law says that the law has to be settled, and as we pointed out in our brief, it was not settled, and the courts, afterwards, have reflected that there was no settlement, and that that's one of the reasons why the error portion of the TILA bona fide error was -- was clarified, as the Petitioner puts it, to say this excludes any interpretations of legal -- of legal -- of the legal interpretations of TILA.

And then there was no -- whether you call it a clarification, whether you call it a ratification, whether you call it an amendment, it doesn't matter, Congress didn't then similarly amend the FDCPA to be consistent with their --

JUSTICE GINSBURG: Well, why wouldn't one say, now, Congress has confirmed that the word in the Truth and Lending Act means thus and so, Congress has said that's what those words mean, and then go back to the other statutes and say the same language was used, so it means the same thing, the same thing that Congress has just confirmed?

MR. COAKLEY: Justice Ginsburg, I believe that the -- the words "bona fide error" in the TILA statute were being construed, although not by courts of appeals, to reasonably read the bona fide error encompasses legal error.

There was a change -- change -- a clarification, whatever, in 1980, to specifically say, bona fide error does not include legal interpretations of TILA, and that was then never clarified, ratified, or whatever, nothing was done to the FDCPA at that time, and -- and the --

JUSTICE SOTOMAYOR: Were there any district court decisions, of any kind, reading bona fide errors to mean legal mistakes under any of the other statutes?

MR. COAKLEY: I --

JUSTICE SOTOMAYOR: The ones that were not changed, the ones that Justice Ginsburg is -- is describing.

MR. COAKLEY: Well, under the TILA, there were -- there were --

JUSTICE SOTOMAYOR: Under TILA, that's why Congress may or may not have acted --

MR. COAKLEY: Okay. But --

JUSTICE SOTOMAYOR: I'm talking about under this statute, under any other statute that uses similar language.

MR. COAKLEY: Yes --

JUSTICE SOTOMAYOR: Were there any district court cases that were reading those statutes to include mistakes of law?

MR. COAKLEY: Well, in this case that we are here on, Judge Gaughan from the U.S. District Court of the Northern District of Ohio read the -- read that TILA --

JUSTICE SOTOMAYOR: But that was after the TILA amendment?

MR. COAKLEY: That was after the amendment. Now, you're talking about before 1980?

JUSTICE SOTOMAYOR: I was talking about the time that Congress was look at amending the statutes.

MR. COAKLEY: Under the -- well, the FDCPA came into effect in 1977, and the -- TILA was in 1968. You are asking between '68 and '77? The were -- the

Wellmaker case did -- did construe the statute to include legal error.

JUSTICE ALITO: Do you think that a -- a mistake of law has to be substantively reasonable in order to fall within this defense, and if so, where do you get that? Where do you find that in the statute?

MR. COAKLEY: The statute doesn't refer to substantively or procedurally, Justice Alito, the statute refers to bona fide error and the maintenance of procedures reasonably adapted. As a -- as a -- as either a lay debt collector or as a lawyer debt collector, they must establish good faith in attempting to comply with the law as it existed at the time.

JUSTICE ALITO: Well, suppose that a lawyer spends a whole week researching a question, but arrives at a conclusion that is plainly incorrect, does not, therefore, intend to violate the statute and proceeds in good faith. Would that -- how would that work out?

MR. COAKLEY: Well, in proving --

JUSTICE ALITO: It would be an unreasonable decision, and yet, would it -- it would fall within your understanding of this provision; is that correct?

MR. COAKLEY: Absolutely. I mean, he would -- he would have -- that lawyer would have to meet the three prongs of the affirmative defense by a

preponderance of the evidence. If he doesn't prove all of the prongs, he's out. If he proves all of the prongs, he's in, and if he creates an issue of fact on one of the three prongs, than he's going back to the district court for a fact-finding analysis, which turns out to be the -- you know, this statute has not proved to be unworkable.

And if I could follow up to Justice Scalia's and Justice Ginsburg's query about the -- the -- and Justice Sotomayor's -- about the interpretation of the words "TILA" versus "FDCPA," I think a review of the cases of the Seventh and Tenth Circuits is instructive because the Seventh Circuit was one of the circuits that, under TILA, had -- had interpreted the word to mean clerical error only. The Tenth Circuit -- and the tenth circuit as well.

Now, today, under interpreting the FDCPA bona fide error, they have abrogated that meaning in TILA and have come around to this means legal error under the FDCPA.

JUSTICE STEVENS: Could you answer one question -- I'm just a little confused about. One statute has the defense in expressly. The other doesn't. Is there a difference in the likelihood of unfairness under the two statutes? Why -- is there a

reason why Congress would have wanted to provide a mistake of law defense under TILA and not in this -- this -- in this case? Why would it treat them differently?

MR. COAKLEY: There -- there are differences -- substantial differences, Justice Stevens, in the TILA and in the FDCPA statute, starting with the purposes of the statute, starting with the construction of the statute, one, TILA has a criminal liability, TILA has life lines that the debt collector doesn't have in the FDCPA, TILA dealing -- is dealing with disclosure of financial information, TILA has regulations, as opposed to no regulations --

JUSTICE SCALIA: I would think all -- which way do these cut? I mean, the fact that there is criminal liability under TILA would seem to me to cut in precisely the opposite direction. You would want to provide excuses of bona fide errors of law, I would think. Why -- am I missing something here?

MR. COAKLEY: The -- no, Your Honor.

JUSTICE SCALIA: I would think --

MR. COAKLEY: It's a -- it's a distinction between why -- in trying to answer Justice Stevens' question, it's a distinction why TILA would be interpreted differently by the -- than the FDCPA.

JUSTICE STEVENS: But the question is -- is there a greater need for the mistake of law defense under one statute, rather than the other, I sort of --

MR. COAKLEY: Given --

JUSTICE STEVENS: -- have the same problem Justice Scalia expressed.

MR. COAKLEY: Given -- well, given the purpose of TILA, and TILA dealing with computational errors, regulation C, Truth in Lending, they -- they amend -- they amended TILA -- I mean, I'm sorry. Originally TILA didn't have a bona fide error and then they amended it so as to -- before it was enacted -- so as to cover this area to provide for the computational error. Because it's so fraught with mathematical errors and the like.

That is not the situation in the FDCPA. And that is precisely the reasoning that is the Seventh and Tenth Circuit have noted, and the case of Frye that we have cited in our brief has noted, as the distinction between these two statutes, and why one could be interpreted this way and the FDCPA could be reasonably interpreted the other way.

CHIEF JUSTICE ROBERTS: So I mean, you're -- the substance of your answer is that they are just two very different statutes.

MR. COAKLEY: Absolutely.

CHIEF JUSTICE ROBERTS: But I -- but I share Justice Scalia's concern, I mean the -- the ways in which they are different would suggest you need the legal mistake defense more in TILA than you do in the FDCPA.

MR. COAKLEY: Mr. Chief Justice, I -- I don't believe that that is consistent with the purpose of -- of TILA. And certainly lawyers are not -- lawyers are not creditors under TILA. And -- so that's a distinction between the -- the two statutes. And further, the -- there is an administrative penalty under the FDCPA that -- the $16,000 a day, but the bona fide error does not apply to that. So there is no inconsistency between the administrative penalties under the FDCPA and the civil penalties under the FDCPA.

And in -- and in truth, the -- the statutes are -- are significantly different.

JUSTICE BREYER: I was wondering if you know, can you give me just a rough idea, of the percentage of instances in which people write to the FTC to take advantage of the safe harbor and the FTC just says, "Well, we won't tell you."

MR. COAKLEY: I do not have that empirical evidence, Your Honor. I do know that the briefs are

consistent on this point, and as admitted to by the Petitioners, there have been four advisory opinions from the FDCPA -- from the FTC in 30 years.

JUSTICE BREYER: How many have asked?

MR. COAKLEY: I don't know how many have asked.

JUSTICE BREYER: I mean, it seems to me that's the obvious solution to the problem, that -- until you hold they are not -- they are liable for mistake of law, but anyone can write to the FTC ahead of time and -- and get a safe harbor.

It's -- so I don't know what we could do to suggest maybe that mechanism, which is built into the statute, should be used.

MR. COAKLEY: I think that --

JUSTICE GINSBURG: Didn't Mr. Jay tell us there were seven requests? Are you disputing that?

MR. COAKLEY: I am not disputing that, Justice Ginsburg. What I am basically saying is it really doesn't make any difference, because the truth with respect to the FTC and the safe harbor defense and the FDCPA, that Mr. Jay does not argue that one is superfluous to the other; the Petitioner argues that one makes the other superfluous -- neither are superfluous to the other.

JUSTICE BREYER: Well, all right. But I mean, if there have been seven requests and four answers then all these horrible things that are going to happen if you do say there is -- unless you have mistake of law defense, aren't going to happen. Because all that has to happen is that people write to the FTC and they get an answer.

MR. COAKLEY: But the safe harbor defense on its face applies prospectively. The FDCPA bona fide error defense --

JUSTICE BREYER: That means lawyer, if you are worried about this, go write before you do it.

MR. COAKLEY: Yes, but the bona fide error defense applies retrospectively.

CHIEF JUSTICE ROBERTS: I see I have a copy in the retail -- Association of Retail Collection Trades. The first -- second sentence in the FTC's response is I apologize for the delay in responding to your request.

MR. COAKLEY: I --

CHIEF JUSTICE ROBERTS: It is not an atypical issue in dealing with government agencies.

MR. COAKLEY: And -- yes, Mr. Chief Justice, and the penultimate paragraph in there: For the foregoing reasons your request for advisory opinion does

not satisfy either the prerequisites described, well -- and accordingly we can't -- grant it.

JUSTICE SCALIA: Mr. Coakley, why do you need a safe harbor if there is no store? I mean what is the purpose of -- of having this procedure, however inefficient it may be, what is the purpose of having it unless you were going to be liable if you make a mistake of law?

MR. COAKLEY: The safe harbor --

JUSTICE SCALIA: You are talking about a safe harbor rule. Leave the harbor.

MR. COAKLEY: Justice Scalia, as it worked out the safe harbor is neither safe nor a harbor, but that's not the perspective that we have to look at it. We have to look at it from 1997, it was for a prospective course of conduct that gives the debt collector categorical --

JUSTICE SCALIA: What does that have to do -- what does that have to do with anything, whether it's prospective or not? The point is what benefit does it give to the person who is asking? If the person is not going to be liable for a bona fide mistake, why would he ever use it?

MR. COAKLEY: Well, there are reasons why a debt collector may use it if he has time and he needs

the prospective letter from the FTC. In -- in reality debt collector's going to go to the bona fide error because it's retrospective, although there is risk with the bona fide error, because it's not the categorical immunity that the safe harbor gives. And there's -- they're not inconsistent.

The safe harbor is not a --a statutory interpretation why you should drive a meaning into the bona fide error provision that is not apparent on its face.

I would say in closing that Justice Breyer, your -- your comments earlier are just right. This is worse -- a reading, the safe harbor, reading the bona fide error provision to exclude legal error is worse than unfair.

JUSTICE BREYER: Oh, now I do see -- which is why I asked the question, I asked to get an answer, and the answer now seems to be floating around the FTC idea. It's -- seven letters, that isn't very much. I just wonder if the -- if the bar in this area, and their clients, if they made an effort, might be able to get the financing for the FTC so they could have enough people to respond quickly to the letter.

(Laughter.)

MR. COAKLEY: Justice Ginsburg asked the

question about unprecedented. In -- in truth, what would really be unprecedented here would be for this Court to construe the bona fide error defense so that a lawyer or a debt collector who is giving advice to his client to follow a particular way of action, and the law was unsettled, for that lawyer to be subject to -- to be punished for personal liability. And we think that the bona fide error clearly under Lamie encompasses --

JUSTICE SCALIA: There are severe limits on the liability, aren't there? Isn't there a thousand -- isn't it a $1,000 limit?

MR. COAKLEY: Yes, Your Honor.

JUSTICE SCALIA: That's not big bucks for an attorney, is it?

(Laughter.)

MR. COAKLEY: But let that -- well, maybe for the prior group that was up here, but I don't --

(Laughter.)

MR. COAKLEY: It's big in Cleveland.

JUSTICE GINSBURG: This isn't -- this is a class action, wasn't it? It was brought as a class action?

MR. COAKLEY: This is definitely a class action. This is a class action that wants all of the validation notices that were sent out by this law firm

to -- that included the words "in writing" in it for that period, and further than that, they wanted the financial information from the law firm, the financials because, under the class action provision, it's $500,000 or 1% of the net worth of the firm, which is ever less.

So the request was made of my client, give me the financials of your law firm, and for some reason, my client did, but this -- the statute was not meant to punish lay debt collectors, including lawyers.

The bona fide error defense is the shield, and we ask the court to affirm the judgment of the Sixth Circuit Court of Appeals.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:22 p.m., the case in the above-entitled matter was submitted.)