

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KAREN L. JERMAN, :

4 Petitioner :

5 v. : No. 08-1200

6 CARLISLE, MCNELLIE, RINI, :

7 KRAMER & ULRICH LPA, ET :

8 AL. :

9 - - - - - x

10 Washington, D.C.

11 Wednesday, January 13, 2010

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13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 11:21 a.m.

16 APPEARANCES:

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

18 Petitioner.

19 WILLIAM M. JAY, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.; on

21 behalf of the United States, as amicus curiae,

22 supporting the Petitioner.

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

24 Respondents.

25

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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

1 indicates such an intent.

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

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

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

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

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

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

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

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

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

1 Workers Protection Act, which we cited in our brief.

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

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

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

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

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

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

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

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

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

22           JUSTICE SCALIA: Okay.

23           JUSTICE BREYER: Yes.

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

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

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

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

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

14 MR. RUSSELL: The lawyer?

15 JUSTICE BREYER: Both.

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

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

22 MR. RUSSELL: Well --

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



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

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

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

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

25 JUSTICE BREYER: But it -- but it suggests

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

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

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

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

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

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

9 MR. RUSSELL: Yes.

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Yes.

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

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

25 MR. RUSSELL: Well, under our view, he

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

4 If I could finish my answer --

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

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

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

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

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

19 MR. RUSSELL: Well, if the --

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

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

25 But I do think that if you are especially

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 25 years.

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

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

9 MR. RUSSELL: I think they --

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

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

21 JUSTICE KENNEDY: Well, what about  
22 attorneys' fees?

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

25 And so there are other structural reasons,

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

3             Congress did provide, in effect, a mistake  
4     of law defense to civil penalties. The civil penalties  
5     provision that applies to this statute, which is at  
6     15 U.S.C. 45(m)(1), and that's quoted in relevant part  
7     on page 24 of the blue brief, provides for very serious  
8     civil penalties for somebody who acts with actual  
9     knowledge or knowledge fairly implied that the act was  
10    prohibited.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. RUSSELL: Yes. And at the --

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

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

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

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

20 MR. RUSSELL: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

22 Mr. Jay.

23 ORAL ARGUMENT OF WILLIAM M. JAY

24 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

25 SUPPORTING PETITIONER

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

3                   I would like, if I may, to pick up with a  
4 point that Mr. Russell made, which is that the FDCPA is  
5 of a piece with most civil regulatory statutes, in that  
6 it makes knowledge of the law an aggravating factor and  
7 subjects violators who know that they are violating a  
8 law subject to substantial civil penalties of up to  
9 \$16,000 per day. But it doesn't completely excuse  
10 violations based on a lack of knowledge of the law. In  
11 order to be excused, the violation must have resulted  
12 from a bona fide error and meet all three elements of  
13 the bona fide error defense.

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

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

25                   Let me illustrate that with an example.

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

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

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

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



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

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

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

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

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

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

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

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

1 after the -- after the law is clarified.

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

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

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

11 MR. JAY: That's correct.

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

15 JUSTICE SCALIA: If you ask and they answer.

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

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

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

1 of our brief.

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

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

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

11 MR. JAY: I submit, Mr. Chief Justice, that  
12 first, even if this were relevant to what Congress  
13 intended the -- how Congress intended the adviser  
14 opinion process to work when it wrote this provision in  
15 1977, that the debt collection industry, as we pointed  
16 out in our brief -- if you ask the FTC for an adviser  
17 opinion, and it sides against the requester, which,  
18 incidentally, in none of these four opinions has it ever  
19 done -- in each case it sided with the requester -- but  
20 if it sides against, then the requester is on notice of  
21 the law. And the requester is going to be -- as I  
22 mentioned at the outset, the requester is going to be in  
23 the category of -- for heightened penalties, because it  
24 will be very difficult to suggest that you don't know  
25 the law.

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

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

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

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

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

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

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

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

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

1 three to four months.

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

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

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

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

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

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

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

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

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



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

4 Thank you, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.

6 Mr. Coakley.

7 ORAL ARGUMENT OF GEORGE S. COAKLEY

8 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

25           MR. COAKLEY: Justice Ginsburg, that is

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

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

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

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

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

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

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

7 MR. COAKLEY: Well -- it was absolutely  
8 meant to protect debt collectors, however, that term was  
9 defined in 1977, which included lay debt collectors. In  
10 1986 it went up a level when we added lawyers, and the  
11 exemption went out and in 1995 it went up another level  
12 when we added litigating lawyers.

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

20 JUSTICE SOTOMAYOR: Call a lawyer.

21 MR. COAKLEY: Pardon?

22 JUSTICE SOTOMAYOR: Call a lawyer.

23 MR. COAKLEY: How --

24 JUSTICE SOTOMAYOR: Just have a lawyer sign  
25 off.

1 MR. COAKLEY: No, but --

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

7 MR. COAKLEY: The unfairness of this  
8 statute, as Justice Breyer indicated in his commentary  
9 with Mr. Russell, is -- is exemplified by your question.  
10 If a lay debt collector calls a lawyer in the 1977 to  
11 1986 round and asks a lawyer for an interpretation of  
12 this act, and he base -- he relies upon that and acts  
13 accordingly, per their interpretation only applying to  
14 clerical error, that lay debt collector who relied upon  
15 advice of counsel is out of luck if the decision goes  
16 against the lay debt collector, because he or she has no  
17 error of law as a defense. So it goes up, the levels of  
18 unfairness go up as the time goes on.

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

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

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

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

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

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

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

1 1995 through Heintz as a litigating lawyer. Certainly a  
2 lawyer has -- it creates this irreconcilable conflict of  
3 interest that you alluded to in your discussion with Mr.  
4 Russell. That puts the lawyer between the proverbial  
5 rock and a hard place. He either -- he or she either  
6 chooses to follow the law and risk --

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

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

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

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

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

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

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

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

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



1 used by the debt collectors' association.

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

10 JUSTICE GINSBURG: It says you "should" --

11 MR. COAKLEY: "Should."

12 JUSTICE GINSBURG: Rather than "may"?

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

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: Every court of appeals to

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

3 MR. COAKLEY: That's correct.

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

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

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

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

1 uniform at the time. There were cases that had taken an  
2 opposite approach to the court of appeals decision on --  
3 on TILA, and that is what led to Congress reacting in  
4 1980 to specifically exclude legal error from the TILA  
5 defense and has -- Congress has --

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

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

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

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

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

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

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

22 MR. COAKLEY: I --

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

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

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

5 MR. COAKLEY: Okay. But --

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

9 MR. COAKLEY: Yes --

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

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

17 JUSTICE SOTOMAYOR: But that was after the  
18 TILA amendment?

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

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

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

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

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

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

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

19 MR. COAKLEY: Well, in proving --

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

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

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

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

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

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



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

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

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

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

21 JUSTICE SCALIA: I would think --

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

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

4 MR. COAKLEY: Given --

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

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

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

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

1 MR. COAKLEY: Absolutely.

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

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

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

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

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

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

4 JUSTICE BREYER: How many have asked?

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

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

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

15 MR. COAKLEY: I think that --

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

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

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

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

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

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

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

20 MR. COAKLEY: I --

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

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

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

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

9 MR. COAKLEY: The safe harbor --

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

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

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

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

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

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

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

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

24 (Laughter.)

25 MR. COAKLEY: Justice Ginsburg asked the

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

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

12 MR. COAKLEY: Yes, Your Honor.

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

15 (Laughter.)

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

18 (Laughter.)

19 MR. COAKLEY: It's big in Cleveland.

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

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



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

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

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

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

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