IN THE SUPREME COURT OF THE UNITED STATES

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TRW, INC., :

Petitioner :

v. : No. 00-1045

ADELAIDE ANDREWS. :

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Washington, D.C.

Tuesday, October 9, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Petitioner.

ANDREW R. HENDERSON, ESQ., Los Angeles, California; on behalf of the Respondent.

KENT L. JONES, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, in support of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-1045, TRW, Inc. v. Adelaide Andrews.

Mr. Nager.

ORAL ARGUMENT OF GLEN D. NAGER

ON BEHALF OF THE PETITIONER

MR. NAGER: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the Court of Appeals for the Ninth Circuit held that the statute of limitations on a claim of improper disclosure under the Fair Credit Reporting Act does not commence until the plaintiff discovers her injury, as opposed to the -- the date of the improper disclosure.

In doing so, the Court of Appeals for the Ninth Circuit did not parse the language of the statute of limitations that is in the Fair Credit Reporting Act, but rather said that language was not sufficiently expressed to overcome a presumption in favor of a discovery rule that the Ninth Circuit held is read into that statute and all Federal statutes.

QUESTION: When did the injury occur here to the respondent?

MR. NAGER: The -- the injury for each alleged

improper disclosure would have occurred on the date of the alleged improper disclosure, Justice O'Connor, although some of the damages --

QUESTION: Disclosure to who? I mean, when -- when exactly did the injury --

MR. NAGER: Well, there were four allegedly improper disclosures at issue in this case. The first was in July of 1994, and when that disclosure was made, it revealed --

QUESTION: Disclosure to some third party.

MR. NAGER: To the third party. And the first one here was to a bank.

QUESTION: And -- and the person injured may never know about it.

MR. NAGER: They -- they might not know about it, although the -- the way these reporting systems work, if they ever actually apply for credit themselves and they're denied, they will automatically know about it, which of course is what happened to the respondent in this case. She didn't know about the --

QUESTION: But it -- it's a 2-year statute of limitations.

MR. NAGER: That's correct, and the statute expressly states that the action must be filed within 2 years of the date upon which liability arises.

QUESTION: Is this the type of statute that -- that depends largely on private enforcement to implement it?

MR. NAGER: It does have private causes of action. The Federal Trade Commission, of course, also has authority to enforce the statute through cease and desist orders, through civil penalties --

QUESTION: But in general, I think you would look at this as one that envisions private enforcement.

MR. NAGER: Absolutely, Justice O'Connor. We don't dispute that.

But what is does envision is private enforcement within 2 years of the date of disclosures. That's what the statute expressly says on its face. It says the action can be brought, but if it's going to be brought, it has to be brought within 2 years from the date upon which liability arises. And in plain English, as well as under the terms of this statute, if there is liability, it arises upon the date of the improper disclosure.

We know that in plain English, the term arise means come into existence, originate. And we know under this statute, section 616 and 617, which specify what a defendant's liability can be, the statute equates liability with a failure of a defendant to comply with a requirement of the section.

QUESTION: What about the argument that the plaintiff isn't harmed -- the plaintiff may not be harmed by the disclosure? So, there may have been a violation of the statute, but no claim for damages, because nothing bad has happened to the plaintiff. So, you have to wait until something bad happens to the plaintiff.

MR. NAGER: I don't think that's what the statute says, Justice Ginsburg. The statute says that liability arises upon an improper disclosure.

QUESTION: Liability for what, if you're not damaged?

MR. NAGER: Well, in this case, the plaintiff sought injunctive relief, punitive damages, and actual damages, as well as, if they prevailed at trial, for attorney's fees.

QUESTION: Can you get nominative -- a -- nominal damages and punitive damages?

MR. NAGER: Well, it's unclear under statute whether you can get nominal damages. Certainly the statute expressly states that in the case of an alleged, willful violation of the statute, which is what the plaintiff in this case alleged, you can get punitive damages. And the case law also allows for a plaintiff to seek injunctive relief.

Let me clarify what the injury is, Justice

Ginsburg. Maybe this will assist both you and Justice O'Connor.

What this statute does is -- the credit reporting companies have computer databases that compile information about credit reporting histories of individuals. And it makes that database available to subscribers, banks, insurance companies, and the like. And a creditor can go onto that database, just like your law clerks can go on Westlaw, and pull off information. And when they pull that information off, if there weren't reasonable procedures in place to prevent them from improperly pulling information off, that would be an improper disclosure, which would injure the person because it would invade their privacy and reveal confidential information about themselves. Under State law, they possibly would have a claim for invasion of privacy, or if there was inaccurate information in the database, for defamation of character.

What this statute did was it created a Federal right against improper disclosure in the absence of reasonable procedures of people's credit history.

QUESTION: Just out of curiosity, what -- what are the statute of limitations applicable to State actions for, let's say, trade liable I suppose? Somebody gives out inaccurate information about -- about the financial

standing of a particular person or company.

MR. NAGER: I don't know --

QUESTION: How do the statutes run? Do they --

MR. NAGER: I don't --

QUESTION: -- normally run from -- from the date of the liable or from the date that -- that the person finds out about it?

MR. NAGER: At the time of enactment of this statute, the -- the statutes of limitations of which I'm aware of at State law, ran from the date of the -- of the disclosure, not from the date of discovery. That was typical in the 1969-1970 time frame for invasion of privacy claims and for defamation claims.

And we also know that this statute is one of six titles of the Consumer Credit Protection act, and we know that each of the statutes of limitations in those other five titles run from the date of alleged violation.

QUESTION: We would have been sure about that if the language in the initial bill, which was the date of the occurrence of the violation -- if that language had been used. Since Congress chose not to use that language, which would have been clear, it seems to me that the phrase that they did use, when liability arises, is ambiguous.

MR. NAGER: Well, I understand the -- the point,

Justice Ginsburg, but let me make the case for why that's not a correct conclusion to draw from the premise.

It obviously would have been simpler if they had used the language from the date of violation, but they used a phrase that means the same thing. And when they made the change --

QUESTION: How do we know it means the same thing?

MR. NAGER: We know it means the same thing because every time this Court has had a case that has used the term arise, it has said that means the date upon which the event happens, not the date upon which someone discovers it later.

And we know in section 616 and 617 of this statute that liability is defined by reference to the acts of the defendant.

And we also know that there is an explicit exception in section 618, the statute of limitations provision, which does expressly refer to a discovery rule, but it says the discovery rule is applied in the case of a willful and material misrepresentation of a disclosure required by the statute. And the strong implication from the inclusion of an express reference to the discovery rule and the exception is that the general rule doesn't include a discovery.

QUESTION: Well, our previous cases haven't looked at when liability arises.

MR. NAGER: You're absolutely right.

QUESTION: There's some other noun before the arise.

MR. NAGER: The -- the other cases that the Court have said cause of action arises.

QUESTION: Do you think anything turns on that?

MR. NAGER: No, I don't. And I -- I would point you to the Court's decision in the Bay Area Laundry case, which was dealing with the Multi-Employer Pension Plan Amendments Act. That statute, like that statute, although it used the phrase, cause of action arise, had a 6-year limitation period from the date the cause of action arose or, alternatively, 3 years from the date of discovery of the cause of action. And this Court, looking at the primary statute of limitations provision, said that reflects the standard rule of statute of limitations law, that the statute of limitations commences when the cause of action is complete, not upon discovery.

QUESTION: Let -- let me ask you. The case is a little bit difficult because we're not quite sure of -- of the boundaries and dimensions of the negligence cause of action that was alleged here. And I assume you're, of course, contesting liability.

I -- I take it you -- you do concede you must concede, because of the statute, that there is a general duty on the part of the reporting agencies and TRW not to be negligent in the performance of its statutory obligation.

MR. NAGER: Yes.

QUESTION: So, we can, I guess, then consider the case based on a supposed cause of action where there is negligence and there is injury.

MR. NAGER: Yes, Justice --

QUESTION: Even though in this case, I'm -- I'm sure you would contest it. You would say there was no negligence.

MR. NAGER: That is correct. The Court can also assume, since these are the allegations in this case, for purposes of considering this issue, you could consider that the failure to maintain procedures was in fact intentional because they've, in fact, proceeded under the -- under the provision of the statute which prohibits intentional noncompliance with the statute because they've alleged a right to punitive damages and an intentional noncompliance with the Ninth Circuit remanding this case to the -- to the trial courts. The claim is not barred by the statute of limitations, and they should have the right to proceed on their allegations, including their claim for

punitive damages. So, you could consider under either section of the statute.

We would say, as they themselves conceded in their briefs to the Ninth Circuit, they said Mrs. Andrews was per se damaged when her privacy was invaded by the disclosures. Now, they've made an actual damages argument in this Court. That's not the argument they were making in the court below. What they were saying in the court below is what would be assumed from their complaint and would have been assumed in any action at common law where someone was alleging invasion of privacy or defamation, that their injury occurred upon the date of the alleged improper disclosure, although they may have suffered some additional damages or more damages or all of their damages at a later point in time.

QUESTION: But you're saying in that respect it's just like common law defamation. The minute the -- the defamatory statement is out, your -- your injury is -- is complete for purposes of a cause of action.

MR. NAGER: For purposes --

QUESTION: That's your only point there.

MR. NAGER: That is correct.

Let -- let me move for a second and -- and explain why the Ninth Circuit's importation of a discovery rule into this statutory scheme makes little sense.

It's in the nature of this statutory scheme and the subject matter that it's dealing with that the claims that this statute can give rise to become stale very quickly. The reason is, is all of the information that's critical to presenting one of those claims is not in the hands of the plaintiff. It's either in our computer database or in the records of the creditors who in the crediting reporting agencies give the information to.

And that's why when Congress passed this statute, it said that there were going to be certain disclosures that it was going to require either the credit reporting agencies to make or the creditors to make. But it also specified, because of concerns about the burdens of record keeping, quite finite periods of time by which those records would have to be kept. So, at the time the statute was passed, a credit reporting agency only had to keep a list of who a disclosure was made to for 6 months, and now, as amended in 1996, they only have to keep it for a year.

And at the time the statute was passed, there was no requirement placed upon a subscriber to our database, one of the creditors, for any time period they had to keep their own records. Now, in 1976, the Equal Credit Opportunity Act was passed, and the Federal Reserve Board promulgated regulations requiring that a creditor

keep records of any action it takes to deny credit for up to 25 months.

But the fact of the matter is, because of -- of the enormous amounts of information that are retained, the record retention policies of credit reporting agencies and creditors, pursuant to guidance received from the Federal Reserve Board and the Federal Trade Commission -- record retention -- we -- we get rid of those records at the end of 2 years as a credit reporting agency, and the banks get rid of them after 25 months. So, the claims --

QUESTION: I don't understand. You mean if I apply for credit and TRW checks me out, they're only interested in the last 2 years?

MR. NAGER: The underlying credit information is preserved, as long as it's not negative, forever. If it's negative, the statute prohibits the credit reporting agencies for retaining it for more than 7 months.

But remember what the -- the claim is is an improper disclosure. So, what you have to know is, is who was the information disclosed to and when. And this -- the -- that's a separate data field. And under the statute, that list has to only be maintained for a year after 1996 by the credit reporting agency. So, the only way to find out that a disclosure has been made is either within a year -- or we actually keep it for 2 years

because, in the case of an employment application, you have to keep it for 2 years, or from the creditor, and they only keep it for 25 months.

What that means is, is that claims that aren't discovered within 2 years that would be preserved under this statute -- the underlying records that would -- would reliably prove whether a disclosure has been made and contained an inaccuracy won't exist.

QUESTION: Well, but if we affirmed the Ninth Circuit, you might change your policies, might you not?

(Laughter.)

MR. NAGER: No. As a matter of fact, Mr. Chief Justice, I don't think we would. And the reason we wouldn't is -- for example, California has already, under its State consumer code, changed its statute of limitations to be a discovery rule, but the credit reporting agencies haven't changed.

And the reason is we -- we have no desire to facilitate the bringing of causes of action. And I'm going to be honest -- candid with the Court about it. And the information is expensive to retain. So --

QUESTION: How many other States have changed the way California has?

MR. NAGER: I don't know the answer to that question, Justice Ginsburg. I do know from my client and

partners who practice in this area regularly that their impression is no State has a statute of limitations that is longer -- I'm sorry. No -- no State has a record keeping requirement that exceeds the Federal record keeping requirement.

QUESTION: But one of the arguments you make, if I remember correctly, was the Ninth Circuit is -- is a large area, so we -- whatever they say is going to govern for the Nation because we can't keep our books one way for California and another way for someplace else. But California is a pretty large State. If -- if you're saying, well, California has done it, it doesn't bother us, we go our merry way, why wouldn't you do the same thing under the Ninth Circuit's decision?

MR. NAGER: Well, we would go -- in response to the Chief Justice's question, as long as the Federal law or State law doesn't require us to keep the records any longer than the present 1-year requirement, we're not going to keep the records for any longer --

QUESTION: So, then this -- this -- whether it's a discovery rule or whether from the date of the violation doesn't matter, as far as your record keeping is --

MR. NAGER: As far as the record keeping. What I would suggest is it would leave the courts and our clients -- to the extent that claims are asserted after

the records are gone, it will be left -- we will be left defending against claims that are based upon quite unreliable evidence, and the courts will be left adjudicating claims that are based upon quite unreliable evidence because the underlying documents won't exist.

And the reason that I would like to make that point to the Court, Justice Ginsburg, is because the very most fundamental purpose of a statute of repose -- of the repose aspect of a statute of limitations is to prevent society and its courts from being burdened with claims that can't be reliably proved. And --

QUESTION: But that's an argument that you really save those records; you shouldn't throw them away.

MR. NAGER: No, I don't think so, Justice Stevens, because no one disputes in this case what Congress contemplated in the record keeping requirements. And my point to the Court --

QUESTION: No, but I'm talking about your exposure to State cause of action where they have a discovery rule that your exposure runs beyond the 2 years.

MR. NAGER: The -- the --

QUESTION: And it seems to me you would have an interest in keeping records that would disprove unmeritorious claims.

MR. NAGER: Well, the -- the -- I think the

answer to that is -- is no.

QUESTION: Except that they would also prove meritorious claims.

MR. NAGER: That's -- that's true.

QUESTION: Well, that's right, and the question is which -- which is the greater number.

(Laughter.)

MR. NAGER: And I think the -- the -- I can't tell you that I have actual empirical information, and my client would tell you that the number of inaccurate disclosures is de minimis relative to the number of accurate, proper disclosures. That's why we maintain reasonable procedures.

But I can tell you this -- and I think this is the issue in this case -- is -- how long did Congress contemplate that we would keep those records for, and what statute of limitations did Congress correlate with those record keeping requirements? Because when asking what could Congress have intended through this statute of limitations rule, when it only said that we had to keep the records for 6 months in 1970 and for a year in 1996, it couldn't possibly have been contemplating that it would create a statute of limitations that would produce unreliable claims for the court, that the more -- much more --

QUESTION: But the statute of limitations I thought was 2 years.

MR. NAGER: The statute -- yes because the --

QUESTION: So, that's more than 7 months or a year.

MR. NAGER: It understandably gives the plaintiff some time to commence their lawsuit.

QUESTION: Even though you can say, we don't have the records after whatever is -- the -- the time periods -- the statute of limitations is longer than the required record keeping.

MR. NAGER: That's correct.

QUESTION: But there's nothing that prevents you from keeping the records.

MR. NAGER: Nothing other than lots of expense.

QUESTION: Do we -- we do have a Federal agency in this picture, the FTC. They know something about credit. Do we owe them any kind of respect?

MR. NAGER: I -- I think the answer is you plainly do not owe them deference in the Chevron sense because they don't have rulemaking power and they're not the only agency charged with that administration of this statute. And I don't think that you owe them Skidmore level respect because the fact of the matter is the first time they've articulated this position is in their brief

in this case. They don't address the language of the statute other than to say, well, other words in other statutes have been -- haven't foreclosed the importation of a discovery rule, and so perhaps it would be appropriate for the Court to import one here.

And we would suggest to the Court that the language of this statute is very clear. It may not be perfectly clear, Justice Ginsburg, but the phrase, liability arise, has a plain English meaning, which corresponds very naturally with the liability provisions of section 616 and -- and section 617.

And the overwhelmingly strong negative implication of the misrepresentation exception, which has an express reference to a discovery rule -- and as you noted, Justice Ginsburg, both the Senate and the House bills had a date of violation language. And the conference committee report, which changed that language and added the misrepresentation exception, commented that its action was taken only for the purpose of adding the misrepresentation exception, not for changing the underlying meaning of the basic statute of limitations --

QUESTION: And -- and the -- at common law, as I recall, I think under California statute in defamation actions, the statute began to arise from the date of the statement, from the date of the defamation.

MR. NAGER: That's correct.

QUESTION: And I assume that one rationale for that was because if the injured party doesn't discover the statement for -- for 2 or 3 years, it's necessarily diminished and any remediation is minor. Is -- is -- and assume that is the rationale.

Does that apply to you or not? Does -- does the fact that the erroneous credit information was given 2 or 3 years ago in most cases diminish its -- its injurious nature?

MR. NAGER: I think that in some --

QUESTION: I'm not sure I can say that. I'm -- I'm just trying to think --

MR. NAGER: With respect to just a pure improper disclosure, it may. I'm not sure I know the answer to the question.

What I can say -- and I think this may not answer your question, but I think it's important for you to know -- is that if a case of identity theft has occurred here, the -- our individual consumer who isn't aware of the disclosure -- they will find out. They may not find out in a month. They may not find out in 6 months, but once the -- a report is issued in a false -- to -- to a person who isn't the consumer, if -- if the consumer later applies for credit and they're denied

credit, they have to be told by the creditor that denies them credit why they're denying them credit and where they got the consumer credit report from, and then they can go check on our database as to what actually is on the database.

QUESTION: But I take it what's implicit in your argument is that if they are not given notice that they have been denied credit within 2 years, chances are not very great that they're going to get that notice after 2 years. Isn't that --

MR. NAGER: No, no. They may because they may not apply for credit within 2 years.

QUESTION: Well, I know. But in terms of probabilities, isn't -- I -- I thought that's what you were assuming.

MR. NAGER: No, no. What I'm -- what I'm suggesting to the Court is that there are improper disclosures that might not be discovered within 2 years. But if there is a disclosure which adversely impacts an individual's credit rating and their desire to obtain credit, they will find out about the fact that their credit has been impaired when they do apply for credit, whether it's within the 2-year period or not. Now, they won't know, because the records won't exist any longer, who that credit information -- what other creditors that

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-- that information was given to, but the underlying data about -- will be in the database about what their credit is and why their credit is being adversely impacted. That -- that was the point --

QUESTION: Well, I know.

But going back to Justice Kennedy's question, I mean, you're saying that there certainly are going to be cases in which the 2 years will have passed and then specific injury will arise.

MR. NAGER: And they'll have a claim about that specific injury if the specific injury is in year 3 I was denied credit, because in order for that credit to be denied, there's going to be a new credit report that's requested. That will be a new disclosure, and if the new request for credit is denied because of something in the credit record reflecting the -- the fact of earlier multiple applications for credit that have been denied, they have to be told that and they have to be told who gave it to them. That's what I'm saying.

If you look at the claims in this case, the two claims that are subject to this Court's review right now are the oddball claims. They're the improper disclosure claims, not the inaccuracy claims. There's no doubt the respondent had a -- had the -- found out within the 2 years and thus had the ability to timely bring a claim

about when she was actually denied credit herself. That was the point I was trying to make.

QUESTION: What happens to a person, if you're right, who finds out 3 years -- 3 years later she's denied credit, and the reason was because 3 years ago the company Sears got a report that had all kinds of incorrect information in it or whatever? Is that person without any remedy totally?

MR. NAGER: I'm not sure I --

QUESTION: Well, happens is --

MR. NAGER: She finds -- she finds --

QUESTION: Let's suppose --

MR. NAGER: When does she apply for credit? That's --

QUESTION: She -- in year 1 you do a credit report. You have 19 things you're not supposed to disclose: old arrest records, old bankruptcy records. You do everything wrong. All right. You send it off to Sears. She doesn't actually apply until year 8 to get credit from Sears. Sears goes to its files, looks up this old report, says no credit. Now, does she have any remedy at all?

MR. NAGER: If she applies in year 8, she'd have a -- a remedy for the credit that she was denied in year 8. She --

QUESTION: She can sue who? She can sue you?

MR. NAGER: She could sue the -- the credit reporting agency for inaccurately disclosing. If I'm understanding you correctly, there's a new report that's issued.

QUESTION: The -- your -- your client deals with Sears in year 1.

QUESTION: He didn't say there was a new report.

MR. NAGER: Oh, I'm -- I misunderstood. If there's not --

QUESTION: In year 1 and they never see Sears again. In year 8, the credit is denied. Is there any remedy for the person who was denied the credit?

MR. NAGER: In the absence of a willful misrepresentation, not -- not under this statute.

QUESTION: It's unlikely, of course, that Sears is going to be using an 8-year-old report without asking again, and you'd probably give the same information again.

MR. NAGER: It's almost inconceivable that they wouldn't ask again, and it's also probably slightly less inconceivable but still relatively inconceivable they would still have the records because it's in their interest and I'm sure they have the record retention policies to abandon them as well.

Thank you, Justice Scalia.

Let me move quickly to the presumption that the court of appeals applied. It's -- it's wrong and it's wrong for two reasons.

First, insofar as they --

QUESTION: What -- precisely what presumption is it you're talking about?

MR. NAGER: I'm sorry, Mr. Chief Justice. The Ninth Circuit in this case said that in the absence of an express statement by Congress, it would imply a discovery rule into this statute -- into this statute irrespective of the particular words this statute chose to use. And so there's a basic -- there are two aspects to the Ninth Circuit's ruling. One is that a default rule will be a discovery rule, and secondly, that they'll apply that default rule in every case under every Federal statute unless the statute expressly refers to discovery for the basic statute of limitations rule.

With -- with respect to the -- their clear statement rule, this -- neither this Court nor any other court of appeals that I'm aware of has equated a statute of limitations with a retroactive law with a waiver of sovereign immunity, or with any of the areas of law in Anglo-American jurisprudence where this Court has said that it will require a specifically clear statement from Congress in order to accept the proposition that Congress

had a particular intent.

All of the courts of appeals that have embraced a discovery rule as a default rule have said in the silence of Congress, not in the ambiguity of Congress.

QUESTION: So, you're not asking us to say, no, there's no discovery rule. But what you're saying is you can find Congress otherwise intent -- intended from something that's not an express negation.

MR. NAGER: Our primary position in this case is that this statute, when you look at the term, liability arise, when -- when the Court looks at the misrepresentation exception, when it looks at the definitions of liability in sections 616 and 617, the only reasonable construction of this statute is that the basic statute of limitations rule is the traditional complete cause of action.

QUESTION: But -- but all that the Court must do to hold in your favor is to say you've got an express misrepresentation exception. Then that's it.

MR. NAGER: That's correct.

We would also say if the Court chose to decide what kind of default rule should be applied in -- in this -- in this case or in Federal cases generally, that the Ninth Circuit's opinion vastly overstates the support and authority for using a discovery rule as a default rule.

This Court for 150 years at least has said that the traditional rule is the complete cause of action rule. This Court has made exceptions to the complete cause of action rule in the cases of fraud, in the case of the Federal Employer's Liability Act, and in -- in the context of medical malpractice claims in the Federal Torts Claims Act.

But both -- in Kubrick, dealing with the Federal Torts Claims Act, both the majority and the dissent in that case said that the general rule is an injury rule, not a discovery rule. And as Justice Stevens pointed out in his dissent, an injury rule would be the thing that makes the most sense in the commercial context and the debate in that case was simply about in the peculiar context of medical malpractice claims, what should the discovery -- the United States in that case didn't contest that -- that a discovery rule shouldn't apply. And the question was what kind of discovery rule should apply.

Now, it is true that a number of -- of courts of appeals -- and, Justice Ginsburg, when you were on the D.C. Circuit, you wrote one of the opinions -- said that in the late 1980's in the wake of Kubrick, a number of Federal courts of appeals had, in fact, adopted discovery rules as default rules in -- in statutory silence.

I would suggest to you that -- that Congress has

written reams of United States code against the traditional rule, not against the discovery rule, that once you enter into the debate -- into the notion of using a discovery rule as a default rule, you run into exactly the kinds of problems that the Court faced in Klehr and in Rotella where then this is, well, which discovery rule do we use now? Is it --

QUESTION: Thank you, Mr. Nager.

MR. NAGER: Thank you, Mr. Chief Justice.

QUESTION: Mr. Henderson, we'll hear from you.

ORAL ARGUMENT OF ANDREW R. HENDERSON

ON BEHALF OF THE RESPONDENT

MR. HENDERSON: Thank you, Mr. Chief Justice, and may it please the Court:

Looking at the statute at issue, there are two parts to it. The first part is the main part that provides that under the Fair Credit Reporting Act, the 2-year limitation begins when liability arises.

QUESTION: I -- it is quite correct for you to begin with the statute, but just a carryover of the very last point. The Ninth Circuit was wrong, wasn't it, when it said the general Federal rule is that a Federal statute of limitations begins to run when a party knows or has reason to know the injury? I mean, that's -- that's just not the general Federal rule, is it?

MR. HENDERSON: That -- that is the rule that's been adopted by many circuit courts of appeal around the country, in Cada and in the Connors case.

QUESTION: Including the D.C. Circuit.

MR. HENDERSON: That's correct.

QUESTION: Yes.

QUESTION: But it's certainly not the rule of this Court, is it?

MR. HENDERSON: I don't know that it's the rule of this Court. That's what we're here to answer today in part.

QUESTION: Well, it's not what we said in Holmberg. That was a much more limited case --

MR. HENDERSON: Holmberg --

QUESTION: -- than the Ninth Circuit gave it credit for.

MR. HENDERSON: That's correct, and I -- and I'm not here to defend the articulation of the judgment by the Ninth Circuit. I -- I believe that the judgment was correct, but for reasons that can be much better explained.

QUESTION: But I sidetracked you on the statute, and I think that is the right place to begin.

MR. HENDERSON: Thank you.

And there are the two parts. The first part is

the liability arises language, which generally applies

The second part is an estoppel provision, and a very liberal one at that, in that it calls for a complete renewal of the limitations period, not merely suspension, which is the normal rule at Federal law. So, it is a very liberal estoppel provision enacted by Congress that should in no way derogate the application of the normal provision, the liability arises language.

QUESTION: That to me is one of the hard parts of this case. It's not quite expressio unius, exclusio alterius, but it's close. And Congress did consider whether or not the -- the rule that the statute begins when the injury arises ought to be modified and it did modify it for a misrepresentation but not otherwise. And that's, it seems to me, a very difficult problem for you to overcome.

MR. HENDERSON: Well, Justice kennedy, I believe that when you consider the misrepresentation exception, what -- what it is is it is a very additive provision that says that if there is an intervening misrepresentation by a credit reporting agency, during the running of a -- of a normal limitations period, then there is complete renewal upon discovery of that intervening misrepresentation, not merely suspension, which is the normal Federal rule, as this Court has recognized, at least members of this Court

have recognized, for example, in Jordan Chardon v. Soto in 1983 in the dissent. But the -- the fact that Congress went out of its way to say if -- if this particular type of -- of egregious misconduct arises, which is not the normal misconduct that the statute is meant to address, but this particular new type of egregious misconduct arises, then we're going to have a complete renewal when that is discovered. That really is an --

QUESTION: Where does this statute say this during thing? It just -- you put a lot of words into it, but all that it seems to say is that -- that if there's a misrepresentation, the statute doesn't run. Period.

MR. HENDERSON: No. It says that the -- that the limitations period shall begin from and shall run from -- for 2 years from the discovery of the misrepresentation.

QUESTION: Why don't we take a look at it? Where is this provision that --

MR. HENDERSON: It's shown on page 1 of the blue brief, for example. And it's -- it's a very long provision that takes up the bulk of statute at issue.

QUESTION: It does but still is an exception from the basic prohibition.

MR. HENDERSON: It -- it uses the word except, but it is clearly an additive provision that -- and the

odd thing about this is that the four courts of appeals that have misconstrued the statute in my view have looked at this and have said, that which is clearly additive should be read so as to subtract from the main provision in -- in a substantial way. And it makes no sense that when Congress intended to simply add something, that is clearly for the benefit of consumers, and that provides 2 full years upon the discovery of an intervening deception, should how -- somehow be read to truncate the normal provision.

QUESTION: Well, the reason that I think I'm having such difficulty with it is because on your theory, the statute doesn't begin to run till discovery anyway. So, you have to imagine a case where the only way -- the thing didn't begin till discovery. Then this proviso is supposed to be doing some work? What could it be? I mean, it seems you have to think of very weird cases, very unusual cases before you could imagine a situation where the proviso would serve any function at all on your theory, which is it doesn't run till discovery anyway.

MR. HENDERSON: Justice Breyer, they are discovery of two different things. Just as, for example, the Seventh Circuit's Cada decision, which was written by Judge Posner, clearly makes a distinction between the injury discovery rule, which is an accrual rule, and

equitable estoppel, which -- which is used normally to suspend the running of a statute of limitations after it has begun, well, the injury accrual rule has to do with the discovery of the injury commencing the limitations period. Equitable estoppel has to do with discovering the deception or the wrongdoing on the part of the --

QUESTION: That, of course, is true, but it's very hard to see how a -- a deception could be a material deception where the person is fully aware of the underlying liability.

MR. HENDERSON: Fully aware is correct.

QUESTION: Well, and if he is not fully aware on your theory, the underlying statute didn't begin to run.

MR. HENDERSON: That -- I beg to differ, Justice Breyer. It's -- full awareness is the kind of full awareness that the dissent in Kubrick argued for, which is full awareness of all the elements, including the breach of the duty. We do not argue that the breach of the duty need be discovered --

QUESTION: Strike full aware.

MR. HENDERSON: I'm sorry?

QUESTION: I'm looking for the example on your theory of the case and at the heart of the statute which has to do primarily with two things. You've got to have reasonable procedures, et cetera, when you have your

agency, and then in the few cases, comparatively, where somebody wants the information about them, you have to give it to them. Okay? That's basically what it's about.

That heartland of the statute on your theory -- it's hard for me to find examples that would be significant in number where this proviso would be doing any work. Now, that's my problem, and you can respond to that by giving me obvious examples where it would be.

MR. HENDERSON: Gladly, Justice Breyer. The best example would be the facts in this case, and I'll add some facts to show you how the misrepresentation exception would work. The facts in this case are that the plaintiff's privacy was breached four times between July 1994 and January 1995, and she had no reason to know that until she went to apply for credit in the normal course of her business in May of 1995.

Now, immediately upon --

QUESTION: And had no cause of action before then.

MR. HENDERSON: She had no cause of action because she had not suffered any injury as a result of these completely latent privacy breaches, and in fact, she could have gone to her grave never knowing about them.

But because she went out and applied for credit, she found out about them, and she immediately asked for

and received her -- a consumer file disclosure from TRW, the defendant.

Now, TRW, the defendant in this case, did not misrepresent any facts, did not, for example, conceal those four privacy breaches. Had they done so, however, had they sent back to here a letter, in which they had concealed the four privacy breaches, then she would still be perhaps -- well, she might not even be aware of the injury at that time, but she would certainly -- the -- the misrepresentation exception at that point in time would be invoked if, in fact, the misrepresentation --

QUESTION: But what you just swallowed -- the words you just swallowed are my problem. If those misrepresentations were material, then she wouldn't have discovered the underlying harm anyway. So, you wouldn't have needed the proviso on your theory of the case.

MR. HENDERSON: Well, there may be -- there may well be other misrepresentations that could be made by a credit reporting agency, however, that was -- that went to the -- their -- that were material to their liability, and the fact that -- that they might not --

QUESTION: But those were the examples I was looking for. You see? That -- you put your finger right on where I'm having the problem.

MR. HENDERSON: Well, perhaps they could give a

misrepresentation to the effect that the Federal Government requires us to use the procedures we use, and they've been deemed reasonable by the Federal Government or in some other way reasonable --

QUESTION: Mr. Henderson, you have, from I think your answer to Justice Breyer, pretty well indicated that there would be, even under your view, a large overlap where you'd never get to the misrepresentation exception because the claim never arose in your -- in your view of the case. You stopped yourself in the middle of your answer to him and gave an answer that suggested that the claim wouldn't accrue anyway. So, you'd never get to the misrepresentation exception. And -- and I think that a lot turns on that.

So, I would like you to give -- I have exactly the problem that Justice Breyer has. I couldn't think of something that wouldn't be covered by your main rule, which is nothing -- no liability arises until the person suffers the injury, knows that she's suffered the injury. Now, give me an example where she knows she suffered the injury and would have the benefit of the misrepresentation exception.

MR. HENDERSON: As I sit here, I'm trying to come up with one, but I think that any misrepresentation by the credit reporting agency in response to a consumer

demand --

QUESTION: But you had time when you wrote your brief to think about this.

MR. HENDERSON: yes.

QUESTION: And if -- if the misrepresentation exception is superfluous on your reading of the statute, that is a powerful reason for us not to agree with you.

MR. HENDERSON: No, I don't believe it's at all superfluous any more than I believe equitable estoppel is superfluous from the injury discovery rule.

QUESTION: Well, then give us a concrete example where it would have any work to do.

MR. HENDERSON: Well, I -- I believe that, for example, if a consumer were to inquire of a credit reporting agency saying give me everything in your file, which includes all the credit accounts, all the disclosures for up to 2 years for employment purposes and lesser amount of time for other reasons, and if there was any disclosure in there or any representation in there by the credit reporting agency that was intended to deceive the -- the consumer about the -- about the extant liability, then it could be, for example, as I said, a -- a -- some message from the credit reporting agency saying that we are -- we are required by law to have the procedures we have or to do that which we did, which would

be a falsehood and intended to deceive the consumer from bringing a claim for -- for -- to determine whether or not the procedures were, in fact, reasonable.

QUESTION: Yes, but if there were anything wrong in what it disclosed to her, presumably the consumer would know, and that would start the period running. And there would be no need for the consumer to invoke the exception.

MR. HENDERSON: How would the consumer know that the misrepresentation is --

QUESTION: Well, I assume it's a misrepresentation about the consumer.

MR. HENDERSON: It would be a misrepresentation about the behind-the-scenes activity of the credit reporting agency.

QUESTION: Well, if the -- if the behind-the-scenes activity of the credit reporting doesn't, in fact, result in a misrepresentation about the consumer, where is there going to be any cause of action ever at any time? Proviso or no proviso.

MR. HENDERSON: Are you talking about a misrepresentation to a user of the credit report?

QUESTION: A false -- false statement about the consumer in a matter that would be material to a decision to extend credit to the consumer.

MR. HENDERSON: I think you're confusing a

misrepresentation made to a user of a credit report from a misrepresentation made to the consumer who inquires of a credit reporting agency.

QUESTION: But doesn't -- I guess what I was assuming was that when the consumer inquires, the consumer is told all those facts which are in the credit reporting company's file which bear on the consumer's credit worthiness which are the sorts of things that the -- that the credit rating service discloses when a credit inquiry is made. Am I wrong about that?

MR. HENDERSON: They should be the same given -- except that there might be differences in time.

QUESTION: Well, is there any reason to -- I mean, I -- I'm not following you. Are you saying that in some cases they won't give the consumer the entire file?

MR. HENDERSON: They -- that's the problem. That's what Congress was intending to address. The way it's set up is that, for example, if I apply for credit and it's denied, the credit -- the creditor, potential creditor, is supposed to notify me that it was based on a report from, for example, TRW. I am then put on notice --

QUESTION: Okay. So, you're saying that if the credit reporting service lies to the consumer when the consumer says, tell me what you've got and who you've been telling, then the proviso would have some work to do.

MR. HENDERSON: Exactly.

QUESTION: Okay.

QUESTION: Why? Why? I mean, the -- I still don't see it. Maybe you need an example.

My simpleminded thinking of it is the consumer -- the credit people make a misrepresentation.

MR. HENDERSON: To whom?

QUESTION: To the consumer and it's either material or it isn't. If it is material, that must be because, at least in most cases, it's hidden, some fact that is relevant to showing liability, in which case you don't need the special exception because the person didn't know all the facts. They hadn't discovered it. Or it's not material, in which case it doesn't fall within the exception anyway.

Now, that's my simpleminded thought, and what I started with and I think I'll continue with is you produce an example that proves my simpleminded thought is simplemindedly wrong.

MR. HENDERSON: And let me give you one. For example, if in the initial credit report that's given out that is erroneous to a user, there are trade accounts that do not belong to the consumer, they belong to someone else and they are negative trade accounts, and yet -- and on that basis the -- the user writes to the consumer and

says, you don't credit, we've got a credit report from TRW, and on that basis we're denying your credit. So, the consumer turns to TRW and says, please give me a credit report, and they look at it and they go, oh, there's all this derogatory information in there that does not belong to this consumer, let's get it out of there and give it to the consumer. So, they take out these -- these trade lines that are derogatory and -- and in so doing misrepresent information to the consumer in such a way as to be material and to deceive the consumer such that the consumer is then misled about the status of the files. And -- and presumably all this is done with the intent of deceiving the --

QUESTION: Yes, but under your theory, the consumer is never put on notice.

QUESTION: Yes. Because the question is simply this. Imagine there were no proviso. Think of the example you just gave. Are you going to admit on your theory that the statute began to run against your consumer, or are you going to say, of course, it didn't run? He didn't discover what was going on.

MR. HENDERSON: I think under --

QUESTION: Which are you going to say?

MR. HENDERSON: -- under the injury discovery rule or the actual injury occurrence rule, either one

which we favor, the injury occurs when the credit is denied, and then immediately thereafter the consumer is put on notice.

QUESTION: All right. I understand.

MR. HENDERSON: And so, yes.

QUESTION: It is true, though, that under what I think is the prevailing rule in most circuits at least, there would be an equitable estoppel there, and the statutory proviso need not have covered that unless it meant to indicate that there was a -- an injury-based statute of limitations.

MR. HENDERSON: Well, I think the -- it's true that the equitable estoppel might apply even if they had not added the misrepresentation exception, but as members of this Court have recognized, for example, when -- when this Court declined the opportunity to apply a Federal rule to class action in civil rights cases, that the general rule under Federal law is suspension not renewal, which means that normally you would just toll the running of the limitations period for such amount of time as there is -- as there is a deception in place.

However, Congress went out of its way to say that's not the rule here. We want complete renewal. We want 2 full years of unadulterated knowledge in which to go about considering whether to bring a claim. And it --

and it's odd to think that the Congress would want that 2 full years in the situation where a -- when a misrepresentation had sprung up but not allow the same 2 full years in the normal case after discovery of an injury.

QUESTION: Mr. Henderson, your -- your response to Justice Breyer's question leaves me with -- with some confusion as to what you mean by injury discovery rule. I assumed it meant at the time the consumer knows, one, that he's been injured, number two, by the defendant. And the example that Justice Breyer was given, you say it's enough he just knows he was injured because he was denied credit. Is that the rule you want?

MR. HENDERSON: Well, this Court in Kubrick seemed to settle upon an injury and causation accrual rule, but I believe that --

QUESTION: And causation. And -- and you don't -- it's enough that he knows he was denied credit and -- and the statute runs then even if he doesn't know that the reason he was denied it was -- was the -- the inaccurate reporting.

MR. HENDERSON: Based on my understanding of the law that has developed in the courts of appeals in Cada and Connors, that it is -- injury alone is enough to set the -- to set the plaintiff on a course of diligence

towards the potential presentation of a claim.

I think obviously the injury and causation accrual rule is -- is more liberal and more fair in many ways. It's the rule in Germany, for example. But -- but --

QUESTION: It destroys -- it destroys the exception, so you don't want to use it here.

MR. HENDERSON: But if I could, Your Honor, I want to just talk also about the actual injury occurrence rule.

In Hyde v. Hibernia National Bank in 1987, I believe it was, the Fifth Circuit looked at this statute and said in the case of negligence violations, you have an actual injury occurrence rule. In the case of willful violations, you really need to discover the fraud. It was somewhat of a -- an elegant theory that -- that was derived by the Fifth Circuit, but it's been argued throughout this case at all levels, in the district court. In fact, in the petition at page 24a is a discussion of -- in the appendix at page 24a is a discussion of Hyde v. Hibernia National Bank.

QUESTION: Why isn't the release of -- of confidential information an injury? That -- that does not count as an injury.

MR. HENDERSON: I don't believe so. If it is an

injury, it is the most metaphysical type of injury, such as underground trespass where some mining company burrows beneath someone's land that is, by its very nature, undiscoverable, unnoticeable. And if it is an injury, it is so metaphysical and so unreal that it cries out for the application of the injury discovery rule, which by the way, does not require actual discovery in all cases, but can also be invoked by constructive discovery. And yet, where you have an injury, if it is an injury, of this nature that is by its nature undiscoverable, unnoticeable, then of course, you would have to have the injury discovery rule at hand.

I want to also point out that there is -- there was some question about the meaning of liability arises. Congress more recently has indicated that the phrasing -- the phraseology used in this statute, the liability arises language, is synonymous with accrual language. And I ask the Court to look at 49 U.S.C., section 32710, and the case of Carasco v. Fiori Enterprises, the site for which is 985 F.Supp. 931 at pages 934 through 935. And in that case, the Court recognized that when Congress amended the odometer --

QUESTION: This is a district court decision?

MR. HENDERSON: It is, and it -- and it analyzes what Congress did with respect to the odometer --

QUESTION: Thank you, Mr. Henderson.

MR. HENDERSON: Thank you.

QUESTION: Mr. Jones, we'll hear from you.

ORAL ARGUMENT OF KENT L. JONES

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF THE RESPONDENT

MR. JONES: It's really the second question, of course, whether if the statute has an injury discovery rule, that would be negated by the misrepresentation exception. But the Court is focused on that and there is a direct and simple answer to it.

In this Court's own opinion in Rotella, at page 555, the Court said, in applying a discovery rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of the claim is what starts the clock.

QUESTION: Well, the difficulty -- the difficulty I'm having with that, though I see that now, is basically what you've done there is you've taken a statute that doesn't discuss any of these things, and you take what would be a full discovery rule, and then you break it into bits. Now, you say -- you say, well, we're taking a bit out of it and that's the work that the proviso will do.

MR. JONES: The injury discovery rule starts the

clock in the sense that once you become aware of the injury, you have a duty of inquiry to find out the cause of the injury, who caused it, whether it violated your -- a standard of care that was owed to you. If in making that inquiry, the -- the defendant lies to you about one of those aspects -- for example, he conceals what he actually disclosed -- the statute then gives you 2 years from the date you discover the truth.

QUESTION: Suppose I find that a credit reporting agency has given incorrect information to -- to somebody who's inquired. I haven't been denied credit. In fact, they give me credit anyway. But I find that they have given inaccurate information. Is that injury discovery?

MR. JONES: Well, you're -- you're mixing, I think, two points. One is what is disclosed to you as the -- if the consumer.

QUESTION: No, no.

MR. JONES: If you think that they violated your rights and you ask them something, what they tell you. That's what the misrepresentation --

QUESTION: No. I -- I discover that the credit reporting agency, in -- in its information to Sears, included erroneous information. Sears has given me credit anyway.

MR. JONES: Right.

QUESTION: Have I had any injury?

MR. JONES: It's just erroneous information?

QUESTION: It's erroneous information.

MR. JONES: I don't --

QUESTION: And it's detrimental. It's detrimental but Sears gives -- Sears gives me the credit anyway.

MR. JONES: I don't --

QUESTION: Have I suffered any injury under this statute?

MR. JONES: I don't see that you would have, but --

QUESTION: Wow.

QUESTION: You might, if there were a higher interest rate charged and you didn't know about that.

MR. JONES: That's possible, but if you were charged a higher interest rate, you'd probably be on a duty of inquiry to -- reasonable diligence to find out whether that was injury to you.

QUESTION: You don't think that you could then get the relief against Sears doing the same thing all over again? You don't think you could tell them to straighten out the record for future requests?

MR. JONES: I didn't say that you wouldn't be

able to ask them to correct the record.

QUESTION: If you haven't been injured, how can you get the relief?

MR. JONES: You'd be entitled to ask them to correct the records, and you'd be entitled to have them do so. But --

QUESTION: You mean they'd be liable. They'd be liable in a suit.

MR. JONES: They'd be required to correct the --

QUESTION: For an injunction.

MR. JONES: Here's the way that would work, as I understand it. If I asked them to correct the records and they failed to do so without a reasonable cause, I could bring a suit to require them to correct the records, and if they willfully refused to do so, I might be able to prove both actual damages and punitive damages. But I would still have to have some actual damages before I got a monetary recovery.

QUESTION: Do you think the word liability in the statute refers only to monetary recovery?

MR. JONES: I think that -- well, I think the word liability in this statute, like any statute that uses cause of action accrues, cause of action arises -- these are ambiguous terms that the court has to interpret based on the purpose of the statute.

QUESTION: Don't they include injunction and refer not merely to monetary damages, but to an action for injunction?

MR. JONES: There is not a statutory action for an injunction. There is a statutory action for damages when the -- when the defendant either acts negligently --

QUESTION: Where does the action for injunction come from if not from the statute?

MR. JONES: It comes from the invocation of the common law when --

QUESTION: I don't believe in Federal common law. If there's -- there's a cause of action, it's a cause of action under the statute.

MR. JONES: Well, it's -- it's a cause of action that perfects the rights created by the statute. I wouldn't call it an implied right of action, but I would think that a Federal court sitting in equity would be able to give an injunction to enjoin repeated violations of a statute.

QUESTION: Before there's any liability, but you can't get money damages before there's any liability.

MR. JONES: That's doesn't strike me as a startling idea, that the -- that an injunction can be given in a situation when you're not able to obtain money relief.

QUESTION: But you do have to assume that there's a violation for the injunction to lie.

MR. JONES: That's correct. You have to -- you have to determine that for an injunction to be given.

But this -- the question here -- I mean, the second half of the question I think is easily answered, and if the Court has more questions on that, fine, but if not, I'd like to address the first question, which is does the phrase, liability arise, suggest an interpretation that -- that -- from which we would conclude that the injury discovery rule applied as opposed to the injury accrual rule.

And Congress often creates remedies for -- for injuries that are latent or hidden, and -- and it's improbable to assume that when Congress does so, it intends to curtail that remedy before even a diligent plaintiff could be expected to learn of it. And so, the injury discovery rule has been applied by the courts in interpreting these kinds of vague provisions like liability arises and cause of action accrues to give them meaning in the context where there's a hidden or latent claim that wouldn't be expected to be discovered in the ordinary course.

QUESTION: But it is odd in the context of a statute that has the other language in it where Congress

spells it out. Yes, here we think there has to be discovery. I just find the juxtaposition in this statute difficult to overcome.

MR. JONES: There -- there is nothing odd. In fact, it's ordinary, as -- as it was pointed out, for this kind of fraudulent concealment or equitable estoppel rule to be applied to a statute that has an injury discovery provision.

QUESTION: No, that isn't odd. What's odd is -- what is odd is how it's expressed. If -- if the first part was expressed in intending to have a discovery rule, the way it was, you would expect the last part to have been expressed, the action may be brought at any time within 2 years after the misrepresentation because --

MR. JONES: The -- Justice --

QUESTION: Of course, you would imply 2 years after discovery of the misrepresentation.

MR. JONES: Justice Scalia, the misrepresentation is -- is of any fact material to the violation. The discovery rule is only of the injury, as this Court said in Rotella and as the other courts have also held. If -- you -- you can know of the injury and not know what caused it or who or whether they were liable for it. And if they -- the defendant lies about that, when you're trying to inquire, during this 2-year period

from discovery of the injury -- if they lie about that, the statute can -- comes in and says, we're not going to let them profit from their lie. They're going to be -- you're going to get another 2 years from the time you discover the injury.

QUESTION: But that's always true under equitable estoppel.

MR. JONES: I'm sorry. Discover the lie. I'm sorry.

QUESTION: That's always true under equitable estoppel.

MR. JONES: That is -- that is --

QUESTION: You have that -- now, it's true that the whole -- the statute doesn't run, but you don't have 2 years.

MR. JONES: Right. This statute does not -- is not a codification of the entire doctrine of equitable estoppel. It's a specification of the doctrine of equitable estoppel in the specific context of these kinds of claims. And it's focuses on these -- these specific types of claims. So, I don't know whether it intends to preclude any broader equitable estoppel doctrine, but I do know that what Congress has provided is simply a application of the equitable estoppel rule in the specific context of this statute.

QUESTION: Well, I'm a little nervous. Perhaps Congress -- I don't know if I would have written the statute this way, but I assume that the credit companies were arguing, look, if you have a discovery rule here across the board, even discovery injury, what will happen is 45 million Americans who never ask for their report, 2 million do. All right? 20 years later, it turns out that we used an unreasonable procedure 20 years ago. And lawyers for the 45 million others will start combing the records to find out how there was an invasion of privacy or some other injury, and before you know it, will proliferate lawsuits about things that happened 20 or 30 years ago and created only minor injuries that people didn't even know about then.

MR. JONES: Well, you have the -- under the injury discovery rule, you have the requirement that the plaintiff act with some reasonable diligence.

QUESTION: They -- they don't know. They don't know who was -- you know, there's no way to know if it was an unreasonable procedure, who was told what.

MR. JONES: Well, if they don't -- if they don't make any inquiry at all over 20 years, I think a court could conclude that they didn't act with reasonable diligence. I certainly don't know of any decision applying the injury discovery rule that refuses to apply

it simply because it may have applications. I mean, I've never seen a court say that when these kinds of hidden harms are -- are remedied by Congress, Congress meant to let them go unremedied if they weren't discovered. I mean, it's just the opposite. It's because as -- as petitioner says, yes, you can have injuries that aren't discovered.

QUESTION: But you -- you can discover the misrepresentation, that -- that is, the -- the erroneous credit information. You can discover that and you can sue indefinitely after that. That doesn't start anything running. It's only when you find that that misinformation has caused a denial of credit that your cause of action arises. You can just leave it there.

MR. JONES: The -- there are two different aspects of this case. One is the inaccurate -- inaccurate reports, which is I believe what you're talking about, but then there's the thing that can never be discovered, which is the improper disclosure. When I say can never be recovered, I mean is not ordinarily going to be likely to be discovered.

This case actually only involves the improper disclosure. And the Court's analysis of this statute of limitations issue should appropriately focus on the fact that these kinds of improper disclosures are inherently

hidden and not going to be known by the -- by the plaintiff.

QUESTION: Thank you, Mr. Jones.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)