IN THE SUPREME COURT OF THE UNITED STATES

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SAFECO INSURANCE :

COMPANY OF AMERICA, ET :

AL., :

Petitioners :

v. : No. 06-84

CHARLES BURR, ET AL.; :

and :

GEICO GENERAL INSURANCE :

COMPANY, ET AL., :

Petitioners :

v. : No. 06-100

AJENE EDO. :

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Washington, D.C.

Tuesday, January 16, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MAUREEN E. MAHONEY, Washington, D.C.; on behalf of the Petitioners.

PATRICIA A. MILLETT, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

SCOTT A. SHORR, Portland, Ore.; on behalf of the Respondents.

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in 06-84, Safeco Insurance Company versus Burr, and 06-100, GEICO General Insurance Company versus Edo.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE PETITIONERS

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

I'd like to turn first to the Ninth Circuit's interpretation of the term "willfully" and its determination that the case had to be remanded for further proceedings to permit an opportunity to explore Petitioners' communications with their counsel. We ask this Court to find that there is no necessity for any such inquiry for waivers of attorney-client privilege because summary judgment should have been affirmed in this case.

Petitioners and their counsel, if you think about what communications you might find, they could not have known anything more about these statutory issues of first impression than the district court did. It's questions of law. And if the district court's opinion

does not reflect reckless disregard for the law, for the reading of the statute, then it would be inappropriate to characterize Petitioners' adoption of the very same views as either a knowing or reckless violation of the, of the FCRA.

The first -- the Ninth Circuit nevertheless reached a contrary conclusion, and said it was time to go ahead and look at privileged communications if the Petitioners wanted to defend the case, because they made self-interpretive errors about the meaning of willfully.

And the first is that they read willfully in this setting to mean recklessly, and relied on several cases where this Court has read the term willfully in civil statutes to mean recklessly.

But this Court has said repeatedly that the word willfully is contextual, that you have to look at all of the sections of the statute to see how it's used to determine whether it means with knowledge that your conduct violates the law, or whether reckless violations are sufficient. And in this particular statute, unlike the other three that were at issue, Congress has used the term willfully in other sections of the law to mean, as Plaintiffs concede, that the Defendant knows that their conduct violates the Act.

JUSTICE SCALIA: Well, it's also used in the

phrase "knowing and willfully." That appears in several other parts of the statute, and that wouldn't make any sense if the only meaning of willful is knowing.

MS. MAHONEY: Well, it actually says "willfully and knowingly --"

JUSTICE SCALIA: In one formulation or another, but it combines the two words, knowing and willful.

MS. MAHONEY: Well, this Court, though, has held that willfully and knowingly, when that phrase is used together, it's been discussed in a number of cases including Dixon recently, that it means -- willfully means knowledge that the conduct violates the law, and knowingly means knowledge of the relevant facts. And that would make perfect sense in this setting, and so the term willfully when, again, used --

JUSTICE SCALIA: You mean willfully alone?

MS. MAHONEY: It --

JUSTICE SCALIA: Where -- where it -- where it means what you think it means, which is knowingly, that does not mean knowing the facts? If you mistake the facts and are laboring under a misimpression of the facts, you have nonetheless willfully violated the law?

MS. MAHONEY: Your Honor, in Ratzlaf, the phrase was willfully, not willfully and knowingly, and

the Court held that it meant that you knew that your conduct violated the law. And that seems to be the most reasonable reading here because if you look, there are also sections of Section 1681n that refer to knowing conduct, and that would require the conclusion that Congress used willfully in this section to mean a -- a less -- a more -- a less culpable mens rea than knowingly. And that's --

CHIEF JUSTICE ROBERTS: So that if you're the CEO of your company, and a lawyer -- Federal counsel comes in and says we've got a real issue under the Fair Credit Reporting Act, I need to brief you on that, we need to make an important decision about whether we are complying, you say I don't want to hear about it, I don't want to know about it. That would not be willfully violating the statute?

MS. MAHONEY: Well, under -- some cases have suggested that there could be a willful blindness instruction that would govern whether you define that as knowing or not. Certainly --

CHIEF JUSTICE ROBERTS: So it doesn't have to be actual knowledge?

MS. MAHONEY: I think that the best reading of knowingly is actual knowledge or something that is, that is everything but, you know, that really is --

JUSTICE SCALIA: How about reckless disregard?

MS. MAHONEY: Well, conscious disregard is a recklessness standard, and even if the Ninth Circuit correctly determined that this should be interpreted as a recklessness standard, this Court has defined recklessness to mean that it has to be conscious disregard, actual knowledge of a high risk of, of -- of harm or in this case illegality. And in these circumstances, you can't say that there was a high risk of illegality because what the district court found is that the Petitioners' interpretations of the statute were actually not only reasonable, but correct, and having --

JUSTICE ALITO: Since the term knowingly or knowing appears in two places in 1681n, can't we infer from that that willfully in that provision also means something different?

MS. MAHONEY: I think the way it's used, it says knowing, knowingly that they did not have a permissible purpose. Permissible purpose, that may not be knowledge of the law, it just may be knowledge that your purpose wasn't permissible. And even if they were using it --

JUSTICE ALITO: I thought the statute says

what the permissible purposes are.

MS. MAHONEY: It does, but it doesn't necessarily mean that the individual knew precisely what the statute said. Because for instance, users are told what the permissible purposes are when they get a credit report from, from a credit agency. But more importantly, Your Honor, I think that the use of the term knowingly there can also be explained.

If you look at Section 1681h, it actually provides that certain tort actions cannot proceed unless there is a willful intent to injure, except as provided in Section 1681n, and they are the same kinds of actions that are carved out in 1681n.

And so I think it was to make clear, I think it was to make clear that you didn't have to have a willful intent to injure. So even if they meant it to be interchangeable with a knowing violation of the law there, I think there was a reason for it, it wasn't just surplusage. It was to clarify that they didn't have to have a willful intent to violate.

JUSTICE BREYER: Would you say it's all right to use the model penal code definition of reckless, which is basically what you -- taking it here, you would have to consciously disregard a substantial and unjustifiable risk that the action is unlawful?

MS. MAHONEY: That's correct, Your Honor.

JUSTICE BREYER: If you come across anything that would use that, I mean "reckless" itself is unclear. The model penal code tried to clarify it based on this Court's opinions primarily.

MS. MAHONEY: But I think you can look to the way this Court described recklessness in Farmer vs. Brennan as well, though, as well as --

JUSTICE BREYER: What's the difference?

MS. MAHONEY: The difference is just, there is two forms of recklessness. One which says that if the risk is sufficiently high, if a person should have known, you could be -- you could be liable. But that the form of recklessness that Congress presumably used here in this setting, where there is the potential for very punitive sanctions, was what is referred to -- Farmer versus Brennan calls it "criminal," the criminal recklessness standard.

And that means that not only do you have to have an objectively high risk of illegality, but you must be actually conscious of that risk. But in this case, you don't even need to get to the issue of consciousness.

JUSTICE BREYER: Well, you said there is no way they couldn't have been conscious of the risk here.

I mean, after all, that's why they went to lawyers. They know there's risk that this is unlawful.

MS. MAHONEY: The question is --

JUSTICE BREYER: But consciousness, I mean, maybe it should come in in the standard, but I don't know that that would help you.

MS. MAHONEY: I think the issue of conscious -- the risk, though, it has to be a high risk. And if it is a reasonable interpretation of the statute, or even if it is an interpretation of the statute that is fairly debatable, that you have a fair chance of success, then how can you say that is a high risk of illegality, so high that we should say that Congress wanted to sanction you for taking that position?

And for saying that, you know, you shouldn't be permitted to adopt a compliance program if there was a fair ground for believing that it was lawful. And here what the Ninth Circuit did --

JUSTICE SCALIA: Suppose there is a fair ground for believing it was lawful. Lawyers are in disagreement, but in fact, I believe the lawyers who say it is unlawful, and I nonetheless go ahead and do it. Is that a willful violation?

MS. MAHONEY: I don't, I don't think so, Your Honor, if, in fact, it was a fair ground for -- -

JUSTICE SCALIA: But I think I'm violating.

MS. MAHONEY: I don't -- yes. But you couldn't know you were violating it, and because if it really is a fair ground for litigation --

JUSTICE SCALIA: I'm a better lawyer than my advisors.

(Laughter.)

MS. MAHONEY: Your Honor, I think if it's an area where the law is truly unsettled. And here an issue of first impression, a lawyer's assessment that you may lose is inherently predictive. These are not true or false answers when there is almost nothing to go on.

And so in that area, it's much like what this Court did in Screws, where it said that this was a case involving a willful violation of, or interference with rights secured by -- by Federal law. And what the Court says, well, it's not just any bad purpose that Congress had in mind, it is a bad purpose to defy announced rules of law. They have to be, there has to be sufficient clarity in the law to say that there was a high risk of illegality that you could disregard.

JUSTICE SCALIA: Would you look to the subjective intent of the actor at all?

MS. MAHONEY: Only --

JUSTICE SCALIA: Or would you just look to the outcome and say, well, you know, it was a close question, so even if the actor indeed thought he was in violation, it was a close question; it's okay?

MS. MAHONEY: I don't think you would look at the intent until you found that there -- there was no reasonable ground or at least no, no -- no fair ground for debate about the question. And at that point, Your Honor, if there was an objectively high risk of illegality, then you do have to ask, what were they consciously aware of; what did they do?

JUSTICE SCALIA: I must say that -- that is not the normal meaning of willful, willfully violating the law.

MS. MAHONEY: Well, I think in Screws --

JUSTICE SCALIA: You're changing it to mean willfully, willfully and blatantly violating the law.

MS. MAHONEY: I don't think so.

JUSTICE SCALIA: I mean, if I know that what I'm doing is in violation of the law, even if it's a close question, it seems to me I am willfully violating the law.

MS. MAHONEY: Your Honor, Screws says you can't know the unknowable. And if the law, if it's really, truly an issue of first impression, you may

think you're violating the law, but you -- you can't know the unknowable. And that's why this setting is so important, because you can't, you know, put -- impose sanctions. Here we're talking about the potential for an industry facing billions of dollars without any actual harm to -- to individuals. And that --

JUSTICE GINSBURG: Is it really billions? How many of these have been certified as class actions?

MS. MAHONEY: I believe that there are two certified class actions. But many -- there are many cases pending and it could be billions of dollars, Your Honor. Certainly if the classes are certified, and --

JUSTICE GINSBURG: Would you, would you, as representative of the insurers, would you have a sound objection to class action certification in these cases?

MS. MAHONEY: Your Honor, I'm sure there would be some bases to resist. But classes have been certified, so I --

JUSTICE GINSBURG: And gone to, gone to judgment?

MS. MAHONEY: I do not believe any have gone to judgment, but I don't, I don't -- I think that the point is that if you allow a thousand dollar penalty or the potential for a thousand dollar penalty for every consumer who didn't get a notice, simply because they

may have gotten a better price if they had even better credit, across the country, if you interpret the statute that way, and then you can say you can get this thousand dollar, what is in essence a penalty, and you multiply that by the number of consumers, then you certainly have the potential for very, very substantial liability.

JUSTICE GINSBURG: It's a question how many will sue for a thousand dollars, given the litigation costs.

MS. MAHONEY: Well, given that these are proceeding as class actions, the answer is there is plenty on the line to incentivize plaintiffs' attorneys to bring these class actions, and they have been brought, and this is a class action. There are two class actions.

JUSTICE GINSBURG: They haven't -- neither has been certified, has it?

MS. MAHONEY: No, it has not. They are putative class actions, Your Honor. But I, but I think that whether it's a class action or not, we have to look at what did, what did Congress presumably have in mind when it authorized these kinds of penalties and punitive damages based on a willful violation in a technical area where there is no potential for harm? And certainly --

JUSTICE KENNEDY: I have just two, two

questions on, on willful and then -- because you may want to talk about the other issue in the case. First, you began by saying that here a district judge has come to the contrary conclusion; by definition, it can't be reckless. Do you have any authority, where we -- for that proposition, where we have said that?

MS. MAHONEY: Well --

JUSTICE KENNEDY: We find all the time that a right is not clearly established under AEDPA, and so forth -- and disregard what I just said. That's my first question.

And the second is willfully, as Screws itself makes very clear, it is interpreted differently in the criminal context than it is in the civil context.

MS. MAHONEY: Except Screws, Your Honor, actually says that it was adopting a criminal recklessness standard, not a knowing standard, but a reckless standard. And that is the same standard that has been applied in the civil cases that use willfully in the punitive damages context.

So I think it's exactly the same standard in that Screws does say that the, you can't have, it can't just be a bad purpose, that it has to have been a bad purpose to violate clearly defined rules. And this Court has said in various contexts in the, in the

qualified immunity area that picking the losing side does not mean that your conduct was objectively, you know, wrongful.

And that's really -- I think that there is great significance to the district court's ruling. I'm not saying that in every case, it would absolutely be dispositive. I think you have to look at what was the, you know, the clarity of the law, what was the reasoning of the district court. But what the Ninth Circuit did is that it, in essence, said that you can't rely on creative but unlikely answers to issues of first impression.

Well, if an administration official goes to a lawyer in the administration and asks about a course of conduct, and is told, well, it's completely an issue of first impression, there is probably a 40 percent chance of success, do you say it's reckless to proceed on that basis?

CHIEF JUSTICE ROBERTS: Well, just because an issue is one of first impression doesn't mean there's a high degree of uncertainty. The statute may be clearly addressed to that issue. It hasn't come up before.

MS. MAHONEY: Absolutely, Your Honor.

CHIEF JUSTICE ROBERTS: First impression.

MS. MAHONEY: It certainly -- this Court has made clear that if the language of the statute is very plain, then, of course, that can be noticed, that can be adequate warning. But certainly this statute doesn't satisfy that standard. Congress didn't provide the benchmarks that you have to use for comparison to determine whether there has been an increase in a charge or whether there has been an adverse action based on the consumer report. You need benchmarks to answer those questions, and there aren't any regulations and there were no cases.

If I could save the balance of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Millett.

ORAL ARGUMENT OF PATRICIA A. MILLETT,

ON BEHALF OF THE RESPONDENTS

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

The Court of Appeals correctly concluded that willfulness in the civil context, as is used here, includes a reckless disregard component or a recklessness component. That is what this Court has held in a number of cases that have similar uses of willfulness focused on a departure from the law, have

held. Thurston, Richland Shoe and Hazen Paper are the three that have been most discussed in the case, in the papers here.

But where the Ninth Circuit misstepped here was in the application of that standard. And in particular, we agreed with Petitioners that when it concluded that a creative but unlikely position constitutes recklessness, it erred. Recklessness speaks an extreme deviation from an ordinary standard of care. It requires that the defendant act in the face of or fail to act --

JUSTICE STEVENS: It is a subjective standard or an objective standard?

MS. MILLETT: It has both in this context. It is, I think, first and foremost, an objective component, because there is -- this is a civil case. It's not purely subjective. And that objective component is very important because that is what makes the act or inaction reckless, and that is the risk. There has to be an objectively high and obvious risk.

JUSTICE STEVENS: So if the potential liability, as in these cases, is huge, then you have to be even more careful because there is liability so great. So is it the greater the liability -- the greater chance of recklessness, the greater the

potential liability?

MS. MILLETT: No, to the extent you're talking about dollar liability, I don't think that's true. I do think it's fair to say that in recklessness generally in the tort law, the more serious an injury that could result, can -- we'll tolerate less risk. If the risk is causing serious bodily injury or death to somebody, we'll -- the law will tolerate a lesser degree of risk than it will if, if it's simply causing, you know, a delay in something or a sort of paper injury or maybe even a dollar injury.

And it's not set. It's a variable calculation. So in that sense, it is. I don't think that when we talk about a high and objective risk in this context, we are talking about the dollars that a, that a company would have to pay, although I'm sure they are interested in hearing about that from their lawyers.

What we are talking about here -- and this is a very unusual statute the way it's written -- the liability itself, not just the damages, but the liability itself turns upon the extent of departure from law. You have to -- there is no recovery here like there is in almost -- or commonly in Federal statutes for just a violation. That isn't it.

You have to show either a willful violation

or a negligent violation, and that requires a determination not only that the defendants violated the law, but a determination as to how much, how far, how many standard deviations from correct their position was and that is an objective determination.

Once an objectively high risk has been found by a court, then -- then the case can shift to looking into subjective things. I think a plaintiff would be entitled, once an objectively high and obvious risk has been found by the court, to rely on that, and allow a jury to, or a judge, whoever is deciding the case, to infer the existence of willfulness from that. And that's often when defendants -- I'm sorry.

JUSTICE STEVENS: May I also ask, do you agree with the Petitioner on the meaning of adverse action?

MS. MILLETT: No, we agree with Respondents on the meaning of adverse action.

CHIEF JUSTICE ROBERTS: Correct me if I'm wrong. You think if I have an insurance policy, I'm paying a certain rate, they look at my credit report and they say, you know, good news, we're going to lower your rates, that's an adverse action because they might have lowered the rates even further if they had notified me about the credit report and there were some errors in

it?

MS. MILLETT: Right. It's a complicated answer, in part because that assumes that you have an existing account and you're not an initial account here. And when you have an existing account, there's a definition of adverse action for insurance provisions, but in iv there is a separate, there's another definition, and this is on, on page -- sorry. Excuse me. On page 3A of the appendix to our brief, iv under big I -- I'm sorry, there's a lot of provisions -- talks about reviewing an existing account, and it cross-referenced another provision which talks about reviewing an account for purposes of termination. And that would include, in our view, not only completely canceling it, but terminating the existing and charging you more for allowing you now to pay a new rate. So which would govern in that particular context is a little bit harder.

But it could, and here's logically why, because I think the understanding of "increase" that's at issue here is one that's very basic to the operation of this statute, and that is, did the content of your information in your credit report, if it had been better, could you have had a better rate or a better deal.

CHIEF JUSTICE ROBERTS: Right.

MS. MILLETT: So have you been hit in the pocketbook.

CHIEF JUSTICE ROBERTS: So if they lower, if they lower the rates, you still say that that fits the meaning of adverse action because they might have lowered them further if the information hadn't been erroneous?

MS. MILLETT: It could have, and here -- in this sense, it could be: In the same way that I, sort of the flip side, but in my office, if everybody in the hallway gets a 5 percent salary increase and I only get a 1 percent salary increase, I am certainly better off, but if the reason I got a lesser increase is because of my gender or because of my credit report, it's an adverse action. So the fact that you're doing somewhat better doesn't mean --

JUSTICE BREYER: That isn't how the statute defines it.

MS. MILLETT: Excuse me?

JUSTICE BREYER: The statute says an adverse action is an increase in a charge for -- in connection with underwriting.

MS. MILLETT: But it also --

JUSTICE BREYER: That's what it says. And

then it says an increase is -- and if you take an adverse action, i.e., if you increase it, and your increase is based in whole or in part on information contained in a consumer report, you have to send the thing. How did you get -- in your example, there was no increase. I mean, in a charge. In your salary, it's a decrease in the salary. Same thing.

MS. MILLETT: The definition again on 3A includes not just increase, but includes an unfavorable change in the terms. And so it's not settled whether --

JUSTICE BREYER: You mean unfavorable change in terms, unfavorable change in terms.

MS. MILLETT: Exactly.

JUSTICE BREYER: Well, suppose you don't have, you don't have any terms because you never did it before. There's no change in terms.

MS. MILLETT: If you're a new customer -- and again, I want to reiterate that, how this applies to existing accounts is complicated --

JUSTICE BREYER: You mean those words "change in terms" refer to rates, in other words? That's a rather odd way to refer to it. In one place, you refer to an "increase"; in the other place, you'd refer to it as a "change in terms." That's sort of an odd way to write a statute.

MS. MILLETT: Well, you can have a change in terms that is not necessarily an increase. It could be you will no longer be entitled to a free rental car when your car is in for repair for some reason. That's not an increase.

JUSTICE BREYER: No, no, I understand that. But what we're after is this. Everybody has a credit report, just about. You put it in and you give people the best possible rate conceivable, and now, how do you know that maybe there could have still been a better rate? And it can't be that the statute intends you to send out notices in such circumstances or you'd have to send notices whenever you read a credit report. Now, I think that's, I've overstated slightly, but that's basically the argument. So what's your response?

MS. MILLETT: And Justice Breyer, my response is that if the content of the information in your credit report would have made you -- had it been better information you'd have gotten a better rate, a better result, your pocketbook wouldn't have been hit as hard, you have a dollars and cents injury because of the content of the information, then you had an adverse action.

JUSTICE BREYER: Okay, so your response is just to repeat my question and say that's right?

MS. MILLETT: No. If I could continue on that, if I could add on, if I could add on, the way insurance companies work is they don't have 3 million customers and 3 million rates. They have ranges and most of them will have a top tier. They may have specialized things for employees, but putting aside a specialized category, there's a top range and they will tell you, as they say in the briefs, that 10 to 15 percent of people fit in there. So they know what the best rate is. They know what the next, above average rate, the standard rate.

JUSTICE SCALIA: How do you fit, how do you fit that within the language of the statute? Is it, I fail -- you're a first- time customer and I fail to give you a, you know, a break that maybe you could have had. Is it a denial or cancellation of insurance? No. Is it an increase in, an increase in any charge for insurance? Is it a reduction or other adverse or unfavorable change in the terms of coverage or in the amount of any insurance? I find it hard to shoehorn your case into that language.

MS. MILLETT: Well, to begin with, that may be why Petitioners' position here certainly was not reckless and the Ninth Circuit erred. But we do think that the statutory language read as a whole supports

this. It could be a denial of a particular term in an insurance contract. But you have to look at -- it's important to understand you look --

JUSTICE SCALIA: I read the term as, as one of the Justices here does, not referring to the rate. The earlier part refers to the rate. An increase in any charge for, that's the rate. And then it speaks of change in the terms of coverage. I mean, that is, you know, whether it covers hurricanes, or in the amount of the insurance, whether you're insured for --

MS. MILLETT: Or it could be a reduction in the terms. I mean, these things are statutory construction issues to be litigated, and the important issue here -- and they are presented in this case. They're to be litigated and the important issue is that when there is fair debate about these issues insurance companies will not be held to be willfully violating the statute if they got the answer wrong.

But I think on the, on the substantive question, it's important to read "adverse action" in light of, if I could just finish the sentence, in light of the definition of when a notice is required to be issued, which turns upon the content of the information in the report.

Thank you.

JUSTICE SCALIA: Which is where?

MS. MILLETT: And that's on page 6a on our appendix.

JUSTICE SCALIA: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Shorr.

ORAL ARGUMENT OF SCOTT A. SHORR

ON BEHALF OF THE RESPONDENTS

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

When Congress intended to require a knowing violation of the Fair Credit Reporting Act, it expressly said so. It did not do so in connection with the claims here under Section 1681n(a)(1)(A). In each instance where Congress wanted to allow -- to require a higher mens rea, it said so and did so in connection with liability that was greater. They required knowing mens rea for the criminal provision. They required knowing mens rea to obtain the even higher statutory damages that are available under the act.

JUSTICE SOUTER: What do you say to the argument from drafting history that looks at the history both of little n and little o and it points out that as originally, in the original bill, little o providing for the actual damages required a finding of gross

negligence? Little n used the word "willful" just as it does now, suggesting that willful would not include gross negligence or something close to gross negligence like recklessness. Then in, then in o, they changed the standard from gross negligence to mere negligence, but they made no change in n, which suggests that n stayed whatever it always was, and if the argument from contrast was that n probably meant knowing rather than reckless, it stayed knowing even when the standard was changed to negligence in o. What do you say to that argument?

MR. SHORR: Justice Souther, I think the only thing we can say about that is Congress reduced the culpability for the actual damages from gross negligence to negligence. I don't think that tells us much about willful means, what willful means as a separate matter.

JUSTICE SOUTER: But the fact that they had originally drafted n as it is, in contrast to the original o, does tell us, doesn't it, something about what they had in mind in n. And they must have had something in mind, probably had in mind, something in n which was a standard higher than gross negligence.

MR. SHORR: No, Justice Souter, I suggest that what you can infer from that is that, if anything, is perhaps Congress wanted to move, make clear that

under o the actual damages aren't close to willful or reckless, so they reduced gross negligence to negligence in that circumstance. But that still doesn't tell us separately what "willful" meant, and of course "willful" had been interpreted by this Court in similar cases involving similar statutes to mean a knowing or reckless disregard. And I respectfully disagree with --

JUSTICE SOUTER: Well, I mean, there's no question it has been and that is sort of the usual reading in the civil context. But we also keep repeating, you know, "willful" is a word of many meanings and you always look to the context. And here the argument is that if you look to the context of the, of the two statutory sections right up next to each other, you can draw a, an inference about what "willful" means.

MR. SHORR: I think if anything, Justice Souter, here the context should be the actual statutory terms used, and in Section 1681n(b) they expressly required the knowing standard and that's a knowing violation of the law, as Justice Alito's question seemed to draw out, a knowing impermissible purpose. And the statute directly defines what a permissible purpose is under this law.

So that reference to knowing could not refer

to a knowing, knowing the facts. And of course, willful in some sense always includes some knowledge of the factual circumstances.

In addition, the logical structure of the act -- as I mentioned, we had negligence and actual damages. We have a reckless standard, a knowing or reckless standard for certain statutory damages, but then an even higher level for the criminal and higher statutory penalty provisions. And as I started to say, a willful, knowing, reckless standard is entirely consistent with how this Court has interpreted the term in similar civil statutes that were in fact passed about the same time the Hazen Paper case and Thurston and McLaughlin cases interpreting the ADA and the FLSA and other similar cases.

CHIEF JUSTICE ROBERTS: Counsel, even if you're right about the standard, how can you suggest that it's willful here when you have no judicial construction, you have no administrative construction, you have the statutory language that at least the questions this morning have suggested is not perfectly clear? How can you suggest that the action of the companies on this case even under your standard was willful?

MR. SHORR: Mr. Chief Justice, of course we

believe and the statute is in fact clear, you do not need further interpretation by the Court.

CHIEF JUSTICE ROBERTS: So if we don't agree with you on that, you would lose on the application of the willfulness standard?

MR. SHORR: If you don't agree with us --

CHIEF JUSTICE ROBERTS: In other words, your, your, your conclusion that this was a willful violation depends upon your assertion that the statute is perfectly clear?

MR. SHORR: I think that there is a level of objective component that the statute at least has to be understood by a reasonable person at some level using standard statutory construction. But that isn't to suggest that the statute needs to be interpreted by a higher court or even a district court for counsel to get guidance. And of course, in this case, there was no guidance supporting Respondents -- excuse me -- no guidance supporting Petitioners', defendants', position. In fact, the only guidance supported our position, including guidance from the FTC.

CHIEF JUSTICE ROBERTS: You're talking about the Ball letter?

MR. SHORR: I am talking about the Ball letter.

CHIEF JUSTICE ROBERTS: That wasn't even binding on the commission, so why would that be regarded as authoritative?

MR. SHORR: It was not, and we are not suggesting it is, although it's entitled to Chevron deference. But if you get past the minimal level of objective standard, the question becomes what indicia and markers were out there that would have guided this company as to whether there was a high risk that they were violating the act. And certainly the Ball letter, which was sent by the staff specifically to address this exact question and to guide insurance companies, gave notice and it said charging anyone a higher amount than the best available rate based on their credit score was an adverse action. And in addition, there was --

JUSTICE BREYER: Well, how could that be? I mean I agree that the statute is clear, but I think it's clear the other way. That is, if you look at the language, as you've just heard, if you look at the purpose it's very hard to reconcile with the purpose an instance where a person has continuous accidents. He's a reckless driver. His insurance company puts him in just a category below the bottom and they read his credit report and they discover, despite his faults, he always pays his bills on time. So they increase it, not

to the top category, but they give him a much better deal. And you're saying this statute means that what I just described is an adverse action based on a credit report?

MR. SHORR: Yes.

JUSTICE BREYER: Yes. Okay. And then if you're going to say yes, I want to hear why yes, and then in light of the following: The little boy who says wolf. You're probably puzzled what I mean by that. I mean that if you're right in that interpretation, there will be tens of millions of notices going out and they'll have the same effect on the public that these privacy notices have today. We get them every day, dozens of them, and they go right in the wastebasket, because they will become meaningless because to an average person that notice will not mean that he better look at his credit report. It will mean throw it in the wastebasket.

All right, now I've got the purpose, I've got the language, and I have what I think of as common sense. Now, you explain why it's obvious the opposite.

JUSTICE GINSBURG: This is a different question. We've been talking about willful up to now.

MR. SHORR: Yes, and this is the adverse action question.

JUSTICE GINSBURG: You haven't addressed adverse action at all.

MR. SHORR: And I'm happy to do so now.

JUSTICE GINSBURG: Yes. But, was there anything further on willful? You said that the statute was clear enough and you had the FTC informal advice, but now we know that courts have divided on this question, right? On --

MR. SHORR: Divided in the sense -- well, the Ninth Circuit of course overturned the district court's ruling so there's no current division, but if that's what you mean, yes, Your Honor.

In a -- I guess I'll address quickly your question. There's additional guidance provided by the FTC that was subject to formal rulemaking and that was 16 CFR, I believe it's Part 601 Appendix C, and in that instance the FTC, again subject to formal notice and comment of rulemaking, said that the statute is defined very broadly and it includes any action that can even be considered to have a negative impact. And that plays in the subjective aspect as well, but addressing your question, Justice Breyer, first on the statutory language --

JUSTICE SCALIA: It's pretty sloppy lawyering, don't you think, any action that even be

considered to have -- wow. This is a standard?

MR. SHORR: That was --

JUSTICE SCALIA: Any action that can even be considered to have a negative impact.

MR. SHORR: That was guidance, Your Honor.

JUSTICE SCALIA: This is guidance?

MR. SHORR: That was guidance. That was guidance to provide in the context of reading this statute, it should be read broadly.

JUSTICE SCALIA: But you know, I would tell my CEO ignore that, that it's meaningless.

MR. SHORR: In addition, the CEO would have the guidance provided by the Ball letter.

But again addressing your question, Justice Breyer, an increase based on credit, if we had let's say an increase based on race, someone goes in and has a product to buy and there's the best rate, and they charge someone else based on their race a higher rate, certainly that's an increase based on credit. There's only one best rate.

CHIEF JUSTICE ROBERTS: But this is not an antidiscrimination provision. It doesn't say anyone who discriminates in the setting of race has to send out letters. It requires an adverse action. It requires an increase in the charge.

MR. SHORR: And Your Honor, I was only using that example to try and explain the statutory language.

JUSTICE BREYER: It doesn't explain it because if you have an increase in the charge based on race, of course that's an increase based on race.

MR. SHORR: Well, here we have --

JUSTICE BREYER: And if you refuse to give a person the best rate, and lower his rate but not the best rate, based on race, that is not an increase based on race. That is discrimination based on race.

MR. SHORR: You're charging someone more based on credit.

JUSTICE BREYER: That's true, and it's a discrimination, but you didn't increase the rate. You decreased it.

MR. SHORR: I think --

JUSTICE BREYER: It's still a discrimination, it's still unlawful.

MR. SHORR: Applying it to credit, a natural definition that is charging someone more than you charge others is an increase.

JUSTICE ALITO: When you say more, in order for there to be an adverse action there has to be an increase or an unfavorable change. And when you have an initial application you have to figure out what is the

baseline in order to determine whether there has been an increase or an adverse action. And you and the Solicitor General just assert that the baseline in that situation is the best possible rate that you can get, but I don't understand where that comes from.

MR. SHORR: Because charging someone more than someone else who qualifies for that better rate based on their credit, is increasing them, charging them more, but it's also evident from the statutory purpose, which I think was a question you asked --

JUSTICE BREYER: Let me look at the language. Go back to give me -- because in ordinary English, which I hope I speak, it is not an increase, but maybe there is a technical term in the technical language of commercial law or in FTC law where the word increase means decrease. And if you -- is there anything you want -- no. It's a serious question, at least if you want to cite me to some authority that uses this word increase in the way you just suggested.

MR. SHORR: We believe that it's a standard dictionary definition, to charge someone more for insurance than they would otherwise qualify for is increasing their charge.

JUSTICE BREYER: Which dictionary shall I look at?

MR. SHORR: I think we can look at any dictionary. I don't have a cite, Your Honor, but --

JUSTICE SOUTER: They're making this argument, and I think you got close to it a minute ago when you alluded to statutory purpose. I think this is what's behind, and you tell me if I'm wrong. One purpose of the statute is to alert a consumer that the consumer's credit report may contain errors which are doing the consumer some kind of damage.

MR. SHORR: Yes, Your Honor.

JUSTICE SOUTER: And you want this consumer alerted so the consumer can ask to see the report and correct it if possible.

MR. SHORR: That's exactly right.

JUSTICE SOUTER: Reading the adverse action the way you read it, it would give the consumer or consumers a tip-off in the maximum number of cases. In every case in which the consumer might have done better if the credit report had assumed different facts, on your reading theoretically, the consumer is going to say I want to look at that report and correct it if it's wrong. But isn't the fallacy of that argument the fallacy of saying because that is one object of the statute, every term within the statute has got to be read in a way that maximizes the effectuation of that

object? And the trouble that we're having on the bench is that discrimination and increase are different terms. Increase says the rate actually goes up from a baseline that the consumer previously had, whereas discrimination does not. And your reading in effect, increase to mean discrimination in order to maximize the likelihood that the consumer will look at the report, isn't that the basis of your argument?

MR. SHORR: I think it has to be an increase based on some aspect, but the only way to give effect to that statutory purpose is an increase above what you would otherwise qualify for had you had better credit and of course --

JUSTICE SOUTER: Well, that's a way to give every conceivable effect to that policy. But the statute in drafting adverse, or drafting the terms of adverse action, may very well have said we don't want to give every conceivable effect to this purpose because if we do, we'll get into the situation that Justice Breyer described. Everybody will be getting notices and the notices will be meaningless.

MR. SHORR: I don't think the notice is problematic because you're alerting the consumer to check that the information that the insurance company expressly relied on to increase your charge --

JUSTICE SOUTER: To set the charge. I mean, that's circular. To set the charge that it gives you.

MR. SHORR: I don't think you need a prior charge to suffer an increase. If I walk into a candy store and I've never purchased that candy before but the best price that day is 5 cents but they say we're going to charge you 10 cents, I've certainly suffered an increase.

JUSTICE BREYER: By that you're talking linguistically, but I am interested in the purpose. So I looked up on the Internet approximately what percent of the people have the best credit score and that's about 1 percent. So 99 percent of the public doesn't have the best possible credit score. Now I take it that means that you could in fact, if it's even roughly right, have 99 percent or a little less or even perhaps a little more when they look at that report that, since it's not perfect in 99 percent of the cases, it's quite possible that they won't get the best conceivable rate which might be reserved for just perfect people. And if that's so, in 99 percent of the cases they'll send out notices. And that's why I asked my question about the boy who calls wolf. What will happen if 99 percent of the people who apply for insurance or any other thing get notices? I suspect that this is only intuitive,

that the notices are more likely to go into the wastebasket than they are if there was really a decrease. Now, do you have any light you can shed on that?

MR. SHORR: Sure. The -- as an initial matter, it's not the perfect credit that is the standard, it's whatever would qualify you for GEICO's best rate. And that's a much broader standard. We don't know the exact amounts but if you look at GEICO JA 6768, they have fairly broad tiers, maybe five or six. And of course not everyone is going to get the notice. If your driving record totally eliminates -- if you have great credit but your driving record eliminates the possibility that you qualify for the better rate, you wouldn't get notice in that circumstance either. But the key to the notice is, if I have very good credit but the information that the insurance company looks at is incorrect, I will be charged more based on incorrect information without ever having the opportunity to tell the insurance company or whoever is collecting that information for them, you've charged me the wrong amount and I in fact qualify for that better rate.

CHIEF JUSTICE ROBERTS: Don't you have that right independently, though, every year to look at a copy of your credit report?

MR. SHORR: Well, what's significant here, that has been added to the statute in the last two years. But since 1970, Congress's concern is giving notice at a critical time, when the insurance company tells you we are relying on it and we may have taken an adverse action.

I wanted to also mention, here it's not just an increase. There's also been a denial, and that Mr. Edo applied for insurance from GEICO, and was denied insurance with the stand-alone company GEICO General, so that is also an adverse action under the act.

CHIEF JUSTICE ROBERTS: When you say you look at the increase with respect to the best credit rate, why is that? Why wouldn't you look at it relative to say the average insured who walks in the door?

MR. SHORR: Because that -- GEICO's argument, and I think that's what they want, presumes they're looking at accurate credit information. And the problem is, Congress has always told that there is significant inadequacy in the credit information. I think it's cited in the National Consumer Law Center brief. In 1996, Congress was told that the error rate in consumer information was 50 percent and there was a 20 percent serious error in the rates. Under GEICO's interpretation --

CHIEF JUSTICE ROBERTS: I don't understand what pertinence that has to my question which is, why do you get to pick the best credit report as the baseline from which you would measure your hypothetical increase?

MR. SHORR: Because under GEICO's theory of the statute you may never get notice, even though you're being charged more for insurance based on inaccurate information, as long as you're not charge -- your charge doesn't move below average. So a lot of people who are in fact intended to be protected under this act will not be protected until their charge goes below average, even though the insurance company is continuing to charge them more based on inaccurate information.

JUSTICE SOUTER: Why do we -- how do we know that they were intended to be protected in this way by getting this notice? That's the issue in the case.

MR. SHORR: Because going through the statute and the increase based on credit, and then the notice will give them the opportunity to check. Since the consumer here is the -- it's a system of checks and balances, and unless you give this consumer the opportunity to check that they are in fact using the correct information, it wasn't mistaken, it wasn't driven down by identity theft, you can continue to charge people more --

JUSTICE SOUTER: Okay. So that's --
MR. SHORR: -- based on inaccurate information.
JUSTICE SOUTER: Your basic argument is the statute, the definitions of adverse action have got to be read in a way that maximizes the occasion upon which a consumer will get a notice that may lead that consumer to ask to see his credit report. That's your basic premise?
MR. SHORR: Both based on the premise and purpose of statute, yes.
JUSTICE SOUTER: All right.
MR. SHORR: Briefly addressing the application of the standard to the facts in this case, we do think it's appropriate to remand for further consideration in light of some new developments. GEICO has just recently produced documents to us that addressly -- directly address the question of scienter here, so if there's -- if you go past a minimum threshold --
JUSTICE STEVENS: I've read your reference to those documents. Explain why you think that's so important.
MR. SHORR: Because those documents directly address the subject of standard here, that GEICO was

reckless or understood their --

JUSTICE STEVENS: How do those documents shed any light on recklessness? I didn't see that.

MR. SHORR: I'm sorry, Your Honor?

JUSTICE STEVENS: How do the documents that you describe shed any light on the extent of their recklessness, if any?

MR. SHORR: I want to be careful, because I had presented -- I asked to lodge them with the Court and I can quote them if necessary, but within those documents there is direct evidence that GEICO interpreted the statute exactly how we do, that not putting someone in the best tier based on credit --

CHIEF JUSTICE ROBERTS: Who's GEICO? I mean, you're talking about particular lawyers at a particular level, an ongoing debate about what this law means. If you get one lawyer who says, you know, I think you could read it this way, does that mean that GEICO reads it that way?

MR. SHORR: No, Your Honor. In this instance, this document involves top level GEICO executives. And with respect to the advice of counsel issue, frankly it's a red herring. We have never asked to compel the Defendants in either of these cases or any of the cases we're involved in, to waive their

privilege. They've got the right, of course, to offer advice of counsel as an affirmative -- as a defense in this case, but we don't believe it's necessary to prove our case to even reach what the counsel said. We believe we can prove our case based on the documents and subjective intent alone.

JUSTICE STEVENS: I still don't really understand this part of the case very much. Assume that a lawyer writes a letter saying you read it two or three different ways, read the statute, it's very ambiguous, and we think the government's reading is the better reading. And the executives think about it and they say no, we don't think that's right. Has that proved reckless disregard?

MR. SHORR: If the statute was clear and the guidance --

JUSTICE STEVENS: If the statute's clear. And of course, Miss Mahoney said the district judge thought it was clear, but the other way.

MR. SHORR: And with respect to the district court, we believe the district court here clearly erred, as the Ninth Circuit found. And the guidance -- that opinion certainly didn't precede the conduct that's at issue here. The only guidance, again, available at the time supported our reading of the statute. There was no

guidance from and court or from the FTC, or from anywhere that would have supported Defendants' interpretation at that time. So that's another aspect of inquiry, the subjective intent of the Defendants.

If there are no other questions?

CHIEF JUSTICE ROBERTS: Thank you, counsel. Ms. Mahoney, you have four minutes remaining.

REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE PETITIONERS

MS. MAHONEY: If I could start by just responding to the issue of the new document, I just want to emphasize that this document was created by people who weren't lawyers. It was done before GEICO even started using credit to price insurance. They were -- said they were brainstorming about what the statute might mean. And I would point the Court to the supplemental excerpt of records at 504 where when GEICO implemented the policy that we're talking about here, the -- they said that the intent was that we would send to the people who were supposed to get the adverse action notice. With the early systems development we didn't have the ability to identify whether they were supposed to receive the notice or not; that was because they had not yet developed the way to do with what they call the neutral, where they compare how the applicant

would have done if they hadn't taken credit, hadn't taken credit into account at all. And this is a procedure that's required actually in most States in order to ensure that those who don't want to allow access to credit reports or who don't have a sufficient credit history are not treated adversely in the meaning of those State laws, and that means worse than the average loss ratio. So there's nothing in this record, even if you take into account the documents they're talking about, to suggest that there was somehow a knowing or deliberate intent to try to violate the law.

With respect to a few of the factual or -- issues that came up, Safeco estimates that approximately 80 percent of all consumers that they are selling new insurance to now have to get notice under the standards established by the Ninth Circuit.

With respect to who can qualify for the top tier of credit, it's only, at least at GEICO, approximately 10 percent. So 90 percent of the consumers would not qualify for that.

And the statute very plainly does not prohibit differential treatment based on persons with better credit, nor do State laws. And so the analogy as to race discrimination simply don't hold water, because there Congress has told you what the baseline is, you

can't treat any person of a different race in a different way, and that's not true under this statute. And instead, it's quite reasonable, as GEICO has concluded, to simply say look, if we wouldn't -- if we're treating you worse than we would have treated you if we ever looked at your credit report, worse than if you had an average loss ratio for this criteria, we'll send you the notice.

JUSTICE KENNEDY: Why did they use credit reports? Is it just a hedge against late premiums and the cost of late premiums, or does it bear on risk factors generally?

MS. MAHONEY: Well, generally there are about 15 factors that they look at to try to come up with a prediction of loss ratio, and someone who has a good credit history is generally regarded as responsible, and responsible people tend to make less claims. And so, again, it's just one factor of 15 though.

JUSTICE STEVENS: Yeah. May I ask this question? The reading of the statute in subsection i about, in the charges for insurance advice, seems to favor your view. But subsection ii about denial of employment really seems to read in favor of the government's reading.

MS. MAHONEY: Well actually, I think that when you factor in employment, it has -- it has the opposite effect. Because what happens here is if you're using employment verification reports, consumer reports about employment, there are all kinds of consumer reports. How do you tell who had the optimal employment history? How could the baseline be the best employment history possible?

JUSTICE STEVENS: No. But my point is, it seems to me that getting a lesser salary, it just seems like the first applicant would be an adverse employment action under subparagraph ii, just -- do you see what I'm trying to say?

MS. MAHONEY: That if you -- that in other words, if you gave someone a lower salary --

JUSTICE STEVENS: It adversely affects any current or prospective employee. Now the language in i isn't, it doesn't read that way. But the thing that's troubling me is whether you should interpret i in the light of what ii seems to say.

MS. MAHONEY: Your Honor, I think that if GEICO in this example, if you actually pay them less because you looked at their credit report, then GEICO would concede that that is in fact an adverse action. So I don't think it's inconsistent at all.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Miss Mahoney. The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matters was submitted.)