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IN THE SUPREME COURT OF THE UNITED STATES

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KOONS BUICK PONTIAC GMC, INC., :

Petitioner, :

v. : No. 03-377

BRADLEY NIGH. :

- - - - -X

Washington, D.C.

Tuesday, October 5, 2004

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:03 a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Washington, D.C.; on behalf of the  
Petitioner.

A. HUGO BLANKINGSHIP, ESQ., Alexandria, Virginia; on  
behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 03-377, the Koons Buick Pontiac v. Bradley  
5 Nigh.

6 Mr. Ayer.

7 ORAL ARGUMENT OF DONALD B. AYER

8 ON BEHALF OF THE PETITIONER

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

11 This is a straightforward case of -- of  
12 statutory construction in which the words, context,  
13 purpose, and history of the statute in question all point  
14 to a single meaning that is contrary to the conclusion  
15 reached by the court below.

16 The case concerns the Truth in Lending Act's  
17 basic statutory damages provision, 1640(a)(2)(A)(i), or  
18 little (i) I'll call it here, which since the statute's  
19 enactment, has allowed individuals to recover from lenders  
20 who violate the act an amount equal to twice the finance  
21 charge, but limited to a range of \$100 to \$1,000. This  
22 statutory damage recovery is available under the act  
23 without regard to actual injury or intent or fault by the  
24 lender. In addition to statutory damages, the act  
25 provides for actual damages to be available,

1 administrative agency enforcement, and criminal penalties.

2 I want to just talk briefly about the history of  
3 the act because I think it's -- it's critical to  
4 understanding the issue before the Court, and I'll refer  
5 to places where we've quoted it in the blue brief.

6 As enacted in 1968 -- and this provision appears  
7 at the bottom of page 5 of our brief up to the top of page  
8 6. The provision I've described was the only statutory  
9 damage provision, and it was followed by language that  
10 indicated -- and I should say it appeared -- and this is  
11 important -- at that time, in section 1640(a)(1) and began  
12 right there after the (1). And the limitation on  
13 liability that appears there says the words that liability  
14 under this paragraph shall not be less than \$100, nor more  
15 than \$1,000.

16 That section was first amended in 1974, and the  
17 amended language appears at the top of page 7 of our  
18 brief. And what happened in 1974 was that this provision  
19 -- the actual words of the provision were not changed  
20 except for one, but it was moved because other things were  
21 added to the statute. And it now became -- instead of  
22 1640(a)(1), it became section 1640(a)(2)(A). The only  
23 change in the provision, the only word changed was the  
24 change from the word paragraph -- liability under this  
25 paragraph -- to the -- to the word subparagraph.

1           The next amendment -- and then the -- the  
2 statute after this then stood for nearly 20 years  
3 unchanged at all.

4           JUSTICE STEVENS: Can I interrupt you right  
5 there?

6           MR. AYER: Yes, Your Honor.

7           JUSTICE STEVENS: What did the word subparagraph  
8 describe in the 1974 statute?

9           MR. AYER: It -- it described subparagraph (A).

10          JUSTICE STEVENS: Subparagraph (A).

11          MR. AYER: Yes.

12          JUSTICE STEVENS: Okay.

13          MR. AYER: And I'll explain --

14          JUSTICE STEVENS: That's the small (a), isn't  
15 it?

16          JUSTICE O'CONNOR: Capital (A). Capital (A)?

17          MR. AYER: That's capital.

18          JUSTICE SOUTER: Which had -- which had two --  
19 two subparts --

20          MR. AYER: Not in '74, Your Honor. In -- the  
21 next --

22          JUSTICE SOUTER: Oh, I'm sorry. Okay.

23          MR. AYER: In 1976 --

24          JUSTICE SOUTER: After the amendment in '76 --

25          MR. AYER: Correct.

1 JUSTICE SOUTER: -- it described the --

2 MR. AYER: Precisely correct. And what was done  
3 in '76 was Congress passed the Consumer Leasing Act, and  
4 it added a second, I'll call it, (ii). I'm sorry. It  
5 added an (i) in front of the original provision, so it was  
6 then 1640(a)(2)(A) -- capital (A), little (i). And then  
7 in '76, (ii), and the (ii) was a provision not really  
8 relevant here except that it's in the middle of what we're  
9 talking about. It dealt with leases and had a formula  
10 with regard to leases.

11 It is uncontested by any court certainly that  
12 from that time forward to 1995, the cap that appeared then  
13 at the end of -- of little (ii) applied to both sections  
14 -- I'm sorry -- clauses (i) and little (i), and that  
15 limitation --

16 JUSTICE O'CONNOR: Was it ever challenged or was  
17 this just a common assumption? Was that ever --

18 MR. AYER: Well, there are --

19 JUSTICE O'CONNOR: Was that issue litigated?

20 MR. AYER: Your Honor, there are a number of --  
21 of cases that applied it presumably to plaintiffs if they  
22 thought they had an argument, would have liked to argue  
23 they could have gotten more than \$1,000, but there --  
24 there are a bunch of cases we've cited in our brief that  
25 -- that show that that was the consistent interpretation.

1 JUSTICE STEVENS: Let me just be sure. You're  
2 going a little fast, and I want to be sure I follow you.

3 During the period between 1976 and 1995, in your  
4 view the term subparagraph still referred to capital (A)  
5 and to both subparts of that subparagraph.

6 MR. AYER: Correct, actually clauses, Your  
7 Honor, but that's correct, yes.

8 JUSTICE STEVENS: All right.

9 MR. AYER: What then happened in 1995 -- and  
10 this -- the actual enactment appears in the blue brief at  
11 page 10, footnote 6, and this is also I think important.  
12 What Congress did -- and they were in the midst of a  
13 series of amendments relating to mortgages that was made  
14 necessary -- the range of them necessary by a court of  
15 appeals decision that created quite a crisis of threatened  
16 liability to the mortgage industry.

17 In this respect here -- they enacted a lot of  
18 other things, but with regard to this provision, as  
19 footnote 6 indicates -- and it's mostly over on page 10 --  
20 all they did -- they did not even reenact the preexisting  
21 provision. They simply said move the or from the middle  
22 of that provision to the end and insert the following  
23 language, and the following language was the expression of  
24 an intent to increase the cap on a class of loans that had  
25 actually previously been included in the -- in the

1 overarching provision that relates to loans, which is the  
2 original one that we're talking about here that deals with  
3 twice the finance charge, capped at \$1,000. They added  
4 the language that essentially says, relating to a credit  
5 transaction not under an open end credit plan that is  
6 secured by real property, i.e., a mortgage, not less than  
7 \$200 nor greater than \$2,000. And in that respect, they  
8 clearly acted to provide a higher cap with regard to  
9 mortgage transactions and to pull those out of the first  
10 section and into the last.

11 JUSTICE O'CONNOR: Mr. Ayer, if I just  
12 read the statutory language as it appears now, the  
13 impression I get is that the language in capital (A),  
14 little (ii), except that the liability, just applies to  
15 little (ii). You have to rely on kind of a -- a word of  
16 art in the use of subparagraph to reach a contrary result  
17 it seems to me.

18 MR. AYER: Well, Your Honor, we -- we have --  
19 and -- and your reasoning -- and I'll -- and I'll expand  
20 on it slightly. The reasoning of the court below -- and  
21 it's essentially a syllogism I think, and it's -- it's not  
22 far from what Your Honor has just said. It is essentially  
23 that, well, the reference to subparagraph formerly did  
24 refer to subparagraph (A). Now Congress has added clause  
25 (iii) which -- with its own cap. So the limitation to

1 \$1,000 clearly cannot apply to clause (iii). Therefore,  
2 it can no longer apply to all of clause (A). Therefore,  
3 it must refer to something. What does it refer to? It  
4 has to refer to clause (ii) only.

5 And the problem with that is essentially  
6 threefold, and I'll -- I'll go through them quickly and  
7 then expand upon them, if I can.

8 The first is that, as -- as Your Honor has  
9 stated, the word subparagraph -- I won't call it a term of  
10 art, but it has a very clear, specific meaning in the  
11 context of this provision. That's the first point.

12 The second point --

13 JUSTICE GINSBURG: May -- may I stop you at that  
14 point? Because you did introduce this neat drafting, the  
15 set of words, section, subsection, paragraph,  
16 subparagraph, and clause.

17 MR. AYER: Correct.

18 JUSTICE GINSBURG: Had you introduced -- have  
19 you argued before the Fourth Circuit those drafting  
20 manuals?

21 MR. AYER: No, Your Honor. We did -- we did  
22 not. And let me -- let me just explain what -- we've been  
23 trying to think about how to understand those manuals, and  
24 the best -- the best idea I've heard from anyone is to  
25 refer to them as a sort of a Rosetta stone. They're not

1 really dictionaries. They're not really, I -- I wouldn't  
2 say, authoritative statements of the way words are always  
3 used in Federal statutes because in fact you can find  
4 exceptions. You can find mistakes. You can find  
5 departures.

6 But they are a tremendous aid in -- what -- what  
7 it tells you is that the folks who are drafting  
8 legislation as technicians have in mind a hierarchy of  
9 these terms, and they try very hard to use them in a  
10 consistent manner, and they have for the last 50 years  
11 because we have books that go back to 1954 that do this.  
12 And so the question becomes, with that in mind, when you  
13 look at what else you know, does that help you understand  
14 what the word means?

15 JUSTICE SCALIA: The problem I have, Mr. Ayer,  
16 is I don't -- I can accept your belief that -- that  
17 subparagraph refers to all of (A) and yet still agree with  
18 the respondent here or with the court below because what  
19 -- what limits the -- the phrase, shall not be less than  
20 \$100 nor greater than \$1,000 -- what limits it to subpart  
21 (2) is not the word subparagraph but rather the fact that  
22 it is an exception only to (2). The liability under  
23 little -- what you've called -- what -- little (ii) --

24 MR. AYER: Right.

25 JUSTICE SCALIA: The liability under little (ii)

1 is a liability under this subparagraph, and the exception to  
2 little (ii) is only an exception to little (ii). So I can  
3 read under this subparagraph to mean perfectly, exactly  
4 what you say it means, in the case of an individual action  
5 relating to a consumer lease the -- the liability would be  
6 25 percent, except that -- that is an exception from what  
7 we've just said -- liability under this subparagraph,  
8 which includes (ii) --

9 MR. AYER: Well, now, that was -- all of  
10 that was true prior to 1995.

11 JUSTICE SCALIA: Well, that may be, but now  
12 you're -- now you're relying on -- on the -- on the  
13 statutory history argument rather than on the mere meaning  
14 of the word subparagraph. What I'm suggesting is I can --  
15 I can concede that subparagraph means what you says -- say  
16 it means.

17 MR. AYER: It refers to a section with a capital  
18 (A).

19 JUSTICE SCALIA: Refers to all -- all of (A).

20 MR. AYER: Okay.

21 JUSTICE SCALIA: But when that phrase is used in  
22 an except clause that only applies to little (ii), it --  
23 it still says the -- the foregoing liability under this  
24 subparagraph, that is, the liability contained in little  
25 (ii) --

1 MR. AYER: Let me go --

2 JUSTICE SCALIA: -- which is a liability under  
3 this subparagraph. Isn't it?

4 MR. AYER: Well, it is, Your Honor. I -- I'm  
5 having trouble following that, Your Honor.

6 And let me go back, if I could, to 1974 which --  
7 and let -- and let me say one more thing about 1974. The  
8 last time this limitation was actually enacted by  
9 Congress, was actually put into words and put into a piece  
10 of legislation, as opposed to adding ornaments to it or  
11 things in between, or this or that, was in 1974. In 1974,  
12 all they did with this provision was move it into a new  
13 section that had an (A) in front -- a capital (A) in front  
14 of it and out of one that had a (1) in front of it. And  
15 they changed the word from paragraph to subparagraph. And  
16 I would suggest the Rosetta stone or the stones in these  
17 manuals that tell us what they tend to want to have in  
18 mind when they're doing this tell us exactly what they  
19 were thinking about when they put the word subparagraph --

20 JUSTICE SOUTER: But even if we don't accept  
21 that -- and I -- if you're going to reach this, I -- I  
22 don't want to spoil your sequence, but even if we don't  
23 accept the Rosetta stone, in order to get to the -- to the  
24 position below, you've got to read subparagraph to refer  
25 to what we would normally call a clause.

1           MR. AYER: Absolutely, Your Honor. Completely  
2 correct. I -- that -- I can't say it better, and I won't.

3           The -- a couple things I will say that are  
4 important are that when you go through the true -- a  
5 standard way of reading legislation, if you want to know  
6 what a word means, is you read the rest of the legislation  
7 in issue. When you read the rest of the legislation in  
8 issue and you find that there are a total of 37 references  
9 to the word subparagraph, and 36 of them, without any  
10 ambiguity at all, refer to a letter -- a -- a provision  
11 that starts with a capital letter. If you read the entire  
12 United States Code, you can find some instances where  
13 there are departures from this standard way of speaking.  
14 A number of them, frankly, are in statutes back to the  
15 '40's and '30's, but some are still -- there are mistakes  
16 in various places. But again, the convention that's laid  
17 out in these manuals is the one that the courts tend to  
18 follow.

19           JUSTICE SCALIA: But that convention, it seems  
20 to me, is much less strong than the fact that you don't  
21 read a word to mean one thing for purposes of one part of  
22 the -- of the whole paragraph and another thing for the  
23 purposes of the rest. If -- if you read it the way you  
24 want us to read it, it would apply to little (iii) as  
25 well.

1           MR. AYER: Well, I mean, I think that that's the  
2 next thing --

3           JUSTICE SCALIA: And that is simply a flat  
4 contradiction.

5           MR. AYER: Well --

6           JUSTICE SCALIA: And -- and the -- the reading  
7 given by the court below produced no flat contradiction in  
8 the terms of the statute.

9           MR. AYER: Well, it -- it flatly contradicted  
10 the standing meaning of the word subparagraph. It ignored  
11 the standing meaning.

12           JUSTICE SCALIA: No -- no contradiction within  
13 -- within the statute itself.

14           MR. AYER: Well --

15           JUSTICE SCALIA: It may have given what you call  
16 the Rosetta stone a different meaning, but it did not  
17 produce a -- a contradiction in the terminology of the  
18 statute, whereas yours does. You want us to read  
19 subparagraph to mean all of (A) except not for purposes of  
20 (iii). You want us to do it for purposes of (ii) but not  
21 for purposes of (iii).

22           MR. AYER: Well, Your Honor, I think that the  
23 principle or the canon that the specific controls the  
24 general is one that -- that Your Honor set forth in the --  
25 in the Casey case, and many other cases have asserted it.

1           What went on here in 1995 I think is easy to  
2 discern. What it -- what it was was they wanted to have a  
3 higher cap on mortgage loans than on other kinds of loans,  
4 and so they glued a provision on the back. Was it done  
5 elegantly? Was it done as clearly as it might have been?  
6 No, but as the Court said in -- in the Lamie case, it's  
7 awkward but it's still straightforward in terms of  
8 meaning.

9           JUSTICE SCALIA: It isn't straightforward. The  
10 -- the specific controls the general where there is an  
11 unavoidable conflict. There is no unavoidable conflict  
12 here. You --

13           MR. AYER: Only if --

14           JUSTICE SCALIA: -- you're urging that one  
15 interpretation is better than another, and if there were  
16 an unavoidable conflict, I would agree that (iii) would --  
17 would overrule (ii), but it is not necessary to read (ii)  
18 that way.

19           MR. AYER: What you have to do, Your Honor, to  
20 take the approach that the court below took is ignore the  
21 established meaning of the word subparagraph. I say  
22 established because when it was enacted in 1974, it's  
23 perfectly clear why the word subparagraph was put in  
24 there.

25           And then what one has to do is -- is hypothesize

1 that the 1995 amendment, which did not reenact the  
2 original provision, but simply added something else to it  
3 -- and it wasn't something else that said we've just  
4 gotten rid of the cap on (i). It was something else that  
5 said, as to mortgages, do the following. That that by  
6 inference changed the meaning that was put in the word  
7 subparagraph in 1974 because it hasn't been reenacted  
8 since.

9 JUSTICE SCALIA: I don't want to have to go  
10 through the -- the legends of the -- of the legislative  
11 process every time I read a statute. If Congress wrote it  
12 this way --

13 MR. AYER: I thought Your Honor was --

14 JUSTICE SCALIA: -- it seems to me that I should  
15 interpret it the way it is written. Why -- why do I have  
16 to go back and say, oh, this is what it used to be? And  
17 when they added this word, if they made a mistake, they  
18 made a mistake, but the language reads the way it reads,  
19 it seems to me.

20 MR. AYER: Well, I mean --

21 JUSTICE SCALIA: It's not my job to correct  
22 their mistakes.

23 MR. AYER: Again, I -- I -- all I can say is  
24 that it -- it seems to me that we really do need to look  
25 at the meaning of the word subparagraph at the time it was

1 enacted by Congress. That meaning in 1974 is utterly  
2 clear. And what -- the only way you can get to the  
3 conclusion of the court below is by saying in 1995  
4 Congress somehow or other changed the meaning that was put  
5 in the statute in 1974, and they did it without ever  
6 saying they were doing it.

7 JUSTICE STEVENS: May I ask you, Mr. Ayer, does  
8 your opponent agree that prior to the 1995 amendment, the  
9 word subparagraph in the (ii) part of (2)(A) referred to  
10 (i) as well as (ii)?

11 MR. AYER: I am not positive if they do agree  
12 with that. The only thing I can say for sure is that  
13 every court that has ever addressed the issue does agree  
14 with that. And I -- and I -- I think they may have said  
15 something in their brief to question that.

16 JUSTICE O'CONNOR: Could we talk about the facts  
17 of this case? Would -- would your client fall under  
18 little (i) as a result of what happened?

19 MR. AYER: Yes, Your Honor.

20 JUSTICE O'CONNOR: And the limit there would be  
21 twice the amount of any finance charge in connection with  
22 it --

23 MR. AYER: Correct.

24 JUSTICE O'CONNOR: Unless the except provision  
25 applies.

1 MR. AYER: That is correct.

2 JUSTICE O'CONNOR: And what would that dollar  
3 amount be here?

4 MR. AYER: Well, that -- that dollar amount in  
5 this case -- and -- and the judgment as it now stands is  
6 over \$24,000. So we --

7 JUSTICE O'CONNOR: And you argue that the  
8 limitation is \$1,000.

9 MR. AYER: Correct, Your Honor. And -- and the  
10 -- the last major reason -- the -- just to summarize, the  
11 -- the two -- first two reasons I think I've given now for  
12 why the decision below must be wrong are, first, that for  
13 all the reasons I've tried to point to, the word  
14 subparagraph really has quite a specific meaning,  
15 thankfully, in the place we're talking about it appearing.  
16 And -- and it refers to a section starting with capital  
17 letter.

18 Second point --

19 JUSTICE GINSBURG: What about the argument that  
20 this drafting manual that you're relying on for the  
21 meaning of paragraph, subparagraph, clause wasn't -- what  
22 was the year it was published?

23 MR. AYER: Well, there -- there are two, Your  
24 Honor. One was published in the -- I believe the House  
25 manual was published in 1995 and actually was published a

1 month after the enactment of the statute. The Senate  
2 manual -- but there -- but there was a prior version of  
3 it, and this version was in fact in draft form at the  
4 time. But the -- but the real -- the point I want to --  
5 and -- and the Senate manual was in fact --

6 JUSTICE GINSBURG: Because the argument is that  
7 these manuals came out after this TILA statute.

8 MR. AYER: Right, Your Honor.

9 But -- but we also in footnote 15 and in the  
10 text on that page refer to a whole collection of books,  
11 drafting books, mostly dealing with Federal legislative  
12 drafting, and all uniformly saying -- and again, we're not  
13 trying to say that these are binding authority. We're  
14 simply trying to say that in the -- in the process of  
15 Federal legislative drafting, this is what the legislative  
16 draftsmen try to do, and then you look at the statute and  
17 you look to see what they in fact have done. And you see  
18 that this provision is there for a very particular reason.  
19 And so we're not trying to trump up these manuals as --  
20 you know, as part of the code or anything else. We're  
21 simply trying to say they -- they give you a real good  
22 guidance on what it means. And then when you look at the  
23 statute and you see that the statute consistently uses  
24 them in that way, uses the word in that way, you've got a  
25 good start on understanding what it means.

1           The -- the last thing I want to say deals with,  
2 as I guess in the order I should be talking about it,  
3 legislative history. And there are two points on that.

4           One is in 1995 by adding clause (iii), Congress  
5 added -- created a provision. Again, I want to emphasize  
6 what they did is they pulled out of part (i), or clause  
7 little (i), which dealt with loans in general and said  
8 twice the finance charge -- it pulled out the category of  
9 loans that were mortgage loans, and it said we want to  
10 impose a higher cap on those loans. And there is  
11 legislative history that we cite in our brief that  
12 indicates that that was what they were thinking about.

13           If they had intended to eliminate, entirely  
14 eliminate, not -- not increase from \$1,000 to \$2,000, but  
15 entirely eliminate the cap on the entire category of -- of  
16 loans, two things would be true.

17           Number one, somebody would have said something  
18 about it surely. This is the dog that didn't bark, as  
19 this -- many members of this Court have -- have observed.  
20 And there's not a breath of a thought in any legislative  
21 history that anybody meant to do this.

22           And the second point, which is even perhaps more  
23 telling, is that if they had done that, they would have  
24 contradicted the clear purpose of what they did. They  
25 wanted a higher cap on mortgage loans than on loans in

1 general, and it's clearly the case that if they had  
2 eliminated the cap on loans in general, they would have a  
3 lower cap on mortgage loans.

4 JUSTICE O'CONNOR: Would there be any  
5 conceivable reason why Congress would have wanted a higher  
6 damages award for hard-to-detect misconduct of the type  
7 under little (i)?

8 MR. AYER: Your Honor, I mean, there's a lot of  
9 speculation in a number of the briefs. You know, there's  
10 speculation about, you know, inflation and -- and there's  
11 all sorts of things that one could talk about endlessly if  
12 one wants to talk about policy. I -- I think the answer  
13 is basically no. I think there's really no good reason to  
14 distinguish between, you know, no cap on (i) and a cap on  
15 (ii). And I'm prepared to argue this, but I think it's  
16 way down in the noise level in terms of what -- what is  
17 relevant here.

18 The -- the last point that I think I would -- I  
19 would like to make is just that if the Court decides to  
20 reverse and if the Court were to decide that -- that  
21 \$1,000 cap is in fact -- has always been and continues to  
22 be the law, we would simply ask the Court also to remand  
23 with regard to the attorney fee award. The situation in  
24 this case would then be that the plaintiff, or the  
25 respondent, will have recovered \$5,000. The petitioner

1 will have recovered affirmatively the other way \$3,900.  
2 It's a net -- a net of \$1,100. And the court below  
3 reduced the fees at a time when the recovery for the  
4 plaintiff was \$29,000, reduced them by 40 percent on the  
5 ground that plaintiff's counsel had -- had raised 40-some  
6 claims, all of which failed, except for 2, and basically  
7 indicated that that was a strong reason for reducing the  
8 claim. I would submit if they essentially recovered  
9 \$1,000 in this case, that that would be a reason to submit  
10 it back to the trial court.

11 If there are no further questions, I will  
12 reserve my time.

13 CHIEF JUSTICE REHNQUIST: Very well, Mr. Ayer.  
14 Mr. Blankingship, we'll hear from you.

15 ORAL ARGUMENT OF A. HUGO BLANKINGSHIP  
16 ON BEHALF OF THE RESPONDENT

17 MR. BLANKINGSHIP: Mr. Chief Justice, may it  
18 please the Court:

19 Petitioner's starting point is not the starting  
20 point established by this Court. The starting point in  
21 this case established by this Court in the Lamie decision  
22 and those prior is clearly the statute before you. He  
23 talks of history. He talks of what happened in the past.  
24 The issue before this Court is what does the statute we  
25 have mean.

1 JUSTICE O'CONNOR: Well, what -- what do you  
2 think the term, this subparagraph, meant before 1995?

3 MR. BLANKINGSHIP: Justice O'Connor, I'm not  
4 certain what it meant. When I first read it --

5 JUSTICE O'CONNOR: Do you agree that the courts  
6 had interpreted it to apply to both little (i) and (ii)?

7 MR. BLANKINGSHIP: I agree that that's what the  
8 opinions in the Dryden and the Mars case said, but I would  
9 point out that in both of those cases that was not the  
10 issue before the Court. In those cases, the plaintiff had  
11 lost down below. There wasn't an issue of damages, and  
12 when the circuit court sent them back, they told them what  
13 the measure of damages was without any discussion.

14 I personally, when I read the statute and first  
15 started this practice, thought that it was limited to  
16 (ii). I then did some research --

17 JUSTICE SOUTER: Well, isn't the difficulty with  
18 that -- that the point that I raised with Mr. Ayer? To  
19 take that position before the most recent amendment and  
20 now, you've got to say that the word subparagraph refers  
21 to the section of one sentence which, regardless of  
22 legislative drafting manuals, I -- I think anybody would  
23 say, well, it's a clause, and to call a clause a  
24 subparagraph is a stretch, at least in the absence of a  
25 very clear provision somewhere in the statute that says

1 when we use the word subparagraph, we include clause.  
2 That -- there's a basic implausibility, I guess I find, in  
3 using subparagraph at any point in the statute to refer to  
4 a mere clause.

5 MR. BLANKINGSHIP: Well, the answer is this  
6 subparagraph. It's not just subparagraph. It refers to  
7 this subparagraph. Thus, it is much clearer or more  
8 precise as to where it's located.

9 JUSTICE SOUTER: Well, no. It -- it -- that --  
10 that completely leaves -- even in your view, that leaves  
11 open the question whether this refers to a clause or a set  
12 of three clauses. It -- it doesn't answer the question  
13 before us whether subparagraph means clause.

14 MR. BLANKINGSHIP: Well, the -- the answer I  
15 believe is in -- is in the context of the statute. You  
16 must look to the context of the entire statute and -- and  
17 look and see that there's obviously a conflict between  
18 (ii) and (iii).

19 JUSTICE SOUTER: Well, the -- you can look at  
20 that either way, it seems to me. One way is to see it as  
21 a conflict. There's no question about that.

22 Another way is to see it -- I think the term  
23 that has been used is carve-out. In other words, the --  
24 the cap on damages will be such and such provided that.  
25 If you got a mortgage, the cap is going to be higher. You

1 can read it either way.

2 MR. BLANKINGSHIP: I would disagree with you  
3 because of the language, the word or. You see, when you  
4 see or that appears after (ii), after the -- after the  
5 damages --

6 JUSTICE SOUTER: That's -- that's the argument  
7 for your reading. There's no question about it. But it  
8 -- I don't see it as an argument that excludes the proviso  
9 kind of reading.

10 MR. BLANKINGSHIP: You have to understand that  
11 -- that all three of these are very, very different. They  
12 have different rules. They have different requirements,  
13 and they have different elements. They all have  
14 different --

15 JUSTICE STEVENS: Well, but wait a minute on  
16 that. Was that true before 1995?

17 MR. BLANKINGSHIP: Before 1995, there weren't --  
18 there was not the section regarding the home mortgages.

19 JUSTICE STEVENS: I understand, but it was my  
20 understanding -- you correct me if I'm -- you say there  
21 are just two cases. My understanding is there are  
22 hundreds of lawyers who have practiced under statute --  
23 under this statute, and it was generally accepted that the  
24 cap in not subparagraph but clause (ii) did apply to cases  
25 under clause (i), that everyone accepted that. And you're

1 -- you're saying -- should we accept that as a starting  
2 point or not?

3 MR. BLANKINGSHIP: I don't think you should  
4 accept it as a starting point because of the history. If  
5 you look at those cases, they were never litigated. That  
6 issue was not litigated --

7 JUSTICE STEVENS: You don't think this issue  
8 would -- if there was a serious question about that, you  
9 don't think that there would have been a single case that  
10 would have arisen between 1974 and 1995 that made the --  
11 that gave this interpretation to -- I want to call it --  
12 clause (i) and clause (ii)? It seems to me most  
13 improbable.

14 MR. BLANKINGSHIP: History suggests that most of  
15 those cases that came up -- and if you look at them -- in  
16 the early years were the technical cases. They were not  
17 cases that involved a lot of money. They were simply very  
18 technical, minor wording --

19 JUSTICE STEVENS: They couldn't have involved  
20 more than \$1,000 if people read the statute the way I read  
21 it. That's correct. But if they read it the way you read  
22 it, it seems to me there would have been a lot of cases  
23 making the point, and they all would have had to assume  
24 that the word subparagraph in the statute, as then  
25 written, merely referred to clause (ii).

1 MR. BLANKINGSHIP: That -- that was the  
2 assumption that was made at that point, and the Fourth  
3 Circuit followed that assumption.

4 JUSTICE STEVENS: That that applied only to  
5 clause (ii)? That there was no cap on (i)?

6 MR. BLANKINGSHIP: No. No, I'm sorry, Justice  
7 Stevens. That -- that it was applying to both of them.

8 JUSTICE STEVENS: Right.

9 MR. BLANKINGSHIP: But that was an assumption,  
10 and as -- and as Judge Luttig pointed out, that was the  
11 assumption of the Fourth Circuit at the time, but when it  
12 got a new piece of evidence, when the statute was amended  
13 and added (iii), it explained clearly that the assumption  
14 was debunked.

15 JUSTICE STEVENS: Do you think your position  
16 would have even been plausible before (iii) was added,

17 MR. BLANKINGSHIP: Yes, I do.

18 JUSTICE STEVENS: if the word subparagraph  
19 meant only clause (ii)?

20 JUSTICE BREYER: So, in other words, if that's  
21 right, I guess when I go get a mortgage -- this is before.  
22 I get a mortgage and say it's a half a million dollars,  
23 and the finance charge is over 30 years. It's probably  
24 \$600,000 or so. And some technical mistake is made and  
25 Congress would have wanted me to collect \$1,200,000 in

1 damages. That's what you're saying?

2 MR. BLANKINGSHIP: No. That's -- that's not  
3 correct. It would not have happened that way because  
4 there is a cap under (i).

5 JUSTICE BREYER: No, no. Under (i) there's a  
6 cap?

7 MR. BLANKINGSHIP: Under (i) there's --

8 JUSTICE BREYER: Before. The older statute?

9 MR. BLANKINGSHIP: That's correct.

10 JUSTICE BREYER: What was it?

11 MR. BLANKINGSHIP: It's \$25,000. The maximum  
12 amount financed. If you finance a car for \$26,000, there  
13 are no remedies --

14 JUSTICE BREYER: So the maximum amount financed  
15 on my house was \$1,000,000. I'm saying if I got a  
16 mortgage before they added paragraph (iii), how did it  
17 work? I get a mortgage on my house. There's a finance  
18 charge. It's over 30 years. It's a huge amount of money.  
19 And before, I -- I guess on your reading of it, I could  
20 have collected millions. But nobody thought that was  
21 possible.

22 MR. BLANKINGSHIP: No. It -- it -- prior to  
23 that, it did not apply.

24 JUSTICE BREYER: Didn't apply to mortgages at  
25 all?

1 MR. BLANKINGSHIP: No. No, Your Honor, and --

2 JUSTICE BREYER: Okay. That's the answer.

3 Fine. I got the answer.

4 Now we have a mortgage because (iii) brings  
5 mortgages in.

6 MR. BLANKINGSHIP: Correct.

7 JUSTICE BREYER: And closed-end mortgages fall  
8 under (iii).

9 MR. BLANKINGSHIP: Second mortgages.

10 JUSTICE BREYER: Second. What about an open-  
11 ended mortgage? What about -- what about an at home  
12 equity mortgage?

13 MR. BLANKINGSHIP: Well, it's a closed-end.

14 JUSTICE BREYER: All right. So home -- home  
15 equity mortgages, do they fall under (i)?

16 MR. BLANKINGSHIP: They -- no. They would be --  
17 they would fall under (iii). It says or.

18 JUSTICE BREYER: No. It says closed. It says  
19 non-open-ended. It says under an open end -- not under an  
20 open end credit plan.

21 MR. BLANKINGSHIP: That's correct --

22 JUSTICE BREYER: So if it's under an open credit  
23 plan, i.e., a home equity mortgage, it's under (i).

24 MR. BLANKINGSHIP: Correct.

25 JUSTICE BREYER: Correct. Okay.

1           So I can just replicate my example. Right now,  
2 we have finance charges on those things. They can be  
3 hundreds of thousands of dollars. And you're -- you're  
4 saying that I guess we could. Am I right? That's why I'm  
5 asking it.

6           MR. BLANKINGSHIP: No. I -- I believe that's  
7 incorrect --

8           JUSTICE BREYER: Because?

9           MR. BLANKINGSHIP: -- in that it would not have  
10 applied to over \$25,000 at the time.

11          JUSTICE BREYER: Under (i). So we're talking  
12 about the range of \$25,000, \$50,000 doubled.

13          MR. BLANKINGSHIP: Right.

14          JUSTICE BREYER: Okay.

15          MR. BLANKINGSHIP: Subsection (iii) was a  
16 completely different set to deal with the --

17          JUSTICE BREYER: I'm trying to figure out what  
18 the range is on your reading under (i), and what I -- I've  
19 been telescoping my questions. But I've come away with  
20 the impression that we're talking about finance charges, if  
21 your reading is correct, in the range of \$25,000, which  
22 would mean the damages would be \$50,000, if you double it.

23          MR. BLANKINGSHIP: No, no.

24          JUSTICE BREYER: No. Okay. What is it?

25          MR. BLANKINGSHIP: The amount financed. I'm

1 sorry. I misspoke. The amount financed. It's not the  
2 finance charges. It's the amount financed is \$25,000. As  
3 a result, you're looking at obviously much less during  
4 that period of time.

5 Also under (i), you have a limited statute of  
6 limitation of 1 years. So you're not going to be able to  
7 come back 10 years later and say, gee, I want all my  
8 finance charges back.

9 JUSTICE BREYER: Thank you. You've answered my  
10 question.

11 MR. BLANKINGSHIP: Petitioner argues that the  
12 term subparagraph, as used in TILA, always -- always --  
13 means a capital letter. That is not correct. If the  
14 Court looks at the brief filed by the petitioner on page  
15 23 --

16 JUSTICE GINSBURG: I don't believe they said  
17 always. They said Congress sometimes doesn't use this.  
18 Sometimes they make mistakes. I thought they said this is  
19 generally the way it is, not that it's always this way.

20 MR. BLANKINGSHIP: That's correct, Justice  
21 Ginsburg. Generally throughout the -- the U.S. Code, they  
22 -- they argue that specifically within TILA that it has  
23 never been used to mean something else. There is an  
24 example that they have cited that -- that supports their  
25 position, and that's 1637a(a)(6)(C). And if you look at

1 that portion of the Federal Truth in Lending Act, it only  
2 has the following language. Under the capital letter C --

3 JUSTICE SCALIA: Does this appear somewhere in  
4 the papers?

5 MR. BLANKINGSHIP: No. This was cited by them  
6 in their footnote.

7 JUSTICE SCALIA: But you're citing them. Okay.  
8 You're going to read it. I'll close my eyes and listen.

9 (Laughter.)

10 CHIEF JUSTICE REHNQUIST: What are you reading  
11 from?

12 JUSTICE SCALIA: He's -- nothing.

13 MR. BLANKINGSHIP: From -- from the statute  
14 itself, 1637a.

15 CHIEF JUSTICE REHNQUIST: And where is that in  
16 the briefs?

17 MR. BLANKINGSHIP: It is not in the -- it is  
18 cited in a footnote to support the proposition that --

19 CHIEF JUSTICE REHNQUIST: Where is the footnote?

20 MR. BLANKINGSHIP: It is on page 23.

21 CHIEF JUSTICE REHNQUIST: It's just cited. It's  
22 not set out in haec verba?

23 MR. BLANKINGSHIP: No. No, Your Honor. It --  
24 it's set out as -- as a string of cites to support the  
25 proposition that Congress, in enacting TILA, never used

1 the term, this subparagraph, in an improper way. And if  
2 you look at that section, the only language in that  
3 section is capital (C) -- retention of information is the  
4 identifier. And the language says, a statement that the  
5 consumer should make or otherwise retain a copy of  
6 information disclosed under this subparagraph. Period.  
7 That's it. That's all that appears under (C).

8 JUSTICE BREYER: All right. Can I -- maybe you  
9 can help me with this because --

10 JUSTICE SCALIA: Wait. I -- I want to hear  
11 more. What does -- what does this prove?

12 MR. BLANKINGSHIP: It proves that it clearly  
13 could not be referring to the capital letter (C). It must  
14 be referring to --

15 JUSTICE SCALIA: No, because (C) doesn't do  
16 anything.

17 MR. BLANKINGSHIP: (C) doesn't have any  
18 requirements.

19 JUSTICE SCALIA: Just read it -- read it once  
20 more, would you?

21 MR. BLANKINGSHIP: Certainly. A statement that  
22 the consumer should make or otherwise retain a copy of  
23 information disclosed under this subparagraph.

24 JUSTICE SCALIA: It couldn't be under (C).  
25 Right?

1 MR. BLANKINGSHIP: It couldn't be possible.

2 Correct. So there are examples when Congress drew --

3 JUSTICE STEVENS: So this has been stuck  
4 at that footnote -- is it not correct, though,  
5 looking at that footnote, that the statute does repeatedly  
6 use a capital letter to describe what is clearly a  
7 subparagraph?

8 MR. BLANKINGSHIP: Well, there are -- I agree  
9 with that. Yes, it does a number of times. But you also  
10 see down in the bottom of the footnote, some of them,  
11 under subparagraph (A) (iii) where it's being more  
12 specific.

13 The problem in this case is that the term, this  
14 subparagraph, doesn't have anything to modify it to  
15 explain exactly what it's supposed to mean.

16 JUSTICE STEVENS: In other words, you're saying  
17 the -- we should read this as though it said, under this  
18 subparagraph (2) (A) (ii).

19 MR. BLANKINGSHIP: If it said that, I don't  
20 think we'd have a dispute here. That would be very clear.

21 JUSTICE BREYER: The difficulty that I'd like  
22 you to -- for me. I'm not speaking for anyone else. But  
23 when I read a statute, I first read it usually with what I  
24 call the approach of an English-speaking Martian, a person  
25 who doesn't know any of the context. I just read the

1 language. And if I were just reading the language, I  
2 would think you have maybe the better of the argument.  
3 But the language does support their position in the sense  
4 that theirs is a possible reading, not maybe the most  
5 natural for our English-speaking Martian, but nonetheless  
6 a possible reading.

7           And then they bring in all these other claims.  
8 First, it really doesn't make sense to have a cap on  
9 everything and not (i). Second, that isn't obviously what  
10 anybody thought was the case before this. Third, there  
11 was nothing in the legislative history. Fourth -- I mean,  
12 you know, fifth, sixth, seventh. And by the time I'm  
13 finished with it, I'm ready to abandon my English-speaking  
14 Martian point of view and ask what was the human purpose  
15 underlying the statute and does the language support it.  
16 Now, that's what I'd like to hear your answer to.

17           MR. BLANKINGSHIP: Well, the Fourth Circuit  
18 looked at that, and they looked at the language on how it  
19 was going to work together. And they found that it was  
20 the only way to put a square peg in a square hole.

21           Petitioner argues that we should put a round peg  
22 in a square hole. We should ignore the conflict with  
23 (iii). We should ignore the fact that it has completely  
24 different requirements and completely different limits,  
25 and we should then try to treat it as a carve-out of (i),

1 but the problem with that language is the or. It doesn't  
2 say and. It doesn't say an alternative. It says or.

3 JUSTICE SCALIA: You're --

4 JUSTICE BREYER: -- thinking it's --

5 JUSTICE SCALIA: -- you're getting back to the  
6 language. Why don't you talk about some of the other  
7 points that Justice Breyer was raising? What about the  
8 purpose? What purpose would there be not to have a limit  
9 on little (i) and have it on the other two? Why -- why  
10 would it make sense?

11 MR. BLANKINGSHIP: Well --

12 JUSTICE SCALIA: Is there no reason why it would  
13 make sense?

14 MR. BLANKINGSHIP: There's only one limit. If  
15 -- if you read the statute our way, there's only one limit  
16 in -- in (ii). There is no limit on (i). There's no  
17 limit on (iii). The fact that Congress decided to treat  
18 leases somewhat differently does not necessarily mean --

19 JUSTICE BREYER: What do you mean there's no  
20 limit on (iii)? I thought it said \$200 or \$2,000.

21 JUSTICE SCALIA: Right.

22 MR. BLANKINGSHIP: Right, but it's not a limit  
23 to anything. That is the damage. It's not a limit. It's  
24 not you get the finance charge or something else. You  
25 see, there -- there's only one that has two options, and

1 that's (ii). All the rest have one option. It's very  
2 clear. Under (i), it's two times the finance charges.

3 One of the things --

4 JUSTICE BREYER: Yes, but he's asking what the  
5 purpose of this would be for these mortgages, you know,  
6 which is a pretty big deal, a mortgage, you know, really  
7 putting a lot at risk when you get into a mortgage.  
8 There's a limit of \$2,000. Indeed, it's only \$2,000, or  
9 whatever it is. No -- no -- you can't get more than that.

10 And as to (ii), there's the limit we're talking  
11 about, and why would anybody want (i) to be limitless?  
12 That's the question. I'm not saying there's a no answer  
13 to it. I want to hear the answer.

14 MR. BLANKINGSHIP: Okay. In (iii), the amount  
15 of \$200 to \$2,000 is simply the icing on the cake. It is  
16 not the cake. The cake is the ability to rescind the  
17 transaction within 3 years and get all of your money back,  
18 which is not an option under (i). (i) has only the cake,  
19 which is the two times the amount of the finance charges.  
20 It's the only damages you get there. Under (iii), it's  
21 just an additional bonus damage.

22 JUSTICE GINSBURG: May I stop you there? I  
23 thought you could get actual damages. Isn't that the  
24 first thing, if you could prove actual damages, you get  
25 actual damages?

1           MR. BLANKINGSHIP: Yes, Justice Ginsburg, you  
2 can. It does say that -- that it's the sum of, and all of  
3 them are added together.

4           JUSTICE GINSBURG: So all -- all these cases are  
5 cases in which you couldn't prove any actual damages.

6           MR. BLANKINGSHIP: Well, the problem is that  
7 it's very difficult to prove actual damages under the  
8 Federal Truth in Lending Act because there is that  
9 requirement that you go and show that you could have gone  
10 somewhere else and gotten a better deal, which by the time  
11 the consumer comes to the lawyer, that time has passed.  
12 It never happens. And as a result, there are almost no  
13 cases that involve actual damages under (i). The only  
14 damages you can get under (i) are the statutory damages.

15           JUSTICE SOUTER: All right. But let's -- I  
16 mean, start --

17           JUSTICE STEVENS: Didn't you get actual damages  
18 in this case?

19           MR. BLANKINGSHIP: I'm sorry.

20           JUSTICE STEVENS: Didn't you get actual damages  
21 in this case?

22           MR. BLANKINGSHIP: No, Justice Stevens, we did  
23 not. We only got the statutory damages.

24           JUSTICE SOUTER: Start from your own analysis.  
25 There's something very odd about saying that when there

1 has been a violation involving a mortgage transaction, you  
2 can only get \$2,000, but a violation in a conventional  
3 bank financing or a finance company financing or a dealer  
4 financing of a chattel transaction, the sky is -- is the  
5 limit. There's just something very strange about that.  
6 Most houses cost more than most cars. It is odd that you  
7 would have the limitation on the potentially larger  
8 damages and no limitation -- or, let's say, recovery just  
9 as a -- a generic term -- but no limitation on the damages  
10 in what normally is -- is a smaller transaction. How do  
11 you explain that oddity?

12 MR. BLANKINGSHIP: I disagree that there are no  
13 limitations. There are a number of limitations under (i).  
14 (i) is the hardest of all of the three to prove and  
15 succeed. The first limitation is the amount financed  
16 cannot be more than \$25,000. In the case of somebody who  
17 buys a car with good credit, they have 0 percent, 0.9  
18 percent financing. Their damages would be very small.

19 JUSTICE SOUTER: Well, they do -- they happen to  
20 be right at this moment in the business climate, but that  
21 is not the characteristic climate in which this act has  
22 operated over the years and presumably will operate again  
23 as interest rates start their way back up.

24 MR. BLANKINGSHIP: But the -- the cap is the  
25 amount of the finance charges, the total amount of the

1 finance charges. So if you start with a principal balance  
2 of \$25,000, even if you have a very high interest rate  
3 like Mr. Nigh's, over 20 percent, the damages are not  
4 going to be even half of -- in this case, it was \$12,000.  
5 It's less than the half of the maximum. So there is a  
6 cap. There are a number of caps.

7 JUSTICE SOUTER: Well, but there's a cap, but  
8 he's still going to get more money than he would be if  
9 exactly this same kind of behavior had taken place with  
10 respect to the financing of a mortgage on a half a million  
11 dollar house.

12 MR. BLANKINGSHIP: I -- I disagree.

13 JUSTICE SOUTER: That's strange.

14 MR. BLANKINGSHIP: I -- I disagree with that  
15 analysis because under subsection (4), you're going to be  
16 able to go back and demand rescission. You're going to be  
17 able to get all of your money back. You will get much  
18 more under the home mortgage situation.

19 JUSTICE SOUTER: Well, but getting all of your  
20 money back is -- is presumably going to make you whole so  
21 far as the transaction is concerned, and we have to assume  
22 that allowing the transaction under (i) is going to keep  
23 you whole so far as the transaction is concerned. The --  
24 the issue is what do you get in addition to remaining  
25 whole or steady with respect to the value of the

1 transaction. And when we ask that question, the potential  
2 for recovery under (i) is significantly greater than the  
3 potential for recovery under (iii), even though (i) tends  
4 to be a smaller transaction, (iii) a bigger one.

5 MR. BLANKINGSHIP: Well, in -- in this case, in  
6 Mr. Nigh's case, he was not made whole. In this case, he  
7 had two cars that were repossessed from him, and that was  
8 not something that the Federal Truth in Lending Act could  
9 -- could resolve. When he came out of this case, he was  
10 much worse than he was when he went in. He now has two  
11 repossessions on his credit. So I -- I wouldn't suggest  
12 that he's --

13 JUSTICE SOUTER: No. Your -- your -- there's no  
14 question that -- that in -- in this -- in the case of your  
15 client, he's got problems that this act really does not  
16 address. But the question what we've got is what does the  
17 statute normally address, and I still find something  
18 anomalous in the normal operation as you describe it.  
19 What am I missing?

20 MR. BLANKINGSHIP: Well, under the Truth in  
21 Lending Simplification Act of 1980, Congress came back and  
22 put a number of limits on (i) that did not apply to (iii),  
23 but do apply to (i). And you can't get violations for  
24 technical wording, misuse of the wording. Under (i), the  
25 only one -- the only way you can get damages is to prove

1 that one of the magic numbers, the amount financed, the  
2 finance charge, the APR, or that they failed to give you  
3 the disclosures altogether. Only under those situations,  
4 do you even qualify to get the statutory damages. It's  
5 very limited and it's very difficult.

6 It's not a simple mathematical error, which is  
7 what happened prior to the Simplification Act. In the  
8 Mars case and the other -- in the Dryden case, those were  
9 simple mathematical errors. They were -- or just  
10 misrepresentations as to the wording of the -- of the  
11 disclosures under the Federal Truth in Lending Act.  
12 That's not the case now. Those will no longer provide  
13 statutory damages. You must prove that they have done  
14 something wrong.

15 And in this case, the proof was that they added  
16 a silencer that Mr. Nigh never wanted, that he didn't  
17 want, and in fact, they had packed this into the loan 3  
18 days before they brought him back in.

19 JUSTICE SCALIA: Mr. Blankingship, I thought  
20 that part of your response to Justice Souter would have  
21 been that there's nothing anomalous about imposing a  
22 dollar limit on massive transactions and not imposing a  
23 dollar limit on smaller transactions, that that is  
24 precisely what you would expect Congress to do. The --  
25 the need for a dollar limit on -- on home mortgages is --

1 is obvious, and the need for a dollar limit on -- on  
2 smaller loans is less obvious.

3 MR. BLANKINGSHIP: I would agree.

4 JUSTICE SOUTER: But if that is the answer,  
5 you're still left with the situation, as I understand it,  
6 in which the recovery under the small loan is going to be  
7 potentially in, I suppose, many cases practically bigger  
8 than the recovery under the large loan. And that still  
9 seems cuckoo to me.

10 MR. BLANKINGSHIP: It -- it is possible there  
11 are, but there are so many different variables. It can be  
12 that way. In a 0 percent financing chance, it will not.

13 JUSTICE BREYER: Of course, in (ii), it's --  
14 it's covered. You have a -- on your theory of it, small  
15 (ii), (ii), is also limited. And that's only \$25,000, I  
16 gather, as well.

17 MR. BLANKINGSHIP: Of the amount due on the  
18 lease, yes.

19 JUSTICE BREYER: Yes.

20 MR. BLANKINGSHIP: It's a little bit different.

21 JUSTICE BREYER: So it -- so it's -- so you'd  
22 have to say Congress wanted to impose a limit on these  
23 small (ii) \$25,000 or less transactions, but they didn't  
24 want to impose any limit on the small (i) \$25,000 or under  
25 transactions. Is that right?

1 MR. BLANKINGSHIP: Well, I think that's --  
2 that's potentially right. And there's a big difference  
3 between (i) and (ii) also. Under (ii), the statute of  
4 limitations is 1 year after the lease expires. Thus, if  
5 you were to lease a car for 4 or 5 years, you have a 5- or  
6 6-year statute of limitations. Under (i), it's much more  
7 limited. You have a 1-year statute of limitations. It is  
8 the most difficult.

9 JUSTICE SOUTER: Let me -- let me ask you a  
10 question which you are free to decline to answer because  
11 it -- it rests upon an assumption that you don't make but  
12 the Fourth Circuit did make, and if you say, look, I don't  
13 want to defend the Fourth Circuit on this, okay with me.

14 JUSTICE SCALIA: Don't answer.

15 (Laughter.)

16 JUSTICE SOUTER: The --

17 MR. BLANKINGSHIP: I think I know where you're  
18 going too.

19 JUSTICE SOUTER: -- the Fourth --

20 JUSTICE SCALIA: I've never heard counsel refuse  
21 to answer. I would just like to see it happen.

22 (Laughter.)

23 JUSTICE SOUTER: The -- not refuse to answer.  
24 Exercise an option not to answer.

25 (Laughter.)

1                   JUSTICE SOUTER: The Fourth Circuit made the  
2 assumption that prior to the addition of (iii), the -- the  
3 \$100,000 minimum and -- and cap applied to -- to both  
4 little (i) or little (i) and little (ii). And you -- you  
5 have argued that that really isn't a sound assumption.  
6 But if you -- if you start where the Fourth Circuit did in  
7 making that assumption, then there being no reenactment of  
8 (i) and (ii) when (iii) was added, the Fourth Circuit  
9 position has got to, I think, encounter the -- the general  
10 presumption against repeals by implication. And on the  
11 Fourth Circuit's theory, the -- the threshold cap applied  
12 to -- to Roman little (i), and without any reenactment or  
13 anything, suddenly it no longer did. There was no express  
14 provision to that effect. There was nothing in the  
15 legislative history to indicate that that was intended,  
16 and it seems to me that there is a -- a difficult repeal  
17 by implication problem here. Is -- is there an answer to  
18 that problem?

19                   MR. BLANKINGSHIP: Well, I -- I think in the  
20 United Bank v. Wolas case, where the Court held that the  
21 fact that Congress may not have foreseen the consequences  
22 of a statutory enactment is not a sufficient reason for  
23 refusing to give effect to its plain meaning, is -- is  
24 probably the answer to the question. Congress may not  
25 have intended or maybe they did intend.

1 JUSTICE SCALIA: That's not the answer. The --  
2 the answer is that it is not implication, that there is a  
3 new statutory text which, if it means what you say it  
4 means, has expressly repealed the earlier one. Now, if it  
5 doesn't mean what you say it means, then I guess it's by  
6 implication. But if it means what you say it means,  
7 there's no implication. There's a statutory text which  
8 means something different from what the prior text meant,  
9 and that's a repeal.

10 MR. BLANKINGSHIP: And that's -- I absolutely --

11 JUSTICE SOUTER: If this is an express repeal,  
12 you win.

13 (Laughter.)

14 JUSTICE STEVENS: Let -- let me just make sure I  
15 understand. You seem to have taken two different  
16 positions. Do you think subparagraph (i) -- I mean,  
17 clause (i) and clause (ii) mean the same thing or  
18 something different than they did before 1995?

19 MR. BLANKINGSHIP: I'm not sure I understand the  
20 question.

21 JUSTICE STEVENS: Did the -- did the 1995  
22 enactment, which added clause (iii), did that change the  
23 preexisting meaning of (i) and (ii)?

24 MR. BLANKINGSHIP: Yes, by its -- by its  
25 language, by its introduction.

1 JUSTICE STEVENS: So then you're agreeing that  
2 prior to the 1995 amendment, that your opponent's reading  
3 of -- of (i) and (ii) would have been correct.

4 MR. BLANKINGSHIP: I would agree that that's  
5 what the law was and that's what had been stated before.  
6 I think if you go back and -- and the other problem with  
7 these -- these statutes or these -- these prior cases --

8 JUSTICE KENNEDY: Is it relevant that all that  
9 Congress did was added (iii)? It didn't reenact (i) and  
10 little (i) -- (i) and (ii)?

11 MR. BLANKINGSHIP: No. The statute then becomes  
12 what it is. I think that -- that the Fourth Circuit did  
13 precisely what it was instructed by this Court to do,  
14 which is to look at the statute the way it is enacted in  
15 front of it today and to read that statute and to try to  
16 find a way to make a fit. And in this case they found  
17 that it was a square peg in a square hole, that everything  
18 fit, as Justice Scalia --

19 JUSTICE KENNEDY: So Congress basically left (i)  
20 or (i) and (ii) alone.

21 MR. BLANKINGSHIP: They did leave them alone, as  
22 they have in -- in a lot of these amendments. They come  
23 and add different things. They don't necessarily change  
24 them.

25 But in this case, you have to look at the

1 statute we have before us, and under that particular  
2 statute, it's clear that it can't work where the -- the  
3 limiter on (ii) applies to (i) and (ii), but not to (iii).  
4 If it applies to all of (A), then it must apply to (i),  
5 (ii), and (iii), not just to (i) and (ii). And thus,  
6 that's why the Fourth Circuit said we cannot apply it this  
7 way. It does not make sense. If it is -- subparagraph is  
8 all of (A), then there's a clear conflict with (iii), and  
9 which petitioners then go and argue, well, now we'll  
10 explain it as a carve-out, but the carve-out argument  
11 loses, I submit, because of the or.

12 JUSTICE BREYER: No, because of the or. Because  
13 of little (iii), (iii). Take out (iii) and it all makes  
14 sense. What it says is to the whole subparagraph damages  
15 are limited to \$1,000 or if it's the special real estate  
16 thing, they're limited to \$2,000. And if that little  
17 (iii) weren't there, it would be clear. But the little  
18 (iii) is there, and you say, well, maybe sometimes we can  
19 say a little (iii) is superfluous. It's not a word, after  
20 all.

21 JUSTICE KENNEDY: And -- and all Congress did  
22 was add (iii), it didn't reenact the whole section.

23 MR. BLANKINGSHIP: It did not reenact the whole  
24 section. That's correct.

25 If there are no further questions.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
2 Blankingship.

3 Mr. Ayer, you have 7 minutes remaining.

4 REBUTTAL ARGUMENT OF DONALD B. AYER

5 ON BEHALF OF THE PETITIONER

6 MR. AYER: Thank you, Your Honor.

7 I just have a short list of things I'd like to  
8 address.

9 The first is just to repeat that the last time  
10 Congress enacted the word subparagraph in this provision  
11 was in 1974. I don't understand why the 1995 amendment is  
12 not simply subsequent legislative history. It tells us  
13 nothing about what Congress meant in 1974.

14 The second point is, Justice Scalia, I'd like to  
15 -- I wasn't quick enough to think when you said before  
16 that if you read the way the Fourth Circuit did, there's  
17 no inconsistency. Indeed, not. There is still an  
18 incongruity between clause (i) and clause (iii) because  
19 contrary to what Mr. Blankingship has said, ever since the  
20 beginning of TILA, mortgage transactions have been covered  
21 by the Truth in Lending Act, I can assure you. And prior  
22 to this addition in 1995, they were dealt with in clause  
23 (i). And so what -- what you've got here is a provision  
24 that says, with regard to loans in general, the cap is --  
25 you know, it's twice the -- the finance charge, and -- and

1 then whatever we --

2 JUSTICE BREYER: Oh, so I was -- I'm sorry.  
3 That was the one thing I was trying to clarify in this  
4 that I thought I had -- that I didn't understand --

5 MR. AYER: Right.

6 JUSTICE BREYER: -- is before this (iii) came  
7 about, where was my normal home mortgage? Was it covered  
8 or not?

9 MR. AYER: It was in (i), Your Honor.

10 JUSTICE BREYER: If it was in (i), then how --  
11 but he says at 1603, there's a \$25,000 limit on what's in  
12 (i).

13 MR. AYER: 1603, Your Honor, specifically says  
14 that credit transactions, other than those in which a  
15 security interest is or will be acquired in real property.

16 JUSTICE BREYER: Are limited to \$25,000?

17 MR. AYER: Correct, Your Honor.

18 JUSTICE BREYER: Oh, so then -- then I'm back  
19 the opposite of what I was thinking. In other words,  
20 you're saying that -- that prior to -- prior to the  
21 reenactment -- I'm sorry. This is the one thing I was  
22 trying to clarify in this oral argument. Prior to the --  
23 prior to the enactment of the new amendment, your secured  
24 mortgage transaction is up in (i).

25 MR. AYER: Correct.

1 JUSTICE BREYER: Okay. And then after, although  
2 the non-open-ended one is in (iii), my home equity loan is  
3 in (i).

4 MR. AYER: You bet, Your Honor.

5 JUSTICE BREYER: And so, in fact, if I have,  
6 say, a balance of a couple hundred thousand dollars of  
7 home equity borrowing over, say, 10 or 15 years, I could  
8 have a total finance charge of hundreds of thousands.

9 MR. AYER: Absolutely. That's correct.

10 I want to just say a word about the facts,  
11 although frankly I think they're utterly irrelevant. But  
12 the facts here are that summary judgment was entered  
13 against Mr. Nigh on 40 or so claims. Three went to trial.  
14 Among the claims on which summary judgment was entered  
15 were claims for fraud and claims for breach of contract.  
16 The reason that no damages -- no actual damages were not  
17 given was not because they weren't available. They were  
18 available. They just weren't proven. There were no  
19 actual damages proven. Actual damages are always  
20 available even for technical TILA violations, technical in  
21 the sense that they're within the group that are said to  
22 give rise to a violation under 1640(a). I do want --

23 JUSTICE GINSBURG: Mr. Blankingship said that as  
24 a matter of fact, it's rare that under TILA people are  
25 able to prove actual damages. Is that so?

1           MR. AYER: That may be true, Your Honor. I -- I  
2 think there's a question of how one goes about doing that,  
3 and you have to actually show harm. And so, you know, the  
4 question is how do you prove that and in what kind of a  
5 case.

6           I do want to say and be clear -- I think I said  
7 earlier that in 36 of 37 uses in TILA, the meaning is  
8 clear and refers to -- subparagraph is used to refer to a  
9 capital letter. The 37th is not clear. In fact, I would  
10 agree with Mr. Blankingship's reading of it. But 36 out  
11 of 37 ain't bad, particularly when we know in 1974 exactly  
12 what they meant to do.

13           The -- the last point I guess I just want to sum  
14 up by saying is that I think this case really has a lot in  
15 common with the parable of the elephant and the blind man.  
16 And when a blind man examines an elephant's leg and  
17 decides that it's a tree, maybe it's because he hasn't  
18 been able to -- to discern what else is out there and  
19 consider what other considerations there are. And in this  
20 case I think clearly what we have is a case where simply  
21 reading a single sentence of a statute and thinking you  
22 know what it means and militantly refusing to look  
23 anywhere else will very likely lead you to the wrong  
24 answer in many cases.

25           Thank you very much.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

2 The case is submitted.

3 (Whereupon, at 11:58 a.m., the case in the  
4 above-entitled matter was submitted.)

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