

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
James S. DOODY and Paul D. Carrington, Appellants,  
v.  
AMERIQUEST MORTGAGE COMPANY, Appellee.  
No. 01-0137.

April 18, 2001.

Appearances:  
Shari L. Heyen (argued), Greenberg Traurig, LLP, Houston, TX, for Appellees.  
Bruce Priddy (argued), Dallas, TX, for Appellants.

Before:

James A. Baker, Craig Enoch, Thomas R. Phillips, Priscilla Owen, Harriet O'Neill, Wallace Jefferson, Xavier Rodriguez, Nathan L. Hecht, Deborah Hankinson.

CONTENTS

ORAL ARGUMENT OF BRUCE PRIDDY ON BEHALF OF THE APPELLANT  
ORAL ARGUMENT OF SHARI L. HEYEN ON BEHALF OF THE APPELLEE  
REBUTTAL ARGUMENT OF BRUCE PRIDDY ON BEHALF OF THE APPELLANT

JUSTICE: Thank you, be seated. Justice Abbott has had to leave but we will participate in [inaudible]. The Court is ready argument from [inaudible].

SPEAKER: May it please the Court. Mr. Bruce Priddy will present argument for the appellants. Appellants will reserve five minutes for rebuttal.

ORAL ARGUMENT OF BRUCE PRIDDY ON BEHALF OF THE APPELLANT

MR. PRIDDY: May it please the Court. This case [inaudible] before this Court by certified questions from the United States Court of Appeals from the Fifth Circuit. Both questions involved Article 16 section 50 of the Texas Constitution, the homestead provision, something near and near the hearts of many Texans.

The first question is pretty simple. Under the homestead provision if the lender charges closing costs is excess three percent cap but later refunds the overcharge, is the lien held by the lender invalid under the general rule section 50(c). We clearly believe that the answer is yes. [inaudible] invalid.

JUSTICE: If it is invalid then in effect you have [inaudible]?

MR. PRIDDY: We have something, your Honor. some thing pretty bad for the lender but it is not coextensive with a forfeiture.

JUSTICE: Why not?

MR. PRIDDY: We have a --

JUSTICE: -- [inaudible], why is it not in effect a forfeiture?

MR. PRIDDY: But it's -- I mean you can -- you can call it many things. It looks -- like I said it's -- it's bad for the lender but it is not coextensive with forfeiture.

JUSTICE: When is it not coextensive? But if the effect is -- but if effect is the same [inaudible] then why shouldn't you treat it as a forfeiture under forfeiture provision?

MR. PRIDDY: Well, you have a lien invalid on a nonrecourse note. One of the differences between forfeiture principal and interest and a lien being declared invalid in a nonrecourse note is most likely the sums paid in up until the date of the lien invalidity, the lender would not have to get back. Whereas the forfeiture, the provisions were clear to all principal and interest.

So lien invalidity just affects the ability for the lender to compel payment of some due. The two are not the same at all. The one is the consequence of applying the general rule of 50(c) and the other is a consumer protection that's been put in to section 50 -- 50(a)(6) -- we're gonna do this a lot -- 50(a)(6)(Q)(10), the forfeiture provision. There are similar bad things up until under but they are not the same. If the legislature had intended for this forfeiture provision to apply the lien invalidity, it could have said so. It didn't and I think the language is very, very clear.

Because the loan failed to comply with the constitutional requirements and that's undisputed. The parties agree with that. Then the lien -- the loan is not a loan described by section 50(a)(6). That's in --

JUSTICE: So, you agree -- you agree however that -- that the constitution does allow [inaudible] to cure a problem such as this.

MR. PRIDDY: It allows the lender to cure for the forfeiture remedy. And the forfeiture remedy is in 50(a)(6)(Q)(10).

JUSTICE: If the cure is allowed then in fact the loan is a valid loan in the constitution?

MR. PRIDDY: There's no forfeiture. Yes, your Honor.

JUSTICE: Well if there's no -- but can I still collect them along?

MR. PRIDDY: There's -- there's no forfeiture but in this case the lien will be valid.

JUSTICE: No -- but -- I understand that there's no forfeiture. I understand there's no forfeiture but can I then on a go-forward basis, having cured the constitutional problem with the loan, can they go forward and collect payments?

MR. PRIDDY: Not if the lien is not valid.

JUSTICE: So, this just puts every -- so -- so they cure and they don't have to forfeit the two months but they can't go forward and collect because they can't have a lien?

MR. PRIDDY: The -- the effect of the -- the way --

JUSTICE: So, if valid -- so what you're saying is that they're curing for in the past but they can't cure for purposes of having a loan that meets constitutional requirements?

MR. PRIDDY: That is correct, your Honor. The text of the forfeiture provision only applies the cure -- only applies the forfeiture remedy and the question, as posed by the Fifth Circuit, have nothing to do with the forfeiture. It has to do whether the lien is valid or not and that particular issue, the forfeiture provision, does not speak here. And so, if they failed to comply with the constitutional requirements, which I have here, then the lien's invalid.

JUSTICE: So your position in this case is that I believe they cured well. It could be about three months after --

MR. PRIDDY: Something like that, yes.

JUSTICE: -- after they made the loan? So, the lender did not have to forfeit those three months of interest and principals they collected but because they have no valid lien, they are unable to collect them the balance of the loan and the consumer walks away?

MR. PRIDDY: Well they -- they -- they are -- they do not have to suffer the forfeiture and that is the forfeiture provision.

JUSTICE: Well -- no, I understand that. What I'm trying to understand, understand about the no-forfeiture but that's looking backwards.

MR. PRIDDY: Right.

JUSTICE: That's looking on what they've already collected. I'm trying to understand what your position is as to the effect of cure on a go-forward basis.

MR. PRIDDY: They end up with the -- they end up with an invalid lien.

JUSTICE: And as a result because they have no -- no -- because they don't have a valid lien they basically have no muscle and so the consumer can walk away and not pay the balance of the loan.

MR. PRIDDY: Unfortunately, the lender outcomes like -- like those are -- I mean that's the stuff of --

JUSTICE: Well, I understand but is that a yes or no? I'm just trying --

MR. PRIDDY: Yes.

JUSTICE: -- to understand what happens -- yes -- so this particular --

MR. PRIDDY: Yes, they -- they -- the lender is left with a -- the [inaudible] position of an invalid lien on a nonrecourse note.

But the -- but the lender knew what was getting --

JUSTICE: Or he could pay off --

MR. PRIDDY: He could --

JUSTICE: -- the protected value [inaudible] their credit rating --

MR. PRIDDY: Absolutely.

JUSTICE: -- in such a way that they pay off any way --

MR. PRIDDY: Absolutely.

JUSTICE: -- could not be enforced against them.

MR. PRIDDY: That is correct. I mean, there's still, if not a legal obligation or maybe a moral obligation, I do not know. But all I know is the lien's gone. And the nonrecourse nature, a consumer protection put in the amendment that botches with the invalidity of the lien goes for the -- the lender in a -- in a bad position. But that is the stuff of homestead. I mean homestead protections necessarily mean that the lender may suffer for pecuniary loss if they do not comply with the law. In this case, they clearly didn't comply with the constitutional amendment and in that case --

JUSTICE: Isn't it an obligation under the extension of credit, to not charge these successive fees?

MR. PRIDDY: Yes it is.

JUSTICE: Well, if it is an obligation over the extension of credit not to charge these successive fees and if it's exactly within the cure provision.

MR. PRIDDY: Well, if we were seeking forfeiture -- we're not.

JUSTICE: I thought you did it in the lower court.

MR. PRIDDY: In the lower court, we sought forfeiture on a couple of other issues. One of which was -- I think the issue paying off

unsecured creditors, the issue that this Court decided in Stringer. At that point, the Stringer had not been decided and that was the issue we've sought forfeiture.

JUSTICE: Well but --

MR. PRIDY: We may have also -- also sought forfeiture on the hazard --

JUSTICE: But your statement -- but your statement was not exactly correct.

MR. PRIDY: You're correct, your Honor.

JUSTICE: You sought forfeiture of all the principals and interest in the trial court, is that correct?

MR. PRIDY: That is correct. But the issue here is not forfeiture. And the issue as plain --

JUSTICE: [inaudible] understand it. If I understand your argument, there's no connection whatsoever between the cure and the validity of the lien under (c).

MR. PRIDY: That's -- that's the plain language of section 50. It's the only way up --

JUSTICE: But that's reposition.

MR. PRIDY: Yes it is, your Honor.

JUSTICE: And if -- if however the lender cures and therefore it's not forfeit, the principal and interest and it is the forfeiture of all principal and the interest under the loan as opposed to dividing as you were saying on the go-forward -- either the looking-backward basis or whatever. As a result, there is no forfeiture then the principal and interest remain -- remains due and owing, why doesn't that then make the lien valid on a go-forward basis?

MR. PRIDY: Because --

JUSTICE: Why do we not then have a loan that does meet the constitution requirements at that point in time? We haven't forfeited the principal and interest. We still have a loan. All requirements have been met. We now, at that point in time have a loan that meets all the constitutional requirements.

MR. PRIDY: Because as I understand the cases of this Court over the last 240 years, that if the requirements of the constitution are not met with the ones made, subsequent efforts can't make the lien valid.

JUSTICE: But we've never had a section 50 before. For a 150 years we haven't had a Section --

MR. PRIDY: Well given that -- given that section 50(a)(6), you got section 50(a)(5). You've had [inaudible] --

JUSTICE: I'm talking -- I'm talking about the particular provision basis that way.

MR. PRIDY: This is -- this is -- this is the home equity amendment is new but homestead protections are not.

JUSTICE: But the opponent says all the cases that you rely on for the proposition that the lien's validity is always judged only at the time of deception. None of those cases involved a situation for the cure, is that correct?

MR. PRIDY: They -- they don't involve -- well --

JUSTICE: Would you say then that the cure for that thing is unique based on all of the 150 years forward of foreclosure of liens on homestead.

MR. PRIDY: Well, I must say that it is -- it is a forfeiture provision not a cure provision. And it is -- it is a consumer protection. It's not an [inaudible]. It gives the consumers an unusual protection and that's if the lenders do not comply with the obligations



under the extension of credit. They can when opportunity cure or before the forfeit of principal and interest. It is clearly a -- a consumer protection. It is not an industry-safe hard work. If you wanna look at -- at Section 50(i), there is a safe harbor there which says that a lender shall be conclusive resumed that the lien's valid if a purchaser of value purchases a foreclosure sale and some other requirements are met.

The legislature knew how to write in safe harbor if wanted and in this case, it didn't. It just added -- and if you read the provision, it is clear if you look at the context, it is clear. It is a consumer protection. It's not a lien saving --

JUSTICE: Are you saying the statute is clear?

MR. PRIDDY: I -- well, in this issue, yeah. There are a lot of things that are not clear.

JUSTICE: How about -- the same argument can be made if they could have easily made this clear. They obtunded it the way you argue it too. I mean, I -- I don't think we can really base what [inaudible] clarity.

MR. PRIDDY: Well Section 50 is pretty clear in my mind. No lien shall ever be valid unless it is a line -- it's a lien -- it's a loan described by section (a)(6) -- I mean, section 50(a), I mean, that's clear.

JUSTICE: So if -- so if we cure, we have a loan then that makes the description of the constitution, then we can have a valid lien from that time forward. I mean that's -- that's another clear way of looking at that, isn't it?

MR. PRIDDY: Well but -- but except -- except it cannot be reconciled with the cases.

JUSTICE: Well but -- but -- but you've already just answered Judge Baker that none of those cases involved a period of time when there was a cure provision like this one in -- in the [inaudible] provisions.

MR. PRIDDY: But there really is not a cure provision. It's a forfeiture provision. It's not a cure provision. It is -- it is a consumer protection that's got an incredible remedy for consumers that's tampered by [inaudible]. It's not a safe harbor for the lenders and that is, in my mind, crystal clear. And so, the fact that this provision exist doesn't change a 140 years of case law. It doesn't change the cases that when the owner fails to notarized the lien -- the lien's invalid or when the work is done a prior loan being made, etc., etc.

The case of the -- the homestead jurisprudence in this State is very clear, that the requirements of the constitution must be made, must be met when the loan is made and that subsequent efforts can't make the lien valid.

JUSTICE: Well, we do have a unique situation that the whole 56 section is a constitutional requirement in and of itself.

MR. PRIDDY: That is correct, your Honor.

JUSTICE: One that the legislature saw fit to include in the constitution rather than in a statutory scheme such as [inaudible].

MR. PRIDDY: That is correct. So we would be in the constitution that can't be changed --

JUSTICE: And so, why should we -- why should we interpret this constitution as Justice Hankinson suggests that when you cure, you now have a loan that complies, you have valid lien.

MR. PRIDDY: Because the language doesn't say that. Because the -- what they call the cure provision is the forfeiture provision, section 50(a)(6)(Q)(10) and that is the consumer -- the one that shall forfeit if and that is not by [inaudible] terms met to apply to lien invalidity

in any way. And I think that -- I mean with all respects to Justice O'Neill that is clear --

JUSTICE: [inaudible] a lien is a lien and a loan is a loan. Forfeiture applies to loans and they don't apply to liens.

MR. PRIDDY: Well, by three prongs, the forfeiture provision does not purport to say the lien. And in fact, right now -- in the legislature, it's in my reply brief, there's a bill to do exactly that on a going-forward basis to provide a lien saving cure provision under narrow circumstances and that to me is strong -- I mean, that's the strongest evidence I can think off is that as written. There is no mechanism to save the lien. They don't comply with the constitutional requirements the lien's invalid, end of story.

JUSTICE: [inaudible] various provisions in legislation that say a waiver -- a party cannot waive their rights by contract under this provision of the DTPA or, you know, other -- other provisions in -- in various acts. Is there any similar provision here that applies in this context yet there is none, why wouldn't the contract that the borrower signed saying acceptance of any refund constitutes a waiver of any rights rising out of the overcharge.

MR. PRIDDY: There's nothing in the home equity amendment per se that deals with a waiver. And that -- and the reason for that is very clear, it's because waiver and homestead rights just don't together at all. Homestead protections necessarily mean that they cannot be waived, because if they could be waived, there would be no protections at all. And in cases all the way back to this Court in Texas Land v. Blalock in 1890 held that simply the lender cannot rely on the waiver of [inaudible] and on the waiver you [inaudible] read as -- it is also clear that whatever the lender -- whatever the borrower does, it cannot wait -- he cannot waive his homestead protections, because if you were to allow that, then the protections would go away. And in the cases --

JUSTICE: [inaudible] the homestead rights remain but you just, you know, waive the arguments that you're talking about here. The invalidity of the lien and --

MR. PRIDDY: Well if you -- if you -- if you -- if you waive the ability to assert the homestead or waive an argument for the homestead, whatever way you want to phrase it, it's the same thing. And if you allow any kind of labor homestead provisions lenders will jump on that and every loan transaction and when you buy a house and when I buy a house and everyone else buys a house, lenders will require that you waive that and the protections will just go away.

So any -- any waiver whether it's termed a waiver of an argument, or a waiver of -- a basis or wavered anything, that just simply can't be because the lenders and their attorneys be very creative in the ways they -- you and I and the other Texans to waive their homestead provision. So anyway you wanna phrase this, it's a waiver of their homestead protections and homestead protection simply cannot be waived.

JUSTICE: Let's look at a (Q) subsection 5. What if, at the closing, there are twenty documents signed by the lender and the lender hands the twenty documents to the owner and there is one that's just missing and the copy machine, it wasn't included in the stack, by mistake. Under your argument, the lien's invalid.

MR. PRIDDY: You're looking at (Q) (x) (10) -- (Q) (x) (a) (6) (Q) (5) and that is, the loan must be made on the provision that the lender at the time the extension of credit is made, provides the owner of the homestead a copy of all documents signed by the owner related to the extension.

JUSTICE: Right.

MR. PRIDDY: Correct.

JUSTICE: And let's say there are twenty documents signed by the owner [inaudible] and the lender goes to copy them and one page is missing but the undersigned, and they send it two days later. Under your argument, the lien is invalid.

MR. PRIDDY: This is a requirement of the constitution.

JUSTICE: That's a yes or no question.

MR. PRIDDY: I mean -- depending upon the situation if the constitution does not comply with in your hypothetical, it seems that it's not, although you might be [inaudible] closing extends over two or three days in the --

JUSTICE: Answer yes or no.

MR. PRIDDY: Yeah -- under your -- under your hypothetical cure, assuming that the cashier's requirements might comply with, yes. I mean that is it has to be complied with for the lien to be valid. Any further questions, your Honor?

JUSTICE: Thank you, Counsel.

The Court is ready to hear argument from the appellee.

SPEAKER: May it please the Court. Ms. Shari Heyen will present argument for the appellee.

ORAL ARGUMENT OF SHARI L. HEYEN ON BEHALF OF THE APPELLEE

JUSTICE: [inaudible] presenting validity statutes is clear as well but it's clear on your report.

MS. HEYEN: We believe that the statutes -- based on the claim reading of the home equity amendment that you can't reach the result urged by Ameriquest Mortgage Company and that is that the extension of credit contained in subsection (Q) (10) refers to the same thing as subsection (a) (6) --

JUSTICE: Well, let me -- let me pause [inaudible] but I believe the opposing counsel is positive in the briefs and that is, if we agree with the cure provision to cover everything that you were saying it covers, then what would prevent lenders from violating the exceptions and just to [inaudible] the buyer doesn't notice and then if we do notice, they can always cure. So, why wouldn't be a method to get around all these requirements?

MS. HEYEN: I don't think that the lenders have any incentive based on home equity amendment to try to get around the requirements that are stated in the Texas Constitution.

JUSTICE: But with this scenario, let's say a lender said "Ha, ha, I'm gonna charge ten percent origination fee." And, you know, buyers are pretty unsophisticated and they probably could not have noticed it and what's the downside if they notify me two years later, hope this cured. I mean, I realize it's an outrageous scenario as to why [inaudible] defense counsel was but in that logical extension [inaudible].

MS. HEYEN: I understand. Yeah -- well I understand the question, but in this case, Ameriquest is the one who discovered the mistake during the routine audit.

JUSTICE: But if you are presenting your argument [inaudible] matter is discover it. I mean under -- under this scenario it wouldn't matter who discovered it, if the -- under your argument that they can always cure anything and a lender who might not be as scrupulous or as



honest as your lender could -- I mean the scenario [inaudible] in the briefing could have happened. In other words, it's clear --

MS. HEYEN: Right.

JUSTICE: -- reading that your [inaudible] --

MS. HEYEN: Right. I understand. Yes, I understand. I suppose that that could happen but there's no incentive for the lender to do that. The lender wants to make sure that it complies with the constitutional requirements. The lender wants to make sure that its financial product is not defective. And if the financial product is defective then the lender needs to have the right to be able to cure as is permitted under (Q) (10) of the home equity amendment.

JUSTICE: So, the argument as I understand it, what the [inaudible] makes, is that a loan is a loan and a lien is a lien and the two aren't to be confused and chapter 50 of the constitution doesn't confuse them. It doesn't -- it doesn't [inaudible] them in any way. It talks about liens and it talks about loans. And historically, we always said, according to Mr. Priddy, forfeiture deals with the loan and its loan interest and invalidity of lien is determined by the constitution. And he says, "You know, if you don't want a constitutional lien on this house, you gotta follow these requisites. If you don't follow these requisites, the lien never comes into existence. It's not that it's invalid. It just never comes into existence."

And since your argument says, "Now we've got this new constitutional provision that talks about home equity laws." You're trying to merge the concepts of forfeiture of the loan into sort of a concept that a lien that never comes into existence under constitutional theory. Actually, it can be brought into existence subsequently by curing the forfeiture [inaudible] loan. He says you're confusing forfeitures with loan invalidity. Now, what in the language of the constitution in citing chapter 50 permits you now to say, irrespective of whatever the law was [inaudible]. We now need that a lien is created by -- the lien is created here is not forfeited by a failure to create the lien properly. He says you're merging those terms. What about the language that allows you to do that?

MS. HEYEN: I think the -- the practical effect of the Texas Constitution in the lien invalidity and forfeiture, I think that you end up essentially the same place. These are nonrecourse notes made by the borrowers. So for example, if the lien is invalid then the borrower -- then the lender has no right of recourse. I think that's --

JUSTICE: So what's -- so -- I mean you all saw that going into this? The legislature said, "Look you gonna have nonrecourse loans. The only way you're gonna get to them is by having a valid lien." But to get a valid lien, you gotta follow the following things.

MS. HEYEN: Right.

JUSTICE: Now forfeiture meant that you -- sorry -- [inaudible]. Mr. Priddy says, "Well [inaudible] -- we're not gonna make you have to get back the money they paid because they still owe you under the note. They still owe you under the note." You just can't go collect if they refuse to pay. But that's a different issue. That's a different issue and whether or not you actually get only your own property.

MS. HEYEN: Your Honor, we believe that we did strictly comply with the home equity requirements thereby giving Ameriquest a valid lien on the property. He's saying that section 50(a)(6)(Q)(10) is only tied to the loan documents and therefore the loan documents don't spell out exactly what was supposed to happen then the lender effectively forfeits all principal and interest. I don't see anything against section 50(Q)(10) that says that the extension of a credit for the



lenders' failure to comply with the obligations under the extension of credit is tied solely to the loan documents.

Had those legislature intended to tie that section to the loan documents it could have easily said that. And it did say that in section 50(k)(7) and the situation's dealing with reverse mortgages. In 50 -- section 50(k)(7), it says that, "If the lender fails to comply with the loan documents then the lender defaults all principal and interest of the reverse mortgage." There's no similar language in Section 50(Q)(10). So, we believe that the importance of the cure provision cannot be overstated. This is the lenders only right of recourse. These are nonrecourse loans. So we believe that section 50(a)(6)(Q) -- (a)(6)(a) through (Q) include all of the obligations under the extension of credit. And I believe that the Supreme Court recently held that in *Stringer v. Cendant Mortgage* where it says that you look at section 50(a)(6) in its totality to determine what the obligations under the extension of the credit are.

JUSTICE: How do you deal with the language though in section -- in subpart (c) that says that no lien shall ever be valid? It seemed pretty strong.

MS. HEYEN: It does seem like a strong language, however if you go on to read subsection (C) which is the centerpiece of the appellants' argument. It says, "No lien shall ever be valid unless it describes a debt," -- unless it secures a debt described by this section. This section includes section 50(a)(6). The appellants would have this Court read the (C) -- home equity amendment to end at section 50(a)(6)(e) where it says, "If you violate the three percent cap then the lien is held invalid. But I think that the Court needs to look at the entire home equity amendment to see what the intent of the legislature --

JUSTICE: So when is the -- when -- when does the lien become valid?

MS. HEYEN: When does -- I'm sorry?

JUSTICE: When does the -- in a case like this, when does the lien become valid?

MS. HEYEN: We believed that the lien was valid at the inception, at the time it was made because we believe that Ameriquest complied with the requirements of the home equity amendment. When Ameriquest discovered during a routine audit that it did made a \$641 error, it immediately refunded the overage to the borrower.

JUSTICE: But there's a time when the lien wasn't valid then, is that correct? I mean you're -- you agree with that?

MS. HEYEN: If it wasn't valid, it would have been invalid for only the two months but we don't think that the lien was invalid because --

JUSTICE: It was invalid from its inception --

MS. HEYEN: Yeah, we think it was invalid from its inception and then once the mistake is found and discovered, then the lender gets an opportunity to cure the mistake that was made.

JUSTICE: If the lender had never cured, would the lien have been valid then?

MS. HEYEN: I think that the lien -- sure I think the lien still would be valid had the lender not cured because the borrower -- I think under the language, it gives the lender a reasonable opportunity to cure once the mistake is vague. So when -- when its -- when the error is discovered I think that both parties didn't work to preserve their lien have the opportunity --

JUSTICE: But -- but is there a period of time. If the loan is out of compliance with all the requirements in this section -- if it's out of compliance and during that period of time before there's a cure, is

there a valid lien in place? Because the language you just quoted is, unless it secures the debt described by the section and you say, we have to look at all of it and we know the loan is not in compliance with this section. So, don't we have a period of time where there is no valid lien in place?

MS. HEYEN: I'm not really sure I can go that far because I think that we --

JUSTICE: How can you have a valid lien if you haven't complied with the provisions of the statute, I mean, of the constitution? I understand, if your argument -- your argument, I take it is that once you're secure, does the cure relates back against section [inaudible] -

MS. HEYEN: That's right.

JUSTICE: At that point in time -- but don't we -- let's say it had taken two years to determine this error and then the lender sent the money back and cures. During that two-year period of time, there is no valid lien there, is there?

MS. HEYEN: Well, let's assume that the lien was not valid once the error was discovered, the lender would have the opportunity to go back and cure, to reestablish the validity of the lien.

JUSTICE: Well, what's gonna happen in terms of lien priority during that period of time? What if I come along and I filed a loan against the property too. Am I gonna have a priority or you during that period of time?

MS. HEYEN: I guess it depends on how you interpret the cure provision. I guess it's how you interpret the scope of the obligations that can't be cured.

JUSTICE: I think that's the question that we're asking we're --

MS. HEYEN: Right.

JUSTICE: -- concerned about -- you're asking us to look at the section in its entirety --

MS. HEYEN: Yes.

JUSTICE: -- and now you're saying that when there's a cure, what it does is that it makes the loan in compliance from its section it relates back. So what -- we have a period of time when there wasn't a valid lien but the day when the cure is done, the liens freeze out and goes back to the inception and now we get to treat it like it's -- I mean, how does this all work?

MS. HEYEN: You're right. I think that the lien would be of record so I think that anybody looking at the public records would notice that there was a lien on the property and perhaps at that point, the new lender, the subsequent lender decides whether he wants to make a lien or have another permissive encumbrance on ones homestead.

JUSTICE: Why wouldn't you read this provision as the lien coming into existence as of the day of the cure because that's the first date that you have a loan in compliance? We need help here.

MS. HEYEN: I understand. We -- again, they can only state what Ameriquist position is and that's -- that the lien was valid from the inception and once the -- if it wasn't valid from its inception, then by the subsequent efforts by the lender, two months later to bring it into compliance, it then did meet the compliance. It did meet the terms of the home equity loan amendment at that point.

JUSTICE: So you're saying the cure should be laid back? Sure.

JUSTICE: Do you think there is anything -- we're trying to determine the intent behind this provision, the fact that there is no cure provision specifically tied to the validity of the loan provision. We don't have any cure provisions specifically tied to that provision.

Is that significant?

MS. HEYEN: No cure provision is tied to the loan documents?

JUSTICE: No tied provision on whether or not a lien is valid, it's at section (c).

MS. HEYEN: Right. I think that you need to -- again, I think you need to read section (c) in conjunction with section 50(a)(6) because this section defines the home equity lien. So, if you don't read -- if you stop your analysis at section 50(c) ...

JUSTICE: No, I'm just asking you if there is any significance that should be placed on the fact that the legislature chose not to include in some parts (c), something that states specific cure provision related to a lender being able to make an invalid lien valid.

MS. HEYEN: Again, I don't see how you can read section (c) in a vacuum because if it's --

JUSTICE: Well, your opponent says the legislature's working on that which --

MS. HEYEN: Right, you're right, it's not --

JUSTICE: [inaudible] some indication that [inaudible] you need to protect the lien or we allow a cure [inaudible] therefore --

MS. HEYEN: Mm-hmm.

JUSTICE: -- we didn't intend for that in the beginning.

MS. HEYEN: Right, so are you saying --

JUSTICE: So, I am just asking you if there is any significance that we should give to the fact that there is no cure provision tied to subsection (c).

MS. HEYEN: Yeah, not surprisingly, I think he is relying on HJ4 which is not law at this point in time. The voters have not approved HJR4 and even if the Court wants to go so far as to look at HJR4, it further clarifies the legislature intent that the lien not become invalid if there is a mistake made at closing.

I think that the will of the people is expressed in the current home equity amendment and that is, that the citizens of the State want to be able to tap into their equity of their homes now instead of waiting until the homes are sold. If you dumped the reasoning --

JUSTICE: [inaudible] insurer as long as there's no recourse, as long as there is no personal liability, and there are so many traps there that the lien's hardly ever good. I would then vote -- be very happy to vote [inaudible] constitution and take the money for it [inaudible] are willing to loan money based on what we've [inaudible] our constitution for this and this is the particular reason. It is not at all [inaudible] constitution that the lien can be somehow brought back if the lender just decides to fix whatever mistakes they made in the beginning with when it only refers to the forfeiture as opposed to the lien that's being avoided here.

MS. HEYEN: But if we ignore section -- that the cure provision then what recourse does the lender ever have if the cure provision isn't -- wasn't included in the home equity amendment then maybe we reached the result [inaudible] by the appellants.

The cure provision was intended to mean something and I think that the requirements to make a home equity loan are complex and numerous. Therefore, the legislature saw fit to insert a cure provision into the home equity amendment.

And I think that it's a good example that you gave Justice O'Neill about what happens when one of the loan documents gets caught in the copier machine. Under the appellant's analysis that immediately after closing and funding, the lien becomes invalid and the lender has no right of recourse even though a simple clerical mistake was made.



Another example would be is what if the closing cost exceeded one penny over the fee cap provision. Under the appellant's scenario, immediately after closing and funding, the entire lien would be invalid. And I don't think that that's what the legislature intended. It clearly intended to include the cure provision in the home equity amendment. And I think again that the Court in Stringer went on to say that the obligations under the extension of credit are found in section 50(a)(6)(Q)(i) which is one of the obligations under the extension of credit.

So if one of the obligations under the extension of credit can be found that subsection (Q)(i), why can't one of the obligations, under the extension of credit, also be valid at (Q)(x). Section (Q)(x) must share equal dignity with the rest of the home equity amendment.

We can't merely dissect section (Q)(x) or (Q)(10) out of the home equity amendment and say it doesn't exist just because it furthers the appellant's argument.

Section (Q)(x) was intended to mean something and we believe that the plain meaning of the statute is clear, that the lender, if it fails to comply with these obligations under the extension of credit, then it forfeits all principal and interest. The extension of credit language is also found at section 50(a)(6) where the obligations are defined.

JUSTICE: Well, let me -- the premise of that argument is an invalid lien can later be then valid and that -- maybe the legislature's intent is you're saying but that would be against [inaudible].

JUSTICE: Now, maybe the legislature wanted that bad. But it would be against any sort of jurisprudence we have that an invalid lien can -- that this type of lien can later be made valid and that is [inaudible].

MS. HEYEN: Right and I think that the appellant's cases rely -- all pre-date the home equity amendment clearly and primarily focus on the [inaudible] cases where there wasn't a way to cure the problems in those cases. But in this case, there is a way to cure minor --

JUSTICE: Oh no, many of the cases that the defense counsel cites that were easily cured [inaudible] problems and they were putting technical [inaudible] curable problems but the cases said that an invalid lien cannot be made valid.

MS. HEYEN: Uh-huh.

JUSTICE: And so you'd agree that in doing this, the legislature intended to depart from that sort of scenario [inaudible] that intent to depart from it somehow in the language and you find it in subsection (10) and opposing counsel finds it in (c), the lien shall never be valid, no lien shall ever [inaudible] but it does seem to me conflicting provisions.

MS. HEYEN: But it's just the lien shall be error, be valid unless it describes a debt secured by this section, because I think section 50(a)(6) is a part of the section. So if you red section 50(a)(6) in its entirety, you do --

JUSTICE: So, you would say that unless it secures the debt describe by this section was the legislature's intent to a loan involving the contract?

MS. HEYEN: If one assumes that the lien was invalid and later became valid, then yes, thus section 50(a)(6) allows the lien to later become valid because it describes a debt described by -- secures a debt described by this section. Section 50(a)(6) again is necessarily a part of this section.

One issue that the appellants brought up was the waiver and the

security agreement. The security agreement did contain language of the borrowers' acceptance of the rate but would constitute a waiver of the right to bring this lawsuit. We believe that the security agreement was merely tracking the language of section 50(a)(6) where it provides that if you do accept an overcharge, then you do waive your right later to bring this cause of action. Assuming that the waiver provision was not in the security agreement, Ameriquest would still have the right to cure under section 50(a)(6). If there are not --

JUSTICE: [inaudible]. Thank you, Counsel.

MS. HEYEN: Thank you.

JUSTICE: Why can't we read section (c), a language, unless it secures a debt described by this section? Why can't we read that to mean that once it meets a description in this section, it can be valid? What was the purpose of putting that language [inaudible]?

REBUTTAL ARGUMENT OF BRUCE PRIDDY ON BEHALF OF THE APPELLANT

MR. PRIDDY: Putting the language of the no lien shall ever be valid?

JUSTICE: No, no. Well, I guess what I'm saying is as I understand counsel's argument is that you're saying that no lien shall ever be valid and therefore cannot be cured be later, therefore --

MR. PRIDDY: That is correct.

JUSTICE: -- so an invalid lien can never be made valid. Why can't we read the -- unless it secures the debt described by this section to mean that even if it's not a debt described by this section but vis-à-vis what they would call a technicality, once it becomes a debt described by this section, then it can [inaudible]. What is the --

MR. PRIDDY: Because that's not what the constitution -- that's not what the language says. The legislature in 1997 wanted to do home equity lending. It could have done it in any number of ways. They could have done a whole new section 50 whatever. They could have done an entirely different framework.

They chose to overlay the home equity lending into the existing framework of homestead protections and they decided to introduce different bills. They had different ways to do it but they ended up doing it having it as a just a six exception to the general rules against [inaudible] homestead loans, taxes, purchase money, home improvements and the sixth one is just a loan that needs these requirements, listed A through Q.

And so, if it does not meet these requirements, it is not a loan described by a sixth. Even if two months, six years, ten years later, it doesn't meet those requirements. At the time the loan was made, it doesn't and that is where whether the lien was created or not, either the lien is created or it's not, and Justice Enoch made a very good point. We're not talking about lien validity at all. We're talking about whether the lien was created or whether it was created and lien creation cannot be fuzzy. It cannot have a -- well, I think it was created when it was a -- when the loan was made, all of the requirements in the constitution were not complied at all.

JUSTICE: Well, you're saying validity has to be measured at the inception?

MR. PRIDDY: Absolutely, and that's what the consistent jurisprudence of this --

JUSTICE: I'm having a hard time seeing that in subsection (c). Could the legislature has easily have said that? I mean it says no lien shall ever be valid unless it secures a debt described by this section and that doesn't clearly mean to me at its inception.

MR. PRIDDY: Well, I guess you just have to go to the cases of this Court on a five for instance which held that subsequent efforts cannot make a nonexistent lien existent. You can't have an extreme lien. Either when the loan is made, the lien is created or it's not. Now, Justice Hankinson's idea that the lien -- that when the cure -- then the lien comes into existence. That would be something that the legislature could very well provide and maybe the best of way to resolve --

JUSTICE: But isn't -- isn't that a way to read this language? That's the problem that we're having is [inaudible]

MR. PRIDDY: I do not believe so.

JUSTICE: -- seems this letter means in it because it says that it shall not be cured unless it secures a debt. Once you have a cure, you have a debt provided by the section.

MR. PRIDDY: Because it's the same language this Court was interpreting when it interpreted all those other cases that held that inception is the key and you cannot cure. It's the same language --

JUSTICE: But what are you --

MR. PRIDDY: -- that existed in those cases years ago that when you didn't notarize or --

JUSTICE: Which language?

MR. PRIDDY: What's that?

JUSTICE: Which language are you referring to that you're saying is exactly the same?

MR. PRIDDY: 50(c).

JUSTICE: The "unless that it secures the debt described by this section"?

MR. PRIDDY: Yes.

JUSTICE: That's in the other provision [inaudible]

MR. PRIDDY: I believe it is. I believe that is and I can look through the history of the -- I believe that that's been in there for years. And --

JUSTICE: [inaudible] Are you saying that a debt as described by this section can be found in our constitution before this amendment was made in 1997?

MS. HEYEN: I'll have to go back on this.

JUSTICE: Well, that's good if you turn to your argument, isn't it that it has to be [inaudible]?

MS. HEYEN: Yes, and by the way what you mean by section, they mean section (a), which the exceptions for the general rule of invalidity are contained in section (a) and there are 1, 2, 3, 4, 5, and 6. And yes, the previous version of section 50 said exactly that, "No mortgage deed of deed, trust bid, or other lien on the homestead shall ever be valid except for a debt described by this section." It's the exact same language that's been there for a number of years. I don't know exactly how much [inaudible] but the previous version had the language --

JUSTICE: Would you agree that we are limited to looking at number six? That's the section that this loan was made up because it's a home equity.

MS. HEYEN: Right, and so the question is, does the loan -- is the loan a debt described by that section?

JUSTICE: All right.

MS. HEYEN: And if they don't comply with the prerequisite --



JUSTICE: Would you agree with the fact that parts (a) through (Q) defined what an extension of credit is under part six?

MS. HEYEN: Page 6, absolutely.

JUSTICE: And that also includes (Q)(10)?

MS. HEYEN: That is correct.

JUSTICE: Okay.

MS. HEYEN: But (Q)(10) again is a consumer protection, not an industry [inaudible]. Any further questions?

JUSTICE: Thank you, Counsel.

SPEAKER: All rise.

2001 WL 36160451 (Tex.)