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Supreme Court of Texas.
Arturo Flores, et al., Appellants,
v.
Millennium Interests, Ltd., et al., Appellees.
No. 04-1003.

February 15, 2005

Appearances:

David A. Carp, Herzog Carp & McManus, Houston, TX, for appellant.
H. Miles Cohn, Sheiness Scott Grossman & Cohn, L.L.P., and
Houston, TX, for appellee.
Bill Davis, Office of Atty. Gen., Austin, TX, amicus curiae.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,
Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W.
Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil
Johnson, Justice Scott A. Brister

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COURT ATTENDANT : Be seated please. The Court is ready to hear argument in 04-1003, Arturo Flores versus Millennium Interest.

COURT MARSHALL: May it please the Court. David Carp, to present the argument for the appellant. [inaudible] to reserve five minutes for rebuttal.

ORAL ARGUMENT OF DAVID A. CARP ON BEHALF OF THE PETITIONER

MR. CARP: May it please the Court. David Carp here, representing the appellant's in this case along with Mr. Harry Herzog. I'd like to speak today about three points. The first is the construction of the wording of the statute that we are here-- on which is Section 5.077, The Texas Property Code. And to show that really it's, it's very clearly written and there's only one result that can be reached as far as the construction. The second issue I'd like to talk on, is the-- the goal of the Appellees here is to lead or and do away with the statute. Because even if a certain construction is reached that was cited only in the absence of a, of a statement which are the \$250 per day liquidated damages on the extra replied. Then that would still be excessive unconstitutional whatever. And to show that-- really an order

for party to get in trouble under the statute; they must be acquittal. The third point that I'd like to discuss is the intent; the latent intent of the legislator to have Chapter 41 of the Civil Practice and Remedies Code applied to Section 5.077 of the Property Code.

JUSTICE: Why doesn't, why doesn't it apply?

MR. CARP: Well, your Honor, first of all, when the, the, the legislature evidence is intent not to apply when they amended the Property Code in 2001. And in 2001 the amendments included Section 5.079 of the Property Code and that was the, the statute that was addressed in the Brown versus De La Cruz case which this case-- this Court recently came down. In that, the-- in, in Section 5.079 the legislature took the word "penalty" and changed it to "liquidated damages." This Court and it's opinion said that, "The legislature had changed not only the recipient of the liquidated damages or the assessment but also the nature of it." And so if the legislature specifically changes penalty, a liquidated damages changing the nature of the recovery or the assessment. Then I will contend that the intent of a legislature was certainly that it not be a penalty.

JUSTICE: Well, liquidated images sometimes are intent. Made the difference might be-- penalties are always penalties. Liquidated damages may be a penalty and may not. Right?

MR. CARP: I agree.

JUSTICE: So it could be the legislature made a change but that didn't necessarily make it, not a penalty at all circumstances.

MR. CARP: Well, I would agree, your Honor. I think the contention is, thus we are looking for legislative content. And we have Chapter 41, that says, "It applies to penalties." And you have the legislature actually taking the word "penalty" out of the statute and replacing it with "liquidated damages." Then I think, you have evidence of a legislative intent that Chapter 41 is not supposed to apply Section 5.077. I think, that the, the legislator could've done that in, in several ways. Now, the legislature could have left the word "penalty" in there. And, and maybe a clearer word applied. The legislature could've said-- could've left the word "penalty" but it is used to have the list of statutes to which Chapter 41 did not apply. It could have put in that list, the Section 5.077.

JUSTICE: So all the legislature would need to do, to exempt if it decided to give 30 times damages. Under that is changed the name from exemplary damages or extra damages to liquidated damages or actually, if, if they would then just a matter of what they called it, you could still get 30 times of your actual damages, any day the language in 4102 that says, "Notwithstanding any provision to the contrary is Chapter Five." As long as-- as long as you just call it's up to the different, then you're out.

MR. CARP: Well, I think that, that is some evidence of legislative intent that, that the legislature didn't intent to apply. And it is taken into situation.

JUSTICE: Well, what is not was a-- notwithstanding any provision to the contrary may be used. That's pretty strong.

MR. CARP: [inaudible] petitions of [inaudible]

JUSTICE: Not pretty strong, pretty strong indication 4102 is supposed to apply to any action in which it claim at six damages.

MR. CARP: But the, the legislature amended Section 5.077 in 2001, after the Chapter 41 will lose in place and, and I think that, that their-- you've got further evidence of, of the intent, Chapter 41 is there. It is an easy thing to lift penalty but by changing that wording to "liquidated damages." I think he had a legislative intent evidence

of the legislative intent. That is not to apply.

JUSTICE: But you don't think, that legislator will seriously think-- the legislator intended to work somewhat, if ever into a 30 times a value of that contract.

MR. CARP: Well, your, Honor, I think that the statute is ...

JUSTICE: Do you think that-- is that what you think-- the legislative intent was, if you read the language that your saying is, is plainly that you say that it is? The result is, that somebody did recover those facts of damages, liquidated damages. Do you think that's what the legislature intended with this provision?

MR. CARP: Yes. I do, your Honor. And if, if I may explain, the, the statute is so easy to comply with. It is like falling out of bed of the ...

JUSTICE O'NEILL: The substantial compliance should be enough. This barely easy to comply with the spirit of it-- should not be enough. And always -

MR. CARP: Well, I ...

JUSTICE O'NEILL: - if you could tell from the statement, if you can make this calculations from what's in the statement itself. And I, well, would not be enough, that the purposes [inaudible] must be so easy.

MR. CARP: If you can make it the calculations from what's in the statement itself then I think he may have a very good argument that the statement includes is that, that those are not the facts that we have. The, the only allegations are that, if you go back and get the contract, then if you get prior years statement send in-- bring in a bunch of documents that you can seat down and figure all of this out. And I don't think that's the intent of statute.

JUSTICE: Can you suggest the reason why a legislature would've thought that if a product tend you back to the intentionally designed, a defect that would seriously harm many user, punitive damages should be limited. But if a contract turn for a deed of property, should leave well one of this pieces of information that, that is essentially unlimited.

MR. CARP: Yes, your Honor. And, and you know, if I may-- again, it's so easy to comply with the statute.

JUSTICE: Well, it's easy now to jaywalk but we don't impose that. That will tend the people to do it.

MR. CARP: I'm sorry I didn't ...

JUSTICE: It's easy not to jaywalk. But we don't impose that to become legal.

MR. CARP: Well, that the legislature has a lot of discretion to, to address what they think needed to be addressed.

JUSTICE: I'm just asking you if you can suggest a reason and all of you can suggest so that this would be easy.

MR. CARP: Well, if, if I may finish, your Honor. The-- here, this is a great example because let's look at Millennium's conduct in this case. In 2001, based on that state, it doesn't apply. Then I get a letter from the attorneys, for my clients at the time and it says, "They hadn't comply. They don't send the supplemental statement." Then, they send a statement for 2002 and it still then comply. They, they come back with one additional piece of information. Few come back come back with one of piece of additional information-- lined up, did everything. Then we-- the lawsuits continually and is also it's been-- I don't know how long at this point before it finally gets correctly. But a matter lingers. May-- what is the legislature supposed to do to get compliance, to get this type of information to the people they were

supposed to have it?

JUSTICE: Well, it take the compliance that this case falling short. There's no better than no compliance at all. Later then, it would [inaudible] in worse. That the circumstances but I would think [inaudible] give it anything. Giving nothing-- same that.

MR. CARP: That's right. And that's-- could the legislature have said if, if there's partial compliance, if they only get two out of the-- out of the four, then the proportion-- the liquidated damages surely I didn't done that. But they didn't. And ...

JUSTICE: I'm appreciative of the second break. First [inaudible] the first of which but, but I'm still wondering if we like to thank that the irrational and they make rational decision. And not just decisions that are-- we send there appeal. I'm just wondering if you can suggest any reason other than case of compliance. Why such, such-- potentially draconian penalties would be imposed for something as in need of correction is this. But it doesn't seem like it's in, in-- anymore need than a lot of other things.

MR. CARP: Well, your Honor, I, I have not read extensively through all the legislative history. I have read some of the larger view articles that we've sited. That the legislature held hearings. The legislature I knows concern that we had a development that this colonies are-- along the boarder, can neither this-- that there were a lot of abuses going on related to used of contract with deeds that there where people who or unscrupolous sellers of land who were or doing all kind of bad things and all I can say is, "The legislature must have felt that this was a significant problem and needed to be addressed. And the, the statute used to say that the, the set or that the purchaser could take 15 percent off of his payment." And the-- they came back in and be fed up. And so obviously they did not feel that the-- that, that was getting the job done. And I think that this case is a, is a prime example that it wasn't.

JUSTICE: Mr. Carp, I, I understand the, the problem in the Colonius and perhaps legislation for this. And understand that the language of the statute has the word "must." And if you did there's one part of that statute that is not comply with then it's non-compliance. And, and I think that's probably what she have here. But I'm still wrestling with the issue that just screened raised in that-- how could the legislature have offended for someone to collect more than actual value of there property land. Perhaps, there could be someone who understands the statute and wait six months, twelve months to, to file the lawsuit. And all that time with this-- 250 day-- \$250 per day damages or [inaudible]. And that's -

MR. CARP: [inaudible]

JUSTICE: - what you going to have to answer from me.

MR. CARP: Well, your Honor, I, I think that-- you know, again the, the legislature made that decision.

JUSTICE: Does it matter that the legislature perhaps is considering changed in the statute during this [inaudible]?

MR. CARP: What it matter in this case?

JUSTICE: Yes.

MR. CARP: I don't think that it would, your Honor. In the, the statute is-- what the statute is that and I, I think that the, the legislature was very clear when they passed the statute as, as was noted in the, in the opinion in, in Brown versus De La Cruz stated sometimes mistakes were made but that doesn't give force the ability to go in and relaxed the statute.

JUSTICE: Another case when you're writing any statute of the great

[inaudible]. I'm just trying to understand the legislature-- legislative history.

MR. CARP: Well, your Honor, some of the, the legislative history that, that I've read and, and other similar statutes. They talk about what, what happens when you-- well, when the, the state mechanisms are not enforcing or not sufficient enough to enforce a certain statute the way that, that they would like. And so by giving it private causes of action you mean list of the help of the, of the citizenry to correct those types of, of abuses. And sometimes the-- though-- that does lead to amounts recovered, it may not be related specifically to actual damages. But as long as that is clearly said out, it's okay. And, and I think that's what happened here. And, and I seen my time is up. Thank you.

MR. CARP: Thank you.

COURT ATTENDANT: Unless the parties have agreed otherwise we will here next from the State of Texas has a major [inaudible] and then the appellee and then Acorn Land Corporation as make [inaudible]. But if you have a different agreement that would satisfy the court as well. The court will here from the State of Texas.

COURT MARSHALL: May it please the Court. Mr. Bill Davis, represent argument [inaudible] state of Texas.

ORAL ARGUMENT OF BILL DAVIS ON BEHALF OF THE RESPONDENT

MR. DAVIS: May it please the Court. The Texas legislator is both fully authorized and unique [inaudible] protective consider protection [inaudible].

JUSTICE: So could it just require for opportunity business if you didn't send one of this statements?

MR. DAVIS: Yes. It is. If the ...

JUSTICE: You don't say the statement before for two business.

MR. DAVIS: There are certainly some due process or some constitutional limits -

JUSTICE: Well, ...

MR. DAVIS: - and [inaudible].

JUSTICE: I, I can't tell what they are from the brief.

MR. DAVIS: The due process cases are inapplicable. They speak to punitive damages that address the concerns about restricting [inaudible], unaccountability ...

JUSTICE: Due process is an applicable. Excess five is an applicable. [inaudible] an applicable. That's a part of [inaudible].

MR. DAVIS: I think neither is applicable in this case. I, I think ...

JUSTICE: I know what is though. What, what is to prevent the state from saying, "If you don't send the statement you forfeiture business." Okay. IF , if, if any ...

MR. DAVIS: There are no constitutional [inaudible] -

JUSTICE: [inaudible]

MR. DAVIS : - or others the statute could be invalidated. [inaudible] that's the states position.

JUSTICE: Does the legislature mean liquidated damages anything other than court-- court's have been 400 years by liquidated damages?

MR. DAVIS : Years passed year the earlier question I think that the liquidated damages in 5.077 had a dual purpose. They partly

compensate consumers. And they partly detour with the legislature identified as a significant problem throughout the state. And there are cases in which ...

JUSTICE: Well, the court puts that definition of liquidated damages come from. Our definition of the liquidated damages not that. They don't do partly one of partly does it. They either do on or the other. And if they do on, we uphold them. If they do the other, we strike him down.

MR. DAVIS: The liquidated damages definitions tend to come from contract case in which damages are difficult to qualify. And so they're set by the party usually at the out set to be a reasonable forecast of ...

JUSTICE: So your [inaudible] with the legislature you'd be liquidated damages in the statute. They meant what we-- in Phillips versus Phillips have lots of cases 400 years have met by liquidated damages.

MR. DAVIS: I believe that we would assume that to be true. The legislature understood that issue.

JUSTICE: So if this wouldn't ask cost under the common law. Is the state comes assuming just to summed that among your argue, it does? But if it didn't, what is to prevent the state from provider for such liquidated damages? That again, you say that.

MR. DAVIS: I believe there's no constitutional grounds to prevent the state from passing legislation that, that is-- of a valid part of a broader scheme to protect Texas' consumers. As 5.077 is and the surrounding divisions barely reflect in the legislative history. A need for the protections and the reasonableness of the damages.

JUSTICE: You said they're no constitutional grounds for striking this damages of the statute and there constitutional limitations on the amount that assume that provision is constitutional-- is valid and there's constitutional limits on the amount that are not stated in the provision.

MR. DAVIS: The-- there constitutional challenges in this case are in the due process. And the excessive funds falls both constitutions. The excessive funds caused [inaudible] and not conceivably apply because the state under the plain language of the provision does not stand and collected the ...

JUSTICE: Why is-- why does that matter? Yeah. I know you'd say all this cases argued-- are, are all this cases historically do that as important. I'm just wondering why it matters whether the state keeps the money and takes it out to your pocket.

MR. DAVIS: In looking at the excessive funds cost I think that the U.S. Supreme Court has, has also determine when it is intended to prohibit. And apprehensively it's then applied in the criminal context and the courts simply eliminated to that context.

JUSTICE: And I, and I can, I can, I can see that but I wonder if anybody imagined at the time that this kinds of civil penalty are statutes with come along.

MR. DAVIS: [inaudible]

JUSTICE: And I just-- nothing in the case is to indicate one way on the other.

MR. DAVIS: That's correct, your Honor.

JUSTICE: So I'm, I'm wondering if the limitation to criminal matters and the government keeps the money are not just sort of accidents of history rather than principle distinctions.

MR. DAVIS: As my time is expired ...

JUSTICE: Answer please.

MR. DAVIS: The case law offers this support for a [inaudible] along the line that the court is suggesting. The case in our [inaudible] set maybe for better.

JUSTICE: I'm sorry ...

MR. DAVIS: Except maybe for better.

JUSTICE: That is the only case that's been cited. Actually an excessive fines clause contacts-- I believe it's the Galaxton case. It speaks to that in [inaudible] speaks to the due process.

JUSTICE: And you, you argue there oh. And nobody as, as come back for [inaudible] and that was true. Delegation of legislative party won't collect though [inaudible]. I guess-- do you find anything in the cases that you've cited is from the federal courts-- the U.S. Supreme Court and State Courts that suggests that this limitations, criminal matter and government [inaudible] money are build into process for principle reason as opposed to-- that's just what they have before limited time.

MR. DAVIS: The United States Supreme Court opinions is cited in our briefs looked to the history of the provision in a clearly indicated that was the intension of the [inaudible] that it apply in this context.

JUSTICE: Thank you, Counsel.

COURT ATTENDANT: The Court will hear argument now from the appellee.

ORAL ARGUMENT OF H. MILES COHN ON BEHALF OF THE RESPONDENT

MR. COHN: May it please the Court. Mr. Miles Cohn represents argument for the Appellee. Your Honors, I'd like to begin by attempting to answer a difficult question to several-- several you asked and the [inaudible] then building with, with this case [inaudible] coupled years. And that is half of the legislature had ever attended a result as extreme of really bizarre as, as statute revolute-- the other side thus would seem leave in this case. It's a result that I only imposed as this enormous penalty completely out to proportion to the transaction itself. But, but also has obvious constitutional and [inaudible]. And I don't mean to get into detail the constitution but I will remind the court that there are in-- you know, both sides have been a lot of researched on this case and we've come up which just a few cases to deal with this kind of situation the Denaher case-- U.S. Supreme Court case from 1916th. The Hayel case ...

JUSTICE: There problems are on you side too and the obvious one is why would the legislator say, "If you don't send him a statement at all, you'll [inaudible]." But if you send him a statement that doesn't say anything, you don't know [inaudible].

MR. COHN: I think, your Honor, that Chapter 41 is the partly the answer to that under. Two parts to my argument because in this case my client did sent a statement. And I believe that the statute can be read to not impose the penalty in that situation. He sent a statement. It's merely deficient. So we've made that argument. My eyes believe is that the better way to deal with this case in the more logical way is through Chapter 41 and that's what I was getting to. I think this all sticks together when you do that because the legislature passed Chapter 41. In Section 41.02(b) it says, "This provision applies to all damages in all other statutes."

JUSTICE: What about the argument that the specific statute that where here on today has been modified since Chapter 41.

MR. COHN: It's been modified that Chapter 41 still says it applies to all statutes. And I think that allows the legislature to setup whatever sort of scheme they want to in terms of damages knowing that there's some reasonable [inaudible] on it, if it's exemplary. That is if it's beyond actual damages.

JUSTICE: Is this just the fallacious turnable answers or any [inaudible] that she found in the history over the year. That this actually the [inaudible] they would think Chapter 41.

MR. COHN: No. I think Chapter 41, you know, this particular statute I'm not saying they were thinking about but Chapter 41 actually have exceptions in it for a civil penalty statutory damages. And they're all different names. Some were called penalty. Some were called-- not liquidated damages because this two statutes are somewhat unique. This two on the Property Codes. But there are call off hands of different things and some of them were called anything. There's just statutes that said, "If it happens that you have to pay what-- without giving a label?" And when the legislature passed Chapter 41 originally it have a laundry list of exceptions for various sorts of whatever you want to call. Statutory damages, civil penalties, whatever. Then they took them out. Well, if they did not intend Chapter 41 to include this sorts of assessments, then why were there exceptions? And why are there taking out? So the structure to statute and I think-- by the way, when I took the laundry list out at the same time they added this fraud 41.002(b) which makes clear I think with may already been case. But that the limits in Chapter 41 apply to exemplary damages no matter what statute they are worried under unless the other statute has a lower limit. So the scheme sets up and I think-- would you read it that way? It actually gives some logic to the legislator. If, if that can be said that there is and-- an umbrella-- a limit that applies to all assessments of exemplary damages unless the other statute is lower ...

JUSTICE: An [inaudible]. What is the is that [inaudible]?

MR. COHN: Where is that statute?

JUSTICE: What is the limit?

MR. COHN: In 41.02. When I actually settle provisions of Chapter 41 that would apply.

JUSTICE: All right.

MR. COHN: One that's applicable with this case is that you-- if you don't have some actual damage we cannot recover it except for damages.

MR. COHN: And so that's sort of orders [inaudible] because what actual damages it would be an unusual cases if you have.

JUSTICE: Well, I, I could hypothesize that a buyer might say, "I didn't have this information therefore, I could not refinance my long for [inaudible]." And because I would refinance it ...

MR. COHN: That would imply here [inaudible].

JUSTICE: That would apply here because I have some substantive this purpose of the statutes because unfortunately is people can get to taps along. That, that would imply here.

MR. COHN: Well, why this?

JUSTICE: So there would be any financing of-- refinancing my old books.

MR. COHN: Well, actually there is financing for this types of lots. They had a high interest rate. And this contracts or as at high interest rates. So there maybe situations especially as I fire filter within this property. And gets a better job. This are not-- I, I don't

call this poverty lots. This are \$30,000 lots. People putting up \$50,000 homes on them-- the working class. And there are situations in which somebody might refinance something that. And it does have.

JUSTICE: Do you agree that the statute-- the [inaudible] statute requires our client to comply with every single element. Element of the statute or a substantial compliance enough.

MR. COHN: Well, must is directory but the cases say, "You've been have to asked what is that mean if it's not there." And it probably gets into the question of what is a statement under the statute? And I thought that's what you're dealing it but if you look at the ADC-- I'm not saying "B" doesn't exist. "B" does it up requirements. The question is: What happens if you don't meet one of them to the penalties and sub Section C apply? And I believe that the logical rating the statute-- the way it was written. We didn't right. But the way it was written that says, "If you don't comply with A-- if you don't combine the statement." Then this penalty applies. It doesn't say if you don't comply with B. Now I think the, the argument that the other side is raised is well, there's the definition of statement it is in B. What is a state? And I, I think-- first of all, I would agree with the [inaudible] one count which is that not every piece of paper that says, "Statement is a statement." I'm not saying that if you sent a paper here by that have the score of the [inaudible] first game which was their example that, that's a state. But if you look at the facts of this case which is probably very typical-- my client sent informative annual statute. They-- the evidence is that they are typical in the mort of servicing in a contract for the Servicing Industry. And in fact, if you take a look at them, their in the record. They're probably somewhat similar to the kind of mortgage statements that any of us would proceed on a traditional mortgage. You know, they have an ask or statement. They include interest pay. They include some other doubt-- including doubt that not require by the-- by the statute.

JUSTICE: I want to-- I want to just return to Chapter 41 -

MR. COHN: Sir.

JUSTICE: - just a second. Former Section C of the-- of Section 5.077 had a 15 percent deduction type of section.

MR. COHN: Yeah.

JUSTICE: You, you think that would've come up with Chapter 41.

MR. COHN: I think literally-- probably would have. And one of the issues that I thought about is, you know, going through this is that there are penalties and sanctions that are not in extreme. Yet they are still exemplary in the sense that they may go beyond actual damages. Now ...

JUSTICE: Was is-- it wouldn't like a lot of sense for them to come along and changed from that regime to the \$250 a day penalty and put the \$250 on a check [inaudible] evidence [inaudible].

MR. COHN: I think-- there maybe two answers for that, your Honor. The, the first is that in a concept of liquidated damages, it would just have been used very much by the legislature. But I don't think there's anything wrong with the legislature. What if they had just said 15 percent and call that liquidated damages? The Court might say, "Yes." That is a reasonable estimate of an actual damages would be. And therefore, we are going to allow the legislature do it and that's not a form of exemplary damages. Liquidated damages is used in the-- the common law contract schemed. And the legislature did picked that term. Has to this something that is a reasonable estimate of actual damages.

JUSTICE: What if it's not? Is that constitutional violation or ...

MR. COHN: I think its-- it [inaudible].

JUSTICE: We won't parties do that? Let-- How do we keep the state for good?

MR. COHN: Well, number one, you have Chapter 41. And that's why as I've said, "I think all this can fit together," because the legislature could say, "Well, let's have the penalty for ex-conduct-- be a million dollars." And we're not going to worry too much about how extreme it is because it is subject to 41-- Chapter 41. You have to show some actual damages and in Chapter 41 some of the provisions provide that there's some element of discretion. So even if you had a statute and except for DTPA which is specifically omitted, you know, there's some specific exemptions. What for that if a Texas statute said, "We have been [inaudible] damages here for such a such a conduct." Under Chapter 41, the judge would still have to look at the factors and decide whether that's fair. It might be fair in some Texas to have damages that are three times or five times or ...

JUSTICE: Did you say, "fair?" I mean ...

MR. COHN: Well, acceptable. I'm sorry. That ...

JUSTICE: [inaudible] acceptable but -

MR. COHN: Well, the compliant with chapter 41 ...

JUSTICE: [inaudible] we charge by constitute or [inaudible] my constitutional or we were [inaudible]. It's just Chapter 41.

MR. COHN: Well, I'm talking primarily about Chapter 41 because it's my belief that if a statute and including this one-- Section 5.077 if Chapter 1-- 41 applies to it then it would be constitutional because we've had a limit on it that brings within constitutional balance. If Chapter 41 doesn't apply, then you've got some more serious issues because the only cases in our legal history that addresses a statute like this say, "Is got a real problem."

JUSTICE: Is there a problem other than the-- other than the constitutional probations that's have [inaudible]-- have been raised here. Is there a common law problem or not, do you think?

MR. COHN: Well, I think if you could get into the question-- I'm not sure you caught a common law problem that maybe a statutory construction problem because the statute used the term "liquidated damages." The liquidated damages is a common law term. It's a little odd to used it in a statute imposing what's-- obviously a harsh penalty. What did they mean? And on one hand, if it done the 15 percent level, I think we might have said-- it might be reasonable to have said, "Well, this is a reasonable estimate of what actual damages might be." And therefore, if not, exemplary Chapter 41 doesn't apply. But when it gets to such a huge level as it does in this case-- \$250 a day forever or 5.079 at even up to \$500 a day forever. It's ...

JUSTICE: I'll tell you where but it's only two correct, correct [inaudible].

MR. COHN: Correct. Until the problem is corrective. Whether or not it's brought your attention or I suppose-- Yes. Correct.

JUSTICE: How do-- how does a statement takes citizens?

JUSTICE: You have to [inaudible] is here and others similar situation with reply Chapter 41 [inaudible] scenario seems to me [inaudible] statute would have-- never have any of them.

MR. COHN: I believe the state could protect citizens by imposing a reasonable constitutional acceptable penalty. And I can assure the court that if the penalty were, you know, something that we could pay back on bankrupt that my clients would take notice of the statute. And, and all would-- and, and my clients are not-- would take a little bit of, of offensive, a notion that, you know, that the other site seems to throw us altogether with people selling lots in colonius. Contracts for

deed or oftenly used in, in-- as is this case paid subdivisions with water, sewer. It's a lay of selling property and keeping the price down. In this case my client's head is-- as I mentioned earlier and informative annual statement does not unlike what any of us would receive on a [inaudible].

JUSTICE O'NEILL: But, but you would agree that the real and by this form of statute with the abuses in the clients. About the debts-- statute probably would not be ...

MR. COHN: I think that's the [inaudible] before the statute as a whole. We have, you know, try to get through the legislative history. You can't find anything that explains why such a hot penalty would be imposed for this -

JUSTICE O'NEILL: But for the [inaudible] that, that the notion of a penalty in this information was clearly to grantify abuse within the colonius system -

MR. COHN: Correct.

JUSTICE O'NEILL: - of, of contracts for data. I think but I'll acknowledge that. And you have agree that your interpretational that makes sense waiting in them with Chapter 41 to prevent abuses on that side. On the other side it was significantly takes of [inaudible] that statute as well as really going to able to showed actual damages reasonably related to this amount. So either way if it's, it's going to be a problem.

MR. COHN: Well, I would say that as between the two explains if they are extremes-- it's a lot more reasonable not to put out of business every seller of contract. Again, of property under contracts per day and let the legislature design something that makes a little more sense ...

JUSTICE O'NEILL: But he agrees, it would be extreme with the way. And your way does take a lot of punch put of it.

MR. COHN: It takes a punched out, you know, I wouldn't call extreme ' cause it's not putting anybody out of business and it's not putting anybody out of there houses. You know, ...

JUSTICE O'NEILL: So there were 10 day fine give me a different situation. If, if, if it were-- if they came within compliance within 10 days and you had a smaller fine you think it would be okay even though that damage amount has no relation to any [inaudible] damages?

MR. COHN: Right. I think is-- as I mention before you, you could have legitimate and again, legislature is never done this. This is a new thing. But could've legitimate liquidated damages. Some of damages that is, you know, and if you're selling a \$27,000 lot, how much been a liquidate damages be? It could be fine as to get the attention of the seller but still within the round of what actual damages to be, 2005. Five thousand five or something. But not in this case hundreds of thousands of dollars ...

JUSTICE O'NEILL: But I guess what I'm getting is, it really doesn't fit the liquidated damages common law construct because in this situation mostly there's some [inaudible] intent. You're not going to have any actual damages. And so there's going to be a, a reasonable estimate of actions, damages and reality. So if any amount controls of the statute is going to fall in Chapter 41.

MR. COHN: Well, I don't know that if I would read it up. I, I think that there's a possibility damages otherwise, why is it matter? I mean, if, if you're trying to protect against some abuse, that abuse must cause some damage to somebody or it's not an abuse. You know, people are entitled to get some annual reports, some statement of there mortgage, there contract or data [inaudible]. And there's nothing

wrong, you know, or improper or beyond constitutional limits of legislator imposing some limits. And there's nothing wrong with imposing some civil penalties or remedy. But the question here is what do you with the remedy that goes way off the charge? It did the-- did somebody in the legislature really seat down and say, "We should put out of business because that was this would ..."

JUSTICE: [inaudible]

MR. COHN: - seller business-- I seller that misses one line on one report three years ago.

JUSTICE: For according to you, how does this work? We have a lawsuit subdivision where one person didn't get a statement. One person didn't get a sewer. One person didn't get water or electricity. And one person didn't get title or anything. The-- the lot was sold to somebody else entirely. They all file one suit and then we asked the Trial Judge to said who sue in for liquidated damages penalty and who sue in for liquidated damages close testament of actual damages.

MR. COHN: I'm not trying to understand the question because you're going to know different types of claims under different provision on statutes -

JUSTICE: I made ...

MR. COHN: - that brought line ...

JUSTICE: I may you're, you're telling-- well, I mean there's-- you agree. There's no other definition of liquidated damages under the common law definition.

MR. COHN: Correct.

JUSTICE: And that makes a sharp distinction. It this estimate-- fair estimate actual damages or is it not? It's penalty or it's not?

MR. COHN: And I think, let's ...

JUSTICE: And it's a-- again, common law that's call for the trial judge.

MR. COHN: Yes. It's a legal ...

JUSTICE: Matter of. So what you would say then is playing that to the statute. The trial judge decide which of this claims are, are going to get 250 a day by making that same call and which are not.

MR. COHN: Yes. Although I would say in this case when you're talking about annual report and there's probably I can't think of any scenario in which \$250 a day would be a reasonable estimate ...

JUSTICE: What if the plaintiff decided to amend their petition and only asked for \$5 a day or 250 for the first 10 days?

MR. COHN: Well, the trial court in this case found that if the liquidated damages did not apply which is said, "It did not here." That day would be entitled to get actual damages or violation of the statute. But in this case there weren't allow for damages and conceded that had no actual loss and therefore, he rent summary judgment. And if you did have a case under that interpretation which are really before the court-- if you have that kind of situation ...

JUSTICE: They said, "I'm just worried about. I'm worried, you know, how much I may-- I'm-- might accidentally paid the insurance to us. Paid the taxes to us. So I want \$5 a day."

MR. COHN: Well, if the statute doesn't have any ego or it's \$250 a day and I think either Chapter 41 applies or it doesn't or some constitutional or it isn't. The one exemption to that if the trial court found is that if they put actual damages. I, I couldn't get my refinancing or it's another problem.

JUSTICE O'NEILL: What couple in the middle state that required ...

MR. COHN: Not in the statute.

JUSTICE O'NEILL: And say you'd say that under 41.03(c) that sees

her none injectify there's none to [inaudible] the 41.03.

MR. COHN: No. I think the-- under Chapter 41 there might be a couple -

JUSTICE O'NEILL: But is ...

MR. COHN: - [inaudible]. This statute does not require ...

JUSTICE O'NEILL: So what 41.03(c) says, "You going to have-- says that with a couple [inaudible] what the requirements are." [inaudible] says but if there's a neither specified couple [inaudible]-- couple [inaudible] state that requires [inaudible] position ...

MR. COHN: There is no other couple moment [inaudible] state in this statute.

JUSTICE O'NEILL: Then you have to prove -

MR. COHN: Therefore, you get to prove them out.

JUSTICE O'NEILL: - [inaudible] to recover -

MR. COHN: Yeah. I think you have to prove [inaudible] ...

JUSTICE O'NEILL: - that [inaudible] your position.

MR. COHN: If that is my position now-- if that's not true with respect to the actual damages the the courts have were recover. You have still recover actual damages. But to recover this enormous penalty and put my client in business, they have to show malice. You have to show that they have some actual damages. And as I said, I think when you, you check Chapter 41 in that way, it does title if it's together. And protects-- and helps us from heaven to reach a very difficult constitutional thought.

JUSTICE O'NEILL: Will you look at the, the liquidated damages [inaudible] and you apply the common law construct? Do you do that on an individual based as a legislature-- I mean is it if when you decide whether it's an illegal penalty or reasonable estimative likely damages? Do you do that? I think this falls us up on Judge Brister's question on a plaintiff-by-plaintiff analysis or do you look at just brought in the industry generally and it awaits to that somehow?

MR. COHN: Is it a constitutional question?

JUSTICE O'NEILL: No. I'm, I'm wondering in any determine whether it's reasonable estimate. Do you did that on an individual plaintiff basis or on -

MR. COHN: Well, -

JUSTICE O'NEILL: - on contract for deeds.

MR. COHN: - in [inaudible]-- in a common law contract it-- it's the contract is for that situation. So it doesn't come up. I would thanked that if you're doing it for the legislature you have to asked on an overall basis not for each individual plaintiff because you're-- this is a statute applicable to everybody. And if, if that's what they meant if that's simplicity in the term liquidated damages that, that there's some assumption that is a reasonable estimate. I don't really think that's what's going on here. I think they just used the term as a lay of creating a civil cause of action, you know, what the-- let's give it up-- really just a poorly draft the statute. They called it liquidated damages-- I could've called it civil damages. But it's damages and this Court has said in a couple of case is that when-- although old cases but that still law we have a statute assesses damages and it's greater than actual damages-- they are exemplary. And uses that term-- I don't know that Chapter 41 could apply more clear.

COURT ATTENDANT: Further questions. Thank you, Counsel. The Court will hear arguments from Acorn Land Corporation as Nature's [inaudible].

COURT MARSHALL: May it please the Court. [inaudible] O'Neill represent argument from Mr. [inaudible].

MS. O'NEILL: May it please the Court. We're here construing a statutory liquidated damages falls. And the poor has cued into of the problematic nature of the statute. The fact that it's a liquidated damages statute. Liquidated damages is reasonable or in forced if there unreasonable in a statutory contest then there instead subject to the excessive fine clause.

JUSTICE: Why when the case is also in the limit that the criminal-
- criminal penalties where the government keeps the file?

MS. O'NEILL: In fact the, the case is cited by the Attorney General BFI do not specifically limit the Eight Amendment Excessive Fine Clause to criminal cases. And following BFI Austin case does not specifically limit to criminal cases and that Austin case says, "The issue is not whether it's a criminal case or a civil case." The issue is, is it a penalty? Is it a punishment? If it's a punishment, then the excessive plaintiff clause is applicable.

JUSTICE: Do you know of other states which you construed there constitutions that way or not?

MS. O'NEILL: I do not.

JUSTICE: No won my idea.

MS. O'NEILL: I, I do not know when where the other of a state statute has. The, the Texas constitution however or step-- cases in Texas construing or state constitution excessive fines have-- well, since 1980 and the four in Pennington said clearly the excessive fine clause in the Texas constitution applies in civil matters. So this is a civil matter. This is a penalty I could have to get pass the liquidated damages in this case is a penalty. Was that established then the excessive fines clause of a Texas constitution clearly applies.

JUSTICE O'NEILL: Would you say it's a penalty on its face or the way of [inaudible] the common law liquidated damages construct?

MS. O'NEILL: Your Honor, I would say facially under due process it is. It and-- in this it has to be as applied to Millennium which ...

JUSTICE: Could if-- but if, but if a legislatures passing the statute that calls people or selling lots two and three times. And selling lots was no sewer, water or electricity. And that looked quite specially. Invalid to say, "We're going to penalduct-- penalize you \$250 everyday ' til you put the sewer in." What's place that clearly [inaudible] on the face of penalty?

MS. O'NEILL: Well, in that-- that would be a circumstances-- circumstance probably that it might not be unconstitutional opponent's face in there due process. However, with the legislative was doing that would clearly address them the problem. There where addressed in the problem in [inaudible]. They were also addressing a problem in third counting with the tornado wherein landowners would take payments of-- for insurance. And then where the, the buyer was the beneficiary on the insurance obviously. And they did not pass in the insurance. That's an insurance fraud -- I mean that they're-- there were clearly egregious problems that were being attempted to address. But with the legislature did was they went beyond the front lines of there discretion. They would beyond constitutional [inaudible]. And they passed away-- I admit. And what they have done is brought in all the sellers he-- in good faith have been selling under contract for deed with-- with not, not doing anything to harm the buyers.

JUSTICE: How can we tell what's excessive?

MS. O'NEILL: [inaudible]

JUSTICE: You don't think unusually penalties are excessive.

MS. O'NEILL: Know that legislature has said the usually penalties are not excessive.

JUSTICE: All I know [inaudible] I think this-- maybe they don't think this is excessive. So I mean you're asking the judiciary you say, "This is excessive."

MS. O'NEILL: Well, the test and in Texas would be the primary consideration would be whether the penalty is fixed with the reference to the object is attempting to accomplish.

JUSTICE: Or clearly, Yes. I mean it's-- I mean they're obviously they want you to send the statements. It maybe the petitioner's grad. It's not hard to do. And they anticipate it-- somebody inspired 250 or thousand-- \$5,000 will correct the mistake and start there right.

MS. O'NEILL: But often what the court's do on the U.S. Supreme Court and apply the excessive fine clause is then a period of analysis. Preparing the actual damages to the punitive damages. And when those punitive damages outrun the actual damages multiple times at then [inaudible] due process [inaudible] ...

JUSTICE: Well, but they do. They do unusually. You have the fourth-- twice the principle.

MS. O'NEILL: But it, it wasn't a [inaudible] twice the principle.

JUSTICE: You do in and I trust cases. You have to-- you're at the paid trouble damages.

MS. O'NEILL: And, and that is-- I think therein again to the notice issue of those statutes. The usuary statutes, your unnoticed and even there is a, a, a bona fide error defense and an opportunity to cure and the use of the statute under the DTPA for example you have a notice provision, this statute does not have noticed provision such that one could comply-- I'm sorry my time has expired.

JUSTICE: Complete your thought.

MS. O'NEILL: One could comply and not even know that there was a violation being alleged. It, it seems that when the legislature impose a \$250 day that they thought that the violator would realize there where in the wrong. So therefore, they had 250-- they had \$250 day penalty for the link of time it was going to take them to cure the problem.

JUSTICE: [inaudible] the questions. Thank you, Counsel.

COURT MARSHALL: MR. HERZOG: May it please the Court. Mr. Harry Herzog represent rebuttal for the appellants.

REBUTTAL ARGUMENT OF MR. HARRY HERZOG ON BEHALF OF PETITIONER

MR. HERZOG: There are three issues I'd like to cover. There are all questions that [inaudible] has filed this Court. Justices Medina, O'Neill and [inaudible] asked questions about Chapter 41 that highlight the fact that they don't want you to construed Chapter 41. They want you to judicially veto Section 5.077 by applying Chapter 41 in a way that in can never ever allows 5.077, The Property Code to be enforced. And all you need to to unveil that argument is to looked at the definitions in Chapter 41. If money is awarded for compensatory purposes, it is defined as not an exemplary damage. Then Justice Brister ask some hypothetical and ...

JUSTICE: Well, this is-- this is not for compensatory purposes. Isn't it?

MR. HERZOG: Well, I, I absolutely believe this Section 5.077 is designed to compensate the victims who do not receive the [inaudible].

JUSTICE: [inaudible]

MR. HERZOG: Well, one example that was given to me ...

JUSTICE: That's all Judge you said or you prevent actual damages but you don't want to prevent actual damages.

MR. HERZOG: Well, Judge you said, "We're to play [inaudible] damages asked it through the case out the court, will be then didn't have a chance to do it".

JUSTICE: I mean, show-- showing what \$250 is [inaudible].

MR. HERZOG: One half [inaudible] was given which is more than hypothetical-- I believe in this case and I'd like to do it with refines. If Mr. Flores had been able to proved actual damages of \$10,000 because he couldn't refine it's a get lower interest rate. And if they had cured the deficiencies in there statement in a week, do you think they would've paid them with 10,000 or do you think they want to [inaudible] that the liquidated damages that would've been [inaudible]? Now the case argued the 4-R case, Justice Hecht. That is a \$50,000 fining close on a lawyer. That they have to reimproved malice of fraud. Did they [inaudible] an ambush [inaudible] refine this to do that. If you're on the trial page and you find the lawyer just some [inaudible] and he have a thousand dollars fine. Do you have to have malice of thought? According to Mr. Cohn's construction of Chapter 41. Yes. He's found the trump car [inaudible] though in Chapter 41 that he thanks [inaudible] every penalty across the State of Texas. It's a misconcern of the statute.

JUSTICE O'NEILL: But you acknowledge there problems with the statute.

MR. HERZOG: Well, ...

JUSTICE O'NEILL: I mean, it was not intended to [inaudible] that a year later someone who has-- as in everything out is going to go out of business. How would you rectify the abuse on that in? I think therefore, is a big knowledge. If you read it the way each of you won't, it's either going to be [inaudible] never rectify whether it's intended to rectify or bad legislation this going to put a lot of good people out of business.

MR. HERZOG: Let me [inaudible] question three [inaudible]. First, the fact in and the legislature of my good friend, Mr. Cohn will not evoke both loaded against the statute. When might have given an implied prior right of action. We might imposed a sliding scale of [inaudible] you get one out four, two out of four, three out of four, four out of four loan. We might have been post a sliding scale of damages and said, "This is how much the plaintiff can recover. This is the element of damage. We might have put in a camp." We might have said ...

JUSTICE: When you might have said if you don'ts in the statement, you forfeiture business. You might-- you might've been so preturb that's what happen to Colonius which is a bad thing. You could've say that if you don't sent it the forfeiture business. Could be-- could be a legislature defend.

MR. HERZOG: I don't think the legislature could. I know that Miles and I would not ...

JUSTICE: But why can't be?

MR. HERZOG: Well, I think that would have some constitutional problems.

JUSTICE: Excess fines are being processed [inaudible].

MR. HERZOG: I thank you process.

JUSTICE: Isn't that we'll hear [inaudible] perhaps send it.

MR. HERZOG: I'm sorry. I couldn't hear you, Justice.

JUSTICE: Could not-- they will we have here if the statute does [inaudible] to this company and perhaps the denial of business.

MR. HERZOG: The Fifth Circuit might have that problem. This Court is not [inaudible] have that problem because this Court doesn't have jurisdiction that answer a question that the Fifth Circuit expressly didn't sent. And I, I ...

JUSTICE: The Fifth Circuit always put set language in their ...

MR. HERZOG: Yes, Sir. But they can't rewrite the Texas Constitution.

JUSTICE: No. But they always put in there. We disclaim any of potential or desired sprinkler of text and find it to apply the precise form or scope of the question.

MR. HERZOG: Yes, Sir.

JUSTICE: So they may not be trying to address the constitution. They might be saying, "If we don't quite asked the question right, please answer the one moment I asked."

MR. HERZOG: I think that's a-- let's not worry to forced it. Now I certainly thank this Court can [inaudible] Section 5.077 statutory language or an answered questions of Chapter 41. You can say, "Well, you missed the hearing your question." I, I think I gave you this foreign language they can give you. And I'm happy to have this Court run with him that [inaudible]. But they cannot changed the constitutional provision that's based, that allows you to answer certified question and no more. And they cannot changed this Court's opinions that say, "We cannot answer question raised by the parties that was not raised by the certifying court."

MS. O'NEILL: But we can. It weren't about principles of construction is to look at its [inaudible] statute constitutionally if we can. So we can look at and say, "Without deciding there might be constitutional problems where we do construed it-- able to go away."

MR. HERZOG: Well, Mr. Cohn gave you that elephant-- elephant mechanism. The problem is, after he gave you that, he did says, "Anyway that you construed the statute that awards liquidated damages of 258 days aren't constitutional." So it's not helping you to construed the statute to analyze that. He's just trying to repeal the statute for [inaudible] ...

MS. O'NEILL: What's the answer on Judge O'sNeill question?

MR. HERZOG: I'm trying to remember. Please forgive me.

MS. O'NEILL: The only two ...

JUSTICE O'NEILL: The [inaudible] was caused the abuse on the other side that it ...

MR. HERZOG: Well, the first time the legislature to do is pass a new statute that says ...

JUSTICE O'NEILL: That would notice you.

MR. HERZOG: It, It won't have be.

MS. O'NEILL: But what have we do with the one we've got? Is there a way to not ...

JUSTICE O'NEILL: [inaudible]

JUSTICE: I, I thought you're in the same position. Here's the best most direct answer I can give to that question. I think you're in the exact same position here that you're all with regulations C and [inaudible] that you are [inaudible] was and I trust and usuary that you are with the custers[inaudible] from provisions that says, "If you do a home equity loaning, don't give the bar where copy the document." You've given away the money. He doesn't have to repay it. It's harsh-- it's a harsh legislative remedy for a big prong. All of those examples have limits.

MR. HERZOG: That's true.

JUSTICE: Any further questions? Thank you, Counsel. That concludes

the argument and all arguments for today and the Marshall will now adjourn the Court.

COURT MARSHALL: All rise. Oyez! Oyez! Oyez! The Honorable Supreme Court of Texas now stand adjourned.

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