ORAL ARGUMENTS - 10/07/97

96-1078

BROWN V. BANK OF GALVESTON

KAY: In this case, after a jury trial in which all issues were answered favorably to the plaintiff, Vincent Brown, the TC after taking motions for entry of judgments and motions for judgment n.o.v. filed by the parties under consideration for over three years decided that there was no evidence whatsoever to support any of the jury's answers and granted a judgment against the plaintiff.

The judgment of the TC was affirmed by the CA based on the argument that Vincent Brown was not a consumer as to the bank and, thus, was not entitled to recover under the Texas DTPA.

Vincent Brown, a married man, bought a vacant lot and, thereafter, hired a contractor, Marcelino Compion, to build a house on that lot for Vincent, his wife and his family. Vincent and the contractor agreed to certain plans and specifications and signed the papers required and prepared by the contractor's bank's attorney, Bill Rider who also represented in the TC below, the Bank of Galveston in this case.

It was admitted that Mrs. Brown did not sign any of those papers, and it was also admitted by all the parties, that before the papers were signed Campion began work on the property.

HECHT: Why didn't Mr. Brown say something about his wife before all that?

KAY: He was never asked about his wife. He told Mr. Campion about his wife. Of course, he never met with Mr. Rider, he never met with the bank, he never said anything because he wasn't asked: Are you married? by the bank or the bank's lawyer.

HECHT: He was asked to make an affidavit if anybody else had an interest in the property and he said, "No."

KAY: I do not recall that from the trial testimony. I recall in the trial testimony Campion admitted that he knew about Mrs. Brown. I remember that Vinson was asked...he had signed some papers with regard to permanent financing with Fort Worth Mortgage Co., and he indicated in that document that he was a single man. And it was true. It was less than 1 month later under the testimony, including the marriage certificate, that Vincent got married. So at the time that he signed that application from a Fort Worth Mortgage company, he was telling the truth and,

thereafter, he got married. Mr. Campion knew all along at the time that Vincent and Campion were dealing, Vincent was a married man.

ENOCH: The bank also succeeded to the $15,000 purchase money lien in the underlying real estate, didn't they?

KAY: The bank took an assignment from Amoco Credit Union with regard to the vendor's line, that is correct.

ENOCH: Is there any question about it being a holder in due course of that lien?

KAY: No, there is no question about it being a holder in due course of that lien.

ENOCH: And in this case, the real issue here is whether or not the bank was a holder in due course of the material and the mechanic's lien, such that, they could be subject to the set off before the cost of completion based on their lien. Is that really what the argument is here, because it cost some additional money to complete it, the lien was not for the full amount of the loan, but for something less and, therefore, they could not have used their self-help foreclosure, they had to use a judicial foreclosure?

KAY: I don't think that holder in due course comes into play at all with regard to the M&M lien. There's no question but that the bank foreclosed on Campion and, therefore, succeeded to not only his rights, but also his obligations under the various agreements between Campion and Brown. Therefore, it's our argument that the bank became the contractor. The bank had a duty to complete the house in accordance with the plans and specifications that Brown and Campion had agreed upon, and that until it did under the terms of the documents which the bank's lawyer prepared, it could not demand the full amount and it could not foreclose.

HECHT: It couldn't even foreclose on the lesser amount?

KAY: It couldn't foreclose on anything. There are cases which we have cited to the court in the brief, which have a very similar fact situation, where there's a vendor's lien and mechanic's lien that are signed only by the husband and not by the husband and the wife, and the bank attempts to foreclose. In one of them, the husband and wife attempted to enjoin the foreclosure, the TC denied it and allowed the foreclosure to go forth. The CA reversed that and said that, No, if we allow this, the wife had not signed all the necessary documents, the Villarreal case comes to mind where both the husband and wife had signed the initial papers, the husband renewed and extended, which is what the bank got Mr. Brown to do with regard to the vendor's lien. All by himself. There was already a divorce, but the wife had the right to live on the property in the Villarreal case cited to the court in our brief. Foreclosure was not allowed because the wife had not signed the renewal paper.

HECHT: Why can't the lien holder foreclose on the interest it does have, which is his? It's at least got his.

KAY: There are two reasons for that: in one of the cases that we've cited to the court, that argument was made and the court said, "No, if we allow that, it emasculates the homestead rights of the parties." I am certainly aware that this court has recently held in a tax case that you can foreclose on the rights of the husband, but that the succeeding bank has to purchase the vested homestead rights of the wife. But that's not what we've got here. And the bank certainly made no claim in attempting to foreclose on the liens that it had, that it was only foreclosing on the vendor's lien. It contended that it was foreclosing on everything, and bid the property in for some $65,000. Under your questions what you've got is, the bank now has to remit approximately $50,000 because it only has a $14,000-$15,000 lien. It bid the property in for more, therefore, it owes some $50,000 and only by Vincent's rights, which is ½ interest, and not the vested homestead rights of the wife.

HECHT: Whatever the truth of that, this is a DTPA case. The question is: If the bank has some right to foreclose on something even if it thought it had more than it did and more than it turns out to have been, how is that a DTPA claim?

KAY: Because the bank was contending that it had the right to do more than it did.

HECHT: Surely it's not a DTPA violation to make a legal claim once a dispute has arisen that these are my rights? I have these rights, you have these rights.

KAY: The bank's claim was not under the vendor's lien. The bank claims all the letters from the bank to Vincent talked about our rights under the M&M lien contract. Under the builders and the mechanic's lien contract, we get to foreclose under that. The notices of foreclosure said, "We're foreclosing under our M&M lien contract." One of the letters, I believe it's plaintiffs Ex. 21, that you have before you, tells Vincent, "You've got to finish the house." "We acknowledge that the house is not finished." "You've got to finish the house under your own costs and expense; alternatively, we will finish it if we foreclose and get possession." The bank acknowledged all along and had acknowledged long before it took over the contract rights of Campion, that the house was not being built in accordance with the plans and specifications.

HECHT: Although the house was not finished, I guess the dispute is over how close to being finished it was, because the Brown's were living in the house, and had been for sometime. They still are, I guess?

KAY: Still are. Campion contended in his testimony at times that the house was completed in accordance with the plans and specifications, and contended at other times that all he had done was make it livable. What he had done after he walked off the job and the bank assumed his contractor role and persuaded him to go back out was to do things like: stretch the carpet and hook up the air conditioning. But the bank acknowledged that the house was not complete, and the

jury found that the total actual damages to Vincent for not following the plans and specifications, for using inferior quality, for doing a bad job, for the work that Vincent did himself just to assist in making the house livable, were some $53,000. This is on a house that the total purchase price, including both the lot and the house are supposed to be in the neighborhood of $75,000.

SPECTOR: Now all the time that this has taken, have the Browns' paid out money?

KAY: They have paid a little bit to bring the house up to where it was livable. They have not paid any rent to the bank if that's what you're asking. They've not paid the taxes. They have not been asked to. They have paid insurance on the house so that their interests is insured.

SPECTOR: But payments on either of these notes, there have been not payments?

KAY: There have been no payments. And the bank does not contend, "You owe us $500 per month." The bank contends, "You owe us the deficiency." "You don't owe use for the $75,000 anymore, Mr. and Mrs. Brown, you owe us for a deficiency."

SPECTOR: After the foreclosure?

KAY: After the foreclosure. And the bank never contended it was not going to make the permanent financing, the permanent financing was going to come from Fort Worth Mortgage, the bank never contended we want $500-600-700 a month. The bank just said, "Pay us the entire $75,000, and if you don't do that, no, we will not make a subtraction for the incomplete. No, we will not complete the house." And on the witness stand I asked the banker, Mr. Byron, "Why didn't you do that?" And he said, "We're not in the business of completing houses." I am not in the business of building either. When I have a construction project to do and it's something beyond my very limited capabilities of hammering a nail or two, I call a contractor, or a painter, or a plumber. And the bank certainly could have done that. But the bank didn't want to unless, as they said in their letter, not from the witness stand, "We take over the house." "If we get the house" said the bank, "we're going to finish it before we try to sell it."

SPECTOR: Following-up on Justice Hecht's question, what DTPA violations specifically are you contending the bank made?

KAY: I think the bank committed many DTPA violations. You need to remember, that they became the contractor. First, they insisted that Vincent pay the full amount of the note with interest when the bank knew the house was not completed in accordance with the plans and specifications. The bank, the contractor, knew that there was no breeze-way between the house and the garage as required by the plans and specifications and, yet, insisted that they receive the full amount of the note. There's a recent case, not in the briefs, simply because it was not at that time in existence, called KC Roofing v. Ebutis, out of the Tyler CA, which said that when you acknowledge that the work is not completed, but you insist nonetheless that you receive the full

payment, that is a DTPA violation. The bank as the contractor knew that the garage was put in the wrong place; nonetheless, did nothing about it, made no subtraction. The bank knew as the contractor from the plans and specifications that there was to be a covered patio when there was none, knew that there was to be a fireplace, but there was none put in by the contractor, Campion or by the bank. And there was one put in after the fact, not the same kind as desired initially by Mr. Brown after he took possession of the house with Campions approval, but no subtraction was to be made for that. The same can be said about the raised brick hearth, which is called for in the plans and specifications. And that was done by Mr. Brown with no subtraction. The bank as the contractor knew that there was supposed to be indirect lighting in accordance with the plans and specifications, but there was none. There was supposed to be a floor-to-ceiling bookshelf, but the bank as contractor did not put one in, and insisted that the house was completed anyway.

HECHT: Is there any way for an interim lender not to be a contractor?

KAY: Certainly.

HECHT: And how would that be?

KAY: First, they don't have to foreclose.

HECHT: Well assuming they want to get paid, is there anyway for an interim lender not to be a contractor?

KAY: Yes. They can say, "Mr. Brown, you go fix the house, submit (obviously) reasonable bills for what it takes to fix the house in accordance with the plans and specifications." In other words, if you were going to have a wooden deck - we're not going to let you have one made out of some kind of fancy gold-plated material, but you get a wooden deck. And we're going to make that subtraction. The bank in the documents which it drew allows it to do that. That is to say, make the subtraction, you finish it at your cost, and then we'll make that subtraction.

The bank has another opportunity also. The bank for its own protection will be happy to tell you makes periodic inspections of the house, and it did so in this case. During those periodic inspections noted that there were deficiencies, wrote to Campion about it, talked to Campion about it, but continued to allow him to draw funds. There's a recent case out of the Tyler CA, which held that a bank, a finance company can stop the wrongful actions simply by refusing to allow the continued draws, and that the making of the continued draws is a DTPA violation.

ABBOTT: If Flinnican is distinguishable, what is your argument for why your clients are consumers as to the bank?

KAY: Let me begin by saying, I do not think that Flinnican is distinguishable. But assuming that it is because that is your question, I think that it is distinguishable because in Flinnican

both Mr. and Mrs. Flinnican signed the appropriate documents at the bank's request and here that did not happen. Only Mr. Brown did. And, therefore, when they foreclosed on Mrs. Brown, I think the Browns are consumers and, therefore, can go after the bank for the bank's wrongful actions, not for Campions wrongful actions.

ABBOTT: In Flinnican wasn't the lender involved at the very beginning when the loan was actually made?

KAY: The bank was with Easterling, the contractor, but not with Flinnican, the purchaser. There is nothing in any of the court's opinions, either this court or the CA that indicate that the bank in Flinnican had any contact with each other until after Easterling started messing up and the bank foreclosed on Easterling, and foreclosed on its interim.

ABBOTT: So it's your position, that regardless of what stage a bank or lender comes into play in a transaction like this, that the homeowner, or the home purchaser, or homebuilder would be a consumer as to that lien?

KAY: That's correct. Because the consumer from whose viewpoint we must look at this has got only one purpose in mind: he's got a very narrow view, "I'm trying to buy a house. I don't care whether Campion has the money in his own pocket, or whether Campion has to get interim financing, that's none of my business. All I care about is, is at the end of this deal I'm going to get a house." Clearly, a consumer product.

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RESPONDENT

STAHL: There are quite a few factual inconsistencies that I would point out from the record in response to some of Mr. Kay's arguments. I will come back to those in a moment. Mr. Kay wants to characterize this case and reasons why the courts below ruled in favor of the Bank of Galveston as something different than what they really were. The underlying facts, and he mentioned them, his client signed a note back in 1985. He's never paid one cent on that note. His client has been living in that house, that house that was completed in April 1987, it was completed prior to the bank's foreclosure in Dec. 1987. That house was completed and his client has paid to live there without paying one cent.

GONZALEZ: Is Mr. Kay correct, that the bank has made no request for any payment of any kind?

STAHL: There have been numerous settlement offers and discussions. I'm actually not privy to that. I didn't do the trial below. It's my understanding that they're in settlement discussions. Yes, the bank was trying to get some kind of accommodation worked out. But I don't know. I can't speak actually in response to Mr. Kay's comment there.

The contractor received the bank's money. Justice Hecht's question, yes, the Amoco lien, the vendor's lien was paid off with the bank's money, and the bank took that. Mr. Kay acknowledges that the bank holds that lien and held that lien. And contrary to what Mr. Kay said when the bank foreclosed, it foreclosed on both of those liens. The M&M lien was obtained through foreclosure on Mr. Compion, the contractor, as well as the vendor's lien that it had paid for from paying for the initial land purchase.

BAKER: You said the bank bought the _____?

STAHL: They provided the interim funding to Mr. Compion.

BAKER: Paid it off?

STAHL: Had paid it off.

BAKER: If you pay it off don't you get a release and then the mechanic's lien becomes the first lien, which is the whole purpose for the bank's buying it off in the first place?

STAHL: It was renewed and extended.

BAKER: So it was wrapped up in the money they were going to advance to build the house?

STAHL: Mr. Kay wants to argue that we should just ignore the underlying vendor's lien. Both liens still existed, both liens could be foreclosed upon.

BAKER: What about the argument that because they took over that position, they were obligated to whatever the contractor was obligated to and that was to allow a completion and to give credit for the amounts paid to complete the house?

STAHL: Two points in response to that. First, Mr. Kay without any authority asserts that the bank somehow had all the obligations of the contractors to complete the house.

BAKER: Where did their rights come from?

STAHL: The rights to the financing, their rights to enforce the note, their rights to enforce the underlying security that underlies that note came from their foreclosure on Mr. Compion. But there's no contractual obligation whatsoever for them to undertake Mr. Compion's job. They are an interim construction _____. They were not supposed to be the permanent financier here. Mr. Brown already had that lined up with someone else. Mr. Kay wants to say that we have all these things that we didn't do, that were Mr. Compion's obligations. This court in the Ogden case, which interestingly came down a few months after Flinnican said that, "Foreclosure in a context where

there's a provision in the mortgage document that says that you may foreclose on a partially completed home," and that's what happened here, you have the exact same language, because it was a state bar form. Mr. Kay wants to say that the bank's lawyers drafted it. The bank's lawyer provided a state bar form. This court in Home Savings v. Garrett said, that provision of a standardized form does not constitute involvement in a sales transaction.

They provided a bar form. That bar form and it is the exact same language as this court saw in Ogden allowed the bank to make a demand for foreclosure and go forward on a foreclosure on a partial completion.

BAKER: If that's the case, how much money is the bank entitled to say that they are owed if it's partially completed now?

STAHL: The facts in this case were, the house was actually completed.

BAKER: By the time of foreclosure?

STAHL: Yes. In Flinnican there was a deed of trust taken on the very day, there was interim financing for the contractor, but there was a deed of trust signed with the bank's VP as the beneficiary on the very day. That's very distinguishable from this case.

BAKER: Why?

STAHL: Because in that instance the bank was not really acting just as interim financier for the construction of the home. They were envisioning that they were going to go on and continue on as the permanent financier. And in the Flinnican situation when the bank foreclosed, they foreclosed on that deed of trust. Also very distinguishable, because in that case...

HECHT: What is the difference though between the deed of trust and the M&M lien?

STAHL: The M&M lien in response to your earlier question, how can a bank under Mr. Kay's arguments not ultimately always be _____ the consumer and subject to whatever the contractor does wrong. In an interim construction lien context they're simply trying to provide financing...

BAKER: Oh, but that's not his argument. He's saying that they did things after they got into it thinking the _____.

STAHL: The demands were legally allowable under this court's ruling in Ogden, and the house was finished. That's the point. And that's what the court below saw.

BAKER: But was it finished because the Brown's paid out $20,000 to get it finished?

STAHL: The record reflects Mr. Brown didn't pay $20,000. But the point would be if Mr. Brown had paid something and he was entitled to some different number in terms of a determination of the deficiency, that issue could have been resolved at trial. Mr. Kay initially started his lawsuit with a wrongful foreclosure claim amongst others. At trial he submitted just the DTPA cause of action. Ogden says that trying to exercise your rights on a partial foreclosure, and then decide later how much is due on the deficiency, does not constitute a DTPA cause of action. He can't go forward on a DTPA claim based upon Ogden for our exercise of our legal rights in a foreclosure context. That's the reason that the TC granted the j.n.o.v. There was no evidence to support the jury's findings.

Flinnican is also substantially different. Mr. Kay wants to talk about Flinnican as his lead case. Flinnican is also substantially different because there is two things in there that make it extremely different: One, the house was 20% completed, the house wasn't livable, they foreclosed on the deed of trust when the house is 20% complete; they were there at the initial point of the transaction...

HECHT: The whole argument here is whether there was some duty to complete it, whether it was completed, who had it as to whether _____, how does it affect that?

STAHL: In order to be a consumer they had to show that you're either involved in the initial sales transaction, or that you did something wrong yourself. I, submit, as the Bank of Galveston, we've done nothing wrong ourselves. And I urge the court to try to hold Mr. Kay, if you look through his briefing there's not a single...he goes through 5 general things that he says we did wrong. And other than his just unsupported argument that we have become Compion, and that all those disputes between Mr. Compion and Mr. Brown are ours, he doesn't set forth anything to show that the bank did anything wrong.

PHILLIPS: Your relationship with a bank, if it's Riverside, means you're not a consumer, and if its Flinnican, you are a consumer. But it doesn't have anything to do with whether the transaction was satisfactory.

STAHL: His dissatisfaction with the transaction is really his gripe against Mr. Compion. If we're willing to have banks as interim lenders for purposes of jurisprudence, and avoiding situations where they are always going to ultimately be deemed a consumer as Mr. Kay relates, that's a stretch of the DTPA far beyond what I believe the legislature ever intended. In Flinnican you've got the bank there from the outset. Here, we came in a year later before we ever took the collateral side of it, he had his contract with the underlying contractor in 1984, the collateral assignment _____ a year later.

HECHT: But it's hard to see what difference it makes?

STAHL: In terms of a stretch, how close are you to the...the DTPA cases all require you

to be connected to the transaction. And I'm arguing and in the court below argued, and I submit for jurisprudence purposes this court can affirm the court below just simply on no evidence claim. Our reply point 1 argues correctly I believe, that which is...

HECHT: The CA never addressed?

STAHL: They did your honor. I think the CA was concerned by the fact that Flinnican is factually distinguishable from this. I think the CA below is trying to say, "Let's call Flinnican what it really is." Flinnican is a situation where the bank was there. That bank was there from day one. And it looks at other things: it looks at the fact that in Flinnican the jury found the foreclosure was unconscionable. In that instance in Flinnican they looked at a specific thing and said, "Yes, that something that was unconscionable created the cause of action." The bank didn't contest it. It went up uncontested. So the issue before the court in Flinnican, this court, was an uncontested admission of a wrongful foreclosure in effect. That's far from the case here. Because given the partial completion language, I refer to the court in Ogden it's an entirely different situation. And I think for jurisprudence it can be affirmed on a no evidence point. I submit though that what this court wrote in Amestead v. Brass...we're trying to define Flinnican. Flinnican has been picked up by many, many CAs. I looked at the last year, and it's 30 cases. I think this court in Brass was saying, "There has to be some connection." And my response to you Justice Hecht, is that I think it's too far. I think the difference here is that the bank coming in and doing nothing more than exercising its legal rights under its loan documents, that house was completed. They didn't have any obligation to go and complete it.

There's nothing that the bank did wrong other than exercise its legal rights to a foreclosure under its documents. That can't constitute a DTPA. If there is some issue of a wrongful foreclosure, Mr. Brown and Mr. Kay should have submitted that a trial and should have tried the wrongful foreclosure issue. They did not. They argued that they were a consumer, that they _____ reached this consumer status, not only to Mr. Compion but he wants to say that we're to stand in the shoes of Mr. Compion. We don't stand in the shoes of Mr. Compion.

HECHT: It may be that there's no liability that you argue. Putting that aside, it's kind of hard to see why you're a consumer if the whole thing closes pretty quick. It looks to me like the reason for Flinnican is whenever that occurs the respective owner is thinking I'm getting the house. He maybe thought that earlier, too. At least he's thinking it now.

STAHL: Mr. Brown got his house, and he didn't have to pay for it either. He got his house and if ultimately someone takes in a collateral assignment some point down the line no matter how far it is, and Mr. Brown has no relationship with that person other than that person took on the paper from someone else, the logical extension of Mr. Kay's argument is, "yes, that person is a DTPA, I've got a consumer relationship because it relates to my house and therefore, anything and any paper that goes with my house, the underlying security documents, all create that _____ personally whom Mr. Brown has since testified: talked to them; had no

involvement with them; didn't do anything with them; 5 months into construction he gets a CC on a piece of paper from them saying, "You know Mr. Compion come on we're trying to monitor what you're doing in terms of progress on this house, we're going to make advances," they are doing that as the bank, they're not doing it for Mr. Brown. And that's just prudent conduct of an interim lender. He wants to take the bootstrap from that that that somehow creates a DTPA consumer status between him and the bank. His only gripe really is the foreclosure. And the foreclosure under Ogden isn't actionable under the DTPA. He pled himself out by doing that.

HECHT: Is that true also if the bank foreclosed on the wife's interest?

STAHL: That's a red-herring. I can't respond to that. The wife clearly was not disclosed to anyone prior to the bank's foreclosure. In fact when the bank was foreclosing, the bank was in contact with Mr. Kay and Mr. Kay was writing letters to the bank on behalf of Mr. Brown. There was never any disclosure whatsoever of Mrs. Brown. To the contrary of what Mr. Kay has said today, the record reflects that he was submitting documents and at trial was rather cute, he said, "I was a single man, I didn't understand what that meant." He never, he signed checks, all those documents were all Mr. Brown. There is no reference...he's called himself a single man. The bank can't be held to...

SPECTOR: On what document did he state that he was a single man?

STAHL: I believe it's renewal and extension of the Amoco vendor's lien. I believe the timing of his financing with the permanent lender was a few months after he actually had signed the note to Mr. Compion. So that places it into 1985, Mr. Brown was married in 1984. So I believe his representations to that permanent financier which all became part of the record later, the bank didn't have the benefit of it until after they had already foreclosed when he's trying to set aside the liens for the first time, telling us about his wife. And we addressed that in the briefing as to why that created an estoppel for Mr. Brown.

Most importantly, the jurisprudence issue there is, he didn't submit any issue whatsoever as to the validity of the lien at trial. He didn't raise the issue. So the issue, I will submit, is waived as to the validity, and the record reflects that Mr. Kay got and his attorney's fees were testimony. There is an entry there where they decided to let the foreclosure go forward. They knew about it. He was represented by counsel. There is no disclosure of the wife. I think they've waived that issue part, yet they want to argue that now as a fallback as to why the liens are invalid.

Perhaps it's a breach of contract. Perhaps there should have been some argument for some kind of a contractual set-off. It's not a DTPA cause of action. This court wrote and that exact argument was before the court, and out of Ogden it says, "Therefore, any demand for the amount of the note cannot be a DTPA."

If he were a consumer, he's not set forth any wrongdoing by the bank, because

what the bank is doing is exercising its legal right protected by Ogden. If there's something he has a claim for, it's not under the DTPA, it would be a breach of contract or some kind of a contractual set-off claim.

There is no evidence of wrongdoing by the bank, because I think the evidence was that the house wasn't completed in April, 1987.

OWEN: Didn't the jury find against you on the completion issue?

STAHL: No, there was not a completion finding per se. What they did was, he just submitted general arguments of was there misrepresentation? was there some unconscionable act? without any specification of what it was. The damages are a bit muddled in there, and the damage calculation and it talks about what would be additional damages and so forth. There was mixed testimony.

OWEN: What was the damage issue?

STAHL: We had several damage findings as to Mr. Brown's testimony as to additional work that he had done, or work he wanted to do on the house, which I would submit would just go to that contractual claim if he had one as to what the deficiency would be after foreclosure if we're exercising pursuant to Ogden.

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REBUTTAL

KAY: Responding to Justice Owen's question, the jury did find noncompletion. The jury found noncompletion by finding all of the actual damages which it found for the noncompletion. No question was asked specifically of the jury: "Was there a noncompletion, or was the house complete?" The jury was simply asked about damages for the noncompletion.

We did submit a DTPA theory, and a DTPA theory only. Counsel is correct and did not ask questions about: "Did the work start early," because that was admitted and we only asked questions about what's not admitted.

No question was asked: "Was Vincent married?" He was married. The evidence was undisputed that he was married. The bank could have asked for at the time that it submitted all its other documents a marital statute affidavit. We all know the title companies do that an awful lot. We've all got it in our wordprocessor fill-in the blanks. Had Vincent been asked to sign that, he would have denied, he would have declined to sign that because he would have said, "But, guys, I am married."

The house according to counsel was completed in April 1987, but in Sept.

1987, five months later, the bank is writing to Vincent saying, "We know the house is not completed. Either complete it yourself at your own cost and pay us the entire amount due, or we will foreclose, we will take possession and we'll complete the house." You can't have it that way.

The initial contact with Compion as counsel pointed out was in 1984 and the papers were signed in 1985. No question about that. But that's the initial contact. "Hello, I'm trying to build a house. Are you a contractor? What about these plans? What about these specifications? Well let's change this, and let's move this." And finally in 1985, that's when the contract between Compion and Brown is signed, and on the same day, that's when Compion borrows the money from the bank and collaterally assigns his interest, his note, his M&M lien contract. There's none of this long delay.

GONZALEZ: Can you respond to the bank's argument here under Ogden there can be no liability as a matter of law?

KAY: Ogden is readily distinguishable. No question about it. You can foreclose for a partial completion. I agree with that. I've always agreed with that. But you've got to make the subtraction. You can't say, "We're going to foreclose for the full amount," when the house is not complete. What you can say is, "We're going to foreclose on the incomplete house and make a subtraction, you owed us $75,000, the house still needs $50,000, or $20,000 or something, we're going to foreclose on this difference."

HECHT: But how do you say that? You post it for foreclosure; you bid a price, and then there's a dispute about whether you owe part of that or not; isn't that what it comes down to?

KAY: No, in this case the dispute arose as the bank knew long before the bank foreclosed. Long before its foreclosure on Brown. In fact it had arisen before its foreclosure on Compion. The bank knew of the incompletion. The letter that I keep referring to is dated Sept. 1987. They didn't foreclose until Dec. 1987. They knew at the time of the foreclosure of the incompleteness and, yet, demanded the full amount.

OWEN: What if they demanded a lesser amount, but it was something more than Brown thought it was owed, and there is simply a dispute about what the appropriate set off was. Is that a DTPA violation if the bank doesn't hit it right on the nose?

KAY: I think it depends on the wording of their demand letter, that they certainly can ask for an amount to be determined. Let's talk about it. In this case, the evidence was, it was admitted over my objection because it was settlement negotiations, I contended that Brown has said in the presence of me, and the bank's lawyer, Mr. Ryder, and the bank's representative Mr. Lee, the President of the bank, "Don't foreclose. Let's see if we can agree on the amount that it's going to take to fix; make a subtraction or you fix." And the bank said, "No, you don't understand (this is all in the testimony) we want the full amount."

OWEN: My specific question. The bank decides we're going to foreclose, we don't want to mess with it, and they have it in their mind an amount with all the deductions, the property is worth, they post it, they foreclose it, then there's a dispute about what the set off is. Is that a DTPA for going forward and foreclosing violation?

KAY: I started out in my life representing banks. Our rule in the firm was when there's going to be a question, judicially foreclose, go to the court and ask them to help you. Because then there can be no dispute. I think the bank runs a risk on a nonjudicial foreclosure when it unilaterally sets an amount. I know that you owe me $75,000 under the note, but I'm only demanding $50,000 because I think that it's only going to take $25,000 to fix and to pay off the M&M liens. We've not even talked about those today. But I am only going to demand $50,000. And if you don't pay the $50,000, I'm going to nonjudicially foreclose. I think the bank is running a risk...

OWEN: What if they're ruling it's $47,000 as opposed to $50,000; is that a DTPA violation?

KAY: There is a case which holds that it is. It's not a foreclosure case. It's a demand for too much interest. The higher amount was paid. Then, a DTPA claim was made. The argument was, "You should have paid it.", that's not a DTPA violation. The court said, "Yes, it is." I believe it to be a CA decision, however.