ORAL ARGUMENT – 04/14/04
03-0703
BROWN V. DE LA CRUZ

THOMPSON: In 1995 §5.102 of the Texas Property Code was added by senate bill that sought to deal with problems in the Colonias and would be applicable only in a small number of counties throughout the state. The broad question in this case is when should Texas courts create or imply a private cause of action when the underlying statute does not expressly contain it? A narrower version of that same question is whether Texas courts should imply a private cause of action in this instance?

We contend that there is no private cause of action in this instance and should be none for basically eight reasons. The first of these is that the express language of the statute creates only a public cause of action. The language subject to a penalty has not been construed by any Texas courts, has not been construed to the best that I can find by any court in the country. However, it seems apparent that the reason for that is subject to a penalty clearly implies a public cause of action. And unless there is more to the language then a private individual has no right to enforce that penalty.

PHILLIPS: By public cause of action do you mean that the state AG or state prosecutor, wherever they reside?

THOMPSON: The state wherever that resides. And it could reside with the AG. It could reside with the county attorney or district attorney depending upon the cause of action and other enabling statutes that may exist.

O'NEILL: If it's before the session was amended is there anything that would keep the AG from now pursuing this claim on behalf of Mr. De la Cruz?

THOMPSON: Other than potential limitations, I don't believe there is.

O'NEILL: So you just care who you pay it to?

THOMPSON: We care who we pay it to you and we care whether or not the person who is imposing that penalty is given any prosecutorial discretion. The amount of the penalty, the size of the penalty in this case, is outrageous compared to the conduct and it's solely due to the passage of time. And we think a public cause of action always brings with it prosecutorial discretion. For that reason, we feel that the public cause of action was intended and should be applied in this case.

The second reason that we believe there is no private cause of action is the legislative history clearly indicates that no private cause of action was intended. There is nothing in the 1995 legislation, nor in the 2001 legislation in terms of legislative history that indicates that

in 1995 there was an intention to create a private cause of action. And in fact there are things in the legislative history that indicate that it was not intended.

The most significant of these is in the 2001 bill analysis for SB 198 in the 77th legislature. The bill analysis says that this section provides that a seller who violates subsection (a), which requires giving the deed within 30 days of the last payment, is liable to the purchaser rather than subject to a penalty for liquidated damages and reasonable attorney's fees. There are three things in there that are important in terms of legislative history. The first is the language "rather than." Rather than means and not. In ___ distinction to something other than. It's not this. It's this. And we say when you say it's not this any longer, and now it's this that that shows that the 2001 amendment brought in a new regulatory scheme.

The second thing that this bill analysis shows is that we go from the language of penalty implying a public cause of action, to liquidated damages implying a private cause of action. The different between a penalty and liquidated damages is important because in the context of a penalty if the person to be penalize dies, the cause of action abates as to those penalties. It ends. As to liquidated damages the cause of action would survive against the estate of the person being regulated. So we have a substantial difference simply by the change in terminology from penalty to liquidated damages.

And finally in the bill analysis we see and in the language of the statute we see a provision for reasonable attorney's fees. We don't see that in 1995. One of the reasons we don't see that in 1995 is the Gov't Code already provided for the AG to recover attorney's fees in a case when the state is entitled to recover a penalty. That's §402.006 of the Gov't Code. And so we see in 1995 we have a public cause of action, we have a provision for recovery of attorney's fees, and then in 2001 rather than that scheme of enforcement we're shifting to a private cause of action and in that private cause of action we're going to recover liquidated damages that don't abate upon the death of the person involved, and we're providing for reasonable attorney's fees.

BRISTER: So if the AG can force this it's too late. Right?

THOMPSON: That would be our position.

BRISTER: So your interpretation has the beneficial effect that you won't pay any penalty?

THOMPSON: That would be our hope. The third reason that we believe there's no private cause of action in this instance...

O'NEILL: Who is harmed by the failure to deliver the deed?

THOMPSON: In the facts of this case no one.

O'NEILL: I mean generically. It's the promisee isn't it?

THOMPSON: Potentially the promisee could be harmed.

O'NEILL: The individual is harmed?

THOMPSON: Yes.

O'NEILL: And if the AG collects a penalty, where does that money go?

THOMPSON: That penalty in the absence of legislative language saying where it goes would go to the state.

O'NEILL: And so there's no redress to the party who is harmed under your scenario?

THOMPSON: That's not correct. The party who is harmed has all of the old common law and statutory causes of action that they had prior to 1995. There could well be fraud in a real estate transaction. There could be breach of contract actions. There could be DTPA actions. And there could be common law fraud actions. So the person who does not receive the deed timely has an action and has a wide panoply of actions to pursue to recover all of his damages and in many instances attorney's fees in addition to those damages. So permitting that person to recover $250 a day for 90 days, and then $500 a day thereafter...

O'NEILL: But conversely permitting the State of Texas to recover money for an injury it did not suffer is equally absurd isn't it?

THOMPSON: I think that the reason for the penalty in the first place is to coerce the seller to provide the deed. One of the things the legislature was dealing with in 1995 was some developer would sell the same piece of paper on a contract for deed to many people. And what the legislature was trying to deal with was an instance where the seller entered into a contract, had that contract paid off, and only then did the buyer find out the seller can't convey title to me. Either he's placed a lien on my proper in the meantime, or prior to that and the lien hasn't been paid off so I can't get clear title. He sold my property to more than one person. So he can't convey title to me.

Those are the things that the state was dealing with. And one of the provisions in the statute in 1995 was a requirement to file these contracts in the deed records of the county involved. There's no penalty for failure to do that. But what the legislature obviously was getting at was we want to make sure that when you pay off your property, the buyer is going to either have a tremendous problem with the state in terms of these penalties, or you're going to get title to your property. In this case the facts are, that Mr. Brown always had the ability to convey title. There were never any liens on this property. There was no prohibition from him transferring that title.

JEFFERSON: We're looking in these statutes for clues. And you've already mentioned legislative history. But the CA did a survey of other statutes in which the AG was both authorized to file suit and to collect a penalty. Why shouldn't we say that when the legislature intends for the

state to be able to sue and collect the money it says so. When it doesn't it doesn't. In this case there's an omission. It doesn't say the AG can collect the penalty or file suit. And in the absence of that if there's no remedy by a private party, then the statute is meaningless.

THOMPSON: There are several answers to that. The most important answer is when you focus on whether or not the state can enforce the cause of action to determine whether or not there was legislative intent to create a private cause of action, you're starting down the road of a _____. The absence of a state cause of action is not legislative intent of a private cause of action. Our US SC in 2001 said this about private causes of action: It says 1) in the absence of legislative intent to create a private cause of action, and a cause of action does not exist; and 2) courts may not create one no matter how desirable that might be as a policy matter or how compatible with the statute. So I say in answer to your question. The first question is, is there express language in the statute that creates a private cause of action?

BRISTER: You've said they do have a cause of action. What we're really looking at is whether to imply an additional penalty not a new cause of action. The cause of action is already there.

THOMPSON: But there is no private cause of action. There's no cause of action available to the buyer.

BRISTER: If they don't give it to you they've got a private cause of action. You just told J. O'Neill that. Breach of contract.

THOMPSON: That's correct.

BRISTER: So all we're talking about is whether we should imply an additional penalty.

THOMPSON: That's correct. Now in the context of whether or not the state can do this, we have - this court's opinion in El Paso Electric Co. v. State Board of Insurance, you set out very clearly that there is this hierarchy of law enforcement officers that represent the state. The AG represents the State in TC's in some instances. And in instances where he does not, then the county attorney and the district attorney represent the state.

The CA's decision in this case goes off on whether or not J. McClure could find specific authorization for the AG. And even though she notes in her opinion that the county attorney and district attorney likewise have constitutional and statutory authority to represent the state, that just goes out of the opinion. She says, I can't find it for the AG, therefore, it must be a private cause of action. And Alexander v. Sanderval(?) the 2001 US SC case says, if you can't find legislative intent to create that private cause of action, it doesn't exist and you can't create it. You have to find it either in the express language of the statute or in the legislative history of the statute in _____.

WAINWRIGHT: Since you cite the US SC, that court has also recognized that in certain context that there's the concept of a private attorney's general that helps the state pursue a public policy objective and help correct a problem. Particularly in Ricco case, certain civil rights actions. The US SC has referred to private attorneys general who help enforce a policy objective by being able to sue individually. Why is that reasoning or that type of analogy not compelling in this case with the 1995 statute such that the AG and private individuals can both help satisfy public policy objective in the colonias?

THOMPSON: I think first of all it's true that if there is a public cause of action, there's no private cause of action without a specific language in the statute. However, we have an instance in Texas, the DTPA, happened to be enacted as I was graduating from law school. And I recall at that time a lot of discussion saying we're creating private attorney's general. And in that statute what we see is a clear delineation of who it is that can seek to enforce the penalties there. And a provision for attorney's fees. In this statute, we do not have any indication of who the person is, who can enforce it if anyone and there's no provision for attorney's fees.

WAINWRIGHT: Which way does that cut? Neither does the statute expressly say that the state or the AG can pursue this claim. There's no express language in either direction.

THOMPSON: I beg to differ with you. I've got to go back to 1892 in a US SC case that says that strictly and primarily the language penalty denotes punishment whether corporal or pecuniary imposed and enforced by the state.

Now I haven't found anything since then. That's Huntington v. Atrel(?), 146 US 657 @667. And it goes on to talk about...

O'NEILL: That was for a public harm. And I think you said that the harm here is to the individual.

THOMPSON: No. I think the harm here potentially is to the individual. This individual in this case suffered no harm. Zero.

O'NEILL: I understand. But in terms of the import of the statutory scheme with the penalty as directed by an individual harm. And I believe that case that you just cited involved a harm to the public didn't it?

THOMPSON: I'm not sure. It did have the only explanation, the only definition of what penalty meant in terms of public verses private.

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RESPONDENT

AGUILAR: As Mr. Thompson said in 1995, Senators Rosen and Truan and Rep. Olivera

submitted legislation to amend ch.5 of the property code. As Senator Rosen stated, she said that the purpose of the bill was a consumer protection bill.

BRISTER: Are you aware of any other private cause of action where you get $250 to $500 a day?

AGUILAR: The only one I know of is if you get into the routine of the fraudulent liens now, you can get the greater of actual damages or $10,000. Now say you have no damages. The statute says you are entitled to $10,000.

BRISTER: But this $250 a day penalty, that looks like a contempt of court penalty doesn't it? Have you ever seen it anywhere else other than a contempt of court?

AGUILAR: In my brief I cited some where they have penalties for shareholders in condominiums, whatever. I don't remember off the top of my head the statute.

BRISTER: This is a $250/day, going up to $500/day and you think they do that to condominium owners?

AGUILAR: I cited some statutes in my brief.

BRISTER: Most often that's done in contempt of court cases. That's the main place we see it. And in contempt of court cases who gets those penalties?

AGUILAR: The state does, or the county does. Sen. Rosen turned around and submitted the bill, and initially the bill had two sections that would allow the purchaser to recover penalties in the event the seller failed to do things. Those sections were 5.100 and 5.102. 5.100 stated that the purchaser if they were not given the annual accounting statement could automatically deduct 15% of the payments until they turned around and got the items. Then 5.102 said that the purchaser was supposed to be given the deed within 30 days after the final payment.

Now if you read 5.102 isolated, you say well are you sure that the purchaser is the one who is entitled to enforce the penalty? My comeback on that is, if you read the whole statute, the whole statute only deals with two entities: seller and purchaser. If purchaser fails to do certain things, seller has remedies to take the property back. If seller fails to do certain things, the purchaser has remedies. And one of those remedies underneath that statute was initially a penalty of the daily rate, which the legislature changed to the $250/day and then $500/day after 90 days.

If you read the whole statute in context, the AG is never mentioned. The one who is supposed to be given the right for the penalties is the purchaser if the seller fails to comply with the terms and conditions. Now this is no different. Mr. Brown had in his contract under para. 6.3 a provision that said, I will give you the deed within 30 days after the final payment. And he didn't give it to him. Now the legislature came in and said, We want the seller to give recorded legal

title before this provision is enforced. The reason for that is very, very simple. One, the initial bill said title vested in the purchaser upon final payment. Now how are you going to have any title policy or anything else on that? So they came in and said recorded legal title. The reason being that there wouldn't be a dispute as to whether or not the title was given. In this case, Mr. Brown and what he calls his replacement warranty deed, says, Well this is to replace a deed I think I gave to De la Cruz in June 1997. When in fact there was no deed.

HECHT: Do you agree that the purchasers have no actual damages in this situation?

AGUILAR: Yes. I do. Candidly, the thing in this case that was a bit of a problem was that so much time had passed. Admittedly, Mr. De la Cruz could have incurred expenses possibly for breach of contract. I don't think he could have done it under the DTPA. Three, there have been no way to get the deed from Mr. Brown. And candidly we wanted to get his undivided attention and get the deed. And this statute was there and it was passed by the legislature.

Now what is bad from a practical viewpoint is that the lawsuit was filed 3-1/2 years after the final payment. And then Mr. Brown took another 2-1/2 months to give the deed. I don't think that the legislature ever contemplated that a seller would let something like this drag on for 3-1/2, almost 4 years.

PHILLIPS: Then your client let it drag on too.

AGUILAR: Yes. My client is basically an uneducated person that buys property underneath a contract to sell. And he didn't know any of the laws. Didn't know anything. He just wanted his deed. And a lawsuit was filed. Two and one-half months later he gets his deed. But you have to put everybody in their categories. As Mr. Thompson said. Mr. Brown had agents. Evidently had attorneys. Was sophisticated in this and done things. My client's an uneducated man. Didn't know. Didn't know at all. But the AG says that underneath certain circumstances the rate of a penalty or the amount of the fine per day can be considered reasonable compensation for failure to get the deed. But my client wasn't out any money. I admit that.

After this lawsuit was filed, the Texas legislature amended 5.100 and 5.102. And I go back to the Stafford v. Butler case, 181 S.W.2d 269 (1944). This court cited it in the Texas Water Commission v. Brushy Creek case in 1996. It says, if you have a latter amendment in all of the statute that's highly persuasive as to the intention of the legislature in the prior statute. The reason that it was amended was essentially that there were some problems in Ft. Worth after the Tornados. And Sen. Moncrief wanted to turn around and extend the coverage of the statute. So there were two dramatic changes. One, they took and redesignated 5.100 to 5.077. And in that instead of the purchaser being able to get the 15% automatically just by himself, they put in that the seller was subject to civil damages in the amount of $250 a day. So they put that specifically in there. Then they came down and redesignated 5.102 to 5.079 and put it that the civil damages were payable to the purchaser.

So I submit if you take the subsequent statute and read it and relate it back they always intended for this to be a private cause of action.

HECHT: It looks the opposite. It looks like why change it if they weren't trying to make it private when it wasn't private before?

AGUILAR: I think they were trying to clarify and I think they were trying to...

HECHT: That's the problem we always have. We see an amendment and we can't tell if it's a clarification or a change.

AGUILAR: I don't argue with that. What I think happened was, Sen. Moncrief took and put 5.077 in, and 5.077 talked about civil damages and the $250 a day. And for clarification purposes since the other penalty section - remedial section for purchaser was 5.079, he put the same language in that. Now when you come to the...

HECHT: Don't you think that liable for liquidated damages certainly sounds a whole lot more like a private cause of action than penalty?

AGUILAR: Sure. I have no argument there. One of the problems with this statute as far as I'm concerned is the phraseology. I admit to you that I prefer civil damages over penalties. But if you go back and you look at the history, they had to be referring whenever they use the phrase penalties to recovery by the purchaser. Now whether or not the penalties are excessive or not, that's for another day. The question we have is, Can the purchaser bring the private cause of action?

O'NEILL: Are there any defenses to the statutory claim?

AGUILAR: Not underneath 5.102. What they did in 5.079 is they brought up affirmative defenses and they gave them affirmative defenses. And 5.079 allowed the recovery of attorneys fees, as did 5.077. The prior 5.100 concerning the remedies for failure to give the annual accounting didn't have attorney fees either. All it said was purchaser if you don't get it, deduct 15% in your fine.

O'NEILL: Under the old statute that we're operating under, would latches, estoppel would those sort of defenses be available?

AGUILAR: I don't think so. That was a question that was asked by the CA. Unless they wanted to give the defense as affirmative defenses, then it should be stated. One of the things that happened procedurally in this case that the CA could handle was the fact that Mr. Brown amended his summary judgment and didn't discuss the affirmative defenses. So we're stuck in a problem. That's why they are remanding it or said they wanted to remand it to the TC because we were going to have to deal with whether or not the affirmative defenses applied.

HECHT: And you agree with that?

AGUILAR: Yes.

HECHT: They haven't been raised here and they weren't raised in the CA, so they would have to go back.

AGUILAR: Right. I think that really what we had to do, and the way this case was set up was, we set it up so that when it came up on appeal, Is there a private cause of action? Yes or no. Then if there is a private cause of action whenever it goes back, then we have certain other questions. It may be that the TC or the AC or this court says, Common law affirmative defenses apply. We don't know that because that was never presented to the AC and it was never presented to the TC.

But all the statute is, and we have other statutes, is a self policing statute. There is two people involved: seller and purchaser. And we can have self policing statutes. For example, this court wrote the opinion in Austaberg(?) v. Pecca(?), where J. Pecca sued Austaberg(?) for civil damages underneath the election code. And there was a discussion in there about the Ragsdale v. Progressive Voters League case, where it says, Sometimes it's beneficial to write statutes that are self policing. And this is self policing. How is the AG ever going to know whether or not or when a contract to sale is paid off?

HECHT: Somebody complains.

AGUILAR: For the AG though. They don't have a system set up to keep track...

HECHT: I know but somebody calls and says, Hey, I can't get my deed.

AGUILAR: Well that may be. But what's the difference of the individual and a self policing statute coming in and saying, Well I'm going to file the lawsuit to try to get my deed and get my money if there are penalties or damages.

BRISTER: Because when they go to a lawyer, the lawyer is going to want to be paid out of that money they are going to get. Right? The AG is not going to charge them for attorneys fees. When they go to a lawyer, the lawyer is going to want 40% of this $250 a day probably before the statute was amended. Right?

AGUILAR: They could.

BRISTER: So which one are they better off going to?

AGUILAR: They are better off going to whomever is going to move their case the fastest to get them the items back. If it's a situation that it's better to go to the AG under those circumstances that's fine. If it's better to go to a private attorney that's fine. In this case, because the AG has never brought any case underneath this statute, I would say it's better to go to a private attorney.

BRISTER: How many private attorneys have ever brought a case under the statute except you.

AGUILAR: I would say the statute's working. Candidly worked really well because after we filed the lawsuit, Mr. De la Cruz did get his deed. It took 2-1/2 months after the lawsuit was filed and it took almost 4 years after he made the last payment, but the statute worked. It worked the way the legislature intended it to work.

WAINWRIGHT: Under the statute, the calculation of damages was about $660,000. Is that correct?

AGUILAR: The statutory penalties is $664,500.

WAINWRIGHT: And the original principal value of the transaction was $13,000.

AGUILAR: My client paid, including interest, $26,054.

WAINWRIGHT: That's why I asked about the original principal value.

AGUILAR: His principal balance was $13,500.

WAINWRIGHT: What's the total amount of the award now with interest?

AGUILAR: Since the legislature changed the interest rate effective Sept. 1, for any judgment signed after Sept 1, and it's floating rate. I can't answer the interest. If you figure out the penalties up to the day in which Mr. De la Cruz received the deed, it was $664.500. And then there is a question if underneath this circumstance he's entitled to prejudgment interest or not, and what is the rate because they changed everything. It's a floating rate.

WAINWRIGHT: If we put to the side the arguments that you are making that you believe are logical in how to apply the statute generally, and just look at the facts of this case. It seems like a very unusual case for there to be over $600,000 in damages for a $13,000 principal transaction. Doesn't that seem to be out of kilter?

AGUILAR: No. Because the Texas legislature said that's the way they wanted to do it.

WAINWRIGHT: If your argument is correct.

AGUILAR: If Mr. Brown had given the deed within the 30 days, there's no damages, no penalties. Zero. If he had given it on the 31st day it was $250. The only reason it is so high is that Mr. Brown, not Mr. De la Cruz, did not comply with the statute, did not comply with the contract. He did not give the recorded legal title until the end of March 2001. So any penalties and the accrual of penalties is not due to Mr. De la Cruz. It's due to Mr. Brown on a daily basis refusing to give the

recorded deed.

WAINWRIGHT: And you've been candied in acknowledging that your client suffered no actual damages.

AGUILAR: My client had no actual damages. I'm not arguing about that. But I am trying to point out that whatever is paid to Mr. De la Cruz in this situation is not technically - well he will benefit. But it's not technically benefit to him. It's more of a punishment to Mr. Brown for not complying with the statute.

O'NEILL: Admittedly it wasn't as though he was trying to withhold the deed. There was a request by Ms. De la Cruz to include her name on the deed, which didn't comply with the contract. There was some confusion and it just appears the ball got dropped. There was no fraud or malfeasance on Mr. Brown's part. You would agree with that?

AGUILAR: Ms. De la Cruz went to Mr. Gann and to Mr. Cargill and laying aside the question of unlawful practice of law, they knew that the item had been paid. At that time, sure. She was over there trying to get her name on the deed. I admit that. But they knew at that juncture that they had to give the deed to Mr. De la Cruz. They were the agents of Mr. Brown. They handled everything for him. All they had to do regardless of the confusion is just give a deed, a recorded legal title, and then the wife needed to do whatever they were going to do. But at least there would have been compliance by Mr. Brown. There was no compliance. And there was no compliance by Mr. Brown even for 2-1/2 months after the lawsuit was filed. And if you get sued for $600,000 and something dollars, I would think that would get someone's undivided attention to promptly comply with the statute. It took 2-1/2 months.

So I submit that it's not a situation of necessarily Mr. De la Cruz being compensated. It's more of a penalty to Mr. Brown for not doing what he is supposed to do. The same with speeding. You can speed everyday and get a ticket everyday. And they just keep on adding up. Eventually it's going to get real high. And that's what happened in this case. And that's what makes it unusual.

But I submit to you that if the AG wants to turn around and bring another lawsuit underneath the DTPA, I don't think the CA was saying that they couldn't do that. What the CA was talking about was, Could the AG bring a lawsuit underneath 5.102? And their statement on it was, obviously not. We did not get in a discussion with the CA concerning grafting the DTPA over and allowing the AG to come in and sue underneath that because of a violation of 51.02. That was never presented. So whenever you read the CA's opinion concerning the AG not being able to bring the cause of action, they are talking about the AG underneath 5.102.

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AMICUS

CRUZ: The best and most direct way for the court to address this question is a simple matter of statutory interpretation. There is no doubt that the statute in question, the former provision of the property code, is ambiguous. This case would be far simpler if it specified on its face either that the AG could bring an action, or that a private cause of action exist.

PHILLIPS: It's got to be one or the other. The legislature would not set up this detailed a scheme with no enforcement mechanism would they?

CRUZ: We agree that the statute has to mean something. It is conceivable it could be both. There are statutory provisions where the legislature, such as the DTPA, decides to allow both a public and private suit. But we agree that this court must strive to ascribe some meaning to the text of what the legislature passed.

What we would submit the best meaning that can be given to the words that were passed by the legislature in the absence of a specification one way or another who collects this penalty? If the best meaning is that the phrase "subject to a penalty yields an inference" that penalty is a penalty on behalf of the state brought by the AG.

The El Paso CA in analyzing this question engaged in an improper and artificial temporal dichotomy. It was a two step analysis where first the CA asked, Is the AG authorized to bring an action? Since the AG was not mentioned in the statute, the CA concluded no. And it then engaged in a second step and said, Well if the AG isn't somebody must be, therefore, a private cause of action exist. That bifurcation is not the correct way to approach it. And it's a fairly simple matter to flip the order of consideration and ask, Is there a private cause of action? No. Therefore, the AG must be able to bring it. And I would say that's the wrong way to approach it as well.

The right way to approach it is to look at the language the legislature passed and ask what is the best and most consistent interpretation this court can give that effectuates the intent of the legislature? And the most natural inference from the use of the phrase "subject to a penalty" with no additional indicia of an outside enforcement mechanism is that that penalty would go to the state.

WAINWRIGHT: Why does subject to a penalty mean state instead of a private actor?

CRUZ: It doesn't necessarily and in other cases the legislature has used penalty with respect to allowing a private cause of action. But in those cases that have specified a private cause of action will lie for this penalty.

OWEN: How many other statutes are there like this one that don't say one way or the other?

CRUZ: From the briefing that's been done there is only one other statute that's been

identified. And we have not engaged in a more comprehensive examination. We're not aware of any additional ones.

In this case, there isn't a specification of who can bring it.

BRISTER: Are there other statutes where you get X number of dollars per day?

CRUZ: There are.

BRISTER: Are those the ones on page 17 of respondent's brief, where an individual gets X number of dollars a day?

CRUZ: Petitioner's reply brief does a very nice job of breaking out a series of statutes, both of those where the legislature specifies - used the word penalty, and specifies that it goes to the state, which is the more usual formulation and also those were it's used the word penalty and specified it's a private cause of action.

WAINWRIGHT: Wouldn't allowing both public and private actors to pursue this claim perhaps expedite public policy objective here? Send a stronger message.

CRUZ: It could well and that's a policy determination. The AG's office did not take a position on whether or not a private cause of action exist under this statute. The court asked our opinion on whether the AG could enforce it? And we're here today to say yes the AG could enforce it. And to note additionally that although in the past the AG's office has not brought actions under either the old or new statute, that we're currently investigating both the facts at issue in this case, and also the facts implicated in the class action suit that was referenced in the amicus brief that was filed.

I would note with one correction to our brief. We stated in our footnote that there had been no actions under the new statute and the consumer protection division has since discovered that we do have one pending action. That is the State of Texas v. Sun City Investments, which is pending in El Paso County court, which is a DTPA suit where we have included an additional claim for the penalty. That's under the new statute. But that is one pending action that we do have. It's currently in discovery. It's in early stage of litigation.

An additional source to buttress the inference that's subject to a penalty yields the natural interpretation that goes to the state is Texas Gov't Code §402.006(c), which provides that in a case in which the state is entitled to recover a penalty, the AG is entitled on behalf of the state to reasonable attorney's fees and court costs. And that's yet another basic indicium of the background _____, the penalties. When the legislature uses that term it is typically thinking of a penalty that will go to the state.

In addition to the statutory interpretation mechanism which we think is the most straightforward and direct way for the court to address this question, we think there are two

alternative bases of authority that are possible. The first is not directly relevant to the facts of this case, but were the defendant a corporation we believe the AG would have authority under the Texas constitution directly to bring an action. And secondly, under the DTPA the AG also we believe would have the authority to bring an action.

Now we would note that with respect to the new statute, the new statute is markedly different from the old. The new statute plainly provides a private cause of action. And so as a matter of statutory interpretation, we do no suggest that the AG could bring an action to collect the new statute. Although the case I just referenced is a very good example of how the DTPA can work in concert with the new statute, where we can bring a DTPA action and the DTPA allows for the collection of actual damages, which now under the new statute damages are specified as liquidated damages. And so that's how we're litigating that case. That's how we believe that the new statute would operate.

BRISTER: What is the AG's view of private attorney generals and applying those into statutes?

CRUZ: That is certainly a tool that is available to the legislature and there are instances where it has chosen to rely upon them. The DTPA is one. The new statute is another. One reason why the office of AG when we examined our records we could not find in the past actions under this property code is there have been relatively few complaints that the office has received in the history of this statute about the failure to deliver deed. We've brought a number of cases focusing on Colonias. Colonias remain a very high priority of the legislature and of AG Abbott. And in the past 15 years we've obtained judgments in 50 cases impacting thousands of Colonias, and focusing primarily on actual improvements that improve the lives of residents that yield the provision of water, the provision of sewage systems, the provision of platting and we've collected hundreds of thousands in penalties. And we have right now enforcement litigation pending in 5 counties concerning Colonias: Hidalgo; Starr; Maverick; Frio; and El Paso County. We have actions pending in all five. So it remains a high priority of the office. But it may well be that given the lack of actions that have been brought in the past, that may have been one of the reasons the legislature chose to make this explicitly a private cause of action with attorney's fees. Is the thought that that might yield a greater incentive for individuals to come forth and relate facts that would support an action.

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REBUTTAL

THOMPSON: J. Hecht you asked was this a clarification or a change? The rather than language would indicate this is a change. The new provision for attorney's fees would indicate this is a change. The change of terminology from penalties which abate to liquidated damages which do not, is a change. And perhaps the most important change is when the statute was amended in 2001, it was given prospective use only. If this was simply a clarification then it seems the legislature would say the substantive part of this, the penalty part of this, the dollars part applies to all actions irrespective of when filed, because after all we're simply clarifying what has always been the law.

They didn't do that. They said this new regime only applies to causes of actions filed after 2001.

OWEN: Is there any indication that this lawsuit was the impetus for the change in the legislation?

THOMPSON: No. As a matter of fact there's an indication it was not. What brought the change in this statute in its entirety was the tornado that went through downtown Ft. Worth. Sen. Moncrief was outraged at some of the abuses that he saw in contract for deed transactions in the Lynnwood subdivision in Ft. Worth. And the primary one there was the sellers requiring insurance on houses that were built. The houses were destroyed by the tornado and the seller got the insurance proceeds rather than the buyer, the person building the property. That outraged Sen. Moncrief and the rest of the legislature and we see that some of the penalties, some the liquidated damages provisions increased substantially as a result of that. But there's no indication that this lawsuit had anything to do with that change.

J. O'Neill you asked, was there a public benefit involved here? **SIDE A RUNS OUT**...that were identified in §1 of SB 336. I would like to tell you what the legislative response was to those evils. The first one was that the statutory law in the state does not ensure that information about the property was being conveyed to the buyer. There was no requirement to tell him about utility service, whether the property is located in a flood plain, whether title to the property is encumbered by a lien. None of that had to be disclosed by the seller.

The legislative response to that evil was §5.094: sellers disclosure of property conditions. That provision says if you don't give these disclosures that can be enforced as a public or private action under the DTPA. So we have a private cause of action established for the remedy for that evil. Under Cole v. Huntsville Hosp., the establishment of a private cause of action for that evil and no private cause of action for the evil involved in our case is an indication the legislature did not intend a private cause of action.

The second evil was there was no statutory requirement for the contract to be recorded to notify subsequent creditors of the purchaser's interest in the property. The current provision for that is found in §5.076 on recording requirements. There is no cause of action public or private for that. The legislature simply said you have to do this.

The third evil was that legal title to the property is transferred to the purchaser by the seller when the purchaser has paid all amounts due under the contract. No statutory requirement compelling that. 5.102 was the response to that. 5.102 does not contain the private cause of action type of language that we see in 5.094.

And the last evil identified in §1 of S.B. 336 is that the purchaser's equity in the property had to be protected. And the current protections in the 2001 statute are found in 5.064, 5.065 and 5.066 of when you can foreclose on a contract for deed situation.