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Supreme Court of Texas.  
American General Finance, Inc., Petitioner,  
v.  
Kyle Allen, Respondent.  
No. 08-0110.

March 31, 2009.

Appearances:

Richard C. Danysh, Bracewell & Giuliani LLP, San Antonio, TX, for petitioner.  
Thomas H. Crofts, Jr., San Antonio, TX, for respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0110, American General Finance, Inc. v. Kyle Allen.

MARSHALL: May it please the Court, Mr. Danysh will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF RICHARD C. DANYSH ON BEHALF OF THE PETITIONER

ATTORNEY RICHARD C. DANYSH: May it please the Court, opposing Counsel, all the issues have been presented in our briefing, but there seem to be are two most important issues, the first whether the disbursement services incidental to a home equity loan sought to avoid a tax lien foreclosure for services under the DTP Act, the Texas Deceptive Trade Practices Act and, secondly, whether a lender can be assessed usurious penalties or usury penalties for a charge that was never received by the Plaintiff. We believe the answer to the first question is no, it is not an accepted trade practice act or within the Act and the standard applied by the Court of Appeals is excessively broad and conflicts with those of other courts.

JUSTICE HARRIET O'NEILL: Let me ask you in terms of framing the question, you defined what the bank did as disbursement services, but wasn't it, at least isn't there a fact issue on whether it was something more, taking care of the lawsuit. I mean, resolving a lawsuit is more than mere disbursement of loan proceeds and don't we have a fact issue as to whether the bank undertook that obligation.

ATTORNEY RICHARD C. DANYSH: May I address that this way, in the

context of what was before the Summary Judgment Court, the only portion of their response that related to our contention that this individual was not a consumer had to do with escrow services and had nothing to do with the objective of the borrower and the testimony, there was no testimony offered in that with respect to that particular point, but what was cited in other points was quite exceedingly thin.

JUSTICE HARRIET O'NEILL: But, I mean, there was some testimony that the and I understand it was controverted, but there was some testimony that the bank undertook to resolve the suit.

ATTORNEY RICHARD C. DANYSH: Well what the, if I might point out to the Court, the Summary Judgment Court was presented as part of the misrepresentation allegation and not as part of the consumer argument, testimony from the plaintiff where he said I was asking for a loan to help me out with a tax suit and they said they would take care of it being the taxes. Our position, I might add that we're not a bank, we're a finance company, that we don't, my client does not provide deposit services. It does not provide independent escrow services. It simply loans money and in this case, it made a home equity loan, a nonrecourse loan. So their only remedy in the event of default was the property itself. But to get back to my point, the Summary Judgment Court only had testimony that I want a loan to pay for my taxes and the statement that they would take care of the taxes, which is incidental or ancillary to the services that they provided as far as [inaudible]. It was not a fee that was charged for. There was no disbursement fee charged. It was primarily done to benefit the lender, which is basically, it was done to establish the superiority of their lien position ala other or versus other lien holders. So.

JUSTICE PAUL W. GREEN: And they did this service for others, not just in this case, but I mean it was kind of a routine part of the business?

ATTORNEY RICHARD C. DANYSH: Correct. Testimony not before the Summary Judgment Court, but at the Trial Court was that these are routine and ancillary and incidental to the loan transaction itself.

CHIEF JUSTICE WALLACE B. JEFFERSON: In answering this question about consumer status, are you saying that we cannot look at anything that was in the case that was tried to the jury, that we have to only look at the Summary Judgment evidence as presented to the judge?

ATTORNEY RICHARD C. DANYSH: Well, of course, it's hard not to look at anything else because we have a full and complete record, but in the context of reversing the Summary Judgment and in the context of did the Summary Judgment Court correctly rule at the time, I think the Court must look back at what was in the record at that particular time and what was presented. For example, in the reply.

JUSTICE SCOTT A. BRISTER: The question is is that the only thing we look at? Aren't, if the Trial Judge grants Summary Judgment and nobody moves to set that aside to trial or that's not set aside at trial, the only thing we could look at is the Summary Judgment rendered right?

ATTORNEY RICHARD C. DANYSH: Well I would think so and I might add that the Trial Court, the judge that tried this case, Judge Peden, was different from the judge you heard the Summary Judgment evidence. Judge Birchman is the judge who granted the Summary Judgment, the partial Summary Judgment.

JUSTICE SCOTT A. BRISTER: That's always the case in San Antonio.

ATTORNEY RICHARD C. DANYSH: Well, it can be the case and is often the case in San Antonio because of the revolving docket. All I'm, what I'm suggesting to the Court is.

JUSTICE SCOTT A. BRISTER: What was the testimony? Why doesn't your client, if you're getting a loan to pay off, they knew this loan was to pay off the taxes, at least part?

ATTORNEY RICHARD C. DANYSH: They did.

JUSTICE SCOTT A. BRISTER: Why didn't they pay off all of them?

ATTORNEY RICHARD C. DANYSH: They made a mistake. The file included the correct amount, which is approximately \$6300. The due diligence they did to correctly determine the correct amount or to determine the correct amount was actually done. They simply, for whatever reason, typed an incorrect amount on the settlement statement and funded, underfunded the payment of the taxes.

CHIEF JUSTICE WALLACE B. JEFFERSON: And sent it to the wrong place. It was six weeks after the loan closed that check arrived.

ATTORNEY RICHARD C. DANYSH: They did not. I don't think they sent it to the wrong place. What they did is there's a gap between when they cut the check and when the taxing authority actually processed it and there was really no explanation that I can recall about that delay. Either it was on our side of the case or on the taxing authority side of the case. But to answer your question, they made a mistake and I guess that is part of the crux of this. They made a mistake. It was not an intentional mistake and they're, as much as I've thought about this case, they had nothing to gain and everything to lose by their mistake. Number one, they lost their security interest and with a non-recourse note, that's all they have. Number two, they exposed themselves to a suit which they did. So they had, there was nothing driving their decision or their inadvertent mistake that would somehow benefit them. There was no deception that would somehow benefit them. This was a simple mistake.

JUSTICE SCOTT A. BRISTER: Of course, under the DTPA, it doesn't, it also covers mistakes.

ATTORNEY RICHARD C. DANYSH: It does.

JUSTICE SCOTT A. BRISTER: And so why shouldn't if you make this mistake and somebody loses their house, even though, was it, he wasn't living in the house. Was anybody living in the house?

ATTORNEY RICHARD C. DANYSH: Under the record, he was not living in the house, had never lived in the house when it was deeded to him since it was deeded to him in 1994 and supposedly his brothers were living in the house. Also under the record, he never made a single payment and never got property insurance.

JUSTICE SCOTT A. BRISTER: Let's assume a better case that it was somebody's home and they lose their home because this is not paid off, why shouldn't that be a deceptive trade practice?

ATTORNEY RICHARD C. DANYSH: Well they have a remedy, first of all, in contract, number one, which would provide them.

JUSTICE SCOTT A. BRISTER: What's the DTPA's in addition to other remedies in contract do you have?

ATTORNEY RICHARD C. DANYSH: I think it shouldn't be because this was in its essence simply a loan. It's not unlike Riverside in the sense that this gentleman didn't want his car to be repossessed. It's not unlike Fix. It's not unlike Munn where they simply wanted money.

CHIEF JUSTICE WALLACE B. JEFFERSON: But if it were just a loan, he would give his check for \$15,000 or whatever it was and then pay the taxes himself, but it seems like at least there's some evidence that he, the primary or the main objective of this, I mean he didn't seek the loan before he got notice that there was a tax lawsuit, so the primary reason for coming down and getting AGS advice was to get the taxes paid right?



ATTORNEY RICHARD C. DANYSH: Well, I would beg to differ. I think the primary driving force was to get money and the money, how you use the money and that's one of our observations. In this day of commerce, there's almost no loan that isn't accompanied by some service and particularly, a mortgage loan or home equity loan, there is always going to be a service that is incidental or ancillary to the loan and, of course, that is our position that the standard that we believe should apply is first, is there an existing debt or obligation that needs to be discharged, ala Riverside and others or are these services incidental or ancillary to the loan itself. You can come up with almost any reason why a loan, some objective, there is some objective to a loan other than simply getting the money. If you take that road, almost any statement, almost any service that's provided incidental to a loan is going to be subject to that Trade Practice Act and I don't think in my humble opinion, I don't think that's what the Act was intended for.

JUSTICE DALE WAINWRIGHT: Counsel, I hear your argument. Knight and Flenniken, however, are pretty broad and Flenniken, for example, the bank was the S&E of the note, not even involved in the initial transaction. What do you do with those two cases?

ATTORNEY RICHARD C. DANYSH: Well they were actually for the purchase of goods. In Knight, the gentleman was buying a dump truck and in Knight, there was a retail installment contract that had a prohibited waiver clause in it as I understand it.

JUSTICE DALE WAINWRIGHT: I thought you were pretty convincingly telling us not to pay much attention to the purpose of the loan because there's always a purpose and the bank or the lender may or may not know about it.

ATTORNEY RICHARD C. DANYSH: Maybe I didn't make myself clear because what we're talking about here is a service. We were talking about and what the Court was talking about in Flenniken and in Knight was a good. I mean, they were actually buying a house. They were actually, he was actually buying a dump truck and the definition of services in the Act itself is a little bit broader. I will recall you back to the statement of the Fifth Circuit and Munn and I know that's not necessarily controlling to this Court, but that Court pointed out that the definition of services includes those rendered in connection with the purchase or excuse me, sale or repair of goods. There was no such expanded definition in connection with services rendered in connection with the sale or purchase of loans or intangibles, stock.

CHIEF JUSTICE WALLACE B. JEFFERSON: But La Sara Grain says services includes an activity, La Sara Grain, service includes an activity of behalf of one party by another and that seemed to be a pretty broad and different definition than Munn.

ATTORNEY RICHARD C. DANYSH: Well, it is broad, but, again, this Court has not looked at this issue of services in connection with DTPA, as best I can tell, in 20 years. I think in the context of this particular case, the fact that this was an incidental disbursement service that was primarily aimed at protecting the superiority of the lien of the lender that that is a legitimate distinction between these other cases. Again, I.

JUSTICE NATHAN L. HECHT: Is there anything to distinguish this disbursement from any other disbursement of loan proceeds in a home mortgage context or anything where there's some allocation of proceeds that is a result of the closing?

ATTORNEY RICHARD C. DANYSH: I don't think so. I mean, if you look at the settlement statement, the HUD settlement statement, you will find that it lists the amount for the taxes. It lists an amount for

some credit insurance. There's a listed amount for an appraisal and they simply underpaid one of the funding, excuse me, one of the items. There will always be, and I speak generally, but there will always be those services that accompany a loan. This is not an escrow agent. They do not provide this service independent. If Mr. Allen had come in and said I want you to handle the disbursement of funds for me, they would say we cannot do it. We don't do that. That's not our business. Our business is to loan money. They don't take accounts. They don't take deposits. They simply loan money. There wasn't a charge for the fee. So. In the broader perspective, I think what this does or what it can do is it could make every home equity loan, every refinance loan, every mortgage loan is accompanied by some service which they all are subject to Deceptive Trade Practices Act. It's a very, very broad application of the rule that given the way services were defined, I don't think was the intent.

JUSTICE DALE WAINWRIGHT: What are some examples of services that AGF could have provided that in your opinion would have made Allen the consumer in this case.

ATTORNEY RICHARD C. DANYSH: Pardon me?

JUSTICE DALE WAINWRIGHT: You're focusing on your case. We've got to draw a line with this opinion between yes and no. There's some companies that want to provide services. You're saying your company, AGF, doesn't provide services.

ATTORNEY RICHARD C. DANYSH: Well, for example.

JUSTICE DALE WAINWRIGHT: What are some that do?

ATTORNEY RICHARD C. DANYSH: Well I'm not sure I can answer that question. I think there might be some lenders that charge separate line item fees for certain services. I can't tell you precisely what they are, but in our case, in my client's case, the testimony and I know we're talking about a Summary Judgment here, but the in terms of context for the Court, testimony was we do not provide escrow services or deposit services. For example, I suppose some, there are cases where checking account, a checking account agreement and the failure to honor certain checks was found to be covered within the Act. That was the case in which that was a specific service for which they charged a fee. So.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Danysh.

ATTORNEY RICHARD C. DANYSH: Thank you, Judge.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Crofts will present argument for the Respondent.

ORAL ARGUMENT OF THOMAS H. CROFTS, JR. ON BEHALF OF THE RESPONDENT

ATTORNEY THOMAS H. CROFTS, JR.: May it please the Court, let me begin by disagreeing with Counsel's response to Justice O'Neill's initial question and to Justice Hecht's recent question. Summary Judgment evidence presented by both sides included the deposition of Kyle Allen, my client, the plaintiff and in that deposition, he said I went to this finance company not just to get a loan and have some disbursements made. I went to this finance company asking for help with this tax suit and, of course, he took those tax suit papers and the whole reason for initiating the transaction was the tax suit papers of which he brought into this loan officer.

JUSTICE NATHAN L. HECHT: But be clear on that, I suppose he wasn't asking them to negotiate a settlement or anything like that. He just wanted whatever they wanted paid is that true or?

ATTORNEY THOMAS H. CROFTS, JR.: Well that's true, but it also involved and this is in the deposition testimony as well, finding out who they were owed to. Where to take the money. What to do in order to do that.

JUSTICE NATHAN L. HECHT: But they were just, the AGF was just supposed to pay off whatever the amount was.

ATTORNEY THOMAS H. CROFTS, JR.: Well that would not have disposed of the tax suit and the deposition testimony is I wanted help with this tax suit and the officer said we'll help you with this tax suit by doing these things.

JUSTICE NATHAN L. HECHT: That's what I'm unclear about is whether those things involve anything other than finding out what the demand was and paying it. Not, surely not, surely AGF was not going to negotiate them down or okay the bill is \$6500, will you take \$6300 or something like that.

ATTORNEY THOMAS H. CROFTS, JR.: I don't, the record doesn't reveal one way or the other about that, but it did taking care of the suit would involve obtaining a release, some adjudication document that would dispose of the tax suit. That's what the problem was. I think picking up.

JUSTICE SCOTT A. BRISTER: Knowing they weren't lawyers. He didn't hire them to be his lawyers.

ATTORNEY THOMAS H. CROFTS, JR.: That's correct. But he said I want help with this tax suit and the bank officer said, this is what we do. We can do it. I'll do it. I'll take the, this is the trial testimony; I'll take the papers over to the lawyer for these taxing agencies who according to our system supposed to deal with.

JUSTICE PHIL JOHNSON: But isn't that, wasn't, isn't that the only way they could protect their lien if they actually got the tax taken care of because it seems like with a non-recourse loan.

ATTORNEY THOMAS H. CROFTS, JR.: Well that would have been something that they would have wanted to do and their testimony is we would have wanted to do it for that purpose.

JUSTICE PHIL JOHNSON: Well actually most lenders are going to say we are going to do it because that's the only way we're protected in this case, wouldn't that not be.

ATTORNEY THOMAS H. CROFTS, JR.: That was not the nature of the transaction that was related to Mr. Allen when he went in and there's a case on this by the Third Court, Judge Shannon, I think it's cited in the opinion called Fortner v. Fannin Bank and it involved a loan with respect to a car and the borrower brought a DTPA case against this bank because the representation was we'll get this title registered for you and they didn't and because he didn't get it registered for him, a prior material man's lien got to be prior and resulted in loss of the car. The bank said oh, well we would record the certificate in the ordinary course of our business because that's what we do, that's how we protect our lien. The Court of Appeals said that's well and fine, but antecedent to that was this transaction with the borrower in which he could have taken the tax title to go get recorded. That's what car owner is supposed to do, but you said that you would do it for him and your failure to do that resulted in this prior lien and according to this opinion, the fact that it has an ancillary.

JUSTICE SCOTT A. BRISTER: Whose opinion was that?

ATTORNEY THOMAS H. CROFTS, JR.: That was, I think, Judge Shannon



wrote the opinion for the Third Court of Appeals.

JUSTICE SCOTT A. BRISTER: I'm just in the abstract. This is not like a bait and switch or a fake going out of business sale. We don't have to worry about other banks trying to do this because no bank in their right mind would do this. You're going to lose money every time. You lose your lends. There's no motive or incentive for any bank to do what happened here, wouldn't you agree with that?

ATTORNEY THOMAS H. CROFTS, JR.: I think that's, I think I would agree with that.

JUSTICE SCOTT A. BRISTER: So, I mean, again abstract and, of course, Deceptive Trade Practice name covers things that one might not necessarily think of as deceptive or trade, but this wouldn't be either just in the abstract.

ATTORNEY THOMAS H. CROFTS, JR.: Well I think it would be. Our claim is that there was a misrepresentation, various misrepresentations under some laundry lists in the DTPA about the quality of the service that was going to be provided by this finance company and I think it's very important, we're only dealing with the one question of the consumer qualification, what is the status for the consumer qualification.

JUSTICE SCOTT A. BRISTER: And they say well this is all loans and you would agree, I assume, virtually every loan is obtained to buy something.

ATTORNEY THOMAS H. CROFTS, JR.: Well, I.

JUSTICE SCOTT A. BRISTER: In other words, people don't.

ATTORNEY THOMAS H. CROFTS, JR.: Most are I would say.

JUSTICE SCOTT A. BRISTER: Yeah, I mean, almost because people don't borrow at 5 or 8 or whatever percent interest home equity loans are now, 8 or 10 so they can put it in a CD and get 3% or put it into stock market and lose all their money.

ATTORNEY THOMAS H. CROFTS, JR.: They might put it under their mattress these days.

JUSTICE SCOTT A. BRISTER: They borrow money from the bank to buy stuff almost always. And so how do we distinguish this case if this case is a consumer wouldn't all loans end up being consumer [inaudible].

ATTORNEY THOMAS H. CROFTS, JR.: No, sir. There's another case and this was mentioned by the other side. I think one of the most important cases, discussions of this subject was in this FDIC v. Munn. It was a Fifth Circuit case by Judge Higginbotham and he, it dealt with, it dealt with a transaction at a bank, a little bit complicated. Mr. Munn wanted to buy some stock from a corporation and in order for them to be able to, other shareholders to sell that corporation, they had to get this loan and in the settlement, loan transaction all kind of in a ball of wax, Mr. Munn signed this guarantee to the bank and the bank and the company that he bought the stock in folded pretty much immediately and he brought this action against the bank. Well, Judge Higginbotham then saying that let's really analyze this Court's decisions in Riverside and Flenniken and Knight and La Sara and so we've got here are the competing concepts we have. One, an extension of credit, loan of money in and of itself, we know that's not a good or a service even though the Court and the Court reserved in that case what about the issue of what about other services that go along with that's what we're here for. And he dealt with this question, everything involves a service. Every transaction has some kind of service. So if you can go in and complain about something in the context of a lending transaction that's just an ordinary service like processing costs or recording fees, that

would undermine, that would undermine the Court's holding in Lewis, that kind of thing just isn't going to be a good or a service. On the other hand, he said, and he cited a Court of Appeals case, Rittenour, which involved a unique set of facts in which a customer went down to the bank and said I want you to put a hold on this account dealing with a loan transaction and they said we will, but then they didn't and in that case the Court of Appeals said well that's different from a loan. That's more than just a loan. They said we're going to do this extra thing for you that's not in the ordinary course of a loan and they didn't and so the Court of Appeals in that case, I believe it was Corpus Christi, said that's actionable. Judge Higginbotham in the FDIC case said that represents a middle ground where there is a service and it's not merely incidental to the loan, not merely a disbursement where the DTPA ought to provide some protection because it's something other than an incidental aspect of a loan of money and he said it's not always easy to determine what that is and he said we need some help and that's one of the refinements this case can result in as the Court resolves it, how do you tell the difference. In that case, Judge Higginbotham said this is a case in which the lender assumed unique duties and what's.

JUSTICE DAVID M. MEDINA: How do we tell the difference here? How do we tell the difference here?

ATTORNEY THOMAS H. CROFTS, JR.: Well the difference here is a service, taking part of the loan proceeds which at that point, you know, was borrowed by my client, Mr. Allen, and belonged to him, taking those loan proceeds to wherever it needed to go and that's what the deposition testimony is, wherever it needed to go and whoever it needed to go to take care of a suit that's pending against me. Now that's not and I don't think you can say that as a matter of law, that's not an independent, unique duty that was assumed by this lender. Another Court of Appeals case trying to make this distinction that's cited in the briefs and that's the.

JUSTICE DALE WAINWRIGHT: Just before you move from the Fifth Circuit case just as Judge Higginbotham says in his opinion discussing Rittenour, the Rittenour established that the bank's financial counseling and the hold on his account were central to the transaction by showing that he considered them important enough to seek them separately from the purchase of the CD. Were there separate services contracted for in this?

ATTORNEY THOMAS H. CROFTS, JR.: It was all one transaction, Judge. And that does distinguish Rittenour from our case. It doesn't distinguish it in Judge Higginbotham's view from the facts in the Munn case because they were, it was all at the same time.

JUSTICE DALE WAINWRIGHT: Was there any financial counseling in this case?

ATTORNEY THOMAS H. CROFTS, JR.: Well the trial testimony reveals that there wasn't.

JUSTICE DALE WAINWRIGHT: In the Summary Judgment record?

ATTORNEY THOMAS H. CROFTS, JR.: The Summary Judgment record is I went in there with my tax papers and I asked for them could they help me take care of this tax suit and they said yes, we can help you take care of that tax suit by this loan and that's. Now I think it's important here to note that the only ground for Summary Judgment urged is one global sentence and that is and this is the only DTPA ground before the Court that's in their motion and that is a loan is not a good or a service. Number two, incidental aspects of a loan are not actionable under the DTPA. That's all their motion says.



JUSTICE DAVID M. MEDINA: I'm just trying to get a better understanding of this. You said that it's not an independent, unique duty and that is the paying of this lend or resolving this lawsuit. Is that your position?

ATTORNEY THOMAS H. CROFTS, JR.: I'm saying I don't know that that label is has to be satisfied in every case. That was the way that Judge Higginbotham made the distinction in his case. The Court of Appeals case again which is cited which cites another Court of Appeals case holding that financial counseling was an independent service that made the borrower the DTPA consumer. They characterized the test as does it involve something that's not typical in a borrowing context.

JUSTICE DAVID M. MEDINA: Let's talk about this specific transaction here. Is this typical, as I understood Counsel on the other side, he said this is not typical.

ATTORNEY THOMAS H. CROFTS, JR.: If it's not typical, then it's an independent service. If it's not typical, that's a representation they made that's not an incidental aspect of the loan and that makes our case.

CHIEF JUSTICE WALLACE B. JEFFERSON: One thing that the Court has to be concerned about I think is in this climate particularly, there are refinancings going on all over the place in which escrow accounts are set up and property taxes are to be paid from those accounts and I can just imagine that there will be mistakes made along the way with this, the frenzy that is occurring here and trying to get ahead of whatever deadline's going to come with whatever happens with the new Administration. Are you saying that in those cases if property taxes are not paid, if the escrow account is not satisfied according to the terms that there might be a DTPA suit in those instances?

ATTORNEY THOMAS H. CROFTS, JR.: Not necessarily, Your Honor, because I think in many of those transactions, a mere taking care of taxes is, might and I think it could be. I don't know that there could be a hard and fixed rule about disbursement and taxes because I think in some transactions, they're just as routine and incidental as they can be. On the other extreme in this same climate, what about the credit card companies that send those things in the mail daily practically and say sign up with us. We'll loan you this money. We'll take this money and we'll discharge your other credit card debts at a lower rate and I sign up and rely on that and lo and behold they don't do that and because they don't do that, a check bounces and I get a lien against me. So it, I think that's a case. That's a case in which there is an independent primary objective that's not merely ancillary to the loan. The credit card company agreed to deal with a third party that I have a connection with to protect my interest and they didn't do it.

JUSTICE NATHAN L. HECHT: Let me ask you a kind of tangential of that, but on the subject of mitigation. I understand your argument that if they had paid off the taxes he wouldn't have lost the house, but it also seems like he wouldn't have lost the house if he had opened his mail and why isn't that a matter of mitigation?

ATTORNEY THOMAS H. CROFTS, JR.: Well, that was in terms of their complaint is that there should have been a mitigation instruction given to not award and the instruction tendered which would go with the typical damage question was don't award any money, don't award any damage for any injury that resulted from it didn't fit with any question that was given and it wouldn't fit with a question asking did the failure to pay those taxes result in the foreclosure. It didn't fit. Now they advanced that in the negligence context and the jury

found that and this fits with their officer's testimony. This record is replete with this officer's testimony to the effect that it was my failure that resulted in this tax foreclosure and it didn't have anything to do with what Mr. Allen did or didn't do. Nevertheless, that got into the case in the comparative negligence question, which the jury answered in favor of.

JUSTICE DON R. WILLETT: We didn't give Mr. Danysh a chance to go into usury at all, but do you have anything to say about that.

ATTORNEY THOMAS H. CROFTS, JR.: Yes, sir, I do think that there's room for some refinement on that subject. We only have this Court's case and the Fuller case that the decision in the Fuller case, which says you can't just have a book entry. It's got to be communicated even if it's communicated indirectly. I think that their position is not one that should be adopted which is it that needs to be read and understood because that's a slippery slope I think in any usury case because we'll have what did you understand about this. Did you understand it well enough? Do you know enough to understand? I think because usury is a penalty and because it's the cases say it's on the legislative books to guard against abusive lenders that the test ought to be if the usurious charge goes out the door into a channel, public channel vested to reach, intended to reach that borrower, that that is a charge. I think that's the only way.

JUSTICE SCOTT A. BRISTER: If somebody's not taking or returning calls from their bank and they're not paying back the loan, can that person who's not paying a dime of the loan and refusing to talk with their bank then say, but something you sent me that I never read either was usurious. That seems a little unfair. It seems like you're having your cake and eating it too. If my unopened mail I get the benefit of it because I'm not going to pay you or talk to you about paying, but if there's something in there that you made a mistake on, I'm going to, you're going to have to be penalized for it.

ATTORNEY THOMAS H. CROFTS, JR.: My response to that, Judge, is I can see what you're saying, but usury penalty fairness and penalty statutes isn't what they're about and number one, I think those facts are a little extreme. They knew where Mr. Allen was in Oregon and he wasn't there where the mail arrived, but he intended to pay that loan. He sent the money to his brothers. The brothers, the brother lied to him about not paying it to the lender and so Mr. Allen wasn't there, but he doesn't have the, he doesn't have the badge of.

JUSTICE SCOTT A. BRISTER: If he had picked up the phone and talked to the bank, he would have found out what his brother was doing.

ATTORNEY THOMAS H. CROFTS, JR.: That's, I don't know that you can interpret the usury statute on nuances like that.

JUSTICE SCOTT A. BRISTER: We're trying to decide what charge means and it just.

ATTORNEY THOMAS H. CROFTS, JR.: Right. And you're all, I think you're all, would you want to have a litigation about this kind of fact on every usury case? And that's what I think needs to be avoided by having a rule that if you're a lender and you send it out, that's a charge.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions?

JUSTICE HARRIET O'NEILL: I have just a quick question.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE HARRIET O'NEILL: I'm having trouble understanding the dynamic here because procedurally if we were to agree with the Court of Appeals, then what happens? Mr. Allen's elected to recover in contract, I mean, is this case really going to be retried?

ATTORNEY THOMAS H. CROFTS, JR.: Well, I think the directive from the Court of Appeals is to give Mr. Allen a chance to see if he can get the DTPA finding and if he.

JUSTICE HARRIET O'NEILL: Which would require a retrial.

ATTORNEY THOMAS H. CROFTS, JR.: At least on that question yes and then if he failed, if he failed to get it, and my understanding from their decision is that the rest of the decision would spring into place for what the adjudication ought to be.

JUSTICE HARRIET O'NEILL: Really? Because I never thought you could just go retry one little claim. I thought you had to send the whole thing back, no?

ATTORNEY THOMAS H. CROFTS, JR.: Well I think as a practical, I don't think there's a black or white rule on that. I know you can't, you have to try the whole case if it's in the default context and when its liability is contested.

JUSTICE SCOTT A. BRISTER: You'd have to retry the question of whether he would.

ATTORNEY THOMAS H. CROFTS, JR.: I would.

JUSTICE SCOTT A. BRISTER: Whether they had agreement that AGF would pay the taxes.

ATTORNEY THOMAS H. CROFTS, JR.: I would, I would.

JUSTICE SCOTT A. BRISTER: If the jury in the second trial said no, then we couldn't spring back into the jury answer that said yes.

ATTORNEY THOMAS H. CROFTS, JR.: I would think that's what the Court of Appeals intended. And I only mention one last thing that Judge Higginbotham in that Munn case did decide there's a jury question on this consumer thing. There's evidence that makes it independent, that makes it an objective that's not simply an incidental aspect of a loan.

JUSTICE HARRIET O'NEILL: Oh yeah.

ATTORNEY THOMAS H. CROFTS, JR.: There's contro--there's evidence on the other side.

JUSTICE HARRIET O'NEILL: I just don't understand the dynamic. I'm having a hard time.

ATTORNEY THOMAS H. CROFTS, JR.: Thank you.

JUSTICE HARRIET O'NEILL: Can you help me with the dynamic? I can't believe the appeal's up here on a \$2000 usury penalty.

REBUTTAL ARGUMENT OF RICHARD C. DANYSH ON BEHALF OF PETITIONER

ATTORNEY RICHARD C. DANYSH: I would like to help you with the dynamic. As I've thought about it.

JUSTICE HARRIET O'NEILL: You don't have to answer it. I don't want to put you on the spot.

ATTORNEY RICHARD C. DANYSH: Well that, no, I'm not sure that I would say please put this in the bank, if you will, but my impression is we'd go back and try the DTPA piece of this case, but I don't know how you go back and not start over.

JUSTICE HARRIET O'NEILL: That's my question.

ATTORNEY RICHARD C. DANYSH: There were other pieces of the case that we have not talked about, but as a follow-up regarding the conduct that.

JUSTICE HARRIET O'NEILL: Let me just ask, you review the remand then as only as the DTPA claim and no error's then assigned to that or do you read the remand differently?

ATTORNEY RICHARD C. DANYSH: Well, it looks like it's a remand only on the DTPA piece, but I don't know how you do that frankly.



CHIEF JUSTICE WALLACE B. JEFFERSON: We've just never seen that in terms of election of remedies. When they're kind of bifurcated like this, there's a summary judgment early on and then a trial and then send it back down to try the other part that the plaintiff could elect just is odd.

ATTORNEY RICHARD C. DANYSH: It is and I would invite the Court to please consider some of the evidence that was excluded because as a follow-up to one of the questions about not only not paying any money, not telling us their brothers were going to pay the money, not following up with the brothers, not taking 30 calls. There was also an affidavit we think was clearly false that was filed to spring the proceeds out of the Court too. That was never, we were never informed about. In fact, my client did not find out that the property had actually been foreclosed upon until they filed their judicial foreclosure suit and learned in a counterclaim that the property had actually been foreclosed upon four months earlier. So if we do go back to try it, we felt the Court should have allowed that what we contend as a false affidavit into the record to because it clearly goes to, in our view, issues of good faith, credibility, whether or not he ever had intent at all to repay this loan. On the usury piece, I would simply say that I agree with Counsel in that I think we need some guidance on this, but I think the guiding principle is that this is punitive and penal in nature and should, therefore, be strictly construed and in this case there's no dispute that he never, he may have received it at an address although one of the letters was returned unclaimed, but he never read it. He never.

JUSTICE HARRIET O'NEILL: But the question is whether it was charged and so whether you have to know about to know whether for it to have been charged and here's my question, what if he had received and read the letter, but under the Finance Code, the bank had send a Correction Notice that he had not read, then under your urging, the Correction letter would not be good either.

ATTORNEY RICHARD C. DANYSH: Well there's a specific curing provision in the statute. I don't think the statute speaks to what is proper delivery of the usurious charge.

JUSTICE HARRIET O'NEILL: But you would divorce those two and you would say you've got to read it for it to be usury, but if you read it and, therefore, you're charged, but you don't read the correction, the bank gets the benefit of the correction?

ATTORNEY RICHARD C. DANYSH: I'm not sure once you read it you can correct it.

JUSTICE HARRIET O'NEILL: Oh, okay. I'm talking about the bank correcting it.

ATTORNEY RICHARD C. DANYSH: Anyway. May I speak just briefly about Munn, particularly some in the context of the Summary Judgment evidence? I again would invite the Court to look back to the response. The response specifically addressed the Allen's lack of consumer status. The objective issue that has been replete throughout this argument and the briefing was not ever presented to the Summary Judgment Court. The only thing they cited in their response was that somehow know that we are providing escrow services and citing the Court to the Zimmerman and Commercial Escrow Company cases. No mention whatsoever about objective. The language or the evidence about intent came in about a 20-line section of deposition. It was cited under misrepresentation under a response to our claim that there was no evidence of misrepresentation. So this Summary Judgment Court was never given evidence about objective in the context of one being a consumer

and I invite the Court to look back at that and then just quickly say that the Munn court and I know I'm about out of time, made a distinction between the statutory language referencing services furnished in connection with the sale of a good. In the absence of that language, services in connection with the sale of other services. And pulling under the they're again discussing the fact that almost all transactions, commercial transactions, consumer transactions and company services, under this approach, any service involved in a stock purchase or a loan transaction would give rise to DTPA consumer status even though the loan could not thereby, could not thereby underlying, undermining the legislature's exclusion of sales. This is a timely issue because of what we may have ahead of us. And I appreciate the Court's time. I assume I'm finished.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

2009 WL 973013 (Tex.)