

there made the choice of remedies is a minor distinction that I don't think bears on the relevance of this _____. Going back to what the legislature did do then, in 1998 the First CA came out with a decision in this case and said that, no, that the legislature merely intended to provide a choice of remedies. Immediately, the legislature changed the law.

OWEN: But under the preexisting law it says, that if you aggrieved by final decision of the commissioner, then you are entitled to judicial review. And it seems like the statute provided for judicial review under 2001 of the government code. Is that correct?

DALY: It does say that. And that is an interpretation of it and I think to copy one of the prior arguments, I think that it was merely a piece of sloppy legislation. I think nobody sat down and thought how this would go out.

OWEN: But nonetheless, that's what it says?

DALY: That's correct.

OWEN: So you would not have a de novo jury trial under the old statute?

DALY: I think that they intended that to be the case. I think that the statute itself does say that you are entitled to judicial review, but I think implicit from the way the act was formed in the remedies that are provided, I think implicit was that there would be a jury trial.

OWEN: Show me where that's implicit? What section of the act do you say it's implied from?

DALY: I think it's implied in the sense that the act provides that the pawnbroker shall provide like kind merchandise. And once the consumer credit commissioner makes a decision whether or not the replacement property is actually like kind merchandise, then I think there has to be some review available.

OWEN: But is it a de novo jury trial? Do you get a common law claims tried? What is the review under the statute as it existed in 1997?

DALY: As it existed in 1997, we argue that the review would be a de novo jury trial on the issues as modified, the issues being 1) whether or not the individual was entitled to like kind merchandise; and 2) whether or not the merchandise is actually like kind?

ABBOTT: And what section is that found in?

DALY: It's not. The legislature does not explain how this remedy would go through the courts.

OWEN: Why wouldn't it be governed by Ch. 2001 of the Gov't Code? Wouldn't it be substantial evidence under the code?

DALY: I don't think that that's what the legislature intended. I merely only state that based on what the legislature did once the CA came out with its decision. Because quite honestly when Cash America said what do we do about this, and I said well you _____ your legislator and tell him to clarify themselves. And in fact, they did that. And so, our argument is merely based on with hindsight going forward with what the legislature did based in the amendments in 1999. You're correct, and I admit that it can be interpreted to be of judicial review under the administrative procedure act, but I don't think that's what the legislature intended by virtue...

OWEN: That's what they said?

DALY: It is what they said until the amendments came out. The question becomes, whether the law violates the open courts provision?

O'NEILL: Would you agree that the commissioner does not have the authority to grant the relief sought in the DC?

DALY: No, I would not agree with that.

O'NEILL: Aren't they two different remedies we're talking about? Conversion gives you reasonable market value, but the statute gives you a replacement of like kind merchandise. Aren't those two different remedies?

DALY: In that context they are. But the legislature here has changed remedy.

O'NEILL: The commissioner does not have the authority to say reasonable market value, which is the conversion measure of damages?

DALY: I think they do. In §371.302 of the Finance Code, the power is given to the consumer credit commissioner to request the AG or other attorneys who are authorized to sue for an injunction or damages on behalf of an aggrieved individual.

O'NEILL: But that's not under the pawn shop act?

DALY: Yes - 371.302. Just as 371.167 gives the commissioner the power to approve a like kind replacement, and 371.301 gives the commissioner the power to issue _____ to a pawnbroker.

O'NEILL: But it can't award a plaintiff reasonable market value?

DALY: It cannot per se award the plaintiff without it going through the courts. That is correct. But it does have the power to put that into motion.

ABBOTT: In the CA's opinion it says something that I don't see you all have argued, and I don't see a citation or an appendix concerning this. The CA says, the act provides that if the customer is dissatisfied with the final decision of the commissioner, that party may file suit against the commissioner, is entitled to judicial review. Where is that found?

DALY: That is found in §14.(I'm not sure of the exact cite) of the finance code. And I think what that says is, that a person who is aggrieved by an act of the commissioner is entitled to judicial review. And recall that that's under the old act. Well that's still there now under the act as amended. The legislature has specifically provided that the pledger must exhaust an administrative remedy with respect to the property before seeking a remedy in court. And then, specifically authorizes the individual to seek a remedy, or after 91 days.

Continuing with the open courts analysis, this court addressed what the test was in the *Garcia* case, the landmark worker's comp case, where the court said that the legislative action withdrawing common law remedies for injuries to one's property is sustained only when a) is reasonable in substituting other remedies, or b) when it is a reasonable exercise of the police power in the interest of the general welfare. The court then stated, that in determining whether or not a substitute remedy is a reasonable remedy, you have to compare the substitute remedy to the common law remedy. So here you would be comparing the like kind merchandise remedy to the common law remedy. As this court showed in *Garcia*, in order to recover common law for example in a negligence claim, the individual would have to not only prove the elements of negligence, duty, breach of duty, proximate cause, damages, but then also overcome all the common law defenses. In this situation this is only a rebuttable presumption of negligence when property is not returned. But again, it's a rebuttable presumption which may be rebutted by proof that there was some other cause that was consistent with due care.

BAKER: How does your argument apply to a conversion?

DALY: Conversion is even harder to prove in this case. In conversion, you have to prove an intentional act of dominion or control...

BAKER: If I make a demand from you as Cash America to return my ring and you say, No, I can't do that, does that seem to be an intentional response not to return whatever the reason is?

DALY: But in this situation, we're talking about lost or stolen property.

BAKER: Yeah but in the conversion theory in _____ that it was for the mutual benefit of the parties, and if you don't give it up when they ask for it you've converted it. Isn't that just hornbook law?

DALY: No, I don't think it is. In fact, I think conversion is a remedy that you don't win in this situation, because it is an intentional tort. I think more likely you are going to win a negligence action or a bellman(?) action. But the legislature has seen fit to do away with all that and say, you don't have to make any proof of these elements and all you have to do is prove that you didn't receive the property. Now you are going to _____ the like kind merchandise. Just like under the worker's comp. act all you have to do is prove you're injured and you are entitled to the remedies available under the worker's comp. act.

ENOCH: Are those issues having to do with remedies properly raised here? In the TC, the TC granted the plea of the jurisdiction because of failure to exhaust administrative remedies. And it goes to the CA and the issue before the CA was whether exhaustion of remedies was required. And the CA said, no it was not and reversed and remanded to the TC. In the CA was an issue raised before them that the statute limiting remedies was unconstitutional, or was the issue in the CA simply that the statute did not require exhaustion remedies and if it did require exhaustion of remedies, then the statute was unconstitutional because it violated open courts? Was the issue of the remedies available under the statute before the CA?

DALY: I think you're correct. That's exactly right, a point that I hadn't considered that it was not before the CA by the petitioner at that stage.

ENOCH: The issue that was raised in deciding the CA's was simply whether or not there was an exhaustion of remedies required. The CA said there was not, and the alternate point that was raised that if exhaustion of the administrative process was required, then the statute was a violation of the open courts provision and the CA didn't reach that question because they decided exhaustion of administrative remedies was not necessary.

DALY: That's right. The CA decided that it wasn't necessary merely because it wasn't expressly stated so in the act. And now that it is stated so in the act, the exhaustion of remedies _____.

So the question is, is it a reasonable substitute for the available common law remedies in order to be provided like kind merchandise? And the answer to that, is you bet it is. Just like it was under the worker's comp. act where an individual is entitled to the remedies available under that act by virtue of just showing that it's injured. Except for in this instance, you're not giving up as much as you are in the worker's comp act. This court stated that although the remedy would be somewhat limited it would be also much more certain. In this instance, the remedy is not limited. It is more certain, but it's not limited because presumably like kind merchandise entails merchandise which is both comparable in quality and values. So you should be able to receive the same value without having to prove any of the elements of common law damages.

The final question is whether or not the act infringes upon the right to a jury trial? And I think undeniably, no.

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PETITIONER

O'NEILL: Do we apply the amendment retroactively?

MCLEAN: Unless the statute says it applies itself retroactively, I believe the general rule is its prospective application.

O'NEILL: But aren't there cases that say _____ gets to be applied retroactively?

MCLEAN: I think it's procedural. And the problem with this statute that we're operating under as it existed at the time that we brought our lawsuit, you can't. Now I think the CA in this case squarely faced the issue and when you're looking at whether or not the court has jurisdiction to entertain a common law conversion suit in a pawnbroker type situation, you can't ignore I don't believe the constitutional analysis. Because the CA referenced the *Hollman* case, which was the payday law. And the Ft. Worth CA, you have to take a look at what the remedy is available.

O'NEILL: Let's me just follow-up on my question. If we were to find that the amendments are retroactive, because it affects the matter of procedure, would you have any quarrel with your opponent's position? Do you still have an argument? You're not claiming that the statute as amended is unconstitutional?

MCLEAN: The statute as amended requires exhaustion. I believe that's a probable interpretation, but I'm not sure of the kind of administrative review that's going to be required under the amended statute.

O'NEILL: So then are you saying you would still have a constitutional problem?

MCLEAN: We might because there's three magic words missing in the amendment: trial de novo. It just says you can go into court for a remedy. It doesn't specify anything. And with the amended provisions, you still have the infirmity, the constitutional infirmity when you're comparing what kind of remedy is available, because there is no right to a jury trial, because if the person disagrees with whatever the commissioner does or doesn't do, then under the administrative procedure act, we have to go through a contested case hearing and then the ultimate review is by judicial review. And as the court is well aware, there is no right to a trial by jury.

OWEN: Under the new amended statute, did they do away with the administrative procedure act review or not? Is it still there?

MCLEAN: As far as I know, it's still there. The appendices I attached to my brief was the research I did about what happens if the commissioner makes a decision that somebody doesn't

like. And the other thing is that - another infirmity in the statute is still the commissioner has no authority to render a money judgment in favor of somebody who has a conversion cause of action.

ENOCH: The issue that you took to the CA was the issue of whether exhaustion of the administrative proceedings was required. The TC dismissed based on that claim. It goes to the CA. And your complaint was that exhaustion of administrative proceedings was not required by the statute, and if it was required by the statute, it was unconstitutional. We're not at the point where your complaining that somehow some remedy is unconstitutionally deprived from you. It seems to me that fits the argument of whether or not there's a exhaustion of administrative remedies is required under this statute. There might be some arguments about the different remedies that would be available and whether or not it was designed to preempt some of those. But the real issue that you had in the CA was simply, is requiring exhaustion of administrative proceedings unconstitutional a violation of the open courts provision? Isn't that the issue that was presented to the CA and decided by the CA?

MCLEAN: Our position was at the CA that there is no such thing as primary jurisdiction, that that was a creature that the Corpus Christi CA invented because the statute is silent on the issue. There is nothing in that statute that says anything about exclusive jurisdiction with the commissioner. I mean it's absolutely silent. So my position was that there is nothing that says that way. We're talking about a common law cause of action on the constitutional dimension of conversion. And if we're going to have a statute that plainly says if given effect to their credence and their arguments, if the statute says you get a replacement, that is in derogation of a common law right that existed before the constitution of 1876. You've got a silent statute. You've got no authority in the commissioner to render the kind of judgment. Even if you did apply the primary jurisdiction rule that the Corpus Christi court invented for this statute, you still have a judicial - is it an inherently judicial cause of action? So we approached it that 1), this statute is unconstitutional if that's the only relief somebody can get; 2) there is no primary exclusive grant or primary jurisdiction in the commissioner; and 3) even if there is something called primary jurisdiction that the statute is silent on, this is a case that is inherently judicial in nature. It fits one of the exceptions. That's what we took the CA.

The CA did not get to the constitutionality issue because they ruled, as we believe, that a person has an election.

HANKINSON: So your view that the doctrine of primary jurisdiction is not part of Texas law?

MCLEAN: I'm saying it's not a part of the law under this statute because the statute does not specifically give primary jurisdiction to the commissioner.

HANKINSON: But does the doctrine of primary jurisdiction actually require a statutory grant of primary jurisdiction in order to be invoked under Texas law?

MCLEAN: I believe it does when you are talking about a cause of action for a conversion when the remedy that the commissioner can give completely abrogates that remedy.

HANKINSON: What authority do you have that before the doctrine of primary jurisdiction can be invoked it must be expressly included in a statute?

MCLEAN: I tailored that back into the art. 1, §13 analysis that this court has done on many occasions where a statute abrogates a common law remedy.

HANKINSON: What is your definition of primary jurisdiction?

MCLEAN: Primary jurisdiction exists where an agency has particular things committed to it. The Texas Air Control Board I think would be an example. If somebody is applying for a permit to dump waste or garbage there's a whole process they have to go through to get different kind of permits. Agencies in that situation are statutorily created to handle that sort of thing. They have the expertise on staff, because having sat through one of those for several months at a time, it does require people that know what they are doing.

HANKINSON: Isn't the doctrine of primary jurisdiction then as you defined it a creature of the common law that is used to reconcile jurisdictional questions as between agencies and courts to avoid the kinds of constitutional problems that you are talking about?

MCLEAN: My belief is that it's a creature of statutory construction.

HANKINSON: But it is in fact used then by the courts to help reconcile agency authority verses court authority and to avoid the kinds of constitutional problems that you are talking about?

MCLEAN: I don't know about avoiding constitutional problems. But I do know that it's used to put the burden where it belongs on the agency that's charged with the responsibility. This statute suffered from two constitutional infirmities that I saw. And our approach and our complaint to the CA was there is no exclusive grant. It's an election. The injured party ought to be able to elect which one they want to go. And this case, I believe, meets all of the requirements of a section 13 challenge. And the CA, I think if you read the opinion to preserve the constitutionality of the statute without having to get into the nuts and bolts of it in trying to uphold the constitutionality they made the decision that people have an election they can make. Some people who go to the commissioner and get their like king replacement. There is a remedy that's been available to people since the 1860's and they can go through the route and get reasonable market value through a court. And that's the approach that we took.

One thing I would like to comment on briefly is some of the amicus briefs mentioned that some kind of floodgate of litigation analysis would allow people to sue pawnshops when the property has been converted. I did an analysis and tried to count the number of cases that

made their way to the appellate level where a pawnshop has been sued either by a disgruntled customer or somebody who had their property stolen, and I could only come up with 5-6 cases since 1908. And that was the Uncle Sam's case.

ABBOTT: And even if that argument had some substance to it, would it in effect no longer be effective with the amendment?

MCLEAN: I still think it's open to question. I don't know what kind of review an injured person's going to get. The statute says you've got 90 days, the commissioner can decide a replacement. If either side is unhappy, then within 90 days they can go to court for a remedy. Perhaps that does create a problem. It gives people the entire full range of remedies. But it shouldn't affect Mrs. Bennett. Mrs. Bennett made her election under the old law. Our case was filed in 1997.

The facts are basically that for 4 months she did everything in her power to work with Cash America to find a replacement. They sent her magazines with jewelry. She went and looked at all the different jewelry things that they had to offer. It was an exhaustive thing for 4 months. I'm not sure what purpose would be served going to the commissioner at this point.

ENOCH: If the court determined that the TC was correct, that you filed your lawsuit too early, that you need to go to the commissioner, you could go to the commissioner and get the commissioner to make the determination and then if you didn't like that you could file suit and one of the complaints you could make is that the commissioner either didn't provide you the remedies the common law otherwise provides you, and if the statute prohibits that, then it's unconstitutional. All of the issues you raise about the remedies aspect of it under the statute could all be raised after you've had your opportunity to go before the commissioner to have him or her resolve the initial property dispute.

MCLEAN: I really don't think that's necessary at this stage of the game. Even if you look at the analysis of what the commissioner can do now, if we had a claim today, fine, go look at it for 90 days. What can the commissioner do that hasn't already been done in this case? Nothing. The election was made under the law as it existed at the time my client's claim arose. I don't see where we would be served by going back and starting something over again, and, especially in view of the statute as it existed at the time that had no exclusive grant of primary jurisdiction. Even in terms of judicial economy, I don't see how that would help anybody in this case because my client will pursue a conversion of common law remedy and regardless of what the commissioner does or doesn't do unless - that's just not going to happen. She worked with them for 4 months.

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REBUTTAL

O'NEILL: Are the amendments retroactive?

DALY: Yes, they are.

O'NEILL: Why is that?

DALY: The *Holder(?) v. Wood* case, I think is determinative. That case was a DTPA action. It was filed in 1983 against the seller of a mobile home. Apparently the mobile home was faulty in some way or another. While the case was pending, the law was amended in 1985 with regard to mobile home manufacturers and it required individuals who wanted to file certain DTPA actions against these manufacturers to seek to exhaust their administrative remedies first. In a mandamus action, this court held that because it was a procedural or remedial amendment, that the law applied retroactively. So, accordingly, the court went back and abated the lawsuit with regard to some of the actions, because some of the actions weren't covered by the suit.

GONZALES: How is this statute remedial? Is this statute remedial, is that what you are arguing?

DALY: It's certainly procedural and possibly remedial. And the reason I say that, is because it's certainly procedural because it requires an individual to at least exhaust their administrative remedies before filing a common law cause of action. But I think it's possibly remedial because I think it can also be interpreted as substituting the remedy of like kind merchandise for the remedy that you are entitled to under the common law. But it's certainly procedural and the court was clear in the *Holder v. Wood* case that a procedural change may be applied retroactively.

ABBOTT: Are you of the opinion, that the amendment in no way diminishes or decreases or eliminates any substantive claim that the plaintiff may have had before the amendment?

DALY: No, I don't think it does. I think they have the same rights. I think the law was just a clarification. When I was sitting there, I was going back through the recent amendments and I noticed, and this is obviously not determinative, but it is somewhat persuasive that another one of the amended sections of the pawn shop act provides the changes in the law made by this act to sections 371.059 and 371.071, which are not at issue here of the finance code applied only to applications filed on or after the effective date of the act. But they didn't say that with regard to the amendment in this provision. I think we can fully assume that the legislature knew what the law was, knew that they were making a procedural and, or remedial change and knew that it could be applied retroactively.

ENOCH: As long as we would say that Bennett's case is just abated and give her an opportunity to go have the commissioner deal with this, it seems to me that that would be okay to have a remedial retroactive application of this deal. But that wouldn't be a basis for affirming the TC's judgment, which dismissed their case because they didn't bring the administrative process. Because it seems if you argued that that would apply, then potentially the statute of limitations would

have run because you've got a 90-day appeal from the commissioner's ruling and they never got a commissioner's ruling. So they would have a difficult time it seems to me reinstating their lawsuit several years later if you said well we've got to dismiss this because they never brought their administrative remedies. It wasn't clearly required in the first statute.

DALY: I think that's correct. And I think the reason it was couched as a motion to dismiss was merely because that's the way it was couched in the *Kayal* case. I don't think it makes any difference to Cash America or any other pawn shop whether or not it's an abatement or motion to dismiss. Because they are certainly not trying to take away an individual's remedy, but merely say you have to go and follow the administrative remedy first before you are entitled to your common law.