IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JEFFREY E. LEHRMAN,

Respondent.

CASE NO. 63,270

On Petition for Review of the Referee's Report in a Disciplinary Proceeding.

REPLY BRIEF OF RESPONDENT

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REPLY BRIEF OF RESPONDENT

The Bar's answer brief demonstrates, we believe, why the technical complexities of "usury" are properly sorted out in conventional civil litigation between lenders and borrowers, and have not been made the basis of a lawyer's discipline in more than two decades.[1]

The Bar's argument also demonstrates how only the Court's "clear and convincing" standard of proof can prevent an utter mismatch, to the lawyer's incalculable detriment,

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[1] Except, as we reported in Respondent's main brief, p. 31, when a lawyer unconscionably asserted a "usury" defense to the creditor's action against him on his own debt, evidenced by a debt instrument the lawyer drafted.

when disciplinary action is predicated on a Referee's unfounded assumption that the person accusing the lawyer was the lawyer's client, which the lawyer convincingly refuted.

For the most part we rely on Respondent's main brief to rebut The Bar's argument. We here address only two principal contentions in the answer brief: (1) that in finding Guiking was Lehrman's client,[2] the Referee did not shift to Lehrman the burden of proving that his "client" Guiking got full value, $6,500, for his note; and (2) that Pawlitzek's demand on Guiking for $25,000, through Lehrman, was "usury" for which Lehrman is professionally liable.

1. There is no "clear and convincing" proof that Lehrman perpetrated a usurious loan by withholding full value, $6,500, from Guiking.

Without a doubt, one who lends another $6,000 upon a promise to repay $6,500 in six days has taken part in a loan that is usurious by Florida law.

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[2] As pointed out in Respondent's main brief (pp. 15, 16, 21, 22), The Bar consciously elected not to allege that Guiking was Lehrman's client, successfully objected to Lehrman's evidence disproving that relationship, and even elicited from the Referee "I agree," sustaining that objection. But in his Report delayed 14 months, the Referee "concluded" on no "finding of fact" that Guiking was Lehrman's client.

True, "at the present time usury must be regarded as merely malum prohibitum, resting entirely upon statutory regulation and prohibition, and not as malum in se." 45 Am. Jur 2d Interest and Usury, Sec. 4 at p. 18 (1969), citing Matlack Properties, Inc. v. Citizen & Southern National Bank, 120 Fla. 77, 162 So. 148 (1935). Thus this Court has recognized that the moral foundation of usury prohibitions has been eroded by countless exceptions. Continental Mortage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla. 1981). So in Continental the Court held that parties to a loan transaction may by contract invoke the maximum-interest laws of any other state having a relationship to the transaction.

But the parties to this transaction, the German principal of a Netherlands Antilles corporation lending to the Dutch principal of a Panamanian corporation in order to fund the latter's gambling investment in a Columbian island casino, did not invoke the maximum-interest law of one of those countries (A. 7).

And it is true also that, even in Florida, one may lawfully lend or borrow at otherwise usurious rates, if one lends enough. Big money lenders may charge up to 45 percent

per annum for loans of $500,000 or more. Sec. 687.03(1), 687.071 (3), Florida Statutes (1983).

But, since Guiking says he only wanted and got $6,000 of someone else's money to throw away at the San Andreas casino, and he only wanted it for six days, the defense available to big money lenders would not be available to Pawlitzek in an action to collect from Guiking. Guiking, of course, refuses to repay even the $6,000 he says he got. And if in fact Lehrman gave Guiking only $6,000 in consideration of Guiking's $6,500 promissory note, the big money lender's defense is not available to Lehrman.

So Lehrman has committed a felony if, as Guiking says, Guiking got only $6,000. Sec. 687.071(3).

The question is why, in a one-on-one swearing match in a proceeding where the complainant must prove this felony at least by "clear and convincing evidence,"[3] this lawyer's testimony, aided by the presumption that burden implies,

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[3] Clear and convincing evidence, at least, is required. The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); State ex rel. The Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958); The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1972); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970); River Hills, Inc. v. Edwards, 190 So.2d 415, 424 (Fla. 2d DCA 1966).

should not be credited as a matter of law. Guiking got the $6,500, and he still has it.

Guiking receipted for $6,500 not once but twice (A. 7, 9). Why should those receipts not be credited, when supported by a lawyer's oath and contradicted only by a fourflushing gambler who specializes in getting loans that "are most frequently not paid back"? (Tr. 167; A. 29; main brief, pp. 26-27.)

To buttress Guiking's testimony, The Bar argues that when Guiking sought $6,500 from Tabor and Rose, he sought the money later, "to pay off the $6,500.00 note," not to fund his gambling venture (answer brief, p. 12). But only Guiking said that. Tabor and Rose said on oath that Guiking wanted $6,500 (not $6,000) for "some gambling equipment" (A. 20) or for "a crap table" at "some casino" (A. 24).

To declare Guiking's bare testimony neither "clear" nor "convincing" does not debate credibility questions contrary to the Referee's findings. It is a matter of recognizing that the burden of proof was on complainant to prove that Guiking was advanced only $6,000, not on Lehrman to prove that full value was advanced, and that the Referee inexplicably carried the complainant's burden by regarding

Guiking as Lehrman's client. That erroneous "conclusion" (A. 39), based on a wholly insufficient "finding" of Guiking's professed assumption that he was Lehrman's client (A. 37), imposed a burden of proof on Lehrman whether that was declared by the Referee or simply assumed in the Referee's eager cross-examination of Lehrman and in his finding that Lehrman's "client" did not get full value for his note in the transaction with "his" lawyer. Gerlach v. Donnelly, 98 So.2d 493, 498 (Fla. 1957), and cases cited.

The Bar, which never previously asserted such a thing, now asserts "belief" in the Referee's finding that Guiking was Lehrman's client (answer brief, p. 8, 9). But The Bar offers no defense of the finding, and seeks to avoid that issue altogether. The Bar entitles its argument (p. 7):

> An attorney/client relationship between respondent and Guiking is not necessary for approval of Referee's guilty findings.

But if Guiking was not Lehrman's client, and he was not, the Bar was obliged to prove by clear and convincing evidence that Lehrman lied and is a felon, that Guiking's two receipts speak falsehoods, that Guiking the intrepid spender of other people's money, speaking here to the end of avoiding his debt altogether, told the overwhelming truth.

Our main brief explained that attorney Lehrman simply wished to accommodate Guiking and that the savvy investor, Pawlitzek, had a perfectly satisfactory reason to lend Guiking $6,500 interest-free for six days, secured by the valuable Vizcaya mortgages. (Respondent's main brief, p. 28 - 30.) The Bar's response is simply that this is not a reasonable explanation (answer brief, p. 10- 12).

Neither the Referee's finding, predicated on a false assumption (no finding) that Guiking was Lehrman's client, nor The Bar's continued skepticism about a wholly reasonable explanation, supplies "clear and convincing" evidence that Lehrman lied and is a felon, and that Guiking should succeed in this attack on Lehrman, which Guiking formulated after deciding not to repay any amount owed (Tr. 138, A. 9).

The Bar then suggests that, even if Lehrman was not Guiking's lawyer, and even if Lehrman did give Guiking $6,500 as Guiking acknowledged in writing, then, even so, Lehrman acted unethically in representing Pawlitzek in making or in attempting to collect Guiking's loan, because it was secured by the Vizcaya mortgages (answer brief, p. 8). But those mortgages are not called into question in Lehrman's representation of Pawlitzek; they were simply the inert securities offered by Guiking himself for the loan.

Contrast, H. Drinker, Legal Ethics. 113 (1953) e.g., The Florida Bar v. Pitts, 219 So.2d 427 (1969); State ex rel. The Florida Bar v. Delves, 160 So.2d 114 (Fla. 1963). And, of course, The Bar never charged and the Referee did not conclude that Lehrman was unethical in undertaking Pawlitzek's representation except for his supposed simultaneous representation of Guiking. (See respondent's main brief, pp. 21-22.)

The basic charge against lawyer Lehrman was not proved by any standard of proof that is appropriate for such grave proceedings as these.

2. Pawlitzek's demand for $25,000 was not "usury."

The Bar continues to argue (answer brief, p. 14) that Pawlitzek's demand upon the defaulting Guiking for $25,000, else Pawlitzek would "negotiate the mortgages elsewhere" (A. 14), was a criminally "usurious" demand for which Lehrman is professionally liable. This is not tenable even in litigation between a debtor and creditor, much less in an action by The Florida Bar to dispel or suspend a member.

"[T]he vice of usury is one which inheres in the parties' agreement itself." Home Credit Company v. Brown,

148 So.2d 257, 260 (Fla. 1962). This principle still prevails, though for some years there was "an anomalous but long standing disregard of the general rule" in litigation over default penalties such as acceleration clauses in installment notes. 148 So.2d at 259, and fn. 6. In Home Credit, the 1959 debt instrument called for the payment of ten years' interest, together with the principal, in 120 monthly installments for the nonpayment of any of which the entire amount, including ten years' interest, became due. The debtor defaulted after one payment, the creditor sued for the whole, and the Court held the "acceleration option became effective by entry of a decree thereon," whereupon the interest reserved over ten years was extracted within two years, producing a usurious annual rate. 148 So.2d at 260.

Home Credit, still honoring the general principle that "the vice of usury is one which inheres in the parties' agreement itself," 148 So.2d at 260, determined the presence or absence of usury from "the literal contract terms" regarding acceleration, not from what the creditor's "complaint in fact seeks." 148 So.2d at 260.

No doubt because Home Credit said the term for which ten years' interest was reserved was ended by acceleration in

two years, when the circuit court entered its decree on May 11, 1961, Feemster v. Schurkman, 291 So.2d 622 (Fla. 3d DCA 1974) turned Home Credit's general principle on its head, saying "the usurious character of a transaction is no longer determined at the inception thereof, but rather on what actually develops." 291 So.2d at 628.

By that expansive statement, citing Home Credit, Feemster meant only that any sum taken or reserved by the creditor as consideration for the accelerated loan, whether called interest or not, must be apportioned over the life of the loan as it "actually develops" by earlier entry of a judicial decree. Thus in Feemster a "finder's fee," shared in by the lender, was held tantamount to interest and, when apportioned over the period of the debt ending with the decree, the fee made the transaction usurious.

The 1976 legislature alleviated, if indeed it had not previously done so,[4] the difficult debate - usury exists or

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[4] Chapter 70-331, Florida Laws, amended Section 687.03 to enact the same language as quoted above. Sec. 687.03, Fla. Stat. (1971). This seems not to have been cited to the Feemster court, which prorated the "finder's fee" as equivalent interest to the date of the circuit court's decree, not to the slightly later date on which, by the terms of the debt instrument, the debt was due. 291 So.2d at 628. Even using the later date, however, the Feemster result would have been the same.

not "at the inception" versus usury depends on what "actually develops" - by Chapter 76-124, amending Section 687.03, Florida Statutes:

> the rate of interest [i.e., usurious or not] . . . shall be determined and computed upon the assumption that the debt will be paid according to the agreed terms, whether or not said loan is paid or collected by court action prior to the term of said loan, and any payments [equivalent to interest, broadly defined] . . . shall be spread over the stated term of the loan for the purpose of determining the rate of interest. [Emphasis added.]

The question is what all this has to do with the matter before the Court in this proceeding. In Guiking's promissory note to Lehrman as trustee for Pawlitzek (A. 7) there is no allocation of long-term interest to monthly installment payments. There are no installment payments at all. There is no acceleration clause. There is no court decree accelerating payment of the debt. There is no provision that Guiking shall pay $25,000 in one month if he does not pay $6,500 in six days.

The Bar, briefing this case as though it were a civil action between Guiking and Pawlitzek, takes the adversary position in Guiking's behalf (answer brief, p. 13) that the principle of Home Credit is no longer viable; that "the

usurious character of a transaction is no longer determined at the inception thereof, but rather on what actually develops," quoting Feemster; and, therefore, that Pawlitzek's demand through Lehrman for $25,000, else Pawlitzek might "negotiate the mortgages elsewhere" (A. 14), was a demand of usurious interest in consideration of Pawlitzek's "forbearance" to collect the debt, which became unlawful by statutes enacted after Home Credit (answer brief, p. 14).

These are astonishing non sequiturs.

If Pawlitzek through Lehrman charged Guiking a sum of money in consideration of "forbearance to enforce the collection of any sum of money" (answer brief, p. 14), that sum would constitute interest under usury statutes in effect in Florida at least since 1892, not just under statutes enacted after Home Credit.[5] But Pawlitzek's demand was for $25,000 in satisfaction of the entire debt, not for "forbearance" in its collection.

If the Guiking promissory note had reserved a payment of $25,000 as interest, or as a finder's fee, or as additional

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[5] Ch. 4022, Sec. 2, Rev. Stat. (1892), continuing through Sec. 687.07, Fla. Stat. (1949).

consideration by any other name, on a loan of $6,500 for six days or six months or six years, then it would have been usurious. But the note contained no such provision. Pawlitzek's later demand for $25,000 was not for "forebearance" to collect the amount due. Rather it was simply a hard-nosed demand for total settlement, addressed to a defaulting debtor who refused to pay anything, backed up by Pawlitzek's undoubted power to "negotiate the mortgages elsewhere" (A. 14, see also A. 12).

A demand such as Pawlitzek's has never been regarded as "usury," and it cannot be. The case most nearly comparable, though still a far cry from this one, is McTigue v. American Savings & Loan Assoc. of Florida 344 So.2d 254 (4th DCA 1977). There the creditor filed a demand in Chapter X reorganization proceedings for interest exceeding the statutory rate. The Fourth District stated, 344 So.2d at 255:

> The issue before us is whether the mere fact that usurious interest was at one time claimed, not not paid, received, or awarded is sufficient to render the transaction itself usurious in law and effect. [Emphasis by the court.]

The court repeated the debtor's contention in his counsel's own words, 344 So.2d at 255, as though to allay any suspicion that the court itself had misunderstood:

> Counsel [for the debtor's trustee] stated unequivocally that the sole basis of his contention that usury was involved lies in American's fruitless and bare claims to usurious interest in the Chapter X proceeding."

Of this the court stated:

> We cannot agree with this position, which, we think, is in conflict both with the decided cases and with common sense.
>
> A holding that a mere demand for usurious interest unjustified by any contractual requirement to pay it, renders the loan usurious, would mean, for example, that an utterly baseless claim for 17% interest upon a simple note which plainly provides for only 9% would invalidate the transaction itself. This cannot be and is not the law.

The McTigue court, concluding its opinion with a citation to Home Credit - which The Bar here says is bad law now - repeated the familiar principle that "the vice of usury is one which inheres in the parties' agreement itself." 344 So.2d at 256. See also Dixon v. Sharp 276 So.2d 817, 821 (Fla. 1973).

McTigue is of course not exactly comparable to this case. A McTigue situation might have been created, as between Pawlitzek and Guiking, if following Pawlitzek's fruitless $25,000 demand, Pawlitzek sued Guiking to foreclose, and Guiking defended saying he was excused from paying because of that demand. But as between The Bar and

Lehrman, McTigue would be comparable to this case only if The Bar and this Court's Referee had recommended that Messrs. Broad & Cassel of Bay Harbor Islands and Larry A. Klein of West Palm Beach, counsel for the creditor who made the demand for interest in the debtor's Chapter X proceedings, 344 So.2d at 254, be disbarred or suspended for having advanced the claim in behalf of their client.

We trust that such foolishness will not be encouraged by the Court.

Conclusion.

These proceedings against attorney Lehrman should be dismissed.

Respectfully submitted,

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