IN THE SUPREME COURT
STATE OF FLORIDA

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BURROUGHS CORPORATION, a Michigan corporation, JAMES ROSS and ROBERT MADDEN,

Petitioners,

vs. CASE NO. 64,109

SUNTOGS OF MIAMI, INC., a Florida corporation,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

INTRODUCTION

This brief is submitted in response to Petitioners' Brief on Jurisdiction submitted August 22, 1983. References to Petitioners' Brief will be abbreviated as "JURIS/B". Page references are indicated by the arabic numeral following the brief abbreviation. For example: "JURIS/B 5" refers to page 5 of Petitioners' Brief on Jurisdiction.

STATEMENT OF THE CASE AND OF THE FACTS

Defendants/Petitioners, Burroughs Corporation, James Ross and Robert Madden, seek to have reviewed a decision of the District Court of Appeal, Third District, dated May 31, 1983, appearing at 433 So.2d 581. Petition for Rehearing was denied on July 13, 1983.

Petitioners were the original Defendants below and the Appellees before the District Court of Appeal. The original case was filed by Respondent, Suntogs of Miami, Inc. Respondent was Appellant before the District Court of Appeal.

Respondent generally concurs with the Statement of Case and Facts as presented in JURIS/B 1-3.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE IS IN CONFLICT WITH THOSE CASES HOLDING PUBLIC POLICY AGAINST USURY IS NOT SO STRONG AS TO OVERCOME THE POLICY IN FAVOR OF GIVING EFFECT TO THE EXPRESSED INTENTIONS OF CONTRACTING PARTIES.

ARGUMENT

General Principles Governing Conflict Jurisdiction.

Before directly addressing the specific issues raised on this Appeal, it would be well to review the general principles governing conflict jurisdiction. This Court has repeatedly affirmed that it was never intended that district courts of appeal should be intermediate courts.[1] Review by the district courts is intended in most instances to be final and absolute:

> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.[2]

An exception to district court finality occurs when one decision "expressly and directly conflicts" with other Florida appellate precedents.[3] The overriding concern is with decisions as precedents as opposed to adjudications of the rights of particular litigants. The issue is whether the district court's opinion has generated a "real and embarrassing conflict of opinion and authority" in the jurisprudence of this state.[4]

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[1] See, e.g., Ansin v. Thurston, 101 So.2d 808, 810 (Fla.1958).

[2] Id., 101 So.2d at 810.

[3] Art. V §3(b)(3), Fla.Const. (1980).

[4] Ansin v. Thurston, supra, 101 So.2d at 811; Florida Greyhound Owners & Breeders Association, Inc. v. West Flagler Associates, Ltd., 347 So.2d 408, 409 (Fla. 1977).

A direct conflict must appear on the face of the opinion.[5] The Supreme Court does not provide a means for a second appeal:

> It can be stated without hesitancy, qualification, or reservation, that every man is entitled to his day in court. He is vouchsafed a fair trial and he is secured a fair hearing on an appeal which he may take as a matter of right. But he is not entitled to two appeals.[6]

When asked to review decisions of the district courts for "conflicts" the Court examines the opinion on which the district court decision is based to determine whether, on its face, it shows the probable existence of a direct conflict of decisions on the same point of law.[7] This Court has consistently held that it will not look into the facts in order to determine whether a conflict exists.[8] The power to review decisions of the district courts in this respect is limited by the obvious purpose of the constitutional provision that the law announced in the decisions of the appellate courts of this state shall be uniform throughout.[9]

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[5] Lake v. Lake, 103 So.2d 639 (Fla.1958).

[6] Id., 103 So.2d at 642.

[7] Seaboard Air Line R.R. v. Branham, 104 So.2d 356, 358 (Fla.1958).

[8] N&L Auto Parts Co. v. Doman, 117 So.2d 410, 412 (Fla.1960).

[9] Id.

The Decision in the Instant Case Is Not in Conflict with Any Appellate Decision.

As a general rule, a contract valid under its governing law is valid everywhere. The law governing the contract in the instant case is that of Michigan. The contract contains a contractual limitation-of-action clause, valid under Michigan law, which provides for a two-year limitations period. Florida law provides a five-year statute of limitations for actions on a contract.[10] Enforcement of the contractual limitation clause would bar Plaintiff's action for breach of contract.

As a general rule, if the enforcement of a contract is contrary to public policy of the forum or place where enforcement is sought, it need not be enforced.[11] This Court has noted that Bond v. Koscot Interplanetary, Inc.,[12] cited at JURIS/B,6, "merely stands for the truism that an agreement against public policy is unenforceable."[13]

The trial court enforced the contractual limitation clause. The Third District Court of Appeal reversed on a holding that "a contractual stipulation purporting to shorten the otherwise applicable statute of limitations remains contrary to the public policy of Florida,...and sufficiently so as to avoid the parties' choice of another jurisdiction's laws sanctioning such stipulations."[14]

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[10] §95.11(2)(b), Fla.Stat. (1981).

[11] Davis v. Ebsco Industries, Inc., 150 So.2d 460 (Fla.3d DCA 1963).

[12] 246 So.2d 631 (Fla.4th DCA 1971), cert. denied, 283 So.2d 866 (Fla.1973).

[13] Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507, 509-510 (Fla.1981).

[14] 433 So.2d at 585.

Petitioner appears to suggest the decision of the Third District Court of Appeal expressly and directly conflicts with this Court's decisions in Continental Mortgage Investors v. Sailboat Key, Inc., supra, and Morgan Walter Properties v. International City Bank & Trust Co.[15] Those cases hold that Florida's legislation on usurious interest does not establish a public policy so strong as to overcome the policy in favor of giving effect to the express intentions of contracting parties. Those cases are silent as to public policy regarding a contractual limitation-of-action clause.

Sun Insurance Office, Limited v. Clay,[16] involved a contract of insurance, governed by the law of Illinois, which, like Michigan, does validate contractual limitation-of-action clauses. This Court determined that such a clause in the insurance contract was void and unenforceable in Florida.

The holding under review is based on a determination of "public policy." Justice Terrell remarked:

> Public policy is a fickle concept. No fixed rule has ever been defined by which it may be shown.[17]

The District Court recalled Justice Terrell's description of public policy as "a very unruly horse, and, when once you get astride it, you never know where it will carry you."[18]

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[15] 404 So.2d 1059 (Fla.1981).

[16] 133 So.2d 735 (Fla.1961).

[17] Russell v. Martin, 88 So.2d 315, 317 (Fla.1956), cited by the District Court, 433 So.2d at 585.

[18] Story v. First Nat. Bank & Trust Co., in Orlando, 115 Fla. 436, 439, 156 So.2d 101, 103 (1934), quoted by the District Court, 433 So.2d at 584.

The opinion of the Third District notes:

> Ordinarily, courts are called upon to seek out the public policy of a state in order to determine whether a particular contract or provision thereof is void.[19]

Use of the introductory word "ordinarily" anticipates the panel's confidence that in contrast to the usual unruly horse, "our mount in this instance [is] tame and our course clear."[20] In the ordinary case, courts are called upon to seek out public policy; in the instant case, there is a legislative manifestation of strong public policy. Courts cannot ignore public policy established by the legislature; indeed, courts must refuse to sustain what has been declared repugnant to public policy by valid statute.[21]

An agreement purporting to shorten the statute of limitations is contrary to public policy and void, pursuant to §95.03, Fla.Stat. (1981). Although the prior version of §95.03 explicitly declared the substance of the statute to be public policy, the 1974 streamlining of the section omitted this surplusage.[22] The substance of revised §95.03 is unchanged by the amendment. The panel correctly refused to divine a legislative intent to renounce the established public policy against contractual provisions reducing statutory limitations, and concluded:

> It follows that where the governing statute already declares a certain contract clause void, a manifestation of strong public policy is present.[23]

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[19] 433 So.2d at 584.

[20] 433 So.2d at 585.

[21] Local No. 234, U.A.J.A. v. Henley & Beckwith, Inc., 66 So.2d 818, 821 (Fla.1953).

[22] Ch. 74-382, §2, Laws of Fla.

[23] 433 So.2d at 584.

The District Court's holding in this case does not require the broad interpretation suggested by Petitioners at JURIS/B,6. Usury cases are distinguishable. Chapter 687, Fla.Stat. (1981), establishes legal interest rates and Chapter 95, Fla.Stat. (1981), establishes limitations of actions. However, significantly, there is no analog of §95.03 in Chapter 687 specifically declaring a contract void which contravenes the statute. Furthermore, as this Court remarked,[24] it is generally held that usury laws are not expressions of strong public policy and the usury statute itself is fraught with exceptions which belie the imputation of a strong public policy.

Appellate courts invariably are called upon to balance contravening rights and policies. Often the balance is delicate and one appellate court's view might tip the scales contrary to that of another appellate court's view, giving rise to conflicts. The instant case is not of that ilk.

CONCLUSION

The decision of the District Court of Appeal, Third District, that the Petitioners seek to have reviewed fails to expressly show direct conflict with any decision of an appellate court of this state. Respondent submits that the decision in the present case is correct.

Respondent therefore requests this Court to deny Petitioners' request to take jurisdiction and hear this case on the merits.

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[24] Continental Mortgage Investors v. Sailboat Key, supra, 395 So.2d at 509.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard S. Banick, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, Fifth Floor, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, Attorneys for Defendant Silton Data, Inc.; and Lawrence R. Heller, Esq., Gilbride, Heller & Brown, P.A., Suite 1946, One Biscayne Tower, Miami, Florida 33131, Attorneys for Defendant Burroughs, et al., this 30th day of August, 1983.

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