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IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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

Petitioners,

vs.

SUNTOGS OF MIAMI, INC., a Florida corporation,

Respondent.

CASE NO. 64,109

RESPONDENT'S BRIEF ON THE MERITS

HOFFMAN & HERTZIG, P.A.
250 Catalonia Ave., Ste. 601
Coral Gables, Florida 33134
Telephone: (305) 445-3100

Attorneys for Respondent

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Coral Gables, Florida 33134
Telephone: (305) 445-3100

Attorneys for Respondent

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STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case and of the Facts contained in the Initial Brief of the Petitioner, but wishes to invite the Court's attention to the following additional facts.

Proceedings in the Court Below

Respondent, Suntogs of Miami, Inc., was the Plaintiff in the Court below and Petitioners, Burroughs Corporation, James Ross and Robert A. Madden, were Defendants. An additional Defendant in the lower court, Silton Data, Inc., is not a party to this Appeal.

In this Brief, the parties will be referred to as "Plaintiff" or "Defendant" or by their names or abbreviated names, e.g., "Suntogs". The Defendant corporations, Burroughs Corporation and Silton Data, Inc., will be referred to as "Burroughs" and "Silton" respectively. Burroughs, Ross and Madden will be referred to collectively as "the Burroughs Defendants" or simply "Burroughs."

The symbols for references used in this Answer Brief are as follows: "R" for "Original Record on Appeal from the Circuit Court of Dade County, Florida, to the District Court of Appeal, Third District" and "A" for "Appendix to Initial Brief of Petitioner."

The proceedings in the Court below were commenced on January 23, 1978 (R,1-10) based upon representations made by Defendants in April, 1975 (R,261-262) and discovered by Plaintiff to be fraudulent in November, 1975. R,263. Plaintiff's Amended Complaint stated a cause of action for damages arising out of Defendants' failure to supply a functional computer system consistent with Defendants' representations to Plaintiff. R,23-37; A,1-15. It was alleged that Silton and the Burroughs Defendants made certain joint misrepresentations to Plaintiff concerning the computer system. The Amended Complaint includes

counts for fraud and deceit, negligence, breach of contract, breach of warranty and breach of guarantee. Dealings on behalf of Defendant Burroughs were alleged to have been conducted by Defendant Ross, as the Burroughs Miami Branch Manager, and by Defendant Madden, as a Burroughs computer salesman for the Miami area.

On December 10, 1981, the Burroughs Defendants filed their Motion for Summary Judgment. R,205-207. An Amended Order Granting Motion for Summary Judgment was entered by the Circuit Court on February 16, 1982, whereby the Court specified that the Burroughs Defendants' Motion for Summary Judgment was granted as to the counts pertaining to breach of contract, breach of guarantee, breach of warranty and negligence, on the basis that the Michigan statute of limitations applies and that statute of limitations had run. R, 3857; A,17. The Amended Order also provided that the Motion for Summary Judgment was granted as to the fraud and deceit counts in that the Court "finds no actual fraud against the named Defendants herein." R,3857; A,17. The Third District Court of Appeal reversed the summary judgment in favor of the Burroughs Defendants in all respects. A,18-25; Suntogs of Miami, Inc. v. Burroughs Corp., 433 So.2d 581 (Fla.3d DCA 1983). Burroughs does not contest the reversal on the fraud counts, confining its Petition in this Court to the contract and negligence counts.

Statement of the Facts

This action arises out of the sale to Plaintiff of a Burroughs B700 computer and two Burroughs AE 306 tape cassette data entry computers along with a system of application software known as the "Silton Basic Apparel Package."

Burroughs' relationship with Suntogs dated back to 1972 when Burroughs first sold to Suntogs an L4000 bookkeeping machine/computer to assist Suntogs

in manufacturing, planning and billing. R,1684-1685; R,3383. As Suntogs' business grew, the need for additional data processing capability became apparent. R,259. In order to address Suntogs' needs, Madden recommended and sold to Suntogs a second L4000. R,260. However, it became immediately apparent in the fall of 1974 that even two L4000's would not be sufficient for Suntogs' needs. R,260. Because of the L4000 limitations, Suntogs was in the market for a larger computer. Nonetheless, Suntogs continued to rely upon the L4000's as its sole operational data processing equipment. R,2433-2437.

In early 1975, Madden brought to Suntogs' attention the Silton Package for the B700. R,260-261. In this respect, Madden proposed to sell to Suntogs a Burroughs B700 computer for use with the Silton Package. R,260. In order to further acquaint Suntogs' officials with the Silton Package, Madden arranged for a Silton sales representative to come to Miami. R,261. Subsequently, Madden arranged for Suntogs to attend a demonstration of the B700 computer with the Silton Package at the Burroughs Miami offices. R,1206.

On April 7, 1975, Suntogs entered into an agreement with IBM to lease an IBM System 32. R,2048; R,2108. However, the Burroughs sales efforts continued: The B700/Silton Package demonstration for Suntogs was held on Friday, April 18, 1975. R,261. On Monday, April 21, 1975, Madden presented Suntogs with a B700 purchase contract in Miami and verbally guaranteed that the Silton Package would work on the B700. R,262. In reliance upon Madden's verbal guarantee, Suntogs signed the purchase contract in Miami on April 22, 1975. R,262; R,2127-2134; A,27. On April 23, 1975, a written guarantee signed by Madden and Ross in Miami was given to Suntogs. R,262; R,937. The B700 was physically delivered to Suntogs in Miami on July 8, 1975. R,262.

The B700 and the Silton Package were never functionally operational at Suntogs. Rather, serious problems developed: The reports generated by the

B700/Silton system were unreliable. R,2396. The invoicing and billing functions did not work. R,2568; R,2670-2672. And the data entry functions alone required nearly twenty-four hours per day (R,1813), resulting in huge backlogs. R,1851.

The B700 problems in turn caused serious financial problems for Suntogs: Suntogs lost customers because it was either unable to fill their orders or else filled the orders incorrectly due to computer errors. R,3254-3255. Suntogs' cash flow stopped because it could not invoice customers. R,2671-2672. Suntogs overproduced thousands of unordered garments due to erroneous computer reports, thereby necessitating their sale at season's end at a substantial loss. R,2474-2477. And Suntogs lost customers in following seasons because wholesalers and retailers lost confidence in Suntogs' ability to fill orders. R,3515. In sum, Suntogs suffered substantial damages as a result of this reliance upon Defendants' promises, and was forced into bankruptcy.

ISSUE PRESENTED FOR REVIEW

Petitioner has not stated the question presented for decision. Respondent states the question presented as follows:

> WHETHER 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, WHERE FLORIDA IS THE STATE OF MOST SIGNIFICANT RELATION TO THE TRANSACTION.

SUMMARY OF THE ARGUMENT

The trial judge granted summary judgment in favor of the Burroughs Defendants on Suntogs' contract and negligence claims because he determined that a contractual shortening of the period of limitations barred the action. The contractual limitation provision is sanctioned by Michigan law and the contract contains a choice of law provision selecting Michigan law to govern as to the interpretation, validity and effect of the contract.

If either the contractual limitation provision or the choice of law provision is nugatory, the action is not time barred. Absent the contractual limitation provision, under the applicable statute of limitations of either Florida or Michigan the action is not time barred. Absent the choice of law provision, the contractual limitation provision is void and unenforceable pursuant to §95.03, Fla.Stat. (1981).

The Third District Court of Appeal determined the choice of law provision to be valid, but refused to enforce the contractual limitation provision as against the public policy of Florida. The Third District did not rely on a judicial analysis of public policy. Rather, the Third District interpreted the plain words of §95.03 to be a sufficiently strong expression of public policy to override the parties' choice of law.

While Suntogs' argument focuses on the applicability of the public policy exception, Suntogs suggests three additional persuasive arguments for finding Suntogs' claims not time barred. First, the choice of law provision governs substantive issues only and since limitation of actions is procedural, the law of the forum governs this issue notwithstanding the parties' choice of Michigan law. Second, since the transaction does not bear a "reasonable relation" to Michigan within the purview of the applicable choice of law enabling statute, the choice of law provision is invalid. Third, since the contract is alleged to have

been induced by fraudulent misrepresentations, both the choice of law provision and the contractual limitation are void at the behest of the defrauded Plaintiff.

ARGUMENT

INTRODUCTION

Burroughs is asking this Court to hold that in a conflict of laws determination in a common law action on a contract for the sale of a computer, Florida's interest in not enforcing a purely procedural contractual limitation of action provision is outweighed by a choice of law provision for Michigan law to govern "as to the interpretation, validity and effect" of the contract. The contractual limitation provision is expressly declared void by a Florida statute, and the Florida legislature repealed a statute identical to that of Michigan which validates the contractual shortening of the limitation period. The computer was manufactured in Pennsylvania for delivery in Florida. The contract was negotiated and executed in Florida for performance in Florida. Plaintiff is a resident Florida corporation with its only place of business in Florida. The Defendant manufacturer, Burroughs, does business and maintains offices and salesmen in Florida. The only contact of the transaction with Michigan is the principal place of business and state of incorporation of Burroughs.

Burroughs relies on this Court's holding that in a conflict of laws determination in an interstate loan transaction, Florida's interest in allowing the defense of usury to invalidate the contract and extinguish the right of action is not outweighed by a choice of law provision for Massachusetts law to govern. Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla.1981). Usury protections are creatures entirely of statutory regulation and not founded upon any common law right, either legal or equitable. The subject loan agree-

ment was executed and made payable in Massachusetts, and the funds were originally disbursed there. The plaintiff's only domicile, office and principal place of business was in Boston. In Boston, it approved loans, handled all commercial banking arrangements, carried on relations with underwriters and pursued other means of raising funds for interstate loans.

Burroughs ignores this Court's admonition in Continental Mortgage Investors that "Courts in almost every jurisdiction recognize that a usury claim presents a distinct choice of laws question." 395 So.2d at 510. The rule with respect to the question of usury followed by this Court is to apply foreign law if the foreign jurisdiction has a "normal relation" to the transaction and would also favor the agreement. 395 So.2d at 512. In determining a "normal relation" in a usury claim, the traditional factors of place of execution and place of performance are today "of little practical value since these contacts are so easily manipulated in our mobile society." 395 So.2d at 510. See also Restatement (Second) of Conflict of Laws §203 (1971), Comment c. This Court considered most significant in Continental Mortgage Investors, a usury case, the factors of domicile and place of business to establish a normal relationship. 395 So.2d at 513. Similarly, in another usury case, Morgan Walton Properties v. International City Bank & Trust Co., 404 So.2d 1059 (Fla.1981), this Court determined that the loan agreements had a normal relation to Louisiana because Louisiana was not only the place of contracting and the place of performance, but was also the state of the lender's domicile. Id., 404 So.2d at 1062.

Burroughs urges this Court to extend the usury conflict of laws validation rule to uphold a contractual limitation clause, repugnant to a Florida statute, in an action for breach of contract for the sale of a computer. Further, Burroughs urges that its domicile, as the sole relation to Michigan, establishes the requisite normal relation to override the public policy of Florida, the state of

most significant relation to the transaction, as that public policy is expressed by acts of the Florida legislature. Suntogs submits that this is a most untenable position. Suntog's analysis in support of this assertion follows.

I. FLORIDA HAS A STRONG PUBLIC POLICY AGAINST CONTRACTUAL STIPULATIONS SHORTENING THE PERIOD OF LIMITATION OF ACTION

A. Florida is the state of most significant relation to the transaction.

Important contacts in determining the state of most significant relation are: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement (Second) of Conflict of Laws §188(2) (1971) and Comment e. Furthermore, this contract for the sale of goods is governed by the Uniform Commercial Code, which places great significance on the place of delivery. Restatement (Second) of Conflict of Laws §191 (1971); §672.401, Fla.Stat. (1981).

All negotiations for the subject contract took place in Florida. Burroughs maintains sales offices in Florida and dealings on their behalf with Suntogs were conducted by the Burroughs Miami Branch Manager, Defendant Ross, and the Miami Area Burroughs computer salesman, Defendant Madden. A demonstration was arranged for Suntogs by Madden at the Burroughs Miami offices. The purchase contract was signed in Miami and a written guarantee signed by Madden and Ross in Miami was given to Suntogs. The computer, the subject matter of the contract, was manufactured in Pennsylvania and delivered to Suntogs in Miami, for performance in Miami. Suntogs, a Florida corporation, was located exclusively in Miami before it was forced into bankruptcy by the failure of the Burroughs computer. Burroughs, a Michigan corporation, with its principal

place of business in Michigan, transacts business in Florida and maintains offices in Florida staffed by residents of Florida.

Thus, Florida is the state of most significant relation to the transaction. Absent the choice of law provision in the contract, §95.03, Fla.Stat. (1981), applies to void the contractual shortening of the otherwise applicable statute of limitations.

B. The public policy exception.

In view of the choice of law provision in the contract, the validity of the contractual provision limiting the time in which an action may be brought under the contract thus turns on Michigan's relation to the transaction and whether application of Michigan law would be contrary to a fundamental policy of Florida, the state having a materially greater interest in the determination of the issue, and which would be the state of the applicable law in the absence of an effective choice of law by the parties. See, Restatement (Second) of Conflict of Laws §187 (1971).

As a general rule, an agreement against the public policy of the forum is unenforceable. Continental Mortgage Investors v. Sailboat Key, Inc., supra, 395 So.2d at 509-510. As stated by this Court in Lloyd v. Cooper Corp., 101 Fla. 533, 134 So.2d 562 (1931):

> A contract made and valid in one state may not be enforced in another state when it is contrary to the law and public policy of the latter state. [Citation omitted.] Id., 134 So.2d at 563.

Nor does the principal of comity require our courts to enforce a contract according to the law of another state where such enforcement would be in conflict with our laws, and being thus in conflict, would work against our own citizens,

and give to a nonresident an advantage over a resident. Walters & Walker v. Whitlock, 9 Fla. 86 (1860).

The public policy exception has been invoked by Florida courts to invalidate covenants not to compete in employment contracts. Davis v. Ebsco Industries, Inc., 150 So.2d 460 (Fla.3d DCA 1963) (recognizing the validity of the parties' choice of law but merely refusing to enforce it); C&D Farms, Inc. v. Cerniglia, 189 So.2d 384 (Fla.3d DCA 1966) (assuming the validity of the covenant under the parties' choice of law but declaring it unenforceable as against public policy). See also, Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So.2d 825 (Fla.1st DCA 1979) (refusing to apply the parties' choice of law invalidating a covenant not to compete and upholding an injunction supported by the express public policy as set forth in a Florida statute). Other applications of the public policy exception are to "other insurance" clauses, Sellers v. United States Fidelity & Guaranty Co., 185 So.2d 689 (Fla.1966); Gillen v. United Services Automobile Association, 300 So.2d 3 (Fla. 1974), and to gambling obligations, Young v. Sands, Inc., 122 So.2d 618 (Fla. 3d DCA 1960).

The public policy exception has also been applied to invalidate contractual provisions fixing the time for instituting suit under the contract at a period of time less than that prescribed by the statute of limitations of Florida. W.F. Thompson Construction Co. v. Southeastern Palm Beach County Hospital District, 174 So.2d 410 (Fla.3d DCA 1965) (building contractors' labor and material payment bond); Sun Insurance Office, Ltd. v. Clay, 133 So.2d 735 (Fla.1961) (personal property all-risk floater insurance policy); Schluter v. National Union Fire Ins. Co., 144 So.2d 95 (Fla.2d DCA 1962) (insurance policy covering a vessel); Quarty v. Insurance Company of North America, 244 So.2d 181 (Fla.2d DCA 1971) (homeowners insurance policy). These cases bottom the application

of the public policy exception to contractual limitation of action clauses on §95.03, Fla.Stat., as did the Third District Court of Appeal in the instant case.

Significantly, in Sun Insurance Office, Ltd. v. Clay, supra, this court held that the prohibition against contractual stipulations shortening the period of limitation applies to " 'any contract whatever' -- foreign or domestic -- when Florida's contact therewith, existing at the time of execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." Id., 133 So.2d at 738. This Court gleaned the legislative intent from §95.03 as it formerly read:

> All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section.

In 1974, however, §95.03 was amended. Ch. 74-382, §2, Laws of Fla. The new streamlined version declares:

> Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.

Burroughs contends the new version of the statute constitutes a renunciation by the legislature of the public policy against contractual provisions reducing statutory limitations. The Third District Court of Appeal could not divine such a legislative intent. A,21; 433 So.2d at 584. Burroughs' arguments apply to legislative changes that are material and substantive and do not apply to omissions of surplusage. The substance of revised §95.03 is manifestly unchanged by the amendment.

Moreover, the Michigan statute sanctioning a contractual shortening of the limitations period is contained in §2-725 of the Uniform Commercial Code as enacted in Michigan. M.S.A. §19.2725(1), M.C.L. §440.2725(1); A,66. The identical provision was originally included in Florida's Uniform Commercial Code. See Ch. 65-254, §1, Laws of Florida. In 1974, the same year §95.03 was amended, the Florida legislature repealed that provision. Ch. 74-382, §26, Laws of Florida. Any act of the legislature must be interpreted as an expression of public policy. When weighed against an amendment retaining the substance of §95.03, the repeal of the same statute in Florida as that relied upon by Burroughs to validate the contractual limitation under Michigan law militates in favor of finding a strong public policy against a contractual shortening of the limitations period in the instant case.

C. Acts of the legislature constitute an expression of strong public policy.

In its opinion, the Third District recognized that 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. A,21; 433 So.2d at 584. Burroughs argues that this Court's decisions in Continental Mortgage Investors and Morgan Walton Properties mandate a judicial determination of public policy as a matter of course in all public policy exception situations. Moreover, Burroughs urges a usury action analysis of factors indicating strong public policy. Burroughs is misguided in its reliance on the usury cases to support this novel theory. This Court carefully and explicitly limited those decisions to their circumstances as usury actions.

This Court extensively discussed the elusive and variable concept of "public policy" in Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So.

761 (1907). In determining that no judicial analysis is required to find a contract in contravention of our statutes void as against public policy, this Court stated:

> There is no better way for a state to declare its public policy than through its lawmaking power. Id., 45 So. at 787.

In Local No. 234, U.A.J.A. v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1963), this Court affirmed that an agreement which violates a statute is illegal and void and will not be enforced. Courts cannot ignore public policy established by the legislature; indeed, courts must sustain what has been declared repugnant to public policy by statute. Id. There is a broad general rule that an agreement which violates a statute or is contrary to public policy is illegal, void and unenforceable as between the parties. Bond v. Koscot Interplanetary, Inc., 246 So.2d 631, 634 (Fla.4th DCA 1971), cert. denied, 283 So.2d 866 (Fla.1973). On grounds of public policy, clauses in a contract which violate a statutory provision are nugatory and will not be given effect. Department of Motor Vehicles v. Mercedes-Benz of North America, Inc., 408 So.2d 627, 630 (Fla.2d DCA 1981).

The Third District Court of Appeal did not indulge in an in-depth judicial determination of public policy in this case because it recognized that "where the governing statute already declares a certain contract clause void, a manifestation of strong public policy is present." A,21; 433 So.2d at 584. The Third District was confident that the plain language expression in §95.03 is a sufficient expression of strong public policy to hold 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 stipulation. A,21; 433

So.2d at 585. Suntogs submits this Court should properly affirm the Third District's holding.

D. The statute of limitations of the forum controls.

The issue in this case is whether the remedial provisions of §95.03, Fla. Stat. (1981), will be applied to save a suit barred by a contractual period of limitations which is valid under the law of Michigan chosen by the parties to govern "as to the interpretation, validity, and effect" of the contract.

Florida's established rule for choice of law governing the validity and interpretation of contracts looks to the law of the place of contracting and the law of the place of performance, while the remedies are governed by the law of the forum state. Perry v. Lewis, 6 Fla. 555, 560 (1856); Morgan Walton Properties v. International City Bank & Trust Co., supra, 404 So.2d at 1061. The law is firmly established that statutes of limitations, and the exceptions thereto, affect only the remedy of the litigant and the limitation of action law of the forum will be applied. Hoagland v. Railway Express Agency, 75 So.2d 822, 827 (Fla.1954) (en banc); Colhoun v. Greyhound Lines, Inc., 265 So.2d 18, 20 (Fla.1972).

It is noted that Florida's "borrowing statute," §95.10, Fla.Stat. (1981), is part of this state's limitation of action law, but is inapplicable in the instant case because the cause of action arose in Florida. Another exception occurs where the cause of action is statutory, and the statute creating the right also establishes the period of limitations. See, Restatement (Second) of Conflict of Laws §143 (1971). The instant case involves a common law action, so it does not fall within this exception. A further exception, clearly inapposite, occurs with contracts governed by federal legislation superseding state legislation on

the subject, such as the regulation of shipments of goods in interstate commerce, which has been preempted by federal authority.

Michigan law concurs with Florida in holding that in common law actions the limitations period for bringing a suit is governed by the law of the forum. Pusquilian v. Cedar Point, 41 Mich.App. 399, 200 N.W. 2d 489, 491 (1972).

E. The transaction does not bear a "reasonable relation" to Michigan.

Burroughs also seeks support in the rule that the construction of a statute is aided by the principle that statutes should be construed in pari materia, pointing to the Uniform Commercial Code version of the party autonomy rule, as embodied in §671.105(1), Fla.Stat. (1981), which lacks a reference to the public policy exception. At the outset, it is noted that §671.105(1) limits the right of the parties to choose the law of jurisdictions to which the transaction bears a "reasonable relation." The Florida Code Comments to §671.1-105, Fla.Stat.Ann. (1966), note:

> Apparently "reasonable relation" means, however, that a significant part of a tranaction must occur in a jurisdiction to warrant the application of the laws of that jurisdiction to the relations of the parties. The question as to whether a "reasonable relation" exists to warrant a choice of jurisdictions has been left by the Code to be determined in each case by the court determining the issue.

In the instant case, the Third District Court of Appeal determined that because Burroughs is a Michigan corporation with its principal place of business in Michigan, the sale of the computer to Suntogs bears a "reasonable relation" to that state. A,20; 433 So.2d at 584. As discussed above, Florida is the unique state of most significant relation to the transaction. It is submitted that the Third District erred in applying the "normal relation" test of a usury transaction to determine a "reasonable relation" in this action based on a contract for the sale of goods.

In light of Florida's substantial relation and Michigan's minimal relation to the transaction, it would appear that §671.105(1) invalidates the parties' choice of Michigan law. Of course, in that event, §95.03 invalidates the contractual shortening of the limitation period.

Notwithstanding the finding of a reasonable relation, the Third District declined to apply Michigan law to permit operation of the clause reducing the limitation period, upon application of the public policy exception. A,20; 433 So.2d at 584. The Third District inferred from the Florida Code Comments to §671.1-105, Fla.Stat.Ann. (1966), that application of the public policy exception is a matter left to the established conflict of laws rule of each jurisdiction, and did not hesitate to read the exception into the Code provision. A,20; 433 So.2d at 584, n.3.

F. Fraud in the inducement.

As a further basis for overriding the choice of law provision of the contract, it is noted that fraud in the inducement should negate the provisions of a written contract at the behest of an injured plaintiff. A contract procured by fraud is never binding on an innocent party. Florida East Coast Ry. Co. v. Thompson, 93 Fla. 30, 111 So. 525 (1927); §672.721, Fla.Stat. (1981), Restatement (Second) Contracts §164 (1981); Restatement (Second) of Conflict of Laws §187(2) (1971). Neither the choice of law provision nor the contractual limitation provision in the contract is determinative since the alleged fraudulent misrepresentations were made in Florida to Suntogs, a Florida corporation doing business in Florida, before the agreement was executed. The evidence with respect to Suntogs' claims of fraud relates to events which occurred in Florida. The system was delivered in Florida and was expected to operate in Florida.

Florida has a strong interest in applying its law where fraud upon its domiciliaries is alleged. Restatement (Second) of Conflict of Laws §148(1) (1971).

Upon weighing the relative interests of Michigan and Florida the balance is found to be in favor of applying the Florida statute of limitations. This is so independent of §95.03, because both the choice of law provision and the contractual limitation provision are void at the behest of Suntogs who was induced to enter into the contract by Burroughs' fraudulent misrepresentations.

II. THE APPLICABLE STATUTORY PERIOD OF LIMITATION OF ACTION IS AT LEAST FOUR YEARS

Burroughs argues that the "applicable statute of limitations" referred to in §95.03, Fla.Stat. (1981), provides a one year period of limitation of action on the subject contract. Burroughs assumes for its argument that the transaction bears a "reasonable relation" to Michigan, so that the choice of Michigan law provision is sanctioned by §671.105(1), Fla.Stat. (1981). Burroughs further assumes the choice of Michigan law to govern the validity and construction of the contract would extend to govern the procedural rules of the Florida forum. Burroughs thereupon reasons that since M.S.A. §19.2725(1), M.C.L. §440.2725 (1), permits a contractual shortening of the applicable limitations period to one year, then the applicable limitations period is one year.

Burroughs' reasoning is faulty. The "applicable statute of limitations" referred to in §95.03, Fla.Stat. (1981), contemplates the absence of a contractual limitations clause, while M.C.L. §440.2725(1), requires the presence of a contractual limitations clause to trigger its provisions permitting reduction of the period of limitation. Absent a contractual limitations clause, M.C.L. §440. 2725(1) provides a four year period of limitation. Florida's applicable statute of limitations, §95.11(2)(b), Fla.Stat. (1981), provides a five year period of limita-

tion. Neither the Florida nor the Michigan applicable statute of limitations bars Suntogs' contract claims against Burroughs.

III. SUNTOGS' NEGLIGENCE CLAIMS ARE TORT CLAIMS

The trial court's entry of summary judgment in favor of Burroughs on Suntogs' claim of negligent performance of the contract also was based on the contractual limitation clause. Because the Third District determined the clause shall have no effect, it found it unnecessary to decide whether such a claim would come within the clause's interdiction. A,21-22; 433 So.2d at 585.

Burroughs argues that the negligence claims arise out of obligations under the agreements, thereby falling within the purview of the contractual limitation clause. The negligent acts complained of occurred in Florida and are governed by Florida law independent of any contractual agreement to interpret and construe the contract pursuant to Michigan law.

The negligent performance of a contractual duty properly supports a tort action. Hanft v. Southern Bell Telephone & Telegraph Co., 402 So.2d 453 (Fla.3d DCA 1981). The right of action on the contract and the right to sue for the breach of the collateral duty are distinct, the only limitation on a suit for either or both being that the same party cannot be compensated twice for the same wrong. Parrish v. Clark, 107 Fla.598, 145 So.848 (1933). When it is proper to bring either a tort action or a contract action, the courts are open for the plaintiff to bring action on whatever theory he elects. Holbrook v. City of Sarasota, 58 So.2d 862 (Fla.1952). Plaintiff controls the election of his action, not Defendants.

Suntogs has elected to plead tort counts against the Burroughs Defendants for the negligent performance of a contractual duty in addition to breach of contract claims. The issue here is whether Burroughs can force Suntogs to sue

only on the contract claims, for which Burroughs is asserting a defense of the contractually shortened limitations period, and not on the negligence claims, for which Burroughs presents no defense. Burroughs might prefer to be sued only in contract, but that election is not within Burroughs' prerogative. The negligence counts against the Burroughs Defendants are not barred by the applicable statute of limitations, having been timely brought. The trial court erred in entering summary judgment in favor of the Burroughs Defendants on the negligence claims based on the running of the statute of limitations.

Schenburn v. Lehner Associates, Inc., 22 Mich.App.534, 177 N.W.2d 699 (1970), cited by Burroughs, is not inconsistent with Suntogs' right to sue the Burroughs Defendants in tort. In that case suit was brought in both tort and (implied) contract and the issue was whether a party can invoke the longer contract statute of limitations by the mere expedient of calling a tort breach of an implied contract. The Michigan court held that in general where the injury is occasioned by negligent breach of some express contractual provision, suit on the contract is not barred by the shorter negligence statute of limitations, and for contracts of a commercial nature or where the breach injures one in his financial expectations and economic benefit rather than his person or specific property, suit on the contract is not barred by the shorter negligence statute of limitations even when founded upon implied contract. Michigan law does not require Suntogs to abandon its negligence claims.

CONCLUSION

For the reasons set forth above, Suntogs respectfully urges this Court to affirm the opinion of the Third District Court of Appeal and to remand with instructions to the trial court to proceed with a jury trial on the merits. Alternatively, if this Court should find that a judicial determination of public

policy based on in-depth analysis is required, Suntogs urges application of a significant relation test rather than the normal relation test applicable to usury actions. Finally, should this Court validate the contractual limitation clause, Suntogs seeks a determination that the negligence claims do not fall within the interdiction of that clause.

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, Suite 1946, One Biscayne Tower, Miami, Florida 33131, Attorneys for Defendant Burroughs, et al., this 11th day April, 1984.

WEINTRAUB, WEINTRAUB, SEIDEN,
DUDLEY & PRESS
Attorneys for Plaintiff
2250 S.W. 3rd Ave., 5th Floor
Miami, Florida 33129
Telephone: (305) 858-0220

HOFFMAN & HERTZIG, P.A.
Attorneys for Plaintiff
250 Catalonia Avenue
Suite 601
Coral Gables, Florida 33134
Telephone: (305) 445-3100

By: David Hertzig

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