C/A 6-5-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,109

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

Petitioners,

v.

SUNTOGS OF MIAMI, INC., a Florida corporation,

Respondent.

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

1. Suntogs of Miami, Inc. (hereinafter referred to as "Suntogs") commenced legal proceedings in Dade County Circuit Court by filing its Complaint on January 23, 1978 against Burroughs Corporation, James Ross and Robert Madden (hereinafter referred to as "Burroughs"). Thereafter, Suntogs filed an Amended Complaint against Burroughs. Said Amended Complaint included counts for breach of contract, breach of warranty, breach of guarantee, negligent breach of contract and fraud (A.1).

2. Thereafter, Burroughs filed its Answer and contained within said Answer was the affirmative defense that the various actions were barred by the applicable statute of limitations.

3. On December 10, 1981, Burroughs filed its Motion for Summary Judgment claiming that the applicable statute of limitations barred the claims in question.

4. On January 27, 1982, the Dade County Circuit Court granted Burroughs' Motion for Summary Judgment as to all counts (A. 16).

5. An Amended Order for Summary Judgment was entered by the trial court on February 16, 1982, which held that Summary Judgment was being granted as to all of the non-fraud counts because the Michigan statute of limitations was applicable and that said action was filed beyond the time permitted by same (A. 17).

6. Thereafter Suntogs appealed to the Third District Court of Appeal which ruled on May 31st, 1983 that a contractual

stipulation purporting to lower the statute of limitations is contrary to the public policy of the State of Florida, despite the fact that the parties contractually agreed that Michigan law, which permitted the lowering of said statute of limitations, governed. The Third District Court of Appeal specifically recognized that the choice of law provision chosen by the parties in the contract was valid because Burroughs Corporation, being a Michigan corporation, with its principal place of business in Michigan had a reasonable relation to that state (A. 20).

7. On July 13, 1983, the Third District Court of Appeal denied Burroughs' Motion for Rehearing (A. 26).

8. Thereafter, Burroughs filed its Petition for Certiorari before this Court. The Court accepted jurisdiction.

STATEMENT OF THE FACTS

1. On April 22nd, 1975, Burroughs and Suntogs entered into a written contract which governed the rights, obligations, and liabilities of the parties (A.27). The contract contained both a choice of law provision[1] and a provision indicating that either party must bring suit within two (2) years for any breach of the agreement or failure to perform obligations under said agreement.[2]

2. Burroughs Corporation is a Michigan corporation with its principal place of business in Michigan and as such has a normal and reasonable relationship with the State of Michigan (A. 20).

3. Suntogs is a Florida corporation in the business of manufacturing and selling women's apparel. Suntogs can best be described as a large commercial entity shipping its wares to practically every state in the Union as well as to foreign nations. Suntogs' customers are located in Arkansas, Alabama, Arizona, California, Colorado, Connecticut, Washington, D. C., Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Maine, Minnesota, Missouri,Mississippi, Montana, Nebraska,

1/ The laws of the State of Michigan shall govern as to the interpretation, validity, and effect of the agreements and any amendments and modifications thereto (A. 30).

2/ No action arising out of any claimed breach of the agreements or obligations under the agreements may be brought by either party more than two years after the cause of action has accrued (A. 29).

North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Tennessee, Utah, Vermont, Virginia, Washington and Wisconsin. In addition, Suntogs also ships merchandise to Canada, Guam, Venezuela, Curacao, Bermuda, Hong Kong, Mexico, Panama, Canal Zone and Puerto Rico (A. 31).

4. The contract for the sale of a Burroughs computer was executed in April of 1975. The computer was delivered shortly thereafter and in December of 1975, Suntogs "pulled the plug" on the computer never to use it again (A. 62).

5. Suit was filed by Suntogs in January of 1978. It is undisputed that Suntogs did not bring its action in Dade County Circuit Court against Burroughs until after the two year statute of limitations fixed by the contract had expired (A. 65).

6. Section 19.2725(1) Mich. Comp. Laws expressly permits the lowering of a statute of limitation in this situation to not less than one year if the parties contractually agree. (A. 66).

7. Section 95.03, Florida Statutes (1982) purportedly does not permit the lowering of any limitation period.

ARGUMENT

I.

NO STRONG OR OVERRIDING PUBLIC POLICY EXISTS IN THE STATE OF FLORIDA WHICH WOULD PREVENT TWO COMMERCIAL PARTIES FROM CONTRACTING TO LOWER THE STATUTE OF LIMITATIONS IN AN AGREEMENT WHEN CHOOSING THE LAW OF A STATE OTHER THAN FLORIDA WHEN SAID STATE HAS A REASONABLE RELATIONSHIP WITH THE TRANSACTION AND ITS LAW PERMITS SAID LIMITATION PERIOD TO BE LOWERED.

In Continental Mortg. Inv. v. Sailboat Key, Inc. 395 So.2d 507 (Fla. 1981) this court clearly recognized that contractual provisions choosing the law of another state will be honored so long as said provisions do not conflict with the "strong public policy of Florida." Id at 509.

Moreover, this court was clear in its mandate requiring any lower court to make a determination as to whether or not a strong public policy exists in the State of Florida in order to find whether any particular contractual provision or clause should be considered void because of a conflict with the laws of Florida:

> We do not think the mere fact that there exists in Florida a usury statute which prohibits certain interest rates establishes a strong public policy against such conduct in this state where interstate loans are concerned.

Morgan Walton Properties,Inc. v. Intern.City Bank & Trust Co., 404 So.2d. 1059 (Fla. 1981) at 1062 quoting Continental at 509. Both Continental and Morgan Walton required an in-depth analysis as to whether or not any contractual provision is indeed against

the "strong public policy of the State of Florida."

In any contract wherein the parties mutually choose the law of the state other than that of the forum, the threshold question is whether or not the transaction bears a reasonable relationship to the law of the chosen state. See, Continental; see, also §671.105 Fla. Stat. (Supp. 1983). If the'reasonable relationship test' is satisfied then the court must look to whether or not the strong public policy of Florida outweighs the parties' contractual rights to choose the law of another state when a conflict exists. In the case at bar it is clear that Burroughs Corporation has its principal place of business in the State of Michigan, is a Michigan corporation, and obviously has a reasonable relationship with that state. Suntogs of Miami, Inc. v. Burroughs Corp.,433 So.2d 581, 584 (Fla. 3d DCA 1983); see, also Continental.

Section 95.03 Florida Statutes (1982) does not permit the lowering of any statutes of limitation. Michigan, the law chosen by the parties, permits the limitation period to be as low as one year. Pursuant to the Michigan statute, the parties agreed that the statute of limitations would be two years.

In Continental this court emphasized various factors that must be analyzed in order to determine whether or not the State of Florida's public policy is so strong in any given area so as to void or vitiate the expectations of two commercial entities in choosing the law of the state that has a reasonable

relationship with the transaction. What follows is an analysis of those factors stressed by this court.

A. The statutes of limitation are fraught with exceptions belying the imputation of a strong public policy.

Continental carefully analyzed the miscellaneous exceptions to the usury statute. See Continental at 509. The exceptions in the area of statutes of limitation are obviously more pervasive. Case law exceptions provide that a contractual provision limiting the statutes of limitation in any transaction (i.e. bills of lading and other contracts) governed by the Carriage of Goods by Sea Act, 46 U.S.C.A. §1300 et. seq. is valid notwithstanding former §95.03 Florida Statutes (Comp.Gen. Laws 1927, §4651), Arrow Beef Corp. v. South Atlantic & Carib L., Inc., 287 So.2d 43, 44 (Fla. 3d DCA 1973). The same principle applies to contracts within the ambit of the Federal Aviation Act of 1958, 49 U.S.C.A. §1373, Life Sciences, Inc. v. Emery Air Freight Corp., 341 So.2d 272 (Fla. 2d DCA 1977).

In addition, Florida statutory exceptions include, but are not limited to §718.124, Florida Statutes (Supp. 1983) wherein the statute of limitations for actions brought by condominium or cooperative associations do not begin to run until a majority of the Board of Directors is elected; §658.62, Fla. Stat. (Supp. 1982) wherein a three year statute of limitations period is fixed for dispute of bank statements; §517.302, Florida Statutes (Supp. 1982) altering the statute of limita-

tions to five years for prosecution of securities law offenses; §733.104, Florida Statutes(1976) which suspends the statute of limitations in certain instances in favor of a personal representative; §733.702, Florida Statutes (1976) involving a separate statute of limitations on claims against a decedent's estate. Moreover, in Guaranty Trust Life Ins. Co. v. Fundora, 343 So.2d 71 (1977), the Third District Court of Appeal read several insurance statutes in pari materia to uphold a contractual provision shortening the statute of limitations against claims that the contract violated §95.03, Florida Statutes (1982). Id. at 73.

Additionally, Chapter 95 Florida Statutes contains internal exceptions. Two such exceptions are §95.05, Florida Statutes (1982) which tolls the otherwise applicable limitation period and §95.10, Florida Statutes (1982) which is Florida's borrowing statute. Said statute impliedly emphasizes the lack of a strong public policy attaching to statutes of limitation in general since under the statute if an action is barred in the state in which the cause of action arose, it is likewise barred in Florida, even if a Florida citizen is involved and even if the Florida statute of limitations has not as yet run. See Beasley v. Fairchild Hiller Corp., 401 F.2d 593 (5th Cir. 1968).

It is apparent that the statutes of limitation are riddled with statutory and case law exceptions and, as in Continental Mortg. Inv. v. Sailboat Key, Inc., 395 So.2d 507

(Fla. 1981), it is difficult for one to believe that the imputation of a strong public policy could exist.

Moreover, this court emphasized in Continental that public policy in the usury field is at the very least relatively flexible in a confrontation with commercial reality. Id. at 509. No less flexibility has been shown by the legislature over the past few years in connection with changes in the limitations period in Florida. Indeed, §95.11 Florida Statutes (1982) the heart of the statutes of limitation chapter, has been changed or modified six times [3] since 1971, and §95.031, Florida Statutes (1982) which governs computation of time, has been amended six times[4] since its enactment in 1974.

Inter alia, the twenty year period for contracts under seal was reduced to five years, intentional torts and wrongful death actions were shifted from two year to four year periods, and many limitation periods in other sections of this statute were consolidated into Chapter 95. See, Chapter 74-382, §126

3/Ch.80-322, §1, Laws of Fla.
Ch.78-435, §11, Laws of Fla.
Ch.77-174, §1, Laws of Fla.
Ch.75-9, §7, Laws of Fla.
Ch.74-382, §7, Laws of Fla.
Ch.73-333, §30, Laws of Fla.

4/Ch. 81-259, §44, Laws of Fla.
Ch. 80-280, §1, Laws of Fla.
Ch. 78-418, §1, Laws of Fla.
Ch. 78-289, §1, Laws of Fla.
Ch. 77-54, §2, Laws of Fla.
Ch. 75-234, §1, Laws of Fla.

Laws of Fla. Indeed,this court has recognized that the legislature may lawfully reduce the statute of limitations retroactively if it provides only a one year saving clause since"an existing law of limitation is not part of a contract". Ruhl v. Perry, 390 So.2d 353, 356 (Fla. 1980). Clearly, the statutes of limitation have changed drastically in a relatively short time span. These changes coupled with the various exceptions stated above strain any argument that the public policy of the State of Florida is so strong so as to defeat a choice of law provision.

B. Neither the usury statutes nor statutes of limitation have the effect of invalidating contracts.

In Continental Mortg. Inv. v. Sailboat Key, 395 So.2d 507 (Fla. 1981) this Court stated:

> Finally, we note the limited effect of the usury laws upon a contract. The usury statutes in this jurisdiction do not have the effect of invalidating contracts for [usurious] interest... but only accord to the obligor the personal privilege of setting up ... affirmative defenses of usury in respect to such contracts.

Id. at 509, quoting Yaffee v. International Co., 80 So. 2d. 910, 912 (Fla. 1966).

The effect of a statute of limitations on a contract is directly analogous to the defense of usury raised against the enforcement of an agreement.

The defense of statutes of limitation operate on the remedy only and not to extinguish the right created by the contract. See Tate v. Clements, 16 Fla. 339 (1878); see also

Hoagland v. Railway Express Agency, 75 So.2d 822 (Fla. 1954).

In fact, statutes of limitation are only remedial in nature and do not affect substantive rights -- they presuppose the existence of said substantive rights, but forbid their enforcement by customary remedies. See Puleston v. Alderman, 148 Fla. 353, 4 So.2d 704 (1941); see also 34 Am.Jur., Limitation of Actions, §428. Neither the usury statute nor statutes of limitation create the underlying right nor act to extinguish same.

C. The defenses of usury and statutes of limitation are creatures entirely of statutory regulation.

In Continental this court stated:

> Nor do we consider usury protections fundamental to a legal system. The defense of usury is a creature entirely of statutory regulation, and is not founded upon any common law right, either legal or equitable. Id. at 509.

Unquestionably statutes of limitation are purely creatures of statute and statutory regulation. Indeed, prior to the adoption of §95.03, Florida Statutes (Ch. 6465, §§1, 2 , Laws of Fla. (1913))stipulations contained in valid contracts limiting the time within which suits could be brought on such contracts were indeed valid and enforceable. National Surety Co. v. Williams, 74 Fla. 446, 77 So. 212 (1918).

Although it is readily conceded that the defense of statutes of limitation may have had its origin in common law, in truth and in fact no specific time periods were ever set forth cutting one's rights off to bring an action, in that a

common law court would simply not permit a suit to continue after a long lapse of time. See generally 35 Fla. Jur. 2d, Limitations and Laches, §2 (1982). In essence, laches was the forerunner of the present day more specific statutes of limitation. The mere fact that the defense arose in some fashion at common law clearly cannot create any overriding public policy in and of itself. An examination should be made of the underlying purposes of statutes of limitation.

It has long been said that statutes of limitation are intended to encourage promptness of parties holding valid claims by fixing arbitrary periods within which the right to enforce such claims must be asserted; to set a time limit within which a suit should be brought so that the parties will be on notice within the time specified; and to protect defendants against unusually long delays in the filing of lawsuits. See, 51 Am. Jr. 2d. Limitation of Actions, §17. See also, Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976); Thermo Air Contractors Inc. v. Travelers Indemnity Company, 277 So.2d 4 (Fla. 3d DCA 1973). None of these objectives would be hindered or thwarted if the parties were permitted to contractually lower the statutes of limitation. Indeed, these very policies are fostered and preserved.

D. Is good faith of the parties relevant to a choice of law question in the statute of limitations area where a normal relationship exists between the State of Michigan and the transaction.

This court held in Continental Mortg. Inv. v. Sailboat Key, 395 So.2d 507 (Fla. 1981), that it is not necessary in a usury case to determine whether or not the parties acted in good faith involving a choice of law question as long as the foreign jurisdiction had a normal relationship with the transaction. Id at 509-510. It is not entirely clear as to whether or not the good faith of the parties must be determined in choice of law questions involving issues other than usury. It is clear, however, that the good faith exhibited in this circumstance cannot be emphasized enough.

A. Pursuant to the applicable Michigan statute the parties have the right to contractually lower the limitations period to one year. A two year period was chosen in order to assure that each party had sufficient time to act.

B. The clause lowering the statute of limitations did not indicate that the period was being lowered to "the minimum period permitted by Michigan law". Such a provision could be considered misleading since the contracting party unfamiliar with Michigan law would have to look to extraneous material to learn that he had but one year to bring suit after a breach and was not fairly and fully apprised of the exact limitation period. The contract herein clearly spells out the two year time frame in plain, unambiguous language.

C. The two year period limits both parties. That is, if Burroughs were not paid for the computer and failed to bring

suit within two years, its actions would be barred as well. The clause obviously does not give either party an advantage over the other.

D. In Continental, the lender knew at the time the contract was signed that the interest rate would be legal under the applicable Massachusetts law, but usurious under the law of Florida. It is clear that the choice of law provision was used in order to permit the lender to charge a higher interest rate and prevent the borrower from successfully raising the Florida usury defense. In the case at bar, neither party had an advantage when the contract was first executed in 1975 since obviously neither Burroughs nor Suntogs breached or intended to breach the agreement at that time. At the time the contract was executed, it was impossible to foresee which party, if any, would be benefited at a later date by using the lower limitation period.

To the extent that good faith is in anyway a criteria to be used in upholding a choice of law provision involving the statute of limitations, no clearer case can be made which would better establish that the provisions were fair and entered into in good faith.

E. The intentions of the parties must be upheld in order to assure certainty, predictability and convenience.

As this court stated in Continental:

> This state would be commercially singular if it did not apply favorable

> law of the state with the normal relationship to a contract. Commercial stability in interstate trade depends on predictability and some degree of uniformity among the states in their willingness to honor commercial agreements. Id. at 511.

This public policy statement is as important in a usury setting as one involving the lowering of the statutes of limitation. These thoughts have also been embodied in Comment (e) RESTATEMENT (SECOND) CONFLICT OF LAWS, §187:

> Prime objectives of contract law are to protect the justified expectations of the parties and make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objections may best be obtained in multi-state transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations ... [I]t may likewise be objected that, if given this power of choice, the parties will be enabled to escape prohibitions prevailing in the state which would otherwise be the state of the applicable law. Nevertheless, the demands of certainty, predictability, and convenience dictate that, subject to some limitations, the parties should have the power to choose the applicable law.

Because of the frequent inclusion of specific choice of law provisions in commercial, multi-state contracts, the focus is on party expectations since the expectations of those involved are usually expressed. See, Continental at 511.

The public policy of this state in permitting two commercial entities to enter into a contract and choose the law of another state that has a reasonable relationship with the transaction, is paramount in that it does establish predictability,

convenience, certainty, uniformity, and fosters commercial comity. All of this must be viewed in the context of the existence, or lack thereof, of countervailing arguments. That is, are there strong public policy considerations that the State of Florida has to void a conflict of laws provision lowering the statute of limitations? Petitioner herein can see none.

The lowering of the statute of limitations does not take away one's right to trial by jury, nor does it violate any due process requirement. All that such a provision does is to tell each party to the agreement that its respective rights must be more diligently pursued. If the time period limited by the contract was so stringent so as to require the filing of a suit almost immediately after the breach, then it could certainly be argued that requiring one to file suit shortly after it has been aggrieved is in effect a denial of due process. That argument fails miserably when confronted with a two year period that is clearly and unambiguously spelled out in the agreement, especially in light of Michigan's mandate permitting the period to be as low as one year.

When confronted with this very argument, that is, illuminating what Florida's strong public policy is in not permitting a choice of law provision to lower the statute of limitations, the Third District Court of Appeal had no response, and indeed begged the issue by simply indicating that:

> "Where the governing statute already declares a certain contract clause void,

a manifestation of strong public policy is present." Suntogs of Miami, Inc. v. Burroughs Corp., 433 So.2d 581 (Fla. 3d DCA 1983) at 584.

Petitioner herein has presented many strong public policy arguments for the upholding of a choice of law provision in a statute of limitations setting. Petitioner cannot honestly enumerate any public policy considerations that should be used in favor of declaring void the free choice of the contracting parties.

The right to shorten the statute of limitations is discussed in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. The pertinent provisions are as follows:

§142 - Statute of Limitations of forum.

(1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing that statute of limitations of another state.

(2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in §143.

Comment C - Contractual provisions.

The validity of a contractual provision limiting the time in which an action may be brought under the contract is determined by the law selected by application of the rules of §§187-188 (emphasis added).

§186 - Law of the State chosen by the parties.

(1) The law of the state chosen by the parties to govern their contractual rights and duties

will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or their transaction and there is no other reasonable basis for the parties' choice, or

(b) Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the State of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law. (emphasis added).

Suntogs is an entity that ships to practically every state in the Union and many foreign countries. It is not a simple individual consumer. As a seller of its goods to such a wide marketplace, Suntogs itself should be interested in commercial stability and commercial comity.

It is clear that more and more rights are being given to contracting parties in a commercial setting to determine

their ultimate destiny and provide certainty and predictability in their dealings. What possible 'fundamental' substantial or strong public policy of this state should be invoked to deprive the parties of their expections? It is respectfully submitted that no such inherent and significant policy exists.

F. Statutory construction and public policy.

Prior to 1974, §95.03 Florida Statutes (Comp. Gen. Laws 1927, §4651) stated that all contracts attempting to lower the statute of limitations of the State of Florida "are hereby declared to be contrary to the public policy of this state, and to be illegal and void." The present §95.03 Florida Statute (1982) omitted all references to the illegality of the provisions and the declaration that said provisions are against the public policy of the State of Florida.

This court has recently held that:

> The legislature is presumed to be aware of existing law in the judicial construction of former laws on the subject of its enactments. Foley v. State, 57 So.2d 179 (Fla. 1951)...[I]t is also presumed that when the legislature amends a statute, it intends to accord the statute a meaning different from that accorded before the amendment. Reino v. State, 352 So.2d 853 (Fla. 1977).

Seddon v. Harpster, 403 So.2d 409 (Fla.1981) at 411; See, also State v. Hart, 372 So.2d 174 (Fla. 2d DCA 1979); Kelly v. Retail Liquor Dealers Assocation of Dade County, 126 So.2d 299 (Fla. 3d DCA 1961)

This court expounded on the proposition in Carlisle v. Game and Freshwater Fish Commission, 354 So.2d 362 (Fla. 1977):

> Inference and implication cannot be substituted for clear expression. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937)... The change [in the statute] clearly evidences an intention on the part of the legislature not to waive the common law privilege in the 1975 statute. In Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968) this Court stated:
>
> > The rule of construction, instead is to assume that the legislature by the amendment intended it to serve a useful purpose. Sharer v. Hotel Corp. of America, 144 So.2d 813, 817 (Fla. 1962); Webb v. Hill, 75 So.2d 596, 603 (Fla. 1954). Likewise, when a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment. (at 119).
>
> This principle is summarized at 30 Fla. Jur. Statutes 97:
>
> > In making material changes in the language of a statute, the legislature is presumed to have intended some objective or alteration of the law, unless the contrary is clear from all enactments on the subject. The courts should give appropriate effect to the amendment. The omission of a word in the amendment to the statute will be assumed to be intentional. And, where it is apparent that substantial portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential.

Carlisle at 364-465 (emphasis added).

Even if the language of the predecessor statute found its way into the existing statute, it is clear from the previous arguments that lowering a statute of limitations via a valid choice of law provision still is not against the strong

and fundamental public policy of the State of Florida. The omission of the public policy phrase, however, only bolsters Petitioner's argument that no such strong public policy exists.

II.

THE THIRD DISTRICT COURT OF APPEAL ERRED BY MISINTERPRETING THE MEANING OF §95.03 IN THAT A READING OF SAID STATUTE IN PARI MATERIA WITH FLORIDA STATUTE 671.105 ALLOWS THE APPLICATION OF MICHIGAN LAW TO CREATE A SHORTENING OF THE 'APPLICABLE STATUTE OF LIMITATIONS'.

It is axiomatic that each Florida statute does not stand alone and the applicable statues must be considered together in order to give the entire statutory scheme a reasonable field of operation. See, State v. Williams, 343 So.2d 35 (Fla. 1977); Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962); State Ex Rel Florida Jai Alai, Inc. v. State Racing Commission, 112 So.2d 825 (Fla. 1959); Taylor v. Payne, 17 So.2d 615 (Fla. 1944); Guaranty Trust Life Insurance Company v. Fundora, 343 So. 2d 71 (Fla. 3d DCA 1977); Woodley Lane, Inc. v. Truly Nolen, 147 So.2d 569 (Fla.2d DCA 1962).

Section 95.03, Florida Statutes (1982) reads as follows:

> §95.03 Contract shortening time.
>
> 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. (emphasis added).

This statutory section previously read:

> §95.03 Stipulation in Contract Shortening Period of Limitation Illegal.
>
> All provisions and stipulations contained in any contract whatever entered into after May 26, 1913 fixing the period of time in which a suit 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. (emphasis added).

The Florida choice of law provision provides as follows:

> §671.105 Territorial Application of the Code; Parties Power to Choose Applicable Law.
>
> (1) Except as provided hereafter in this section, where a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this code applies to transactions bearing an appropriate relation to this state.

It is presumed that the legislature will not create any useless and non-functional legislation and that even where there appears to be an apparent conflict, the laws must be construed to give each statute a reasonable field of operation. See, State in re School Board of Martin County v. Department of Education, 317 So.2d 68 (Fla. 1975); State v. Nourse, 340 So.2d

966 (Fla. 3d DCA 1976).

Not only did the legislature remove the "public policy" verbiage from §95.03 Florida Statutes (1982), but it made a more significant change. Previously any attempt to lower the statute of limitations by contract "of this state" was void. In the new statute such a provision would be void only if it fixed the time less than provided for by the "applicable statute of limitations" which is that of the State of Michigan.

Section 671.105 Florida Statutes (Supp. 1983) permits contracting parties to choose a foreign law. Pursuant to the Burroughs-Suntogs contract the parties chose Michigan law and chose the Michigan limitations period which permits the parties to agree to a period as low as one year.

We are no longer dealing with a contractual provision providing a lower time period than permitted by a statute of limitation"of this state". Rather, the question to be answered is does the contractual provision lower the statute of limitation to a time less than provided for by the "applicable statute of limitations" which is that of Michigan. Tne answer is clearly "no". §671.105, Florida Statutes (1983) must be read in conjunction with §95.03 Florida Statutes (1982). The effect of viewing the statutes in pari materia would result in a finding that the contractual provisions herein lowering the statute of limitations to two years indeed did not fix the period within which the action could be brought for a time less than that provided by the applicable statute of limitations (Mich-

igan -- one year).

The reasoning is not only logical, but necessarily mandated by the legislature's explicit proviso permitting the parties to choose the law of another state that has a reasonable relationship to the transaction.

Moreover, this interpretation would have no effect on any suit brought in the State of Florida that did not have a choice of law provision since the "applicable statute of limitations" would, in all likelihood, be that of the forum state.

It would have been extremely simple for the legislature to reword §95.03 to provide as follows:

> 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 statute of limitations of this state is void.

The legislature failed to word the statute in such a fashion and it must be presumed that there was a meaningful reason for the change to the present status.

Section 671.105, Florida Statutes (Supp. 1983) and §95.03 Florida Statutes (1982) can be read in perfect harmony when viewed in the light stated above. To interpret "applicable statute of limitations" so as to refer only to a Florida statute, fails to take into account the clear change in language and the harmonious interaction of said statute with §671.105 Florida Statutes (Supp. 1983).

III.

SUNTOGS' CLAIM FOR NEGLIGENT BREACH OF CONTRACT IS ALSO GOVERNED BY THE TWO YEAR LIMITATION PERIOD IN THE CONTRACT.

As can readily be seen by a simple review of Suntogs' Amended Complaint, its claim for negligence against Burroughs simply alleges that Burroughs breached its obligation by performing the acts required under the contract in a negligent fashion (A. The pertinent contractual provision states that:

> "No action arising out of any claimed breach of the agreements or obligations under the agreements may be brought by either party more than two years after the cause of action has accrued."

Negligent breach of the contract is an "action arising out of ... obligations under the agreements" and as such the contract requires this action to have been brought within the two year period specified therein. Michigan law recognizes that negligent breach of a contract causing economic injury is clearly governed by the Michigan contractual statute of limitations. See, Schemburn v. Lerner & Associates, Inc., 177 N.W.2d 699 (Mich. Ct. App. 1970).

Inasmuch as the negligence alleged in the Amended Complaint is simply a failure to perform the contract prudently, it is clearly an obligation arising out of the agreement and pursuant to the limitations provision in the contract and applicable Michigan statute, said claim is barred because it was not brought within the two year period.

CONCLUSION

It is clear that no strong public policy exists in the State of Florida which would prevent two commercial entities from contracting to lower the statute of limitations when choosing the law of a state other than Florida that has a reasonable relationship with the transaction.

There appear to be many public policy reasons to enforce such a provision. These reasons include the fact that statutes of limitation are fraught with exceptions, are extremely flexible, do not have the effect of invalidating contracts, and are creatures entirely of statutory regulation. Moreover, the good faith intention of the parties must be upheld in order to assure certainty, predictability, convenience, commercial stability and comity. There are no strong public policy reasons to void such a choice of law provision.

In addition, a reading of §95.03, Florida Statutes (1982) and §671.105, Florida Statutes (Supp. 1983) in pari materia permit the choice of the Michigan Statute of Limitations.

The decision of the District Court of Appeal, Third District should be quashed and the Summary Judgment previously entered by the trial court should be reinstated.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was hand-delivered this 22nd day of March, 1984, to Richard S. Banick, Esq., Fifth Floor, City National Bank Bldg., Miami FL 33130, Attorney for Silton Data, Inc.; Weintrub, Weintraub & Seiden, Attorneys for Respondent, 2250 S. W. 3rd Avenue, Miami, FL 33139, and Hoffman & Hertzig, P.A., Attorneys for Respondent, 250 Catalonia Avenue, Coral Gables, FL 33134.

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