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.

PETITIONERS' BRIEF ON JURISDICTION

FILED

AUG 25 1983

SID J. WHITE
CLERK SUPREME COURT
By Chief Deputy Clerk

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STATEMENT OF THE CASE

1. This is a proceeding wherein the Petitioners, Burroughs Corporation, James Ross and Robert Madden are seeking to invoke the discretionary jurisdiction of the Supreme Court pursuant to their notice dated August 12th, 1983, to review the Third District Court of Appeal's Opinion filed May 1st, 1983 (A.1-8).

2. Suntogs of Miami, Inc. (hereinafter referred to as "Suntogs") commenced legal proceedings in Dade County Circuit Court by filings 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 which included counts for breach of contract.

3. On July 27th, 1982, the Dade County Circuit Court entered its Order granting Burroughs' Motion for Summary Judgment as to all counts, including the contractual counts. An Amended Order for Summary Judgment was entered by the trial court on February 16, 1982. Said Order stated that the Summary Judgment in connection with the contractual counts was entered because the Michigan Statute of Limitations, chosen by the parties pursuant to their written contract, effectively barred all contractual claims (A. 9).

4. 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 strong 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. On July 13, 1983, the Third District Court of Appeal denied Burroughs' Motion for Rehearing (A.10).

5. It is from the above rulings that Burroughs filed its Notice to Invoke Discretionary Jurisdiction on August 12, 1983.

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STATEMENT OF THE FACTS

L. On April 22nd, 1975, Burroughs and Suntogs entered into a written contract which governed the rights, obligations, and liabilities of the parties.(A.11-14).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 claim or alleged breach.[2]

2. Burroughs 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. As such, the choice of the laws of the State of Michigan was appropriate. (A.1-8).

3. It is undisputed that Suntogs did not bring its action in Dade County Circuit Court against Burroughs until after the two year statute of limitation fixed by the contract had run.

4. Pursuant to Michigan statute §440.225 Michigan law permits the lowering of a statute of limitation to not less than one year if the parties contractually agree to do so.

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.

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.

ARGUMENT

APPLICABLE CASE LAW REQUIRES AN INDEPENDENT DETERMINATION MADE BY ANY COURT RULING ON WHETHER OR NOT A CONTRACTUAL PROVISION IS VOID BECAUSE IT IS AGAINST THE STRONG PUBLIC POLICY OF THE STATE OF FLORIDA. THE THIRD DISTRICT COURT OF APPEAL FAILED TO MAKE SUCH DETERMINATION IN THE CASE AT BAR.

In Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla. 1981), it is clearly recognized by this court that contractual provisions chosing the law of another state will be honored so long as said provisions do not conflict with the "strong public policy of Florida."

Moreover, this Court was clear in its mandate in requiring any lower court to make a determination as to what the strong public policy of the State of Florida is in order to determine whether any particular contractual clause or provision should be considered void.

> "Finding no real support of our case law for the use of the public policy exceptions under these circumstances, and in view of the pervasive exceptions to the usury laws and the actual operation of these laws, we are unable, particularly in the commercial setting of this case, to glean any overriding public policy against usury qua usury in a choice of law situation." Continental at page 510.

Continental and Morgan Walton Properties ,Inc. v. International City Bank & Trust Co, 404 So.2d 1059 (Fla. 1981) require an in depth analysis as to whether a particular contractual provision is indeed against the "strong public policy of the State of Florida."

In Continental this Court determined that because the defense of usury was a creature created entirely of statutory

regulation, was not founded upon any common law right, and did not have the effect of invalidating contracts, but simply accorded to the obligor the personal privilege of setting up affirmative defenses to usury, the strong public policy considerations were absent. This court was not concerned with the fact that Florida statutes prohibited usurious transactions. The court was concerned the the policy behind the statute in making its determination!

In the case at bar, however, the Appellate Court made no effort to determine whether or not there were strong public policy considerations behind the Florida statute which voided any attempts to lower the statute of limitations. Instead, the court ignored the parties rights to contractually choose the law of Michigan in a commercial setting which law permits the lowering of the statute of limitations. Rather, the court simply held that

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

This is in direct conflict to this Court's statement in Continental that

> "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. Continental at 509.

In fact, to follow the Third District Court of Appeal's reasoning, any violation of a Florida statute should be considered void as against public policy when Continental and Morgan Walton Properties clearly require a contrary finding.

As recognized in the Third District Court of Appeal's Opinion of May 31st, 1983, Courts of this state are often called upon to seek out the public policy of Florida in order to determine whether a particular contract or provision is void. See, Edwards v. Miami Transit Co., 77 So.2d 440, 1942, and Bond v.Koscot Interplanetary, Inc., 246 So.2d 631 (Fla. 4th DCA 1971). The court then deviated from every case decided under Florida law that requires an independent determination be made as to whether or not any particular contract or provision is indeed so "strongly against the public policy" of the State of Florida by holding that "where the governing statute already declares a certain contract void, a manifestation of strong public policy is present."

This appears to be the only Florida case decided in any Appellate Court that does not discuss the reasons why said clause is so repugnant and so strongly against our public policy that it is void. As a result, the lower court has begged the issue by simply saying the statute holding said clause void is the "manifestation of strong public policy", but offers no reason to substantiate the finding.

Most importantly, Florida Statute 95.03 formerly read as follows:

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> "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."

As amended, §95.03 Florida Statutes (1975) now reads

> "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."

The legislature excluded the words that the lowering of the statute of limitations is "declared to be contrary to the public policy of this state, and to be illegal." The Appellate Court and Suntogs offered no explanation or reasons to why the legislature omitted the very language which the Third District is now using as a basis to void the specific provision. At the very least the Third District should have analyzed the reasons behind the statute to make the ultimate determination as to whether or not said clause was so repugnant as to render it void as against strong public policy of the State of Florida.
No less of a consideration is required by Continental and Morgan Walton Properties.

The Third District Court of Appeal is setting a dangerous precedent by holding that simply because a Florida Statute declares void a certain contractual provision, it becomes unnecessary to determine whether or not the enforcement of said clause through a choice of law provision would violate the strong public policy of the State of Florida since the mere statement in the statute constitutes a manifestation of strong public policy and therefore no further reasoning or analysis need be entertained.

The issue raised herein is one of extreme importance, the merits of which must be decided by this court. §671.105(1) Fla. Stat. (1975) permits and requires the upholding of a choice of law provision when a transaction bears a reasonable relationship to the state chosen. Is not the public policy of the State of Florida violated when a court does not permit contracting parties their statutory right to invoke a choice of law provision?

CONCLUSION

Continental clearly holds that the mere fact there exists in a Florida statute prohibition against certain acts (in that case the charging of usurious interest) is in and of itself insufficient to render the specific act void as against Florida's strong public policy. Burroughs requests the opportunity to show this court on its Brief on the merits that for the reasons stated in Continental, it is not against strong public policy of the State of Florida in a commercial setting to invoke a choice of law provision agreed to by the parties which lawfully lowers the statute of limitations under the laws of the State of Michigan.

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 mailed this 22 day of August, 1983, to Richard S. Banick, Esq., Fifth Floor, City National Bank Bldg., Miami, FL 33130, Attorneys for Silton Data, Inc.; Weintraub, Weintraub, & Seiden, Attorneys for Appellant, 2250 S.W. 3rd Avenue, Miami, FL 33139, and Hoffman & Hertzig, P.A., Attorneys for Appellant, 250 Catalonia Avenue, Coral Gables, FL 33134.

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