IN THE SUPREME COURT OF FLORIDA

84,029

ARTHUR LEVINE, ETC., ET AL.,

Petitioners,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON PETITION FOR REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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FLORIDA STATUTES

INTRODUCTION

This is a case involving the denial of a motion to amend an answer to assert an affirmative defense of usury in a foreclosure action. The motion was made a year after the lender brought suit, well after two partial summary judgments had been entered in the lender's favor, and two weeks before the case was scheduled to go to trial. Even if there had been any validity to the proposed usury defense, the trial court's decision to deny the motion to amend was hardly an abuse of discretion given the facts and posture of this case. Viewed as the amendment case it is, the district court's decision affirming the trial court presents no conflict with any other authority and is, of course, eminently correct.

But even viewed as a usury case with a timely asserted usury defense, the result is the same. The proposed defense of usury was baseless: not, as the borrowers suggest, because the savings clause in the Note insulated, as a matter of law, the contract from a claim of usury, but instead because the borrowers' claim -- a faulty one -- was that a prepayment penalty should be treated as interest and added to the default interest rate so as to make the interest rate in excess of that which the law allows. The fallacy of their claim, as all jurisdictions uniformly hold, is that a prepayment penalty is *not* interest and is not to be considered in determining whether a transaction is usurious.

Thus, the district court's holding was perfectly correct, not because of Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n,[1] the citation to which was unnecessary to its decision, but because the prepayment penalty requirement did not make the interest rate excessive; the note and mortgage could not therefore be usurious; and no usury savings clause -- at the heart of the

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[1]531 So. 2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So. 2d 1172 (Fla. 1989).

conflict between Forest Creek and Jersey Palm-Gross, Inc. v. Paper[2] -- was needed to save the note and mortgage from a claim of usury.

STATEMENT OF THE FACTS AND CASE

The Loan and Default

To finance the purchase of a commercial complex, the petitioners, mostly individuals investing for their respective pension or profit sharing trusts[3] -- borrowed $1,300,000.00 at 10.25% interest from United Companies Life Insurance Company ("United Companies") (R. 19-57).[4,5] The purchase mortgage loan was made in January of 1990 for a period of five years (R. 19). Under the agreement, the borrowers were to pay monthly installments of principal and interest on the first of every month (R. 19). When the borrowers did not make their September

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[2]639 So. 2d 664 (Fla. 4th DCA 1994).

[3]Arthur R. Levine, individually and as trustee of a land trust agreement, Mark A. Yaffey, D.D.S., P.A., Pension Trust Fund; Frederic J. Wasserman and Mark A. Yaffey, a Florida General Partnership; Larry E. Wynne, D.D.S., P.A., Profit Sharing Trust; Baumann & Wasserman, D.D.S., P.A., Employees Pension Trust, and Larry E. Wynne and Mark A. Yaffey, individually and as trustees. We will refer to them collectively as "the borrowers."

[4]United Companies assigned the mortgage, note, and lease agreement to Security Pacific National Bank (R. 58-59). Under a pooling and servicing agreement entered into between United Companies and Security Pacific, United Companies is obligated to bring suit to foreclose the loan (R. 7, 104-112).

[5]We will refer to the record on appeal as "(R. __)" and to the Appendix to Petitioners' Initial Brief as "(Pet. App. Tab __ at __)."

1, 1991 loan payment or any installment payments after that (R. 247, 293, 295), United Companies declared the loan in default on January 9, 1992 (R. 292-93).[6]

The Foreclosure Action

United Companies sued to foreclosure the mortgage and for damages in March of 1992 (R. 2-65). Two months later it moved for the appointment of a receiver or in the alternative for an order sequestering rents under the parties' assignment of leases agreement (R. 40-47, 82-95).[7] The trial court chose to order that the borrowers pay over the net rents from the property to United Companies (R. 115-18).[8] United Companies deposited these collections in a special escrow account (R. 248-49).[9]

Three months after suit was filed the borrowers moved to dismiss the complaint on the ground that United Companies did not have standing to sue (R. 96-98). They did not claim that

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[6]Earlier, on October 23, 1991, United Companies notified the borrowers that their loan was delinquent and requested $24,463.57 to bring the loan current (R. 295-96). The borrowers did not pay the requested amount or any further installments (R. 293), but did send United Companies a check for $7,754.13 around November 27, 1991 (R. 248). United Companies deposited this check in an account entitled "Received Not Applied" (R. 248, 305). Having received no further payments, United Companies sent the borrowers a letter on January 9, 1992 demanding a total balance due of $1,375,567.33 plus default interest and costs and declaring the loan in default (R. 292-94).

[7]Under section 697.07 of the Florida Statutes, an assignment of rents "shall be absolute upon the mortgagor's default. . . ." § 697.07, Fla. Stat. (1991).

[8]Under section 697.07 of the Florida Statutes, the court could have required the borrowers to deposit all rents into the court registry pending adjudication of the lender's rights. § 697.07, Fla. Stat. (1991). However, by agreement of the parties and to avoid the 1% surcharge for deposits to the court registry, the borrowers paid the rents directly to United Companies (R. 248-49, 306).

[9]By March of 1993, a year later, these rent collections totaled $83,531.12 (R. 248-50, 359-61, 413). The borrowers were credited with this entire amount in the final summary judgment thereby reducing the total amount due from $1,890,501.97 to $1,806,970.85 (R. 413).

the contract was usurious. In response, United Companies produced a servicing agreement between it and its assignee, Security Pacific, showing that United Companies had retained responsibility for enforcing the loan agreement (R. 100-12). The trial court denied the borrowers' motion to dismiss and ordered them to answer the complaint within twenty days (R. 113-14). Rather than answer, the borrowers moved for summary judgment on the same lack of standing ground (R. 119-20). Again, they made no mention of usury. Because the borrowers had not answered the complaint as ordered, United Companies moved for default (R. 121-23). The trial court denied the motion for default (R. 126-27), and upon reconsideration ordered the borrowers to file an answer within ten days (R. 157-58). Finally, on November 30, 1992, eight months after United Companies filed its foreclosure action, the borrowers answered the complaint (R. 159-61). Their answer raised a single affirmative defense: that United Companies was "obliged to elect its remedies and prove the existence of a deficiency balance owed before seeking damages from any and/or all of the Defendants on account of either the promissory note and/or contracts of guaranty" (R. 159-61). Not a word of usury.

There being no dispute that the loan was in default and that under the parties' agreements United Companies had a right to accelerate the loan and foreclose on the property, the trial court entered partial summary judgment as to the principal amount of $1,289,441.67 on January 7, 1993 (R. 233-34). On January 15, 1993, United Companies noticed the case for trial, which was thereafter set for the week of April 19, 1993 (R. 236, 252, 253-54). In February, United Companies renewed its motion for summary judgment as to the other amounts due and owing including interest, default interest, late charges, prepayment penalty, an appraisal fee, an environmental assessment fee and advances made for real estate taxes (R. 237-251). By March,

United Companies was readying for trial and had filed its Witness and Exhibit Lists (R. 258-261).

Again, there being no dispute that United Companies was entitled to accrued and unpaid interest on the principal and entitled to recoup the amount it paid in property taxes, on March 26th the trial court granted in part the renewed motion for summary judgment as to the interest and taxes (R. 262-63). As for the default interest, late charges, prepayment penalty, and fees, the trial court requested that the parties submit memoranda of law addressing entitlement to these amounts (R. 263).

The Summary Final Judgment of Foreclosure and for Damages

On April 2, 1993, a year after suit began, three months after the partial summary judgment on principal, a week after the partial summary judgment on interest and taxes, and two weeks before the case was to go to trial, the borrowers moved for leave to amend their answer to include an affirmative defense of usury (R. 266-69). Ten days later, they filed the requested memorandum of law in which they argued, inter alia, that the note violated Florida usury law because the note called for default interest at the highest legal rate and imposed a prepayment penalty upon default and acceleration.[10,11]

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[10]Both the mortgage note and the mortgage deed called for a prepayment penalty upon default and acceleration. The mortgage note provided that:

> If an event of default under this Note or any other Loan Documents (as hereafter defined) shall occur and the maturity date of this Note shall be accelerated, then a tender of payment by Borrower or by anyone on behalf of Borrower of the amount necessary to satisfy all sums due hereunder shall constitute an evasion of the payment terms hereof and shall be deemed to be a voluntary prepayment hereunder, and any such payment, to the extent permitted by law, shall, therefore, include the prepayment charge required under and calculated in

(continued...)

[10](...continued)

accordance with the provisions of this Note. Notwithstanding anything to the contrary contained herein or in any of the Loan Documents, if Borrower does not exercise its right to make such payment following such acceleration, and Lender obtains a judgment in any action by it to foreclose the lien of the Mortgage (as such term is defined below) the prepayment charge shall be included in the amount of such judgment. (R. 19-20.)

The mortgage deed provided:

> 13. Default. In (a) the event of any breach or default of this Mortgage, the Note, or related loan documents, or if any of said sums of money or interest referred to herein or in the Note be not promptly and fully paid without demand or notice; or (b) if the stipulations, agreements, conditions, and covenants of the Note, this Mortgage, or other related loan documents are not duly, promptly and fully performed, then in either or any such event, the said aggregate sum mentioned in the Note then remaining unpaid, with interest accrued to that time, any prepayment penalty, to the extent allowed by law, and all monies secured hereby, shall become due and payable forthwith, or thereafter at the option of the Mortgagee, without notice or demand which are hereby expressly waived, as fully and completely as if all of said sums of money were originally stipulated to be paid on such day, anything in the Note, this Mortgage or the other instruments referred to herein to the contrary notwithstanding; . . . . (R. 28.)

[11]Quite apart from their usury claim, the borrowers also argued that United Companies was not entitled to default rate interest, and that United Companies was not entitled to collect a prepayment premium because it had accelerated the amounts due on the Note (R. 278-285). United Companies, however, was clearly entitled to both.

Although courts generally do not permit a prepayment charge and will allow borrowers to recoup prepayment penalties paid to the lender if the borrower defaults and the lender accelerates or forecloses on the loan where the mortgage agreement has provided for a prepayment penalty only on the *voluntary* exercise by the borrower of the right to prepay, In re LHD Realty Corp., 726 F.2d 327, 330 (7th Cir. 1983); Tan v. California Fed. Sav. & Loan Ass'n, 189 Cal. Rptr. 775, 782 (Cal. Ct. App. 1983); Slevin Container Corp. v. Provident Fed. Sav. & Loan Ass'n, 424 N.E.2d 939, 941 (Ill. App. Ct. 1981); Coca-Cola Bottling Co. v. Citizens Bank, 583 N.E.2d 184, 190 (Ind. Ct. App. 1991); 3C Assocs. v. IC & LP Realty Co., 524 N.Y.S.2d 701 (N.Y. App. Div. 1988); George H. Nutman, Inc. v. Aetna Business Credit, Inc., 453 N.Y.S.2d 586, 587 (N.Y. Sup. Ct. 1982), where, as here, the promissory note clearly provides for a premium or penalty when prepayment is either voluntary or *in*voluntary, the premium or penalty may be charged. See Pacific Trust Co. TTEE v. Fidelity Fed. Sav. & Loan

(continued...)

United Companies responded that the affirmative defense of usury had been waived, or if not waived, was invalid because of the usury savings clause in the parties' agreements (R. 301-02).[12] The trial court denied the motion to amend (R. 362), and five days later reset the case for trial (R. 363). One week later, the court granted United Companies' renewed motion for summary judgment (R. 393). In its Order and its Summary Final Judgment of Foreclosure and For Damages, the trial court awarded default interest of 25% from September 1, 1991, late charges, the appraisal fee and the environmental assessment fee (R. 393, 411-17). The court did not award the prepayment penalty (R. 393, 412-13).

[11](...continued)
Ass'n, 229 Cal. Rptr. 269, 274 (Cal. Ct. App. 1986). See also Florida Nat'l Bank v. Bankatlantic, 557 So. 2d 596 (Fla. 4th DCA 1990) (acceleration does not automatically preclude a claim for prepayment penalty fees), decision approved by 589 So. 2d 255 (Fla. 1991).

Because it is undisputed that the loan documents in the present case *specifically provided* for a prepayment penalty upon default and acceleration, United Companies was entitled to charge and collect the penalty *in addition* to the default interest.

[12]The usury savings clause in the Mortgage Note stated in part:

> The parties agree and intend to comply with the applicable usury law, and notwithstanding anything contained herein, in the Mortgage or in any other Loan Document, the effective rate of interest to be paid on this Note (including all costs, charges and fees which are characterized as interest under applicable law) shall not exceed the maximum contract rate of interest permitted under applicable law, as it exists from time to time. (R. 20).

While the usury savings clause could have been relied on by United Companies as a fallback had there been an excessive interest charge and thus a possibility of usury, United Companies' first response to the borrowers' proposed amendment claiming usury should have been that the prepayment penalty was not interest and thus the interest charged was not excessive and not capable of being usurious.

The Appeal

The borrowers appealed the Summary Final Judgment of Foreclosure and for Damages to the Third District Court of Appeal claiming that the trial court abused its discretion in denying the borrowers' motion to amend their answer to include the affirmative defense of usury.[13] The Third District affirmed, ruling that the trial court had not abused its discretion. (Pet. App. Tab A at 2). The borrowers then petitioned this Court for review on the ground that the district court, in affirming, had cited to Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So. 2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So. 2d 1172 (Fla. 1989), which was in conflict with the decision of the Fourth District in Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664 (Fla. 4th DCA 1994), and therefore the district court's decision was likewise in conflict with Jersey Palm-Gross. This Court accepted jurisdiction.

[13]The borrowers also complained that the wording of the final judgment permitted United Companies to execute against the guarantors for the full amount of the judgment before a deficiency had been determined, and that United Companies was not entitled to recoup the appraisal fee or environmental assessment fee under the terms of the loan documents. United Companies, which had not attempted to execute on the summary final judgment, nor required a bond during review proceedings, confessed error to these two minor points.

SUMMARY OF THE ARGUMENT

Simply put, this is an amendment case, not a usury case. The sole question on appeal before the Third District in this case was whether, given the facts, nature and progress of this foreclosure action, the trial court abused its discretion when it denied the borrowers' eleventh hour motion to amend to assert the affirmative defense of usury.

The Third District correctly held that the trial court did not abuse its discretion. The record shows a history of delay on the part of borrowers who did not answer the complaint for eight months and who waited until two partial summary judgments were entered against them before conjuring up a meritless defense.

Not only did the defense of usury come too late, it was facially groundless and, therefore, futile. Although not previously addressed in this case, prepayment penalties are not considered interest and the charge or acceptance of a prepayment penalty cannot be the basis for a claim of usury or render a nonusurious transaction usurious. Therefore, that United Companies charged both default interest at the highest rate allowed by law and a prepayment penalty did not render -- and could not have rendered -- the loan transaction usurious. Since a nonusurious transaction needs no savings clause to save it from a claim of usury, the district court's reference to Forest Creek was entirely unnecessary and the suggested conflict, illusory.

The borrowers' arguments are based on the erroneous premise that this case "involved criminally usurious conduct." But the transaction was never found by the court to be usurious nor could it have been. Therefore, this is not a proper case to address or resolve the issue of the effect to be given usury savings clauses where excessive interest has been charged. Such a case, Jersey Palm-Gross, Inc. v. Paper, Case No. 84,158, is now pending before this Court.

This Court should, therefore, determine that it has improvidently taken jurisdiction and should deny certiorari, allowing the lower courts' decisions to stand. Surely there was no abuse of discretion in the trial court's denial of an egregiously untimely motion to amend even if the defense sought to be asserted had merit. A fortiori, where the defense sought to be asserted was without merit and to allow an amendment would have been futile, there can be no abuse of discretion in denying amendment. The loan transaction here was not usurious because prepayment charges are not interest and therefore cannot be the basis for a claim of usury. Only if this Court were to depart from the accepted rule that a prepayment penalty is not interest (and therefore cannot be used in determining whether the interest rate is excessive and thus capable of being deemed usurious) would we be called upon to address the effect of the usury savings clause contained in the Note.[14]

[14]We would then also address the effect of the prepayment provisions in the note and mortgage, which state that upon default and acceleration a prepayment penalty would be charged "to the extent permitted by law."

ARGUMENT

I.

GIVEN THE PROCEDURAL FACTS OF THIS CASE, THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE BORROWERS' BELATED MOTION TO AMEND

As we argued to the Third District, the trial court did not abuse its discretion when it denied the borrowers' motion to amend because the borrowers' proposed amendment would have introduced an entirely new issue into the case at a very late stage and would have prejudiced the lender. (Pet. App. Tab E at 10-11.) The bases for the claim of usury were the default interest rate and the prepayment penalty provisions found in the loan documents. Both of these provisions appeared on the face of the note and mortgage and the borrowers had ample time to analyze and present their affirmative defenses from the beginning of the case -- especially in light of the fact that they delayed filing an answer and thus affirmative defenses until eight months after the complaint was filed (R. 159-61).

As the borrowers admit, it was not until the trial court requested that the parties brief the issue of entitlement to the various default charges that they first analyzed the documents, issues, and charges and conjured up the usury defense thereby hoping to delay the foreclosure action even more. (Pet. Initial Brief at 4.) By the time the borrowers moved to amend, the trial court had already entered two summary judgments (R. 233-34, 262-63), and was on the brink of ruling on the third (R. 263). Thus, amendment at that point would have introduced a totally new issue delaying the case and prejudicing United Companies. Based on all of this, the district court concluded that "the trial court did not abuse its discretion in denying [the borrowers'] motion to amend their pleadings," citing Costa Bella Dev. Corp. v. Costa Dev. Corp., 445 So.

2d 1090 (Fla. 3d DCA 1984) and Ruden v. Medalie, 294 So. 2d 403 (Fla. 3d DCA 1974). (Pet. App. Tab A at 2.) Since the borrowers could show no abuse of discretion, the Third District was bound to affirm the trial court's denial. See Costa Bella Dev. Corp., 445 So. 2d at 1090; Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So. 2d 38, 40 (Fla. 2d DCA) (trial court's decision to permit or refuse amendment to pleadings will not be disturbed on appeal in absence of some demonstration that it has abused its discretion), cert. denied, 136 So. 2d 349 (Fla. 1961).

Amendment of pleadings a year into a foreclosure suit, after two partial summary judgments have been granted, and two months after the case has been set for trial, as here, is not a matter of right but rather is within the trial court's sound judicial discretion. See 2765 South Bayshore Drive Corp. v. Fred Howland, Inc., 212 So. 2d 911, 914 (Fla. 3d DCA 1968). Although Florida's policy is to liberally allow amendments to pleadings, this liberality diminishes as the case progresses. Steyr Daimler Puch v. A & A Bicycle Mart, Inc., 453 So. 2d 1149 (Fla. 4th DCA), rev. denied, 459 So. 2d 1039 (Fla. 1984). See also Ruden v. Medalie, 294 So. 2d 403, 406 (Fla. 3d DCA 1974) (trial court may deny an amendment "where a case has progressed to a point that the liberality ordinarily to be indulged has diminished").

> Also, this rule of liberality does not authorize a party to state a new and different cause of action under guise of an amendment, or it if will change the issue, introduce new issues, or materially vary the grounds of relief and such amendments must not prejudice the opposing party.

Versen v. Versen, 347 So. 2d 1047, 1050 (Fla. 4th DCA 1977) (citations omitted).

This rule was applied in Title & Trust Co. v. Parker, 468 So. 2d 520 (Fla. 1st DCA 1985) with similar results. In that case, the Parkers agreed to make a loan to a California corporation and as security for the loan received a mortgage on a parcel of real property

allegedly owned by the corporation. Before closing, the Parkers received a title insurance commitment from Title & Trust covering the mortgaged property. Title & Trust later learned that the California corporation was not the owner of the mortgaged property and refused to issue a title insurance policy covering the parcel. Title & Trust did not inform the Parkers of its decision until after they had disbursed the loan funds. Id. at 522.

The Parkers sued Title & Trust for breach of the commitment to provide title insurance. Partial summary judgment was entered in favor of the Parkers on liability and the case went to trial on the issue of damages, which were awarded to the Parkers. On appeal, Title & Trust argued that the trial judge committed reversible error by refusing to grant its motion to file a second amended affirmative defense of usury on the ground that the actual interest rate on the loan was 52% per annum and was in excess of 200% for ninety days. Id. at 521-22.

On review the First District found that the trial court had not abused its discretion when it denied the motion to amend in part because Title & Trust had sought leave to amend two weeks before trial and because the proposed defense would have raised a new issue, usury. Id. at 522.

Thus, untimeliness and case posture in the present case was reason enough to deny the amendment and sufficient to pass the abuse of discretion standard of review. Any additional reason given by the Third District, including its unnecessary reference to Forest Creek, was superfluous.[15]

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[15]Petitioners argue that since a criminally usurious loan is unenforceable in the courts of this state under section 687.071 of the Florida Statutes, by denying the motion to amend and affirming, the courts below "enforced" an illegal contract. However, usury is an affirmative defense that must be timely raised or it is waived even if, unlike here, it has merit. See (continued...)

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE GRANTING THE BORROWERS' MOTION TO AMEND WOULD HAVE BEEN A FUTILE ACT

Assuming for the sake of argument that the Third District based it affirmance, however slightly, on United Companies' futility argument, the affirmance was still correct and the district court's decision does not conflict with Jersey Palm-Gross, Inc. v. Paper.

A Prepayment Premium, Charge, or Penalty is Not Interest And Therefore Cannot Be the Basis for A Claim of Usury

The borrowers' entire case is based on the faulty premise that a prepayment penalty is interest. They cite no authority for this premise -- most likely, we suggest, because there is none. But because the borrowers are not the first to assert that a prepayment penalty charged

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[15](...continued)
Continental Mortgage Invs. v. Sailboat Key, Inc., 395 So. 2d 507, 509 (Fla. 1981) ("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" (quoting Yaffee v. International Co., 80 So. 2d 910, 912 (Fla. 1955))); Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1, 4 (Fla. 1971) ("usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute"); Cerrito v. Kovitch, 423 So. 2d 1008, 1010 (Fla. 4th DCA 1982) (usury is an affirmative defense that must be properly pleaded), decision approved by 457 So. 2d 1021 (Fla. 1984); Shaffran v. Holness, 102 So. 2d 35, 39 (Fla. 2d DCA 1958) (usury is a purely personal defense that may be "availed of, or waived, at the election of the party aggrieved" (quoting Mackey v. Thompson, 153 Fla. 210, 14 So. 2d 571, 573 (1943))); Holywell Corp. v. Gould, 49 B.R. 694, 696-97 (S.D. Fla. 1985) (although usury violates a statute and is contrary to public policy and is illegal and unenforceable as between parties, a party may lawfully waive a defense based upon usury).

Simply put, by not being vigilant and timely raising the defense of usury, criminal or not, the borrowers in this case voluntarily waived such a defense.

or accepted by a lender causes a loan transaction to become usurious, there has developed, as we will show, a very substantial body of authority that holds against them.

Interest is "compensation paid by a borrower to a lender for the use of the money." Parker v. Brinson Constr. Co., 78 So. 2d 873, 874 (Fla. 1955). Courts have consistently ruled that a prepayment penalty, whether demanded by the lender on voluntary prepayment by the borrower or demanded on default and acceleration, is *not* compensation paid for the use of money and is therefore *not* interest. See e.g., Lyons v. National Sav. Bank, 113 N.Y.S.2d 695, 696 (N.Y. App. Div. 1952) (amount paid to effect prepayment may not be considered interest because it is "not exacted in connection with or as a consideration for any loan or forbearance of money or any goods or things in action"); Feldman v. Kings Highway Sav. Bank, 102 N.Y.S.2d 306, 307 (N.Y. App. Div.) (prepayment charge was not in consideration for making of loan or of forbearance of money; "[a]ccordingly, it was not a payment of interest"), aff'd, 102 N.E.2d 835 (N.Y. 1951); Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 338 (R.I. 1992) ("prepayment premium is not a charge for use of money"); Texas Airfinance Corp. v. Lesikar, 777 S.W.2d 559, 563 (Tex. Ct. App. 1989) ("prepayment charge on a promissory note is not compensation for the use of money"); Bearden v. Tarrant Sav. Ass'n, 643 S.W.2d 247, 249 (Tex. Ct. App. 1982) ("prepayment penalty is not a charge for the 'use, forbearance or detention of money'"); Boyd v. Life Ins. Co. of the Southwest, 546 S.W.2d 132, 133 (Tex. Civ. App. 1977) (charge for privilege of prepayment is not interest); Gulf Coast Inv. Corp. v. Prichard, 438 S.W.2d 658, 661 (Tex. Civ. App. 1969) (prepayment penalty is not paid or collected or received as compensation for the use or forbearance or detention of money and cannot be considered interest at all).

Indeed, courts have found prepayment penalties to be the exact *opposite* of interest. See e.g., Bearden, 643 S.W. 2d at 249 ("A prepayment penalty is not a charge for the 'use, forbearance or detention of money,' but is actually the opposite thereof. It is a payment, a consideration, for the option or privilege, . . . , of paying off a loan early to avoid payment of high interest over a long term of years."); Holliston Mills, 604 A.2d at 338 ("A prepayment premium is not a charge for use of money but is instead a consideration granted to the party who has extended to the borrowing party the option or privilege of early repayment and avoidance of further accrued interest."); Affiliated Capital Corp. v. Commercial Fed. Bank, 834 S.W.2d 521, 525 (Tex. Ct. App. 1992) (prepayment penalty is "not for continuing forbearance of payment of accelerated sum after acceleration but, rather, is designed to compensate the lender for interest that will not be earned due to the failure of the Note to go to maturity"). A Texas court in Gulf Coast Inv. Corp. summarized the reasoning on this issue:

> Instead of being an agreed consideration for the extension of credit, or for the use, forbearance or detention of money, [a prepayment charge is] the converse, a consideration for the termination of the use, forbearance or detention of money. It put[s] an end to credit, instead of giving it. We find no authority expressing a tenable theory under which such a charge could under these circumstances be considered as interest.

Gulf Coast Inv. Corp., 438 S.W.2d at 661. See also Casino Espanol de la Habana, Inc. v. Bussel, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990) (prepayment penalty "is compensation, in the form of liquidated damages, for a lender's bargained-for-consideration that its money would receive a set return for a given length of time"), rev. denied, 581 So. 2d 163 (Fla. 1991).

Since prepayment penalties are not interest, but are compensation paid for the privilege of paying off a loan before its term has run, *courts uniformly refuse to find prepayment penalties a basis for a claim of usury*. See Dezell v. King, 91 So. 2d 624, 627 (Fla. 1956) ("where the

contract is not usurious at its inception it is not rendered usurious because of exercise of the option of prepayment by the maker and the demand and receipt of interest by payee for the full length of the contract").

> The courts of this country have uniformly held that a loan transaction otherwise free of usury is not rendered usurious by a voluntary repayment prior to maturity even though the interest paid to the lender exceeds the lawful interest rate computed to the date when the loan was prepaid. In other words, as long as the interest charged and collected does not exceed the legal rate, calculated to the stipulated maturity date, the voluntary act of the borrower in prepaying the loan cannot thereby make the transaction usurious. . . . Thus, a sum paid for an early release of a note, being a charge for the termination of the use, forbearance or detention of money, is actually the opposite of interest, and hence *cannot serve as a basis for a claim of usury*.

Ware v. Traveler's Indemnity Co., 604 S.W.2d 400, 401 (Tex. Civ. App. 1980) (citations omitted; emphasis added). See Texas Airfinance, 777 S.W.2d at 563 (prepayment charge is not interest and demand for payment of it is not usurious); Winkle v. Grand Nat'l Bank, 601 S.W.2d 559, 568 (Ark.) ("[a] voluntary prepayment in the exercise of an option given by the contract does not render the contract usurious even though the creditor receives, in the aggregate, a sum more than the principal and maximum legal rate of interest"), cert. denied, 449 U.S. 880 (1980). See also Bloomfield Sav. Bank v. Howard S. Stainton & Co., 159 A.2d 443, 447 (N.J. Super. Ct. App. Div. 1960); Feldman, 102 N.Y.S.2d at 307; Silver Homes, Inc. v. Marx & Bensdorf, Inc., 333 S.W.2d 810, 814 (Tenn. 1960); Bearden, 643 S.W.2d at 249.

In Reichwein v. Kirshenbaum, 201 A.2d 918 (R.I. 1964), the court was called upon to answer the question of

> whether a loan contract otherwise free from usury and containing no option in the borrowers to anticipate payment is rendered usurious if as a result of a voluntary prepayment the lender receives for interest a sum greater than the maximum allowed by statute.

Id. at 919. Unable to find a case that answered that question affirmatively, the court observed that, on the contrary, "by the great weight of authority, it is held that a debtor by his voluntary act cannot render usurious that which but for such act would be free from usury." Id. at 919-20. The court explained the rationale:

> It is premised upon the right of a lender who has bargained to let his money out over an agreed period of time to be compensated by a borrower who for his own advantage seeks and is granted the privilege of prepayment, a privilege not otherwise his. Such a prepayment the authorities treat as a charge made for a new and separate agreement in termination of an indebtedness and not as consideration for the making of a loan or of a forbearance for money. So construed, it is not a payment of interest and cannot therefore serve as a basis for a claim of usury.

Id. at 920.

Section 687.071(2), the criminal usury statute that petitioners invoke in this case, pertains to "any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive *interest* thereon at a rate exceeding 25 percent per annum but not in excess of 45 percent per annum, ..." § 687.071(2), Fla. Stat. (1991) (emphasis added). Since, under the authorities cited, the 2% prepayment penalty that United Companies charged the borrowers may not be considered compensation for the use of the $1.3 million and is therefore *not* interest, it cannot be the basis for the borrowers' claim of usury. Thus, an amendment to their answer raising the defense of usury would have been futile and the borrowers' entire argument to this Court -- based as it is on the premise that United Companies committed criminal usury -- falls.

CONCLUSION

For the reasons stated and upon the authorities cited, this Court should determine that there is no conflict between the district court's decision and a decision of another district and thus that it is without jurisdiction. It should therefore deny certiorari and allow the correct decision of the district court to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was mailed to: Paul D. Friedman, Esq. and Paulino A. Nunez, Esq., **Friedman, Rodriguez, & Ferraro, P.A.**, 2300 Miami Center, 201 S. Biscayne Blvd., Miami, Florida 33131-4329, this 13th day of February 1995.

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