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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,029

ARTHUR LEVINE, FREDERIC J. WASSERMAN, MARK A. YAFFEY, LARRY E. WYNNE,

Petitioners,

vs.

UNITED COMPANIES LIFE INSURANCE COMPANY,

Respondent.

PETITIONERS' INTIAL BRIEF ON THE MERITS

On Discretionary Review from the District Court of Appeal of Florida, Third District

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INTRODUCTION

Without having first made the threshold determination whether criminal usury may have been charged in this case, the lower tribunals permitted a lender - Respondent - to enforce a promissory note and related loan instruments. This occurred notwithstanding Petitioners' request of the trial court to be allowed to assert the affirmative defense of criminal usury, facially supported as it were by matters of record. By refusing to allow the proposed amendment and then address whether the court had the power to enforce the loan transaction, the lower tribunals not only denied Petitioners the opportunity to show that criminally usurious conduct had occurred, but also extended the power of the judiciary to a setting where the power to act does not exist.

By this petition, three dentists together with a fourth partner ask this Court to furnish borrowers and lenders with guidance regarding whether a usury "savings" clause in a loan instrument may allow a court to enforce a contract which the Florida legislature specifically decreed may not be enforced.

This issue comes to this Court by reason of differing points of view on this matter in our District Courts of Appeal. In an opinion which sheds no light upon the foundation for its conclusion that a form of a so-called usury "savings" clause precludes the maintenance of a claim for usury, the Fifth District's decision in 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) was the first decision in this arena. Earlier this year the Third

District approvingly cited Forest Creek, holding that a defense of criminal usury may not be maintained in the face of the usury "savings" clause in Respondent's promissory note. Thus, the Third District's decision suggests that criminally usurious contracts may be enforced by our courts, notwithstanding the legislative pronouncement to the contrary expressed at § 687.071(7), Fla Stat. (1993). Thereafter, the Fourth District in Jersey-Palm Gross, Inc. v. Paper, 639 So. 2d 664 (Fla. 4th DCA 1994) heralded a completely different point of view, namely, that a usury savings clause is not a bar to a defense of usury. That court held that the presence of such a clause is but a factor to be considered in evaluating whether the lender's conduct was intentional.

The conflicting points of view are not without significance. On the one hand, a lender may be able to knowingly draft a usurious contract and intentionally charge or receive usurious interest payments all the while comforted by the fact that a legislative pronouncement of that contract's unenforceability can be ignored and its crime "waived" by the mere act of inserting text in a loan agreement which effectively says "if I get caught, then I don't mean to have entered into a usurious contract or charge a criminally usurious rate, and we'll unwind the offending conduct." On the other hand, lenders the world over ought know that a loan transaction subject to Florida law will not be enforced in a court of law - notwithstanding any exculpatory text - when they enter into criminally usurious contracts or charge criminally usurious rates.

STATEMENT OF THE FACTS

The four petitioners, Arthur Levine, Frederic J. Wasserman, Mark A. Yaffey and Larry E. Wynne, are beneficiaries of a trust which held title to a small neighborhood office services center in the West Kendall neighborhood of Dade County (the "Property"). The trust borrowed $1,300,000 from the Respondent on January 8, 1990, securing that extension of credit with a mortgage (the "Mortgage") upon the Property and each Petitioner limited personal guaranty of payment. (R. 2-65)

In the second half of 1991, Petitioners proposed to temporarily pay Respondent the Property's net cash flow and modify the loan, (R. 230) which proposal was not acceptable to Respondent because it was for less than the full monthly payment due under the promissory note. (R. 294) Nonetheless, Petitioners continued sending odd amounts of money to Respondent over the next several months, (R. 230) monies which the Respondent did not apply to the loan's balance until after the litigation commenced. (R. 360) Ignoring the partial payments, Respondent declared the loan in default in October 1991, (R. 292-93) and on January 9, 1992 accelerated the balance due. (R. 294) Shortly thereafter, Respondent filed suit to both foreclose the Mortgage and obtain money damages against the Petitioners on their limited guaranty. (R. 2-65)

More than two months after suit was filed, Respondent moved for the appointment of a receiver. (R. 82-95) After an evidentiary hearing, the lower court denied the request to appoint

a receiver and permitted Petitioners to continue to manage the Property. (R. 115-118) Several months later, Respondent first moved for a summary judgment, and in January 1993 the trial court granted that motion in part. (R. 233-35) That order set forth the principal sum awarded, but denied the motion "as to all amounts exceeding the amount of principal set forth above." (R. 233-35)

The Respondent thereafter filed its "renewed" motion for summary judgment (the "Renewed Summary Judgment Motion"). (R. 237-51), which the trial court granted in part on March 26, 1993. (R. 262-63) That order provided for Respondent's recovery of the amount due for one month's worth of interest, which represented interest at the "contract" (non-default) rate set forth in the promissory note, and the amount advanced for taxes. However, the trial court specifically:

> reserved jurisdiction 'to determine [Respondent's] entitlement to, and the amount of, the following costs and/or expenses [Respondent] claims are due under the loan that is the subject matter of this dispute: (a) default interest; (b) late charges; (c) prepayment penalty . . .'

(R. 262-63). The Renewed Summary Judgment Motion included as an attachment an affidavit from Respondent which in no uncertain terms set forth that Respondent was charging interest at the rate of 25% for the period commencing September 1, 1991 in addition to charging a prepayment penalty and late charges. (R. 249)

Shortly thereafter, as they contemplated the matters as to which the trial court had reserved jurisdiction, Petitioners determined that a defense raising issues still to be considered by the trial court should be affirmatively pled. Petitioners thus

immediately filed a motion for leave to amend their answer and affirmative defenses, (R. 266-67) attached to which was their proposed amendment alleging that Respondent was engaging in usury by charging a rate of interest in excess of 25% per annum. (R. 268-69) An order was entered days later, denying Appellants' motion for leave to amend, though no reason was set forth for said denial. (R. 362) This occurred even though the case was not set for trial and discovery could still be conducted

The case was then ordered set upon the court's trial calendar (R. 363-64). The prospect of a trial was short-lived, as just a few days later the trial court entered its order on that part of the Renewed Summary Judgment Motion as to which it had asked and received further briefs from the parties, (R. 270-97; 297-357) awarding Respondent interest at the highest rate allowed by law as claimed due by Respondent (25% per annum), but denying Respondent's claim to entitlement to recover a prepayment penalty allegedly countenanced by the promissory note. (R. 393).

STATEMENT OF THE CASE

After default, Respondent filed a mortgage foreclosure action and also sought to recover money damages against the loan's limited guarantors. (R. 2-65) The trial court denied Petitioners' motion for leave to amend their affirmative defenses, which proposed amendment sought to add the defense of criminal usury.

Respondent obtained a final judgment by means of summary adjudication under Rule 1.510, Fla. R. Civ. P. The final judgment was obtained only after Respondent succeeded in convincing the

trial court that Petitioners' motion for leave to amend represented a futile attempt at delay, based upon the argument that the subject matter of the proposed defense had been waived by Petitioners in view of the usury "savings" clause in Respondent's promissory note. The promissory note provided for both a prepayment penalty and the highest lawful rate of interest on default, and also contained a rather unusual and distinct usury "savings" clause. Respondent demanded - based upon the terms of its promissory note and buttressed by its own affidavit in support of its Renewed Summary Judgment Motion - both the prepayment penalty and default rate interest of 25% per annum, the combination of which Petitioners maintained generated an interest rate in excess of that permitted by Florida law. Shortly after Petitioners' motion for leave to amend was denied, the trial court adjudged the Respondent entitled to default interest at the rate of 25% per annum, but expressly denied Respondent entitlement to prepayment penalty it claimed due under the promissory note. The final judgment followed soon thereafter.

Respondent contended on appeal that it was not an abuse of discretion to deny leave to amend in order to assert a futile defense. In support thereof, Respondent proffered the usury "savings" clause in the promissory note and Forest Creek for the proposition that the usury savings clause precluded assertion of the defense, let alone the prospect of a finding of usury. Petitioners argued that Forest Creek was wrongly decided, lacked any analysis in support of its holding, and did not take into

account pertinent Florida law. Petitioners' notice to invoke the discretionary jurisdiction of this Court was thereafter filed and accepted.

SUMMARY OF THE ARGUMENT

Whether under Florida law a court may enforce a mortgage loan transaction which involves criminally usurious conduct is at the heart of this case. Respondent's mortgage loan to Petitioners, evidenced by a promissory note, the Mortgage and guaranteed by Petitioners, together with Respondent's affidavit filed in support of the Renewed Summary Judgment Motion, collectively constitute record evidence in this case of that criminally usurious conduct, all of which was before the trial court when it denied Petitioners' motion for leave to amend to assert the subject defense.

On default, the promissory note provided for a prepayment penalty, late charges and the highest lawful rate of interest on default. The promissory note also contained a variant of what is commonly referred to as a usury "savings" clause, purporting to establish that in entering into the loan the Respondent did not intend to charge, require or receive a usurious rate of interest.

Petitioners contend that, in view of the facts of this case, it was an abuse of discretion to deny their motion made prior to entry of a summary final judgment for leave to amend their affirmative defenses in order to assert the defense of criminal usury. This is so because Florida law - specifically § 687.071(7), Fla. Stat. (1993) - provides that no contract may be enforced which charges interest at a rate deemed criminally usurious.

Petitioners also contend that, as a matter of public policy, usury "savings" clauses in contracts are not permitted to bar a defense predicated upon criminal usury. Florida's usury statutes plainly evidence that contractual waivers of usurious contracts were not within the legislature's contemplation of allowed exceptions to conduct otherwise criminally usurious.

At a minimum and as a matter of law, Petitioners' proposed defense ought have been allowed so that the court could initially determine whether it had the power to enforce the interest charges which Respondent insisted it was entitled to charge and receive via judicial decree. This is so because it is a violation of Florida law to even charge a rate of interest deemed usurious. This is all the more so because the usury "savings" clause in Respondent's promissory note - relied upon by the lower tribunals in concluding that it was not an abuse of discretion to deny the requested amendment - is simply not a statutorily permitted basis for avoiding a criminally usurious defense. Moreover, Petitioners believe that careful scrutiny of Respondent's usury "savings" clause reveals that clause does not even exculpate Respondent from its conduct in this case.

Petitioners further contend that, when applied in the context of criminally usurious conduct, usury "savings" clauses may be deemed void as a matter of public policy. This ought be so because such clauses - in the criminal usury context - are not allowed by any statutory provision in Florida law, in a statutory scheme which

requires that conduct not otherwise allowed by law is criminally usurious.

Petitioners urge that the court declare that a contractual usury "savings" clause does not exempt conduct statutorily considered criminal usury from judicial scrutiny, and that it was error to not have allowed Petitioners proposed amendment.

ARGUMENT

I. The lower tribunals erred in enforcing the promissory note's usury "savings" clause because that clause violates Florida law.

The question presented by this appeal is whether a lender who charges interest at a rate in excess of 25% per annum may, when caught, excuse and avoid its criminal conduct by resorting to a self-serving usury "savings" clause in its promissory note. We respectfully submit that the answer to this question is no. This is because the only permissible exceptions to criminally usurious conduct are those specifically allowed by statute.

The conduct at issue in this case -- Respondent's charging of interest at a rate in excess of 25% per annum -- implicates

Florida's criminal usury statute.[1] That statute provides in pertinent part that:

> Unless otherwise specifically allowed by law, any person making an extension of credit . . . who shall willfully and knowingly charge, take, or receive interest thereon at a rate exceeding 25 percent per annum . . . whether directly or indirectly, or conspires to do so, shall be guilty of a misdemeanor of the second degree . . .

§ 687.071(2), Fla. Stat. (1993) (emphasis added). Because a contractual waiver of criminal usury is not provided for by statute, Respondent's usury "savings" clause is therefore legally ineffective.

A. Florida law does not allow a lender to purge itself of criminal usury.

This Court has in the past described the Florida usury statutes as being "fraught . . . with exceptions."[2] Indeed, the legislature has expressly exempted certain loans from the usury

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[1] Florida law distinguishes between two types of usury, "civil" and "criminal." The statutes in fact outlaw all usurious contracts. Where the usurious rate charged is less than 25% per annum, however, no criminal penalties are imposed upon the lender. Compare § 687.03, Fla. Stat. (1993) (contracts for payment of interest in excess of 18% per annum unlawful unless principal amount of loan exceeds $500,000) and § 687.04, Fla. Stat. (1993) (imposing forfeiture of interest as penalty for violation of § 687.03) with § 687.071(2)-(3) and (7), Fla. Stat. (1993) (imposing criminal sanctions upon persons charging, taking or receiving interest in excess of 25% per annum, and voiding the underlying contract).

In their proposed amendment, Petitioners referred to Respondent's conduct as usurious upon the basis of contracting for and charging interest at a rate in excess of 25% per annum. Unless exempted from the usury statutes, such conduct can only constitute criminal usury. Petitioners' proposed amendment (mistakenly) also alleged that the penalty for such conduct is forfeiture of interest (the penalty for civil usury).

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

laws altogether.[3] Nonetheless, the legislature has also made clear that the taking, receiving, or charging of interest at a rate exceeding 25% per annum (viz., criminal usury) shall not be excused "unless otherwise specifically allowed by law." § 687.071(2) (emphasis added). The legislative pronouncement is clear: Any lender not specifically allowed by law to take, charge or receive interest in excess of 25% per annum, who nevertheless does so, has committed criminal usury. The legislature's specific exemptions from the usury statutes do not afford a lender a "contractual exemption" such as Respondent argues was created by the usury "savings" clause in its promissory note. Respondent's position is but a request for such an exemption, and such a request is therefore "more appropriately determined in the legislative process than in a judicial forum." Coastal Caisson Drill Co., Inc. v. American Casualty Co. of Reading, Pa., 523 So.2d 791, 794 (Fla. 2d DCA 1988), aff'd, 542 So.2d 957 (Fla. 1989).

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[3] See § 655.56, Fla. Stat. (1993) (exempting entirely from the usury statutes certain types of loans made by financial institutions); § 687.12, Fla. Stat. (1993) (authorizing lenders and creditors licensed or chartered under certain specified provisions of Florida law "to charge interest on loans or extensions of credit ... at the maximum rate of interest permitted by law to be charged on similar loans or extensions of credit made by any lender or creditor in the State of Florida ..."); South Pointe Development Co. v. Capital Bank, 573 So.2d 939 (Fla. 3d DCA 1991) (holding that, pursuant to § 687.12, commercial bank which was not an "association" as defined in § 665.077, Fla. Stat. [1989], could rely upon language of that statute [similar to current § 655.56] which exempted savings banks from usury statutes for certain types of loans); see also § 687.02, Fla. Stat. (1993) (declaring contracts for the payment of interest at a rate higher than 18% per annum usurious but exempting from that provision all contracts for loans in excess of $500,000 "unless the rate of interest exceeds the rate prescribed in S. 687.071").

The text of § 687.04(2), Fla. Stat. (1993), provides further evidence that the legislature did not intend to allow a lender to contractually "purge" or excuse itself from a violation of the criminal usury statute. There, the legislature expressly allowed lenders who initiate specified corrective action to avoid the penalties imposed by the civil usury laws.[4] Had the legislature intended to allow lenders to avoid the criminal usury statute through a contractual clause it would have said so. See Plantation Village Ltd. Partnership of Sanibel v. Aycock, 617 So.2d 729, 731 (Fla. 2d DCA 1993) (reversing a summary judgment of foreclosure, the court rejected the lender's reliance on its usury "savings" clause because: "The 'savings clause' found in section 687.04(2), and as set forth in the promissory note applies only to civil usury. Appellants have pleaded usury under section 687.071, criminal usury. No disclaimer or savings clause provision is found under this section").

In a very recent decision, the Fourth District Court of Appeal refused to reverse a judgment entered against a lender after a finding that its loan violated the criminal usury statutes despite the presence of a usury "savings" clause. Jersey Palm-Gross, Inc.

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[4] Section 687.04 provides in part that: "[T]he penalties provided for by this section shall not apply: . . . (2) If, prior to the institution of an action by the borrower or the filing of a defense under this chapter by the borrower or receipt of written notice by the lender from the borrower that usury has been charged or collected, the lender notifies the borrower of the usurious overcharge and refunds the amount of any overcharge taken, plus interest on the overcharge taken ... to the borrower and makes whatever adjustments in the appropriate contract or account as are necessary to ensure that the borrower will not be required to pay further interest in excess of the amount permitted by S. 687.03."

v. Paper, 639 So.2d 664 (Fla. 4th DCA 1994). The Paper majority observed that:

> Section 687.04(2) allows a lender a complete defense to civil usury if prior to the institution of an action by a borrower or the filing of a defense, the lender notifies the borrowers of any allegedly usurious overcharge and refunds the amount of any overcharge. Thus, Florida's usury law affords lenders a method to avoid a claim of usury by taking the affirmative action of notification and refund before the borrower raises the claim of usury in litigation. On the other hand, a usury savings clause is an expression of the lender's intent to refund the usurious charges only after a claim of usury is raised and challenged by the borrower. We find the blanket application of a usury savings clause to defeat a usury claim as a matter of law to be inconsistent with section 687.04(2).

639 So.2d at 670 (emphasis in original). Petitioners submit that this analysis properly explains why usury "savings" clauses such as the one used by Respondent should not be given effect even in the context of civil usury. Where the conduct involved implicates the criminal usury statutes, in light of the prohibition in § 687.071(2) on anything but an express statutory exemption, the conclusion expressed by Paper applies with even greater force.[5]

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[5] The dissent in Paper also addressed § 687.04(2), commenting that it "expressly allows a post facto purge of any simple usury violation." 639 So.2d at 673 (Farmer, J. dissenting). The dissent chided the majority for failing to "explain why under anything found in chapter 687 such a purge could not be built ab origine like this savings clause into the loan documents themselves and achieve the same effect. They do not seem to consider whether if usury can be purged ex post facto, as the statute clearly allows, it can also be avoided anticipatorily, which the statute does not clearly prohibit." Id. Respectfully, even if the dissent were correct as to cases involving civil usury, it ignores the fact that § 687.071(2) does indeed "clearly prohibit" a purported after-the-fact (or any other non-statutory) purge in cases of criminal usury.

Rather than allow lenders to avoid the criminal usury statute through a contractual clause, the Legislature prohibited the taking, receiving, or charging of interest at a rate exceeding 25% per annum unless expressly allowed by law. Since it is patently clear that no statute allows Respondent's usurious conduct, Respondent's contract cannot be said to excuse its prohibited conduct from judicial scrutiny.

B. Enforcement of a usury "savings" clause to allow a lender to escape the sanctions of the criminal usury statutes is against public policy.

Even if the legislature had not expressly forbidden lenders from contractually "saving" themselves from their criminally usurious contracts and conduct, Petitioners believe enforcement of such clauses would violate public policy. This Court has long recognized that, in dealing with matters of usury, courts must not consider the form of a loan transaction over its substance:

> It cannot be held that a design formulated in the mind of the lender to evade the evident purpose of the usury laws and still exact his unlawful interest would be permitted, especially in a court of equity.
>
> 'The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered.'

Beacham v. Carr, 122 Fla. 736, 742-43, 166 So. 456, 459 (1936). Because enforcement of Respondent's usury "savings" clause would require this Court to ignore the substance of the parties agreement

and Respondent's conduct in favor of the form of Respondent's promissory note (the usury "savings" clause), this established principle of Florida jurisprudence would be rendered a nullity.

In a recent decision, the Supreme Court of North Carolina held that application of a usury "savings" clause would be against public policy because a such a clause "cannot shield a lender from liability for charging usurious rates." Swindell v. Federal Nat'l Mortgage Ass'n, 409 S.E.2d 892, 896 (N.C. 1991). Accord Countrywide Funding v. Kapinos, Case No. 91-0504817, 1993 WL 118070 (Conn. Super. Ct. April 2, 1993) (unpublished, copy at Appendix tab C). The Swindell court held that allowing lenders to rely on usury "savings" clauses would frustrate legislative intent:

> The [usury] statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law. A 'usury savings clause,' if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute's protection and penalties.

409 S.E.2d at 896. In concluding its discussion of usury "savings" clauses, the Swindell court said: "A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower." Id (emphasis added). Petitioners respectfully submit that the reasoning of the Supreme Court of North Carolina is consistent with the expressed intent of the Florida legislature as well as Florida jurisprudence.

Decisions of this Court outside of the usury context also suggest that enforcement of a usury "savings" clause in the face of criminal usury statutes is against public policy. As discussed, § 687.071(2), among other things, prohibits the charging or receiving of interest at a rate exceeding 25% per annum. Usury "savings" clauses such as Respondent's purport to cure or "purge" usury by providing for the refund of any usurious interest collected by the lender and professing intent to not act wrongfully. In effect, the clauses purport to have the borrower "waive" usury. In Coastal Caisson, this Court affirmed a decision refusing to allow an individual subcontractor to waive a bonding requirement established by statute. The Court agreed with the subcontractor that the statute was "for the protection of the public as well as the subcontractors." 542 So.2d at 958. The usury statutes at issue here contain criminal penalties obviously designed to redress public rights and specifically prohibit courts from enforcing any contract which violates the statute. § 687.071(7), Fla. Stat. (1993). Even if an after-the-fact refund of usurious interest could otherwise serve as a waiver by the borrower, in light of the public interest served by the criminal usury statutes Petitioners respectfully submit that enforcement of such "waivers" would contravene legislatively pronounced public policy.

C. Allowing a usury "savings" clause to furnish a lender with an absolute escape from the sanctions of the criminal usury statutes is against public policy.

Even if the Court were to conclude that usury "savings" clauses are not prohibited by statute and are not absolutely against public policy, the published decision of the Third District Court of Appeal in this case should be reversed. In a thorough and scholarly opinion, the Paper court surveyed the reported decisions from Florida and other jurisdictions regarding usury "savings" clauses. The Paper decision, rendered before the opinion below was published, found only one published decision nationwide giving "blanket" effect to a usury "savings" clause: 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). See Paper 639 So.2d at 669 ("No other Florida case goes as far, and we expressly disagree with the blanket holding in Forest Creek.").[6]

The decision below expressly relied upon Forest Creek. The court held that the presence of Respondent's usury "savings" clause, together with the trial court's refusal to award Respondent

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[6] In addition to the North Carolina and Connecticut decisions which refused enforcement of usury "savings" clauses on public policy grounds and the Florida decisions discussed above, the Paper court found that only Texas courts had addressed usury "savings" clauses. See Paper, 639 So.2d at 670 ("A review of the decisions nationwide reveals that only North Carolina, Texas and Connecticut have discussed the effect of usury savings clauses on otherwise usurious transactions."). The Texas courts, although not refusing to enforce such clauses outright, will not allow a lender to "exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done." Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1050 (1937).

usurious interest, was grounds for affirming the judgment entered after the trial court's order denying Petitioners' motion for leave to add the defense of usury. Levine v. United Cos. Life Ins. Co., 638 So.2d 183, 184 (Fla. 3d DCA 1994) ("[T]he mortgage note expressly stated that interest was to be charged only at a lawful percentage. The inclusion of this language in loan documents has been held to warrant dismissal of a usury claim. Finally, the trial court did not award the prepayment penalty. . . . Thus, the court's refusal to permit the amendment was harmless since the court effectuated the parties' expressed intent that a usurious rate not be charged or received.") (citation to Forest Creek omitted). This ruling came despite the filing in the trial court of Respondent's affidavit acknowledging that it had been repeatedly charging both a "prepayment" penalty (of two percent) as well as default interest at the rate of 25% per annum.

The Paper court did not conclude that usury "savings" clauses are legally unenforceable or void as against public policy. Nevertheless, the court refused to "hold that the insertion of a usury savings clause in one of several documents to a loan transaction will shield the lender from the reach of Florida's usury laws as a matter of law." 639 So.2d at 671. Even the dissent in Paper conceded that "ascribing to savings clauses a categorical avoidance of usury, as in Forest Creek, might be too sweeping." Id. at 675 (Farmer, J. dissenting). The decision below assumes, as it must, that Respondent in fact charged interest which is usurious unless "saved" by Respondent's "savings" clause. (As

discussed in section D, below, the decision below in this case also ignored the fact that Respondent had "charged" usurious interest, a matter Petitioners submits could never be cured by Respondent's "savings" clause). In order to affirm that decision, the Court would have to accept Respondent's position that such a clause negates, as a matter of law and without need for any factual inquiry whatsoever, a lender's intent to charge or receive usurious interest. Petitioners respectfully submit that Respondent's position adopted in the decision below is inconsistent with Florida public policy.

D. Even if usury "savings" clauses could be enforced, Respondent's usury "savings" clause does not "save" Respondent from its criminally usurious conduct.

1. Respondent's "savings" clause does not negate Respondent's intent to charge usurious interest.

Respondent successfully argued to the lower tribunal that its usury "savings" clause negated any intent on the part of Respondent to charge usury and, moreover, that the trial court's failure to award Respondent the usurious interest it charged rendered Respondent's conduct in repeatedly charging usurious interest harmless. Even if this Court were to conclude that usury savings clauses can be enforced by Florida courts in cases involving criminally usurious interest and that such clauses can be given the blanket effect afforded by Forest Creek, Respondent's "savings" clause does not work to "save" Respondent from its conduct. In this regard, the lower tribunal was simply (and respectfully) in error.

The Florida criminal usury statute applicable to this case prohibits three types of conduct: Willfully and knowingly (i) charging interest at a rate exceeding 25% per annum; (ii) taking interest at a rate exceeding 25% per annum; or (iii) receiving interest at a rate exceeding 25% per annum. See § 687.071(2). In this case, Respondent had not yet taken or received interest at a rate exceeding 25% per annum as of the time Petitioners filed their motion for leave to amend their affirmative defenses. Respondent had, however, repeatedly charged interest at a rate in excess of 25% per annum. Respondent's conduct, therefore, is no less than a facial violation of the criminal usury provision of § 687.071(2) unless - by decree of this Court - its conduct can be "saved" by the usury "savings" clause.

Respondent's "savings" clause (contained in the tenth paragraph of Respondent's promissory note) provides as follows:

> 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. Lender agrees not to knowingly collect or charge interest (whether denominated as fees, interest or other charges) which will render the interest rate hereunder usurious, and if any payment of interest or fees by Borrowers to Lender would render this Note usurious, Borrower agrees to give Lender written notice of such fact with or in advance of such payment. If Lender should receive any payment which constitutes interest under applicable law in excess of the maximum lawful contract rate permitted under applicable law (whether denominated as interest, fees or other charges), the amount of interest received in excess of the maximum lawful rate shall automatically be applied to reduce the principal

balance, regardless of how such sum is characterized or recorded by the parties.

Promissory note at 2-3 (emphasis added) (see Appendix tab B).

Careful analysis of this clause reveals that the first sentence contains a self-serving expression of an alleged intent on the part of Respondent to "comply" with the applicable usury law and an alleged agreement that "the effective rate of interest to be paid" under the promissory note will not exceed the maximum rate allowed by law. The next sentence contains the Respondent's self-serving statement that it will not "knowingly collect or charge" interest which would render the interest rate usurious. Rather remarkably - given that it turns § 687.04 upside down[7] - that sentence further provides that the borrower (Petitioners) should give notice to Respondent of any usurious payment actually made. Finally, the last sentence expresses the Respondent's agreement to re-characterize as principal any payment of usurious interest the Lender actually receives under the promissory note.

Thus, the only sentence of Respondent's usury "savings" clause which actually speaks to the charging of criminally usurious interest, the conduct at issue in this case, is the second sentence. That sentence expresses only the Respondent's intent (promise) at the time it signed the promissory note, that it would not in the future "knowingly" charge usurious interest. However, the record in this case demonstrates that Respondent in fact did charge usurious interest after Petitioners' default. Regardless of

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[7] Even assuming that section has any application when the criminal usury statutes are implicated.

whether Respondent originally intended to knowingly charge usurious interest, Respondent later did so. Therefore, Respondent cannot be "saved" by the language of its own "savings" clause.

The facts in Kapinos, supra. are analogous to the facts of the instant case. In Kapinos, as here, the lender prepared an instrument containing a usury "savings" clause denying an intent to charge usurious interest. The lender later actually charged usurious interest. The Kapinos court refused to allow the lender's "savings" clause to excuse its usurious conduct:

> While this disclaimer or "savings clause" appears to negate any intent to extract a usurious rate of interest at the time the note was drafted, the plaintiff's subsequent actual demand and acceptance of the 12.5% rate of interest reveals a different intent after the note was executed. Its Affidavit of Debt at the time of foreclosure calculates the amount due at the usurious rate.

Slip op. at 2. This holding applies with equal force to Respondent's conduct.

2. Respondent's conduct demonstrates its intent to charge and receive usurious interest while "hiding" behind its usury "savings" clause.

Respondent's promissory note - containing language allowing it to charge upon default both interest at the highest rate allowed by law and a prepayment penalty[8] and late fees - is peculiarly the type of loan agreement which the Court should not allow to be "saved" by a usury "savings" clause. While at first glance it may seem to be the case that the presence of Respondent's usury "savings" clause could be read to "save" the Note from being

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[8] The promissory note unabashedly refers to the prepayment penalty as a prepayment "premium."

facially usurious, given that Respondent actually charged interest at more than 25% per annum after default, the "savings" clause does not "save" Respondent from its post-contracting conduct.

If Respondent in fact had no intent to charge or collect usurious interest - as Respondent now contends - the language of the promissory note is indeed curious. The fourth paragraph of the promissory note purports to require that following acceleration of the loan balance after an event of default a "prepayment" penalty "shall be included in the amount of" any judgment obtained by Respondent. Promissory note at 2 (emphasis added). The ninth paragraph of the promissory note then purports to give Respondent the right to collect "[a]fter default . . . interest at the highest lawful rate per annum allowed by the laws of the State of Florida." Id. In that Respondent was allowed, under the ninth paragraph, to collect interest at the highest lawful rate, any additional interest charged by Respondent would certainly be unlawful.

The fourth paragraph of Respondent's promissory note, exacting a "prepayment" penalty (commencing in the loan's third year) in addition to interest at the highest lawful rate charged under the ninth paragraph, could perhaps be construed as being mere surplusage in light of the "savings" clause. However, Respondent's post-default conduct demonstrates that Respondent had no intention of ignoring the fourth paragraph. Instead, Respondent repeatedly insisted on charging both a two percent[9] "prepayment" penalty (as

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[9] The January 8, 1990 promissory note does not permit prepayment at any time during the first two years. Yet, it is the case that Petitioner's payment default occurred during the second

well as "late fees") and "default" interest at what it later admitted to be the rate of 25% per annum.

As an attachment to the Renewed Summary Judgment Motion, (R. 237-251) Respondent filed an affidavit with the trial court which proclaimed that Respondent's "records show that it is entitled to recover . . . interest, late charges, [and] prepayment penalty." (R. 247), Affidavit at 6, ¶ 10 g (emphasis added). The affidavit further made clear that Respondent was charging interest "at default rate of 25 % from 9/1/91" plus "late charges" computed at "$582.47 per month from 9/1/91" plus a "prepayment penalty" of $25,788.83. (R. 249), Affidavit at 8, ¶ 15. Respondent's trial counsel added that this affidavit established that: "Plaintiff is irrefutably entitled to all of the sums it sought . . . in excess of the principal awarded by the Court . . . Plaintiff has specifically shown that . . . (a) post-default interest was properly calculated . . . (b) late charges and the prepayment

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year of the loan (failure to make the payment due in September 1991), which occasioned Respondent's written notice of default in October 1991. (R. 292-93) Interestingly, the promissory note does countenance prepayment in certain circumstances; it provides for a two percent prepayment penalty during the third year of the loan (see the third paragraph of the promissory note) and a one percent prepayment penalty during the fourth year. The promissory note does not set forth a prepayment penalty - in any amount - during the first two years of the loan, yet purports to exact "the prepayment charge" in the event of foreclosure after acceleration. Perhaps this explains why Respondent gave notice of Petitioners' delinquency in October 1991, but waited until exactly January 9, 1992 to declare the loan balance accelerated. (R. 294-96) See Respondent's demand letters, contained in Appendix at tab D. Since the loan was made on January 8, 1990, the two percent prepayment "premium" which kicked-in under the terms of the promissory note upon acceleration during the third year of the loan became applicable on January 9, 1992.

penalty were properly calculated." (R. 239) (emphasis in original).

The facts of this case illustrate why enforcement of usury "savings" clauses would frustrate the purpose of the legislature. Prior to filing its lawsuit, Respondent demanded that it be paid both default interest at a rate it later admitted was 25% per annum as well as a 2% "prepayment" penalty after petitioner's default[10] by failing to make principal payments. See Respondent's demand letters. (R. 294-296) These demands continued after the filing of Respondent's complaint.

After Petitioners sought leave of the trial court to add the defense of usury (R. 266-67), Respondent argued that its "usury disclaimer clause," as a matter of law, prevented the loan from being usurious. Respondent further argued that, as a result, allowance of the amendment would be futile. (R. 301-02) Respondent nevertheless insisted it was entitled to both 25% default interest and the prepayment penalty. The trial court ultimately granted the Renewed Summary Judgment Motion, but refused to assess the prepayment penalty. (R. 393) On appeal, Respondent changed tact and argued that the trial court, by refusing to assess the prepayment penalty "effected" the parties' intent and prevented the loan from being usurious.[11]

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[10] Again, it is noted that Respondent's promissory note does not state that a prepayment penalty can be charged when the loan balance is due during the loan's first two years.

[11] See Respondent/Appellee's Answer Brief at 4 n.9 (Appendix tab E) ("since the trial court's order brought the judgment into conformity with the applicable usury laws, United Companies did not

Thus, the record reflects that Respondent repeatedly charged what it later effectively conceded was criminally usurious interest. When Respondent was caught, however, Respondent argued that: (i) its "savings" clause made clear that it never intended to charge usurious interest; and (ii) in any event, the trial court's refusal to award Respondent interest in excess of 25% per annum rendered its charging of criminally usurious interest harmless. Petitioners respectfully submit that Respondent's conduct in this case demonstrates why usury "savings" clauses should not be enforced.

II. The lower courts erred in refusing to consider whether they had the power to enforce Respondent's promissory note.

Section 687.071(7) Fla. Stat. (1993), provides that:

> No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state.

This statute makes clear that contracts for criminally usurious interest -- such as that involved in this case -- are void and cannot be enforced in Florida courts.

In this case Petitioners alleged that Respondent was charging usurious interest in excess of 25% per annum, i.e., criminal usury,

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-- and does not -- challenge the denial of the prepayment penalty"). See Id. at 6-7 ("by omitting an award of the prepayment penalty in the final summary judgment, the trial court correctly effectuated the parties' expressed intent that a usurious rate not be charged or received."); See also Id. at 11 (trial court's refusal to assess prepayment penalty "was the equivalent of finding, as a matter of law, lack of intent to charge a usurious rate and conforming the judgment to this finding and the parties' agreements.")

and Respondent's own promissory note and affidavit facially confirmed this allegation. The trial court denied Petitioners' motion for leave to add the affirmative defense of usury without explanation (R. 362) and later granted the Renewed Summary Judgment Motion, awarding Respondent default interest at 25%, but refusing to award Respondent the prepayment penalty it had been charging. The Third District Court of Appeal affirmed the trial court, tacitly finding that Petitioners had waived the defense of usury and that the usury "savings" clause justified the relief that was awarded to Respondent. The Third District Court of Appeal also held that Petitioners' claim of error was "harmless" since the trial court's refusal to award the prepayment penalty "effectuated the parties' expressed intent that a usurious rate not be charged or received." Id. at 1294.[12]

For the reasons discussed in Section I, above, Petitioners respectfully submit that Respondent's "savings" clause cannot sanction charging a criminally usurious rate of interest, particularly when such contracts may not be enforced under Florida law. See § 687.071(7). Thus, the trial court abused its discretion in not allowing the defense of usury to be pled, and the Third District Court erred in affirming that ruling.

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[12] However, since Florida law is violated merely by charging a usurious rate of interest, see § 687.071(2), Fla. Stat. (1994), the act of charging a criminally usurious rate of interest can not ever be said to be "harmless."

Florida courts routinely hold that leave to amend pleadings should be freely granted in order that cases may be resolved on the merits. In fact, this Court has held that, even where:

> summary judgment should be entered, yet the matters presented indicate that the unsuccessful party may have a cause of action or defense not pleaded, or a better one than that pleaded, the proper procedure is to enter the summary judgment with leave to the party to amend.

Hart Properties, Inc. v. Slack, 159 So.2d 236, 240 (Fla. 1963). Further, as noted below, in light of the enactment of § 687.071(7), the defense of criminal usury is not waivable as a matter of law.

Prior to 1969, Florida courts held that usurious contracts were not void and the defense of usury was waivable. Yaffee v. International Co., Inc., 80 So.2d 910, 912 (Fla. 1955) ("[T]he usury statutes in this jurisdiction do not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accord to the obligor the personal privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts") (some emphasis in original). In 1969, the legislature enacted § 687.071(7). In doing so the legislature is presumed to be cognizant of the judicial construction of the statute when contemplating making changes in the statute. See Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981). Thus, it is presumed that when the legislature effectuates changes in a statute, it intends to accord the statute a meaning different from that accorded it before the changes were made, See e.g., Seddon; Arnold v. Shumpert, 217 So.2d 116, 119 (Fla. 1968). By depriving Florida courts of the power to enforce criminally

usurious contracts the legislature must be presumed to have intended to effectuate a change in the law -- i.e., the legislature must be presumed to have intended to overrule Yaffee and those previous rulings which allowed courts to enforce usurious contracts upon a finding that borrowers had waived the defense.

For the reasons discussed in Section I, above, Petitioners respectfully submit that Respondent's "savings" clause cannot sanction charging a criminally usurious rate of interest. As a result, Respondent's usury "savings" clause cannot operate to validate Respondent's charging of criminally usurious interest. Under the circumstances, the trial court must be deemed to have abused its discretion in enforcing a contract that, pursuant to § 687.071(7), is not enforceable in Florida courts (and the Third District Court to have erred in affirming that ruling).

CONCLUSION

It ought be obvious that Respondent has thus far avoided being held to the dictate of Florida law, a circumstance which invites correction. Contractual waivers of criminal usury are not countenanced by Florida law; indeed, the loan agreements from which such conduct emanates are statutorily decreed to not be enforceable. Florida's public policy in the civil arena should be in accord with its criminal laws made applicable thereto. Conduct considered criminal should not, by the grace of an allowed or disallowed pleading amendment, escape judicial scrutiny.

Petitioners urge that in transactions subject to Florida law lenders be required to strictly adhere to legislative decrees

rather than be allowed to avoid the same by non-sanctioned, albeit creative, initiatives.

Petitioners respectfully request that the decisions below be reversed.

Respectfully submitted,

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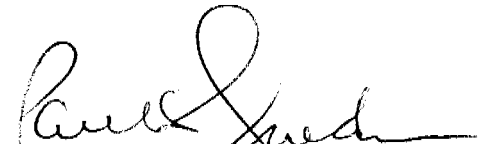
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Initial Brief on the Merits was mailed this 20th day of December, 1994 to Daniel S. Pearson, Esq., Holland & Knight, P.O. Box 015441, Miami, Florida 33101-5441.



Paul D. Friedman