IN THE SUPREME COURT OF FLORIDA

#84029

ARTHUR LEVINE, etc., et al.,

Petitioners,

-versus-

UNITED COMPANIES LIFE INSURANCE COMPANY

Respondent.

On Appeal from the a decision of
the Third District Court of Appeals
Case No. 93-1404

PETITIONER'S JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	(i)
TABLE OF CITATIONS	(ii)
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
JURISDICTIONAL STATEMENT	3
ARGUMENT	4
The decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Jersey-Palm Gross, Inc. v. Paper, 19 Fla. L. Weekly 1455 (Fla. 4th DCA 1994)	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9
APPENDIX	

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TABLE OF CITATIONS

Cases — Page

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962) 3

Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So.2d 356 (Fla. 5th DCA 1988) 1, 2, 4-6

Jersey-Palm Gross, Inc. v. Paper, 19 Fla. L. Weekly 1455 (Fla. 4th DCA 1994) 2, 4-6

Levine v. United Cos. Life Ins. Co., 19 Fla. L. Weekly 1293 (Fla. 3d DCA 1994) 4, 5

N.&.L. Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960) 4

Spradley v. Stick, 622 So. 2d 610 (Fla. 1st DCA 1993) 3

Constitutional Provisions

FLA. CONST. art. 5, § 3(b)(3) 3, 4

Court Rules

FLA. R. APP. P. 9.030(a)(2)(A)(iv) 3, 4

FLA. R. APP. P. 9.040 3

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STATEMENT OF THE CASE AND FACTS

This case concerns a commercial mortgage loan transaction evidenced by a note (the "Note") and guaranteed by Petitioners. The Note provided for both a prepayment penalty and the highest lawful rate of interest on default, and also contained a "usury savings" provision. On default, Respondent demanded both the prepayment penalty and default rate interest of 25% per annum, the combination of which Petitioners maintained produced an interest rate in excess of that permitted by Florida law. When Petitioners sought to amend their defenses to include a defense of usury, leave of court was denied.

The failure to grant leave to amend was raised on appeal. Respondent contended 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" provision in the Note and Forest Creek Development Co. v. Liberty Savings & Loan Association, 531 So. 2d 356, 357 (Fla. 5th DCA 1988), for the proposition that the usury savings provision precluded 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. The Third District Court, relying on Forest Creek, agreed with Respondent's point of view.

Petitioners' notice to invoke the discretionary jurisdiction of this Court was timely filed on July 13, 1994.

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SUMMARY OF THE ARGUMENT

The Third District Court held in this case that, since the Note contained language expressly stating that "interest was to be charged only at a lawful percentage," such was sufficient to render Petitioners' usury defense legally insufficient.[1]

This decision of the Third District Court cannot be reconciled with the decision of the Fourth District Court in Jersey-Palm Gross, Inc. v. Paper, 19 Fla. L. Weekly 1455 (Fla. 4th DCA 1994), wherein the court held that the inclusion of such language did not preclude, as a matter of law, a finding of usury. Thus, Petitioners contend that the decision of the Third District Court expressly and directly conflicts with the decision of the Fourth District Court.

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[1] This decision, like the Forest Creek opinion on which it is premised, thus eviscerated the language of Florida's usury laws, which prescribe that:

> 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 . . . shall be guilty of a misdemeanor of the second degree . . . [and] 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.

§§ 687.071(2), (3), Fla. Stat. (1994) (emphasis added).

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review the decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. FLA. CONST. art. 5, § 3(b)(3); FLA. R. APP. P. 9.030(a)(2)(A)(iv).[2]

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[2] Respondent may argue that the Court should refuse to accept jurisdiction in this case, because the appellate court determined that the trial court did not abuse its discretion in refusing -- prior to fully adjudicating Respondent's pending summary judgment application -- Petitioners' leave to amend their defenses to assert usury. Petitioners respectfully assert that, when read in context, the Third District Court found no abuse of discretion in denying leave to amend precisely because it concluded, relying on Forest Creek, that the usury savings language in the Note precluded the assertion of the defense of usury, rendering amendment futile. See, e.g., Spradley v. Stick, 622 So. 2d 610, 613 (Fla. 1st DCA 1993) (abuse of discretion to refuse to allow amendment unless "amendment would be futile."); Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222 (1962) (same). Moreover, Florida law specifically provides for "such jurisdiction as may be necessary for a complete determination of the cause." Rule 9.040, *Fla. R. App. P.* (emphasis added). Thus, this Court is empowered, on accepting jurisdiction, to completely determine all issues raised.

ARGUMENT

The decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Jersey-Palm Gross, Inc. v. Paper, 19 Fla. L. Weekly 1455 (Fla. 4th DCA 1994)

This Court's discretionary jurisdiction is properly invoked where decisions of district courts of appeal expressly and directly conflict with a decision of another district court of appeal on the same question of law. FLA. CONST. art. V, § 3(b)(3); Rule 9.030 (a)(2)(A)(iv). In considering jurisdiction, this Court's concern:

> is with the decision under review as a legal precedent to the end that conflicts in the body of the law of this State will be reduced to an absolute minimum and the law announced in the decision of the appellate courts of this State shall be uniform throughout.

N & L Auto Parts Co. v. Doman, 117 So. 2d 410, 412 (Fla. 1960).

In this case, the Third District Court of Appeal emphasized that the Note "expressly stated that interest was to be charged only at a lawful rate." Levine v. United Cos. Life Ins. Co., 19 Fla. L. Weekly 1293, 1293 (Fla. 3d DCA 1994). The court then relied on Forest Creek Development Co. v. Liberty Savings & Loan Association, 531 So. 2d 356, 357 (Fla. 5th DCA 1988), rev. denied, 541 So. 2d 1172 (Fla. 1989), for the proposition that usury savings language "has been held to warrant dismissal of a usury claim." Levine, 19 Fla. L. Weekly at 1293. Finally, the Levine court considered "harmless" the trial court's ruling refusing to award

the prepayment penalty, "since the court effectuated the parties' expressed intent that a usurious rate not be charged or received." Id. at 1294.[3] In so doing, the appellate court apparently tacitly admitted that, had the Levine court not held the usury savings language to have precluded a finding of usury, usury indeed existed.[4]

In Jersey-Palm Gross, Inc. v. Paper, 19 Fla. L. Weekly 1455 (Fla. 4th DCA 1994), the Fourth District Court of Appeal affirmed the trial court's determination of usury, concluding that "[t]he existence of a `usury savings clause' did not preclude, as a matter of law, a finding of usury." Id. at 1455. The loan in that case also contained usury savings language, which, as in Levine, was asserted to prevent any determination of usury.

The Jersey-Palm Gross court analyzed usury law meticulously, in the course of which it noted the Forest Creek holding that "the usury count was properly dismissed because of the usury savings clause." Jersey-Palm Gross, 19 Fla. L. Weekly at 1456 (citing Forest Creek). The Fourth District Court also stressed that the Fifth District Court in Forest Creek cited no authority in support

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[3] However, Florida law is violated merely by charging a usurious rate of interest. See § 687.071(2), Fla. Stat. (1994).

[4] Petitioners' analysis and arguments presented during the appeal below presaged the analysis and holding announced in the Fourth District Court of Appeal's Jersey-Palm Gross decision.

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of its extreme conclusion. Jersey-Palm Gross, 19 Fla. L. Weekly at 1456. The Fourth District Court's exhaustive analysis plainly buttressed its determination that:

> No other Florida case goes as far, and we expressly disagree with the blanket holding in Forest Creek.

Jersey-Palm Gross, 19 Fla. L. Weekly at 1456.

Levine, relying on Forest Creek, expressly and directly conflicts with the decision of the Fourth District in Jersey-Palm Gross. Moreover, noting that to countenance Forest Creek would "grant commercial lenders automatic immunity from the reach of our state's usury statute so as to nullify its effect," Jersey-Palm Gross, 19 Fla. L. Weekly at 1457 (emphasis in original), the Jersey-Palm Gross court certified conflict with Forest Creek.

As a result, commercial financing transactions in Florida have been thrown into confusion. Currently, the rules for lenders and borrowers differ from one appellate judicial district to another regarding enforceability of usury savings language. Moreover, both lenders and borrowers are at a loss as to the effect of usury savings language and what, if any, reliance may be placed thereon. More significantly, legislative protections for borrowers have been negated.

As a result, Petitioners respectfully submit that, since this matter is of such significance to lenders and borrowers in this

state, the Supreme Court ought thus accept discretionary review and resolve the conflict.

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CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of Petitioners' argument.

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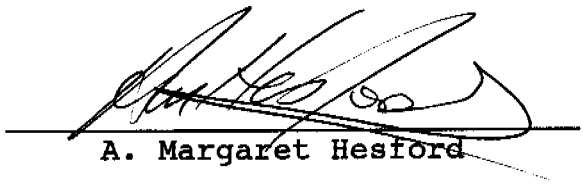
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing jurisdictional brief has been furnished by U.S. mail this 22nd day of July, 1994 to Daniel S. Pearson, Esq., and Lucinda A. Hofmann, Esq., Holland & Knight, 701 Brickell Avenue, P.O. Box 015441, Miami, Florida 33101.

By: 
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APPENDIX

INDEX

Conformed copy of the opinion to be reviewed

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TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1994

ARTHUR LEVINE, et al., **

Appellants, **

vs. ** CASE NO. 93-1404

UNITED COMPANIES LIFE INSURANCE COMPANY, **

**

Appellee. **

Opinion filed June 14, 1994.

An Appeal from the Circuit Court for Dade County, Harvey Goldstein, Judge.

Friedman, Rodriguez & Ferraro, and Paul D. Friedman, and A. Margaret Hesford, for appellants.

Holland & Knight, and Daniel S. Pearson, and Lucinda A. Hofmann, for appellee.

Before JORGENSON, LEVY, and GERSTEN, JJ.

PER CURIAM.

Appellants, Arthur Levine, et al., appeal from a judgment of foreclosure and money damages. We reverse in part and affirm in part.

Appellee, United Companies Life Insurance Co., correctly concedes the first two points on appeal. First, guarantors of a purchase mortgage loan should be liable only for the amount of a deficiency if established subsequent to a foreclosure. See Hatton v. Barnett Bank, 550 So. 2d 65, 66-68 (Fla. 2d DCA 1989). Therefore, the guarantors here may not be held liable for the full amount of the judgment prior to a determination of a deficiency. Second, appellee is not entitled to an award for appraisal and environmental assessment fees where the loan documents do not provide for either fee.

Turning to the contested issue on appeal, we conclude that the trial court did not abuse its discretion in denying appellants' motion to amend their pleadings to state an affirmative defense of usury. See Costa Bella Dev. Corp. v. Costa Dev. Corp., 445 So. 2d 1090 (Fla. 3d DCA 1984). While the trial court has discretion to grant amendments to pleadings even during trial, this liberality diminishes as the case progresses. Ruden v. Medalie, 294 So. 2d 403, 406 (Fla. 3d DCA 1974).

In addition, the 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. Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So. 2d 356, 357 (Fla. 5th DCA 1988), review denied, 541 So. 2d 1172 (Fla. 1989).

Finally, the trial court did not award the prepayment penalty. Appellants had asserted that this penalty in combination with the default interest rate constituted usury. 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. Accordingly, we reverse the trial court on the issues to which appellee confessed error while, at the same time, affirming the trial court's denial to amend the pleadings.

Reversed in part; affirmed in part.