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' REPLY BRIEF

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

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INTRODUCTION

Not content with being able to charge interest at 25% per annum, Respondent prepared a promissory note (the "Note") which allowed Respondent to charge both interest at 25% and a "prepayment" penalty of 2% of the outstanding balance due under the Note in the event of Petitioners' default. Petitioners became unable to make the full monthly payment amount due under the Note. Respondent refused Petitioners' partial payments and declared the Note in default. When it became clear to the Petitioners that Respondent was charging both default interest at the rate of 25% per annum and a "prepayment" penalty, Petitioners sought leave to amend their pleadings to add the defense of usury. Relying upon a usury "savings" clause contained in the Note, Respondent successfully argued to the trial court that the Note, as a matter of law, could not be usurious. The trial court thereafter denied Petitioners' motion for leave and granted a final judgment in favor of Respondent. In its brief to the Third District Court of Appeal, Respondent again relied upon its usury "savings" clause and succeeded in obtaining an order affirming the final judgment.

In their initial brief on the merits, Petitioners argued that usury "savings" clauses are prohibited by the Florida statutes regarding criminal usury; are against public policy; and, in any event, that Respondent's usury "savings" clause does not work to "save" Respondent from usury under the facts of this case. Despite having relied upon its "savings" clause in order to secure victory below, Respondent has now abandoned entirely any attempt to defend

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its usury "savings" clause argument. Instead, and incredibly, Respondent argues that a prepayment penalty cannot constitute usury. In doing so, Respondent admits that this argument was never raised below and was raised for the first time before this Court.

Respondent's other argument before this Court is that Petitioners' motion for leave to add the affirmative defense of usury was untimely. Respondent further argues, therefore, that the trial court did not abuse its discretion in denying Petitioners' motion for leave and that the Third District properly affirmed the trial court's ruling. Petitioners respectfully submit that the trial court denied the motion for leave precisely because Respondent successfully convinced the trial court that the proposed amendment was futile as its usury "savings" clause, as a matter of law, prevented the Note from being usurious: the Third District, in its published opinion, expressly relied upon Respondent's "savings" clause and Forest Creek Dev. Co. v. Liberty Sav. & Loan Ass'n, 531 So.2d 356 (Fla. 5th DCA 1988) in affirming the trial court's judgment.

This Court accepted jurisdiction of this case after noting the direct conflict between the decision of the Third District below and the decision of the Fourth District Court of Appeal in Jersey-Palm Gross, Inc. v. Paper, 639 So.2d 664 (Fla. 4th DCA 1994). Respondent's refusal to defend its usury "savings" clause before this Court, in addition to reflecting Respondent's admission of the weakness of its position, reflects Respondent's effort to have this Court vacate its order accepting jurisdiction.

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Respondent's refusal to defend its position before this Court, however, cannot change the fact that the trial court and, more importantly for purpose of Respondent's jurisdictional argument, the Third District, expressly relied upon Respondent's usury "savings" clause in ruling against the Petitioners.

Petitioners respectfully submit that the Respondent cannot evade the usury laws of this State by hiding interest charges behind the label of a "prepayment" charge. It is undisputed in this case that there was no prepayment. The 2% charge that Respondent has labeled a "prepayment" charge is nothing other than interest. The record is clear that Respondent's Note allowed Respondent to charge, and that Respondent in fact charged, interest in excess of 25% per annum after Petitioners' involuntary default. The record, therefore, demonstrates that Respondent's Note is unenforceable in the courts of this state by reason of Florida Statute § 687.071(7) (1993). Accordingly, the judgments of the lower court enforcing the Note should be reversed.

SUMMARY OF THE ARGUMENT

Respondent's Note charged interest at a rate in excess of 25% per annum. The Note, therefore, is criminally usurious. Respondent's new argument that its "prepayment" penalty is not part of the usurious interest charged by the Note fails. The Petitioners did not attempt to prepay the Note. Respondent's "prepayment" charge was imposed solely upon the Petitioners' involuntary default due to their inability to make payments under the Note. Under the governing Florida usury statutes, the

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Respondent's "prepayment" charge is interest. When coupled with the 25% default interest charged under the Note, the "prepayment" charge renders the Note criminally usurious.

The Florida usury statutes prohibit courts from enforcing criminally usurious promissory notes. Respondent convinced the lower courts to enforce the Note on the basis of its usury "savings" clause argument. The Petitioners' Initial Brief demonstrates and the Respondent now concedes that its "savings" clause cannot "save" the Note. There is no other basis upon which the decisions enforcing the criminally usurious Note can be justified. Accordingly, the decisions of the lower courts should be reversed.

I. RESPONDENT'S NOTE CHARGED CRIMINALLY USURIOUS INTEREST

A. Respondents' "Prepayment" Penalty Was Imposed Solely As A Result Of Petitioners' Involuntary Default

After Petitioners' non-payment default under the Note, Respondent charged default interest at the rate of 25% per annum under the Note. In addition to charging 25% interest, Respondent also charged Petitioners 2% of the outstanding balance due under the Note.[1/] Respondent does not contest that the highest rate of interest Respondent could lawfully charge under the Note is 25% per

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[1/] See Affidavit of Andrew Kelleher at 8 (R. 249) (charging principal of $1,289,411.67 and a "prepayment" penalty of $25,788.83. $1,289,411.67 x 2% = $25,788.23).

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annum.[2/] Nevertheless, Respondent insists that it did not charge usurious interest.

Petitioners' initial brief demonstrated that Respondent's usury "savings" clause is invalid in part because it would require the court to elevate the form of the Note over its substance.[3/] Respondent has now abandoned the argument upon which it succeeded below -- that its usury "savings" clause essentially rendered it immune from the operation of the usury statutes. Instead, Respondent now contends that, because the 2% charge Respondent added to the 25% default interest it charged to Petitioners was labeled a "prepayment" charge, its conduct is immune from the usury statutes. In making its new "prepayment" argument, Respondent once again tries to elevate form over substance. It is undisputed that Petitioners defaulted on the Note because they were unable to make the monthly payments due thereunder. Petitioners did not attempt to "prepay" the Note at any time prior to or after defaulting under the Note. The fact that the Note broke Respondent's default interest charges down into two categories -- interest at 25% per annum and a 2% "prepayment" charge -- is not dispositive. It remains that Respondent's Note was designed so that Respondent

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[2/] See, Fla. Stat. §§ 687.02 (defining usurious contracts generally); 687.03 (defining unlawful rates of interest for purposes of usury statutes); 687.071(2) (prohibiting the charging of interest in excess of 25% per annum).

[3/] In deciding questions of usury, courts will not consider the form of a loan transaction over its substance. E.g., Beacham v. Carr, 122 Fla. 736, 743, 166 So. 456, 459 (1936).(In order to frustrate evasions of the usury laws, courts "have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered.").

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could, and Respondent in fact did, charge Petitioners in excess of 25% per annum after default.

In the context of a default such as actually occurred herein -- Petitioners default due to their inability to make the payments due under the Note, Respondent's "prepayment" label is designed merely to disguise Respondent's intent to charge criminally usurious interest. Two paragraphs of the Note are pertinent to this discussion. The third paragraph addresses the circumstance in which a borrower voluntarily prepays (i.e. satisfies prior to the maturity date) all or a portion of the balance due under the Note.[4/] It is undisputed that the Petitioners did not voluntarily prepay the Note so as to invoke the language of the third paragraph.

The fourth paragraph of the Note is the one invoked by Respondent. That paragraph addresses two entirely distinct circumstances. The first portion of the paragraph is designed to ensure that a borrower who deliberately defaults under the Note and later tenders the entire balance due after acceleration of the Note would not be able to avoid paying the prepayment charge which would

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[4/] The third paragraph of the Note provides in part that: "The indebtedness represented by this Note may not be prepaid in any amount ... within the first two (2) Loan Years. After the first two (2) Loan Years ... Borrower shall have the privilege ... to prepay all or any part of the principal balance of this Note ... upon Borrower paying, at the time of such prepayment and in addition thereto a prepayment premium computed on the amount so prepaid. ..." (R. 19). (App. Pet. Tab B).

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otherwise be due under the third paragraph.[5/] Again, it is undisputed that the Petitioners did not deliberately default under the Note and that they did not otherwise attempt to prepay the Note after default so as to invoke the language of the first portion of the fourth paragraph of the Note.

The last sentence of the fourth paragraph of the Note is the only portion of that paragraph that has any application in this case. That sentence provides that:

> 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.

Note at 1-2 (R. 19-20). This last sentence of the fourth paragraph has nothing to do with a "prepayment" or attempted prepayment of the Note. Instead, this sentence makes clear that, in the event of the Petitioners' default under the Note "notwithstanding anything to the contrary" contained in the Note, the Petitioners were to be assessed a charge, labeled by this sentence as a "prepayment"

[5/] The first part of the fourth paragraph of the Note provides in part that: "If an event of default under this Note ... shall occur and the maturity date of this Note shall be accelerated, then a tender of payment by 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 and calculated in accordance with the provisions of this Note." (R. 19).

charge.[6/] This charge, of course, was in addition to the 25% per annum interest charged by the Respondent under a separate "default" provision in the Note.

Respondent's additional charge appears in a paragraph of the Note which otherwise deals with its efforts to ensure that a borrower not avoid what would perhaps be a valid prepayment premium by deliberately defaulting. This, however, does not change the true nature of this default charge. In fact, the fourth paragraph of the Note could more accurately have been written, as regards the last sentence, as follows:

> If an event of default under this Note ... shall occur and the maturity date of this Note shall be accelerated ...
>
> Notwithstanding anything to the contrary contained herein ... if Borrower [is not able to] make such payment following acceleration, and Lender obtains a judgment in any action by it to foreclose the lien of the Mortgage ... [an additional] charge shall be included in the amount of such judgment.

Had the bracketed language been included in the last sentence of the fourth paragraph of the Note, there would be no question but that Respondent's additional default charge, when combined with the 25% per annum default interest also charged by the Respondent, would render the interest charged under the Note criminally usurious and hence render the Note unenforceable. The bracketed language, however, accurately describes the result

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[6/] Being charged a sum classified as a "prepayment charge" is simply not the same thing as voluntarily (or through evasive tactic) prepaying a debt. "A rose by any other name . . ." comes to mind.

obtained by the Respondent through the use of this clause. Respondent's request that the Court focus on the form of the clause -- particularly the use of the label "prepayment" cannot serve to overcome the substance of the clause -- an additional 2% charge upon default which, when added to the 25% per annum default interest already charged by the Respondent under the Note, renders the Note criminally usurious.

B. Respondent's "Prepayment" Charge Is Usurious Under Florida Law

Section 687.03 of the Florida usury statutes is entitled "`Unlawful rates of interest' defined: proviso." That section provides in relevant part that:

> [I]t shall be usury and unlawful for any person ... to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18% per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivances, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18% per annum simple interest. However, if any loan ... or obligation exceeds $500,000 in amount or value, it shall not be usury or unlawful to reserve, charge, or take interest thereon unless the rate of interest exceeds the rate prescribed by § 687.071.

Fla. Stat. § 687.03(1)(1993)(emphasis added). The broad language of this statute contemplates that any device used by a lender to charge a borrower more than the permitted rate of interest shall be included in the computation of "unlawful rates of interest" for

purposes of determining usury. Indeed, the language is so broad that the legislature, presumably believing that such charges could otherwise be deemed "usurious interest" for purposes of this chapter, expressly excluded from the provisions of the usury statutes the amount of any attorneys fees or casualty insurance premiums a borrower may be required to pay. See Fla. Stat. §§ 687.05[7], 687.06[8] (1993).

Respondent's Note required Petitioners to pay a penalty of 2% in addition to requiring Petitioners to pay 25% interest per annum upon default. Respondent's effort to characterize the 2% penalty as a "prepayment" penalty in order to avoid the usury statutes is unavailing. The 2% charge, as well as the 25% default interest, is an amount which the Petitioners were "required or obligated to pay" in the event they defaulted under the terms of the Note. The 2% charge when added to the 25% default interest exceeds the 25% rate "prescribed in § 687.071." The Petitioners did not prepay the Note nor did they obtain any consideration of any sort from the Respondent in return for Respondent's charging of a 2% penalty. Respondent's 2% charge when added to the 25% default

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[7] Section 687.05 provides in part that: "No provision for the payment of attorney's fees . . . or similar charge shall render such instrument subject to the terms of any statute . . . limiting the amount of interest which shall be charged on such instrument."

[8] Section 687.06 provides in part that: "This chapter shall not be so construed as to prevent provision for the payment of such attorney's fees as the court may determine . . . for legal services rendered in enforcing nonusurious contracts . . .. This chapter shall not be construed so as to prohibit mortgagees from contracting for or collecting premiums for insurance actually issued on the property mortgaged. . . ."

interest must be construed as that which it is, a: "contract, contrivance[], or device . . . whereby the debtor is required or obligated" to pay a sum in excess of 25%.

C. Respondent's Cases Regarding Voluntary Prepayment Are Inapposite

Respondent cites to a dozen cases from other jurisdictions which Respondent asserts establish that a prepayment penalty "is not interest" and that "courts uniformly refuse to find prepayment penalties a basis for a claim of usury." As demonstrated above, there was no prepayment in this case. For that reason alone, Respondent's "prepayment" penalty argument should be rejected. Moreover, an analysis of the cases cited by Respondent reveals that they do not support the broad proposition for which they are cited.

The majority of the cases deal only with circumstances involving a voluntary prepayment by a borrower. Those cases hold that where a borrower actually makes a voluntary prepayment of a promissory note, a prepayment penalty is not interest and hence does not render the note usurious. The courts reason that a charge imposed upon a borrower's voluntary prepayment is properly deemed as a separate compensation to the lender in return for the lender's agreement to cancel the borrower's obligation to continue making payments of principal and interest for the entire term of the promissory note. An integral part of the holding of those cases is the courts' recognition that, under the terms of the promissory notes involved, the borrowers could not be compelled to prepay the notes. See, Feldman v. Kings Highway Sav. Bank, 102 N.Y.S. 2d 306,

307 (N.Y. App. Div. 1951) ("the prepayment was not under cohesion or duress but was voluntary. The payment ... was not in consideration of the making of a loan. ... it was the converse, that is, for the making of a new and separate agreement, the termination of the indebtedness.") (emphasis added).

The reasoning of these cases is clear. In each instance, the borrower could not be required to pay the loan prior to its maturity. Any charge made by the lender in return for the borrower's voluntary request to prepay the loan, therefore, was deemed by the courts to be something other than interest compelled under the terms of the promissory note and hence was not subject to the usury laws of the states in question.[9/] In contrast to the

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[9/] See also, Lyons v. National Sav. Bank, 113 N.Y.S. 2d 695, 696 (N.Y. App. Div. 1952) (same); Bloomfield Sav. Bank v. Howard S. Stainton & Co., 159 A.2d 443, 447 (N.J. Super. Ct. App. Div. 1960) (same) ("[The lender] could not force earlier payment over defendants' resistance."); Silver Homes, Inc. v. Marx & Bensdorf, Inc., 333 S.W. 2d 810, 814 (Tenn. 1960) ("`A provision in a note ... permitting the payment of the principal sum before its maturity at the debtor's option ... does not render the transaction usurious.' ... `The prepayment was not under cohesion, or duress, but was voluntary.'") (emphasis added); Ware v. Traveller's Indemnity Co., 604 S.W. 2d 400, 401 (Tex. Civ. App. 1980) ("The voluntary action of the borrower in prepaying the loan cannot thereby make the transaction usurious.") (emphasis added); Boyd v. Life Ins. Co. of the Southwest, 546 S.W. 2d 132, 133 (Tex. Civ. App. 1977) (The borrower "chose to prepay the note long before maturity. The insurance company accepted Boyd's prepayment, but charged him for the privilege. This charge was not interest."); Gold Coast Investment Corp. v. Prichard, 438 S.W. 2d 658, 661 (Tex. Ct. App. 1969). (Borrower's payment "for the privilege of paying off the loan prior to maturity" was not interest). Bearden v. Tarrant Sav. Ass'n, 643 S.W. 2d 247 (Tex. Civ. App. 1982) (same); Winkle v. Grand Nat'l Bank, 601 S.W. 2d 559, 566 Ark. 1980) ("a debtor cannot by making a payment in advance of its due date convert a valid loan into a usurious one."). One of the cases cited by the Respondent does not even deal with prepayment charges in the context of the usury laws. See Holliston Mills, Inc. v. (continued...)

circumstances discussed in these cases, in the instant case, Respondent's Note required the Petitioners to pay a 2% charge, self-servingly labeled by the Respondent as a "prepayment" charge, in addition to interest at the rate of 25% per annum, in the event of the Petitioners' involuntary default due to their inability to make the payments due under the Note. The Respondent's 2% default charge, although labeled a "prepayment" charge, is not a charge like the kind discussed in the cases cited by the Respondent. On the contrary, because the charge is required under the terms of the Note, the charge is and can only be interest which, when added to the 25% default interest charge, renders the Respondent's Note criminally usurious.

Only one case cited by Respondent actually contains a discussion of the effect of the usury laws on a "prepayment" charge imposed upon a borrower after an involuntary default.[10/] Affiliated Capital Corp. v. Commercial Fed. Bank, 834 S.W. 2d 521 (Tex. Ct. App. 1992). The promissory note involved in Affiliated Capital allowed the lender to charge both a "prepayment" charge as

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[9/](...continued)
Citizens Trust Co., 604 A.2d 331, 337 (R.I. 1992) ("the issue of usury has been neither addressed nor charged in the present case before this court.").

[10/] Contrary to the suggestion in Respondent's brief, Texas Airfinance Corp. v. Lesikar, 777 S.W. 2d 559, 563 (Tex. Ct. App. 1989), refused to award a prepayment penalty to the lender. The Lesikar court distinguished cases regarding voluntary prepayment reasoning that where the lender had accelerated the note, "[The lender] was not entitled to the $250,000 prepayment penalty and that portion of the judgment awarding such damages is reversed." The court did not discuss whether the lender's imposition of the "prepayment" charge after default would render the promissory note usurious under the Texas usury statutes.

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well as default rate interest upon the borrower's default under the note. In deciding whether the promissory note was usurious, the court began by attempting to characterize the nature of the "prepayment" charge. Significantly, the court did not rely on the numerous cases cited by Respondent from Texas and other jurisdictions which conclude that a penalty imposed by a lender upon a borrower's voluntary prepayment is not interest.

The voluntary prepayment cases are not even discussed by the Affiliated Capital court. Instead, the court concluded that the "prepayment" charge there was "designed to compensate the lender for interest that will not be earned due to the failure of the note to go to maturity." 834 S.W. 2d at 525 (emphasis added). In other words, the court concluded that the prepayment charge was interest. The promissory note involved in Affiliated Capital, like Respondent's Note, contained a usury "savings" clause. The court concluded that application of the Texas usury statutes "and the savings clause to the prepayment penalty prevents the penalty, as charged, from being usurious." Id. at 526.

The instant case, of course, does not involve Texas law.[11/] Moreover, the Respondent has specifically refused to

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[11/] It should be noted that the Texas usury statutes differ markedly from the Florida usury statutes. See, e.g. Goldcoast Investment Corp. v. Prichard, 438 S.W. 2d 658 (Tex. Civ. App. 1969). In Prichard the lender admitted that "the promissory note is usurious." Id. at 659. Nevertheless, the court accepted the lender's argument that no usurious interest had been paid. The marked difference between the Florida usury statutes and the Texas statutes construed by the Texas courts cited by the Respondent renders those cases largely inapplicable except perhaps with respect to the discussion of broad doctrines not controlled directly by the Florida usury statutes.

rely upon its usury "savings" clause. The only relevant holding of Affiliated Capital for purposes of the instant case, therefore, is the court's conclusion that a "prepayment" charge imposed upon a borrower solely because of the borrower's default is interest.[12/] In the instant case, the Note allowed for and Respondent charged both 25% default interest and additional interest in the form of a 2% "prepayment" charge upon Petitioners' involuntary default. Therefore, the Note is criminally usurious.

II. RESPONDENT'S CRIMINALLY USURIOUS NOTE CANNOT BE ENFORCED IN THE COURTS OF THIS STATE

In the proceedings before the trial court the Respondent argued that, as a matter of law, its usury "savings" clause prevented the Note from being usurious. (R. 301-02). On appeal to the Third District, Respondent effectively conceded that, unless "saved" by its "savings" clause, the Note charged usurious interest.[13/] The Third District relied upon Respondent's usury "savings" clause argument and affirmed the trial court's judgment. In doing so, the Third District expressly cited to the decision in Forrest Creek. That decision was characterized by the court in

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[12/] See also Reichwein v. Kirshenbaum, 201 A. 2d 918, 919 (R.I. 1964). (The court agreed with the cases holding that a charge imposed upon the borrower's voluntary prepayment of a promissory note will not render the note usurious. The court noted however that "if the prepayment were involuntary defendants [the lender] concede that the [plaintiff's] declaration would state a good cause of action.") (emphasis added).

[13/] See Respondent's Brief to the Third District at 4 n. 9 ("since the trial court's order [refusing to award the "prepayment" penalty] brought the judgment into conformity with the applicable usury laws, United Companies did not -- and does not -- challenge the denial of the prepayment penalty.")

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Jersey-Palm as being the only decision in the country that has given "blanket effect" to a usury "savings" clause.

The Third District also accepted and relied upon Respondent's argument that the trial court, by refusing to award to Respondent the "prepayment" penalty, had "effectuated" the parties intent as reflected in the "savings clause" prevented the Note from being usurious. The Third District concluded its opinion stating: "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." Levine v. United Companies Life Ins. Co., 638 So.2d 183, 184 (Fla. 3rd DCA 1994).

In its opinion, the Third District also cited to one case which held that a trial court had not abused its discretion in denying a motion for leave to amend a complaint. Ruden v. Medalie, 294 So.2d 403 (Fla. 3rd DCA 1974). The Ruden court held that denial of a motion for leave to amend filed one week before trial was not improper. The court reasoned that "a trial judge in the exercise of sound discretion may deny an amendment where the same material varies from the relief initially sought, or where a case has progressed to a point that the liberality ordinarily to be indulged has diminished." 294 So.2d at 406.

The Respondent would have this Court conclude that the Third District relied solely upon the alleged untimeliness of the Petitioners' motion for leave to amend in affirming the judgment of the trial court. The Respondent therefore contends that the case

was set to go to trial two weeks after the Petitioners filed their motion for leave. The Respondent's contention is simply inaccurate. On April 19, 1993, the Honorable Judge Lawrence A. Schwartz entered an order setting the case on his June 14, 1993 trial calendar. (R.363-64). The order setting the case for trial was entered four days after Judge Schwartz had denied the Petitioners' motion for leave to amend. (R. 362). Contrary to the Respondent's contention, the record makes clear that the case was not set for trial at the time the Petitions filed their motion for leave.[14/]

The Respondent also argues that the Petitioners' motion for leave would have introduced a new issue into the case. The Respondent relies heavily on Title & Trust Co. of Florida v. Parker, 468 So.2d 520 (Fla. 1st DCA 1985). Parker, however, did not involve a suit by a lender seeking to enforce a usurious promissory note against a borrower. In Parker a lender brought suit against a title insurance company after it was discovered that the deed under which the borrower allegedly held title to the property which was to serve as collateral for the loan was a forgery. See Id. at 522. Because Parker did not involve an action to enforce a promissory note, the title insurance company's motion for leave to add the defense that the underlying loan made by the lender to the non-party borrower (who had provided the fraudulent

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[14/] The case had at one time been set for trial on the Honorable Judge A. Leo Adderly's April, 1993 trial calendar. (R. 252-54). By the time Petitioners' motion for leave was filed however, the case had been transferred to judge Schwartz.

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mortgage) was usurious would indeed have added a new issue to the case.

The Parker court noted that it could not conclude that the trial court had erred in denying the motion for leave to amend. Significantly, however, despite having denied the motion for leave, at trial, the title company "was allowed, over objection, to introduce testimony concerning the usurious nature of the [lenders'] loan transaction." Id. The Parker court noted that although that issue was not on appeal it "would not be inclined to overrule the trial judge, as the court may, on its own motion take notice of illegal contracts coming before it." Id. Finally, even though Parker did not involve an action to enforce the usurious loan underlying the title policy, the trial court refused to allow the lender to recover the full amount of the title policy. The trial court limited the lender's recovery to the amount actually disbursed by the lender. The appellate court expressly approved this holding of the trial court. The court explained that had the title insurance company been required to pay the full amount of the title policy including the amount representing the usurious interest on the underlying promissory note, its ruling "might be construed as giving approval to the [lenders'] facially extortionate transaction." Id. at 523.

In contrast to Parker, of course, Respondent filed the lawsuit which led to the instant appeal specifically for the purpose of enforcing the usurious Note. If the Note is indeed criminally usurious in that it allows Respondent to charge interest

in excess of 25% per annum, the Note is unenforceable in any court of this state. Fla. Stat. § 687.071(7) (1993). The enforceability of the Note was always at issue in Respondent's action to enforce the Note. Therefore, the Petitioners's usury defense did not introduce a new issue in the sense discussed in Parker.

The Petitioners' respectfully submit that their initial brief demonstrates that usury "savings" clauses are ineffective where criminal usury is charged and that Respondent's "savings" clause does not "save" the Note. Respondent, by not addressing Petitioners' argument, concedes that its "savings" clause does not "save" the Note as Respondent had previously insisted in arguments to the trial court and the Third District. Apparently recognizing the weakness of its "savings" clause argument, Respondent gambled that it might be able to convince this Court to vacate its order accepting jurisdiction if it could only give this Court a new reason to believe the Note was not criminally usurious. As the discussion in Section I above demonstrates, however, Respondent's new "prepayment" penalty argument does not work.

As discussed in Petitioners' Initial Brief, the language in § 687.071(7) which now makes criminally usurious contracts unenforceable in any court of this state was added by a legislative amendment in 1969.[15/] The legislative amendment came after Florida courts had for many years held that usury was an

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[15/] See Ch. 69-135, Laws of Fla. at 631-32 describing new § 687.07, now § 681.071, as "AN ACT relating to criminal usury ... prohibit[ing] civil collection of criminal[ly] usurious loans. ..."

affirmative defense which could be waived. See Yaffee v. International Co., Inc., 80 So.2d 910, 912 (Fla. 1955). The new language makes clear that the legislature intended to change prior case law allowing civil enforcement of criminally usurious promissory notes such as that involved herein. This Court has held that usury is peculiarly a creature of statute therefore, "the usury statute must control over prior case law." St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071, 1074 (Fla. 1982). The provision in § 687.071(7) prohibiting enforcement of criminally usurious loans, therefore, is controlling over case law to the extent it holds that the defense of criminal usury can be waived.

Respondent's Note charged criminally usurious interest, therefore, it is unenforceable in the courts of this state. Respondent convinced the lower courts to enforce the Note by arguing that its usury "savings" clause rendered the charging of criminally usurious interest harmless. Respondent now concedes, however, that the Note is not "saved" by Respondent's "savings" clause. There is no other basis upon which the decision of the lower courts can be justified. Accordingly, Petitioners respectfully submit that the decisions below must be reversed.

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CONCLUSION

On the strength of a "usury savings" clause, Respondent succeeded in convincing the lower courts to enforce an instrument which permits Respondent to charge in excess of 25% on the debt owed. Apparently aware that its "savings clause" could not withstand the scrutiny brought to bear in this forum, Respondent shifted tactics. Respondent's new argument - that prepayment penalties are not interest - also wilts under the lamp of reason. When the lower court refused to permit the usury defense to be considered, it enforced a criminally usurious promissory note - an act expressly prohibited by Florida law. As the discussion above demonstrates, the Note's usurious terms are neither "saved" nor exempted from Florida's usury statutes. The decision to deny Petitioners leave to amend their answer in order to assert the defense of usury was an abuse of discretion.

Petitioners respectfully request that the decision below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief was mailed this 10th day of March, 1995 to Daniel S. Pearson, Esq. and Lucinda A. Hofmann, Esq., Holland & Knight, P.O. Box 015441, Miami, Florida 33101-5441.

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