

ORIGINAL

THE SUPREME COURT OF OHIO

JNT PROPERTIES, LLC,)	CASE NO. 2011-1392
)	
Plaintiff-Appellee,)	On Appeal from the Cuyahoga County Court
)	of Appeals, Eighth Appellate District
v.)	
)	Court of Appeals Case No. CA-10-095822
KEYBANK NATIONAL ASSOCIATION,)	
)	
Defendant-Appellant.)	

**JURISDICTIONAL MEMORANDUM OF AMICI CURIAE OHIO BANKERS LEAGUE
AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF DEFENDANT-
APPELLANT KEYBANK NATIONAL ASSOCIATION**

John J. Kulewicz (0008376)
VORYS, SATER, SEYMOUR AND PEASE LLP
 52 East Gay Street
 P.O. Box 1008
 Columbus, Ohio 43216-1008
 Telephone: (614) 464-5634
 Facsimile: (614) 719-4812
 Email: jjkulewicz@vorys.com

*Attorneys for Amici Curiae
 Ohio Bankers League and American Bankers
 Association*

Hugh M. Stanley (0013065)
 Thomas R. Simmons (0062422)
 Benjamin C. Sassé (0072856)
TUCKER ELLIS & WEST LLP
 925 Euclid Avenue, Suite 1150
 Cleveland, Ohio 44115-1414
 Telephone: (216) 592-5000
 Facsimile: (216) 592-5009
 Email: hugh.stanley@tuckerellis.com

*Attorneys for Defendant-Appellant
 KeyBank National Association*

Steven M. Weiss (0028984)
LAW OFFICES OF STEVEN M. WEISS
 55 Public Square, Suite 1009
 Cleveland, Ohio 44113
 Telephone: (216) 348-1800
 Facsimile: (216) 348-1130
 Email: sweiss@weiss-legal.com

Mark R. Koberna (0038985)
 Rick D. Sonkin (0038771)
SONKIN & KOBERNA CO., LPA
 3401 Enterprise Parkway, Suite 400
 Cleveland, Ohio 44122
 Telephone: (216) 514-8300
 Facsimile: (216) 514-4467
 Email: mkoberna@sonkinkoberna.com
rsonkin@sonkinkoberna.com

*Attorneys for Plaintiff-Appellee
 JNT Properties, LLC*

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Bankers League (“OBL”) is a non-profit trade association that represents the interests of Ohio’s commercial banks, savings banks and savings associations as well as their holding companies and affiliated organizations. OBL has over two hundred members, which comprise the overwhelming majority of all depository institutions doing business in this state. OBL’s membership includes the full spectrum of FDIC-insured depository institutions. Among OBL’s members are small savings associations organized as mutual thrifts and owned by their depositors, locally owned and operated community banks, and large regional and multistate holding companies that conduct business from coast to coast through several bank and non-bank affiliates. OBL’s Ohio depository institutions directly employ more than 130,000 people.

This case is of keen interest to OBL members and is important to Ohio businesses and the general public. Almost all of OBL’s members compute interest on commercial loans by using the long-standing and generally accepted 365/360 accrual method. That is, the banks multiply the stated interest rate by 365 and divide that number by 360 in order to standardize daily interest rates based on a thirty-day month. Indeed, many of the OBL members’ loan documents contain language that is identical to the interest-computation provision at issue in this case for at least some commercial loans. Allowing the decision of the Eighth District Court of Appeals to stand would unsettle this agreed-upon method of interest computation that is widely accepted throughout Ohio and the United States, and would subject OBL members to a host of unforeseen and costly legal threats.¹

¹ Indeed, at least two other similar lawsuits already have been brought against OBL member institutions in Ohio courts: *Ely Enterprises, Inc. v. FirstMerit Bank, N.A.*, Cuyahoga County Court of Common Pleas, Case No. CV-08-667641; and *D K & D Properties, Ltd. v. National City Bank*, Cuyahoga County Court of Common Pleas, Case No. CV-08-680078.

While this case targets larger banking institutions, OBL's smaller local institutions are at risk too. As discussed below, the Eighth District is alone among state appellate courts and federal courts in its finding of an ambiguity in the 365/360 accrual method when used in conjunction with the term *per annum*. While institutions with nationwide branches may be able to avoid that holding by selecting the law of a different jurisdiction for their loan documents, OBL's local institutions will be hard-pressed to adopt a new choice of law and accordingly will become less competitive in their commercial lending. The prospect of imposing this competitive disadvantage on smaller Ohio lenders is a matter of grave concern.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry. The ABA's headquarters are located in Washington, D.C. Its members, located in each of the fifty states, the District of Columbia and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States. The ABA frequently submits amicus curiae briefs to state and federal courts in matters that significantly affect its members and the business of banking.

Accordingly, both OBL and the ABA have a vital interest in the issues presented by this case.

II. STATEMENT OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The Eighth District decision will create confusion and cast uncertainty upon thousands of commercial loan transactions throughout the state. It is a matter of urgent public necessity that the Court act now to consider whether that decision shall be allowed to convert Ohio law into an outlier.

A. The Eighth District's Decision Conflicts with the Conclusions of All Other State Appellate Courts and Federal Courts That Have Reviewed the Interest-Computation Provision That This Case Concerns.

Harland Financial Services drafted and inserted in its LaserPro lending software the interest-computation language that banks throughout Ohio and the United States have lawfully put into general circulation. Appellate state courts and federal courts in other jurisdictions have thus considered claims identical to JNT's based on identical interest-computation provisions. Those courts have all reached a diametrically opposite conclusion from the approach taken by the Eighth District. They have held that the LaserPro notes **unambiguously** provide for use of the 365/360 method. *See Asset Exchange II, LLC v. First Choice Bank*, No. 1-10-3718, 2011 Ill. App. LEXIS 736, at *20 (Ill.App. Jul. 12, 2011) (promissory note containing identical 365/360 provision was unambiguous, and breach-of-contract claim was properly dismissed); *Kreiser & Kreiser, LLC v. Nat'l City Bank*, No. 4:10CV956, 2011 U.S. Dist. LEXIS 23472, at *11-12 (E.D.Mo. Mar. 8, 2011) (365/360 interest accrual method, together with the phrase *per annum*, was "neither ambiguous nor unintelligible").

Other states' appellate courts and federal courts have also considered—and squarely rejected—the argument that the use of the phrase *per annum* to describe an interest rate precludes use of the 365/360 interest-computation method to convert that rate into a daily interest factor or introduces ambiguity into a contract requiring use of that method. *See Bank of Am. v. Shelbourne* (N.D.Ill. 2010), 732 F. Supp.2d 809, 823-24 ("there is no conflict between using the 365/360 method and stating that the applicable interest rates were per annum"); *RBS Citizens, Natl. Assn. v. RTG-Oak Lawn, LLC* (2011), 407 Ill App.3d 183, 943 N.E.2d 198 (agreement providing for *per annum* rates and specifying that overall interest rate would be calculated based on 365/360 method was unambiguous); *FDIC v. Fox Creek Holding, LLC*, No. 1:09-CV-00480-

E-EJL-LMB, 2010 U.S. Dist. LEXIS 66539, at *16-19 (D.Idaho Jul. 2, 2010) (use of the 365/360 method is not deceptive).

The Eighth District's decision stands in stark contrast to the decisions of every federal court and every other state's appellate courts that have ruled upon the issue. It is in the public interest that this Court keep the law of Ohio in harmony with that of other jurisdictions, in order to avoid the disruptive uncertainty and impediment to the flow of capital that this conflict threatens to create.

B. The Eighth District's Decision Could Impact Thousands of Commercial Loan Transactions in Ohio.

The 365/360 interest-computation method itself is neither novel nor uncommon; it is "common in the commercial world," *Fox Creek Holding*, 2010 U.S. Dist. LEXIS 66539, at *17, and there is "nothing novel" about it, *Martin v. Moore* (1980), 269 Ark. 375, 378, 601 S.W.2d 838 (365/360 is a standard way of "striking a reasonable average as a practical means of reconciling erratic variables"). See also *Holisak v. Northwestern Natl. Bank* (1973), 297 Minn. 248, 250-51, 210 N.W.2d 413 (365/360 method of computing interest charges "is neither novel nor the result of legislative inadvertence"). Indeed, one court observed that "[a] universal custom to calculate interest on 360 days a year was noted as early as 1824." *Holisak*, 297 Minn. at 251 (citing *Bank of Utica v. Wager* (N.Y. 1824), 2 Cow. 712, 763, affirmed (1826), 8 Cow. 398). Another court referred to a 1971 study by the Federal Reserve Bank finding that 82% of commercial banks used the 365/360 method for at least some of their loans. *Fox Creek Holding*, 2010 U.S. Dist. LEXIS 66539, at *18.

The LaserPro language has been used in thousands of commercial loan transactions involving many different lending institutions and commercial enterprises in Ohio. Doubt will suddenly overshadow those transactions if the Eighth District's decision survives. That

decision—which finds ambiguity or “unintelligibility” in language that every other federal court and state appellate court to have addressed this issue have found unambiguous—provides little guidance to parties seeking to predict how the identical language appearing in their contracts will ultimately be interpreted.

The Eighth District’s decision will have a significant economic impact not only on banks, but also on their customers and the Ohio economy. Commercial lending plays a vital role in fueling Ohio’s economic engine. Businesses depend on capital both to start and, once established, to fund operations and expand. The additional risk wrought by class actions and other litigation, and uncertainty as to whether settled contract terms will retain their judicial currency, would be an impediment to new lending and would add to the cost of commercial loans.

The Eighth District’s decision also runs contrary to Ohio’s general respect for contractual choices that parties make. *See, e.g., Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶ 8 (noting the “fundamental right to contract freely with the expectation that that the terms of the contract will be enforced”) (quoting *Nottingdale Homeowners’ Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 36, 514 N.E.2d 702); *see also Brandon/Wiant Co. v. Teamor* (8th Dist. 1998), 125 Ohio App.3d 442, 449, 708 N.E.2d 1024 (“[T]he concept of freedom to contract is considered to be fundamental to our society.”).

Moreover, the Ohio General Assembly has adopted, as the policy of this state, the proposition that “a bank may contract for and receive interest or finance charges at any rate or rates agreed upon or consented to by the parties to the loan contract,” so long as the rate does not exceed an annual percentage rate of 25%. R.C. 1109.20. Under Ohio law, the “computation of the loan balance on which interest and finance charges are assessed and the method of

compounding interest on the balance shall be as agreed upon by the bank and the borrower.” *Id.* As one court wrote, “[E]ven though [a borrower] does not like the 365/360 method of computation because it results in a greater interest charge over time . . . it is not ambiguous. . . . The Court will not rewrite the Note to have a different method of computation.” *In re Mkt. Ctr. E.Retail Prop., Inc.* (Bankr.D.N.M. 2010), 433 B.R. 335, 355.

For these reasons, this case presents matters of public or great general interest over which the Court should assert jurisdiction.

III. STATEMENT OF THE CASE AND FACTS

OBL and the ABA adopt and incorporate the Statement of the Case and Facts set forth by Plaintiff-Appellant KeyBank National Association (“KeyBank”).

IV. ARGUMENT

Inherent in the Propositions of Law advanced by KeyBank are the following propositions for consideration by the Court.

PROPOSITION OF LAW NO. 1

The parties to a promissory note may specify any method for conversion of a *per annum* interest rate to a daily interest charge.

PROPOSITION OF LAW NO. 2

Courts must enforce contractual language that has a definite meaning.

PROPOSITION OF LAW NO. 3

Where extrinsic evidence clarifies the intent of the parties to a commercial contract, a court should not resort to the secondary rule of interpretation that ambiguities are interpreted against the drafter.

OBL and the ABA adopt and incorporate KeyBank’s arguments in support of Propositions of Law Nos. 1, 2 and 3.

OBL and the ABA amplify their view of Proposition of Law No. 2 to this extent: Regardless of whether the interest-computation clause contains a word that is “misplaced,” Ohio

law squarely provides that contract provisions must be read within the context of the entire contract in order to give them their intended meaning and effect. *See, e.g., Carroll Weir Funeral Home v. Miller* (1965), 2 Ohio St.2d 189, 192, 207 N.E.2d 747 (“In interpreting a provision in a written contract, the words used should be read in context and given their usual and ordinary meaning.”); *Monsler v. Cincinnati Casualty Co.* (10th Dist. 1991), 74 Ohio App.3d 321, 330, 598 N.E.2d 1203 (terms “must be read in the context of the entire contract”).

As one respected commentator has described it, “a frequently stated and useful rule is that the terms of a contract are to be interpreted and their legal effects determined as a whole. . . . Meanings are expressed and conveyed to people by words and other symbols that are grouped in phrases, sentences, paragraphs, chapters, and volumes. They are not expressed and conveyed by separate, disconnected words placed in a row. As a federal judge has observed, ‘[W]ords matter; but the words are to be read as elements in a practical working document and not as a crossword puzzle.’” 5-24 Corbin on Contracts § 24.21 (2011) (internal citations omitted).

Even if there were a technical semantic conflict in the language of the promissory note, that conflict would be inconsequential as a matter of law due to the specificity with which the note describes the method for computation of the daily interest charge. Both courts below have pointed out the anomaly inherent in the phrase, at the outset of the computation formula, that “[t]he annual interest rate for this Note is computed on a 365/360 basis,” when the note provides a specific Initial Interest Rate and a specific Index for periodic adjustment of that rate. But the distinction between the interest rate and the computation of the interest charge is obvious from the specific provision thereafter for the 365/360 computation formula. *See generally* 5-24 Corbin on Contracts § 24.23 (2011) (“When a contract contains conflicting or repugnant provisions, a court can sometimes discover factors that will enable it to reconcile the real or

apparent conflict so as to give effect to all or most of the contract terms. Numerous cases can be seen in which courts have resolved conflicts between terms by enforcing the term that better accomplished the parties' purpose.”). Indeed, “[i]n discerning the meaning each party intended to assign to a disputed contract term, and in exploring whether each party knew or had reason to know the meaning intended by the other party, the court may utilize any evidence that is ordinarily admitted to prove a state of mind.” *Id.* at § 24.10.

When these principles are applied here, it is manifestly clear that the parties intended to use the 365/360 method of interest computation. That provision could have no other reasonable meaning. When language in a contract, seen in the context of the entire agreement, has only one reasonable meaning, it is unambiguous. *See, e.g., Shifrin v. Forest City Enter.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (“If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity.”). The Eighth District inexplicably departed from this axiomatic rule of contract construction. This Court should reverse that decision.

V. CONCLUSION

For these reasons and those set forth by KeyBank, OBL and the ABA ask that the Court accept jurisdiction and reinstate Ohio law into the sound national consensus that the 365/360 accrual method and the term *per annum* can properly coexist in loan agreements.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP



John J. Kulewicz (0008376)

52 East Gay Street

P.O. Box 1008

Columbus, Ohio 43216-1008

Telephone: (614) 464-5634

Facsimile: (614) 719-4812

Email: jjkulewicz@vorys.com

Attorneys for Amici Curiae

*Ohio Bankers League and American Bankers
Association*

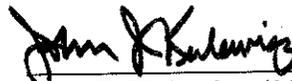
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, this 15th day of August, 2011, upon the following:

Hugh M. Stanley, Esq.
Thomas R. Simmons, Esq.
Benjamin C. Sassé, Esq.
Tucker Ellis & West LLP
925 Euclid Avenue, Suite 1150
Cleveland, Ohio 44115-1414

Steven M. Weiss, Esq.
Law Offices of Steven M. Weiss
55 Public Square, Suite 1009
Cleveland, Ohio 44113

Mark R. Koberna, Esq.
Rick D. Sonkin, Esq.
Sonkin & Koberna Co., LPA
3401 Enterprise Parkway, Suite 400
Cleveland, Ohio 44122



John J. Kulewicz (0008376)