IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 64,140

OPPENHEIMER & COMPANY, INC.,

Defendant-Petitioner,

vs.

MARCIA YOUNG,

Plaintiff-Respondent.

ON APPEAL FROM THE
THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Respondent, Mrs. Marcia Young, sued her errant broker and several of his employers, including Oppenheimer & Co., Inc., ("Oppenheimer") in federal court. The federal court dismissed the pendent state claims but retained jurisdiction over the federal claims. The federal case continues.

Mrs. Young then filed her state claims in state court against the same defendants. The trial court compelled arbitration of Mrs. Young's claims against Oppenheimer, but retained jurisdiction and control over her claims against the remaining defendants. That case also continues. The arbitration proceeding in New York City has never started.

When the matter came to the Third District Court of Appeal for review, the Third District quashed the trial court's order compelling arbitration. Its decision appears at 434 So.2d 369 (Fla. 3d DCA 1983), a copy of which is attached to this brief.

ARGUMENT

A. Introduction.

Oppenheimer seeks review of the Third District Court's opinion in Young v. Oppenheimer & Co., Inc., 434 So.2d 369 (Fla. 3d DCA 1983), pursuant to this Court's discretionary

authority to review district court decisions "that expressly and directly conflict" with decisions of another district court.

This Court's discretionary conflict jurisdiction is narrow. As stated in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970), "[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." [Emphasis in text] Nor is this Court's jurisdiction measured by its views as to the correctness of the decision in question, or by consideration of policy reasons for a contrary result. See Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

The focus then is on the existence of a conflict, direct and express. Such conflict is absent here.

B. THE YOUNG DECISION.

Mrs. Young entered into a brokerage contract with Oppenheimer which contained an arbitration clause. In litigation in state court, Oppenheimer moved to enforce the clause and to compel arbitration. The trial court ruled that the arbitration clause was enforceable in Florida pursuant to the Federal Arbitration Act, 9 U.S.C. §2. It did so notwithstanding the Third District Court of Appeal's decision in Shearson, Hammill & Co., Inc. v. Vouis, 247 So.2d 773 (Fla. 3d DCA), cert. denied, 253 So.2d 444 (Fla. 1971), which held that:

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> (1) arbitration of alleged fraud, misrepresentation and breach of fiduciary duties is not consistent with the policy and language of the Florida Securities Act, which will control over provisions of the Florida Arbitration Code, and (2) agreements to arbitrate controversies in the future cannot oust the courts of jurisdiction conferred upon them by organic law.
>
> [434 So.2d at 371]

The Third District quashed the trial court's order and re-affirmed Vouis. It expressly based its re-affirmation of Vouis on statutory provisions never before construed by a Florida court, §§517.241(2) and (3) of the Florida Securities Act: [1]

> We reaffirm Vouis' first holding not as a broad statement of law but as applied to claims arising out of interstate securities transactions which are brought pursuant to the Florida Securities Act. The second holding is the principle adopted by the United States Supreme Court in Wilko v. Swan... [346 U.S. 427 (1953)] to justify invalidation of compulsory arbitration provisions in interstate securities agreements; it remains viable in state law only because the Florida Securities Act provides the same remedy as federal law.
>
> [Id. at 371 n.2; emphasis added]

1/ Fla. Stat. §§517.241(2) and (3) state:

> (2) Nothing in this chapter shall limit any statutory or common-law right of any person to bring any action in any court for any act involved in the sale of securities or the right of the state to punish any person for any violation of any law.
>
> (3) The same civil remedies provided by the laws of the United States for the purchaser or seller of securities under any such laws, in interstate commerce, shall extend also to purchasers or sellers of securities under this chapter.

From this foundation, the Third District analyzed the core issue in the case: Whether Mrs. Young's arbitration agreement with Oppenheimer was enforceable under the Federal Arbitration Act, 9 U.S.C. §2 (1976), which the court acknowledged applies in state courts. See id. at 373.

The court concluded that the arbitration agreement in question was unenforceable:

> The Federal Arbitration Act does not apply to compel arbitration of claims arising out of interstate commerce transactions which are filed in federal court because federal law precludes a pre-sale waiver of the statutory right to a judicial determination of such claims. [434 So.2d at 372]
>
> ***Because Florida law extends the same civil remedies to purchasers and sellers of securities in interstate commerce as the laws of the United States, an arbitration agreement which in unenforceable under United States law is also unenforceable in Florida.
>
> [Id. at 373]

The court held that:

(1) the arbitration clause is unenforceable under the Florida Arbitration Act (construing §§571.241(2) and (3), Florida Securities Act); and

(2) the arbitration clause is unenforceable under the Federal Arbitration Act because such a clause is not valid or enforceable even under federal law, so that the Federal Arbitration Act cannot serve to enforce it. See 434 So.2d at 373.

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C. THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN YOUNG AND MAVES.

Oppenheimer claims that Young conflicts with the Second District Court's decision in Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980).[2]

In Maves, the trial court had denied a motion to compel arbitration of claims for negligence and fraudulent misrepresentation in the handling of a brokerage account. The Second District reversed, distinguishing the Third District's Vouis decision:

> The...[Vouis] court had refused to compel arbitration because of the policy of Florida securities law, citing Wilko v. Swan.... However, the Wilko case offers no support for such a policy argument in Florida since that case dealt with an alleged violation of federal securities law and the application of specific federal statutory requirements. These requirements have no counterpart in Florida's securities legislation and no application at all to this case.
>
> [384 So.2d at 717-18; emphasis added]

The Maves court concluded that Vouis was wrong in finding a policy reason to deny arbitration of a securities claim. It did so summarily, finding "no counterpart in Florida" to the

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2/ The Fourth District Court of Appeal relied on Maves in A.G. Edwards & Sons, Inc. v. Bing, ___So.2d___, 8 F.L.W. 2212 (Fla. 4 DCA, September 7, 1983).

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non-waiver provision of the federal securities laws.[3]

Arguably, there may have been a "conflict" between Maves and Vouis, but that is not the concern here. The issue here is whether there is conflict between Maves and Young. And there is no such conflict.

In Young, the Third District refined Vouis. In holding that agreements to arbitrate securities claims are unenforceable under the Florida Arbitration Act, the court did not merely rely--as it had in Vouis--on policy reasons underlying the securities laws. See Young, 434 So.2d at 372-73. Rather, the Third District newly construed and interpreted Fla. Stat. §517.241(3) [providing "the same civil remedies" as under federal law] to require a judicial remedy for securities violations--the only type of remedy available under federal law. The Second District in Maves neither considered nor construed this statutory provision at all.

Had the Second District in Maves held--contrary to Young's conclusion--that Fla. Stat. §517.241(3) does not insure a judicial remedy to a person aggrieved by a securities violation, then Maves might directly and expressly conflict with Young.

3/ The federal non-waiver provision, 15 U.S.C. §77n, states:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this sub-chapter...shall be void.

There is no clause in the Florida Securities Act that mirrors this provision.

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But Maves did not so hold.

The Third District's "disagreement" in Young [434 So.2d at 372 n.5) with Maves' criticism of Vouis cannot inject conflict where really there is none. Cf. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981)(district court need not identify a conflicting decision in its opinion in order to create a conflict).

D. THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN YOUNG AND MELAMED.

Oppenheimer also contends that Young expressly and directly conflicts with Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981).

In Melamed, the brokerage contract contained an arbitration clause which incorporated the laws of New York.[4] The trial court refused to compel arbitration on the ground that state courts were not required to apply the Federal Arbitration Act.

The Fourth District quashed the trial court's order. It held that the Federal Arbitration Act applies in state courts and makes the arbitration agreement enforceable in state court. This was so even though the arbitration agreement was unenforceable under Florida law, as it incorporated laws

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4/ Such a provision would exempt the contract from the Florida Arbitration Code, Fla. Stat. §682.02, which states that the Code does not apply to an arbitration agreement "in which it is stipulated that this law shall not apply...."Unlike the contract in Melamed, the contract in Young did not contain such a stipulation. 434 So.2d at 372 n.6.

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of another state. The court stated:

> [I]n Florida, an agreement like that in the present case which incorporates the laws of New York cannot be enforced under Florida law, but the same agreement can be enforced under the Federal Arbitration Act.***
>
> ***We therefore hold that Florida courts must recognize and apply the Federal Arbitration Act and that arbitration agreements which are valid and enforceable under the federal law are also valid and enforceable in Florida courts.
>
> [405 So.2d at 729]

The only imaginable "conflict" between Melamed and Young would purportedly arise from the Third District's imputation to the Melamed court of a decision it did not make, on a point of law it did not consider. The Third District said:

> [W]e disagree with the Melamed court that such an agreement [i.e. an arbitration clause in a securities contract, regardless of whether it incorporates another state's law] would be valid under federal law.
>
> [Young, 434 So.2d at 373]

But it is plain that the Melamed court did not make a decision on that point of law.

In Melamed, the court was faced with the issue of enforceability of an arbitration clause incorporating another state's laws. Under Florida law, such clauses are not enforceable, but under the Federal Arbitration Act, they are. Therefore, the court concluded, the Federal Arbitration Act applied to enforce an otherwise-valid arbitration clause.

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But it was not an issue in the case, and the court never discussed or analyzed, whether the arbitration clause was invalid and unenforceable for other reasons under federal law. This question--not present in Melamed--was the core issue in Young. This question--which was never raised or decided in Melamed--was answered and decided in Young. There can be no "conflict" between Young and Melamed, for the points of law decided in the two cases are different.

The Third District in Young even acknowledged that Melamed presented "a slightly different issue", 434 So.2d at 372, and that Melamed was "factually distinguishable." Id. at 373 n.7. As this Court announced in Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962):

> If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.

No express and direct conflict can arise, therefore, between Young and Melamed.

CONCLUSION

Young does not expressly and directly conflict with the Second District's Maves decision. Nor does it expressly and

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directly conflict with the Fourth District's Melamed decision. There is no justification for this Court's exercise of its discretionary conflict jurisdiction. This Court should therefore decline to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was furnished by mail to: Stanley A. Beiley, Esquire, Richard E. Brodsky, Esquire, and David S. Garbett, Esquire, Paul, Landy, Beiley, Harper & Metsch, P.A., Penthouse, Peninsula Federal Building, 200 S.E. First Street, Miami, Florida 33131; Jerald A. Freshman, Esquire, Freshman & Freshman, P.A., Suite 205, 2000 South Dixie Highway, Miami, Florida 33131; Curtis Carlson, Esquire, Fowler, White, Burnett, Hurley, Banick & Strickroot, City National Bank Building, 5th Floor, 25 West Flagler Street, Miami, Florida 33130; and to Bennett Falk, Esquire, Ruden, Barnett, McClosky, Schuster & Russell, P.A., One Biscayne Tower, Two South Biscayne Boulevard, Suite 2000, Miami, Florida 33131 this 19th day of September, 1983.

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