O/A 6-8-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 64,140

OPPENHEIMER & CO., INC.,

Defendant-Petitioner,

vs.

MARCIA YOUNG,

Plaintiff-Respondent



ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

---

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

---

BAILEY & DAWES,
a professional association
Attorneys for Respondent
Fifth Floor
1390 Brickell Avenue
Miami, Florida 33131-3313
(305) 374-5505

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 64,140

OPPENHEIMER & CO., INC.,

Defendant-Petitioner,

vs.

MARCIA YOUNG,

Plaintiff-Respondent

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

---

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

---

BAILEY & DAWES,
a professional association
Attorneys for Respondent
Fifth Floor
1390 Brickell Avenue
Miami, Florida 33131-3313
(305) 374-5505

TABLE OF CONTENTS





BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

## TABLE OF AUTHORITIES





BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

STATUTES:

Federal:

Securities Act of 1933

BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

## ISSUES PRESENTED

I.

WHETHER THE THIRD DISTRICT CORRECTLY HELD THAT MRS. YOUNG'S INTERSTATE SECURITIES CLAIMS ARE NOT ARBITRABLE.

II.

WHETHER THE THIRD DISTRICT CORRECTLY HELD THAT THE FEDERAL ARBITRATION ACT DOES NOT COMPEL ARBITRATION OF MRS. YOUNG'S CLAIMS.

III.

WHETHER OPPENHEIMER WAIVED ITS RIGHT TO ARBITRATION.

## STATEMENT OF THE FACTS AND THE CASE [1]

### A. The Facts

Respondent, Mrs. Marcia Young, met Ned Elgart, a stockbroker, at a seminar where Elgart explained and recommended a method of investing in bonds on margin. Elgart represented that bond margin investments created a higher income yield than did purchasing bonds outright, that investing in bonds on margin was secure, and that ten to twenty percent of an investor's net worth was a proper amount to invest in a bond margin account. Based on Elgart's advice, Mrs. Young decided to invest in bonds on margin and to entrust management of her investment to Elgart. Mrs. Young explained to Elgart that she was not experienced in bonds or margin transactions. Elgart knew that she was a 68-year old widow without employment and with a net worth of approximately $200,000, and that her investment objective was to increase her income without unduly sacrificing security.

Elgart was at that time with Thomson McKinnon Securities, Inc., but later transferred to Oppenheimer & Company, Inc. ("Oppenheimer"). He was employed there from August, 1978, to October,

---

[1] References to Respondent's Appendix will be designated "A."



BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

1978,[2] and then again from May, 1980, until April, 1981. Elgart was employed by other brokerage houses during the intermediate period.

B. Proceedings In Federal District Court

As a result of Elgart's misrepresentations and mismanagement of her accounts, Mrs. Young sued Elgart and his employers, including Oppenheimer, on May 22, 1981, in federal court. The complaint alleged violations of the Florida and federal securities laws. [See A-22]

Having obtained an extension of time to respond to the Complaint [A-51], Oppenheimer moved to dismiss for failure to state a claim, and for lack of jurisdiction over the state statutory claim. [A-52] It also filed a 23-page memorandum of law in support of its motion [A-54] arguing, as to the state law claims, that "once the federal claims are dismissed, the pendent claims should also be dismissed." [A-67]

Mrs. Young then filed an Amended Complaint, which Oppenheimer moved to dismiss on the same grounds. [A-78] Oppenheimer again filed a memorandum of law [A-80], questioning the exercise of

---

[2] On August 28, 1978, Mrs. Young signed an agreement with Oppenheimer, which states in part:

> Any difference between us with respect to my account or any transaction shall be submitted to arbitration in New York City under the rules of the New York Stock Exchange, Inc....
>
> [A-25]

pendent jurisdiction, and adopting another defendant's argument that the common law claims should be dismissed because their elements differed from those of the 10b-5 claim and would lead to jury confusion. [A-88][3/] The court dismissed the Amended Complaint, with leave to amend. [A-77]

On October 2, 1981, Mrs. Young filed her Second Amended Complaint, alleging violations of Rule 10b-5 and of Fla. Stat. §517.301. [A-28]

Oppenheimer then filed its Answer and Affirmative Defenses to Second Amended Complaint on October 14, 1981. [A-43]

Thereafter, on November 23, 1981, the federal court dismissed the pendent state claim on authority of Stowell v. Ted S. Finkle Inv. Serv., Inc., 489 F.Supp. 1209 (S.D. Fla. 1980), which holds that federal securities fraud claims and Florida fraud claims involve different elements and different ultimate facts, thus leaving no justification for exercise of pendent jurisdiction. [A-50]

During the time the state claim was pending in federal court, Oppenheimer never suggested that it had a right to arbitration and never questioned Mrs. Young's right to proceed in a judicial forum. Implicitly accepting the choice of forum, Oppenheimer did challenge the sufficiency of Mrs. Young's pleadings and the court's exercise of pendent jurisdiction over the state claim. And it affirmatively defended, charging, among other things, lack of due diligence, negligence, and ratification. [A-44, 45]

---

3/ The case cited for this proposition was Stowell v. Ted S. Finkle Inv. Serv., Inc., 489 F.Supp. 1209 (S.D. Fla. 1980), discussed above.

C. Proceedings In State Trial Court

Mrs. Young refiled her state statutory claim and common law claims in state court in June, 1982. [A-1] Oppenheimer then belatedly decided to move to compel arbitration, invoking the Florida Arbitration Code and the United States Arbitration Act. [A-17]

Mrs. Young objected to Oppenheimer's Motion to Compel Arbitration on the grounds that: (a) Oppenheimer had waived any right to arbitration; (b) claims for violation of Fla.Stat. § 517.301, common law negligence and gross negligence, common law misrepresentation, and breach of fiduciary duties, were not arbitrable under Florida law; and (c) the clause limiting venue to New York City was unconscionable, amounted to a limitation of liability, and, as such, was against the public policy expressed in the Florida Securities Law, Fla.Stat. Chapter 517. [A-22]

At the hearing on the Motion to Compel Arbitration, Respondent's counsel also pointed out to the court that Elgart's conduct was an integral part of Mrs. Young's claim against Oppenheimer, and that Elgart's culpability during his period of employment with Oppenheimer would necessarily have to be determined by the arbitrators, even though Mrs. Young's claim against Elgart was not subject to arbitration.

The trial court granted Oppenheimer's Motion to Compel Arbitration, finding that the Federal Arbitration Code applied and prevailed over the State Arbitration Code and over state laws; that Oppenheimer had not waived the right to arbitration; and that the arbitration provision was not unreasonable at law or in equity. [A-47]



BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

D. Proceedings In Third District Court of Appeal

Mrs. Young then petitioned for certiorari to the Third District Court of Appeal, on the ground that (1) Oppenheimer had waived its purported right to arbitration; (2) Mrs. Young's stated claims were not arbitrable; and (3) the arbitration clause requiring that arbitration take place in New York City was unconscionable and invalid under Florida law.

The Third District granted certiorari and quashed the order compelling arbitration, holding that:

(1) the arbitratrion 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. Young v. Oppenheimer & Co., Inc., 434 So.2d 369 (Fla. 3d DCA 1983).

Having found "no compulsion to arbitrate," [434 So.2d at 373], the Third District refused to decide whether Oppenheimer had waived arbitration, and whether the arbitration provision, requiring that arbitration take place in New York, was unconscionable and invalid.

E. Proceedings In This Court.

Oppenheimer thereafter invoked this Court's conflict jurisdiction on the ground that Young v. Oppenheimer & Co., directly



BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

and expressly conflicts with Raymond, James & Associates, Inc., v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), and with Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981).

## ARGUMENT

### Introduction

The declared purpose of the Florida Securities Act is the protection of investors. This law gives expression to Florida's public policy, manifested as early as the 1930s, to protect buyers of stocks and securities against "conspicuous sources of existing evil." State, by Knott v. Minge, 160 So. 670, 675 (Fla. 1935). Accord, Nichols v. Yandre, 9 So.2d 157, 159, 151 Fla. 87 (1942); McElfresh v. State, 9 So.2d 277, 151 Fla. 140 (1942); Leithauser v. Harrison, 168 So.2d 95, 98 (Fla.2d DCA 1964); O'Neill v. State, 336 So.2d 699, 700 (Fla. 4th DCA 1976); Rudd v. State, 386 So.2d 1216, 1218 (Fla. 5th DCA 1980); Stottler Stagg & Assoc. v. Argo, 403 So.2d 617, 618 (Fla. 5th DCA 1981), appeal dismissed, 408 So.2d 1092 (Fla. 1981). As this Court stated in Robson Link & Co. v. Leedy Wheeler & Co., 18 So.2d 523, 531, 154 Fla. 596 (1944):

> It is important that... a high standard of business ethics should be observed by dealers in...securities -- not only for the protection of each other, but certainly for the protection of private investors -- that portion of the general public which furnishes the large majority of ultimate purchasers.
>
> The enactment of the law establishing the Florida Securities Commission...recognizes this principle of reasonable responsibility to the investing public, and makes it a part of the public policy of the State.

This state policy is not a provincial concern. To the contrary, the policy is deeply rooted in the national conscience, expressed through Congress. Section 2 of the Securities Exchange Act of 1934, 15 U.S.C. §78b, articulates the reasons for the enactment of the federal securities laws:


BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

> Transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto *** to protect interstate commerce *** and to insure the maintenance of fair and honest markets in such transactions....

Accord, Wilko v. Swan, 346 U.S. 427, 431 (1953)(Securities Act of 1933); Smallwood v. Pearl Brewing Co., 489 F.2d 579, 590 (5th Cir. 1974), cert. denied, 419 U.S. 873 (1974)(Exchage Act of 1934); Sargent v. Genesco, 492 F.2d 750, 760 (5th Cir. 1974) (same).

The Florida and federal securities laws thus have a singular aim -- to prevent fraud in the sale and purchase of securities and to instill confidence to investors. The two sets of laws complement each other, reflecting a scheme of cooperative federalism. For example, the federal securities laws expressly rely on the states to further the effectuation of the policies embodied in those laws. Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78bb(a), states:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

Accord, Section 18 of the Securities Act of 1933, 15 U.S.C. §77r. Congress has expressed the need for uniformity in federal-state securities matters. 15 U.S.C. §77s(c) states:

> (1) The Commission is authorized to cooperate with any association composed of duly constituted representatives of State governments whose primary assignment is the regulation of the securities business within those States,

> and which, in the judgment of the Commission, could assist in effectuating greater uniformity in Federal-State securities matters.
>
> (2) It is the declared policy of this subsection that there should be greater Federal and State cooperation in securities matters, including -- (A) maximum effectiveness of regulation.... [Emphasis added]

Conversely, Fla.Stat. §517.061(3)(b) borrows federal law to exclude from its registration requirements transactions which are exempt under Section 4(1) of the Securities Act of 1933; Fla.Stat. §517.061(18)(a) takes advantage of federal regulation of certain issuers of securities. And Fla.Stat. 517.241(3) expressly adopts the federal remedies available to purchasers or sellers of securities which travel in interstate commerce.

It is against this setting that the Court must consider the issues in this case.

## I.

## THE THIRD DISTRICT CORRECTLY HELD THAT MRS. YOUNG'S INTERSTATE SECURITIES CLAIMS ARE NOT ARBITRABLE

In Young, the Third District interpreted Fla.Stat. §517.241[4] to preclude arbitration of claims arising out of inter-

---

[4] The Third District considered the following provisions:

> (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 laws.
>
> (3) The same civil remedies provided by 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.
>
> (4) When not in conflict with the Constitution or laws of the United States, the courts of this state have the same jurisdiction over civil suits instituted in connection with the sale or offer of sale of securities under any laws of the United States as they may have under similar cases instituted under the laws of the state.

state securities transactions:

> That arbitration of such claims is inconsistent with the Florida Securities Act is made clear by Section 517.241(3) of the Act, which expressly provides an aggrieved person the same civil remedies provided by laws of the United States for the purchaser or seller of securities which travel in interstate commerce.[5/] [434 So.2d at 371-72]

The court reaffirmed its prior holding in Shearson, Hammill & Co., Inc. v. Vouis, 247 So.2d 733 (Fla. 3d DCA 1971), cert. denied, 253 So.2d 444 (Fla. 1971), that "arbitration of alleged fraud, misrepresentation and breach of fiduciary duties is not consistent with the policy and language of the Florida Securites Act, which will control over provisions of the Florida Arbitration Code." 434 So.2d at 371. The court explained the scope of its holding:

> 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.
>
> [Id. at 371 n.2; emphasis added]

This holding has its source in settled federal law, that claims brought under the federal securities acts, involving transactions in interstate commerce, cannot be arbitrated. The

---

5/ Mrs. Young's transactions were in interstate commerce. The transactions involved bonds that were publicly traded either in a national exchange or in the over-the-counter markets.

case of Wilko v. Swan, 346 U.S. 427 (1953), established that principle.6/

In Wilko, the United States Supreme Court considered the issue whether Section 14 of the Securities Act of 1933, 15 U.S.C. 77n, prohibited arbitration of securities claims. Section 14 states:

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

The Court viewed the arbitration clause in question as a stipulation to waive compliance with a "provision" of the Securities Act. It did so even though no "provision" of the Securities Act expressly required that a securities claim be brought in a court of law. The court reasoned:

> While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers.
>
> When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would

---

6/ See also, Int'l Brotherhood of Painters v. Anderson, 401 So.2d 824, 831 (Fla. 5th DCA 1981): "Where a Florida statute is patterned after a federal law on the same subject, it will take the same construction in Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of the Florida legislation on the subject."

a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.

Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings... * * * This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," ... cannot be examined. Power to vacate an award is limited. While it may be true... that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award..." that failure would need to be made clearly to appear. In unrestricted submissions... the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues.... As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended §14,... to apply to waiver of judicial trial and review.

* * *

We decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

[at 435-38; emphasis added]

The Court thus interpreted the Securities Act to preclude a "waiver of judicial remedy." Id. at 438 (Jackson, J., concurring).7/

Oppenheimer claims that the Third District's interpretation of Fla.Stat. §517.241 is incorrect. It argues that Wilko v. Swan does not apply in Florida because the Florida Securities Act does not contain an anti-waiver provision identical to Section 14 of the Federal Securities Act; and that, had the Florida Legislature intended to prohibit arbitration of securities claims, it would have explicitly prohibited it, or would have adopted an anti-waiver provision. Oppenheimer further asserts that Wilko does not apply here because Fla.Stat. §517.241 deals with "remedies" and not with "forum," and that the federal anti-waiver provision is a "forum selection provision."

The federal anti-waiver provision is not a "forum selection provision," as Oppenheimer contends. That clause merely voids

---

7/ This preservation of the right to a judicial remedy is of paramount importance in the regulatory scheme, for the statute creates private rights of action for violations of the law, to aid in its enforcement. Legislative history reveals this purpose of the remedial provisions of the federal securities laws:

> The Congress has long taken the view that private rights of action for violations of the federal securities laws are a necessary adjunct to the Commission's enforcement efforts. * * * [P]rivate lawsuits serve as an added deterrent to conduct made unlawful by Congress, without the necessity of governmental involvement.

H.R. Rep. No. 96-1341, 96th Cong., 2d Sess. 28, reprinted in [1980] U.S. Code Cong. & Ad. News 4800, 4810.

"any... stipulation... binding any person acquiring any security to waive any provision" of the Act. In Wilko, the petitioner argued that this anti-waiver clause prohibited a waiver of the provisions of 15 U.S.C. §77v(a), which states:

> The district courts of the United States... shall have jurisdiction of offenses and violations under this title... and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendants may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code,... No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

This section deals with jurisdiction of the federal courts. Nowhere does it say that claims brought under the Federal Securities Act must be litigated in a court of law. The U.S. Supreme Court stretched the scope and meaning of that section to prevent arbitration of a securities claim. It did so only because the purpose of the Act and Congressional intent behind it would be frustrated were a securities claim to be heard by arbitrators: arbitration was a threat to the effectiveness of the securities laws' protective provisions. 346 U.S. at 435-36. In fact, the Court agreed with the petitioner's argument that:

> [T]he purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act.
>
> [at 432]

Therefore, securities claimants were entitled to "judicial trial and review." Id. at 437. As Justice Jackson aptly stated, the Securities Act prohibits "waiver of a judicial remedy." Id. at 438 (Jackson, J., concurring). Wilko's bottom line is that the securities laws' remedies must be judicial remedies. That is, the laws must be enforced in a court of law to assure that the remedies under the Act properly fulfill their function -- to compensate victims of violations and to act as a deterrent to would-be violators.8/

The transactions covered by the Federal Securities Acts are interstate securities transactions. Those transactions were and are Congress's concern. The significance of the regulation of interstate securities transactions is that they affect "interstate commerce, the national credit, the Federal taxing power, ... the national banking system and Federal Reserve System." 15 U.S.C.

---

8/ Clearly, it is inconsequential that the Florida Legislature did not copy the anti-waiver provision verbatim. Such formalism has no place in the construction of remedial statutes. For it is a settled principle of statutory construction that remedial statutes must be liberally construed so as to effectuate their aims and advance the remedies intended. Becker v. Amos, 141 So. 136, 140, 105 Fla. 231 (1932); Howard v. Amer. Service Mut. Ins. Co., 151 So.2d 682, 686 (Fla. 3d DCA 1963). Accord, S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

§78b. These are important concerns. Every interstate securities transaction touches those national interests. Every interstate transaction is affected by the national policy expressed by Congress and by the Supreme Court in Wilko.

Since Mrs. Young's transactions were in interstate commerce, the Third District correctly held that the claims could not be arbitrated. It did so based on Fla.Stat. §517.241:

> (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 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.
>
> (4) When not in conflict with the Constitution or laws of the United States, the courts of this state have the same jurisdiction over civil suits instituted in connection with the sale or offer of sale of securities under any laws of the United States as they may have under similar cases instituted under the laws of the state.

This section, entitled "Remedies," speaks of "action in any court," and of jurisdiction of the Florida courts, and affords the "same civil remedies" as provided by federal law.9/ This section

---

9/ See generally State v. Burr, 84 So.2d 61, 73-74 (Fla. 1920):

> Where there is ambiguity or uncertainty of meaning in the words employed in a statute, the legislative intent should be ascertained by a consideration of the entire act and of others in pari materia; and in doing so appropriate effect should, if possible, be given to all the material portions of the law so as to carry out and effectuate in the fullest degree the intention of the lawmakers.

shows legislative intent that those aggrieved by violations have a judicial remedy, in a judicial forum.10/

The Third District correctly interpreted Fla.Stat. §517.241 in this case involving a claim arising out of interstate securities transactions. Such interpretation effectuates not only state, but national policy, and promotes the scheme of cooperative federalism which Congress envisaged. In short, that interpretation pays heed to the supreme law of the land.

Oppenheimer claims that Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), reached a "totally contrary conclusion," one which correctly construes the Florida Securities Act. Yet Maves does not consider the remedial purposes of that law; in fact, it does not even cite Fla.Stat. Ch. 517. The court only discussed the requirements and policies of the Florida Arbitration Act, as if no other legislation were involved. The Maves court failed to consider specific provisions of the Florida Securities Act or the interrelationship between the

---

10/ Compare Fla.Stat. §517.211, entitled "Remedies Available in Cases of Unlawful Sale." Oppenheimer's contention that §517.241(3) deals only with "remedies" and not with "judicial forum" might arguably have some merit if the Legislature had included the §517.241(3) language in §517.211. The fact is, however, that the Legislature adopted "the same civil remedies provided by laws of the United Stated" in §517.241, which deals with courts and the right to bring court actions. This amply shows legislative intent to adopt the federal requirement of judicial trial and review. Moreover, it must be assumed that, when the Legislature enacted §517.241(3) in 1979, it knew of, and approved, the construction of Fla.Stat. Ch. 517, and the adoption of the Wilko rationale in Shearson, Hammill & Co. v. Vouis, 247 So.2d 733 (Fla. 3d DCA 1971), cert. denied, 253 So.2d 444 (Fla. 1971). Collins Inv. Co. v. Metro. Dade County, 164 So.2d 806, 809 (Fla. 1964).

federal and state securities laws and their policies, or the declared need for uniformity especially in matters relating to interstate securities transactions covered by both federal and state law. The Maves court rejected wholesale, in one sentence, the public policy considerations expressed by the United States Supreme Court in Wilko. Such a brief and simplistic "analysis" ignores the maxims that remedial statutes shall be liberally construed, McElfresh v. State, 9 So.2d 277, 278 (Fla. 1942)(securities laws); that a special statute (securities act) controls over a general act (arbitration code), Adams v. Culver, 111 So.2d 665 (Fla. 1959); and that the last expression of the legislative will controls (§517.241 [1979]; §682.02 [1967]), Cable-Vision, Inc. v. Freeman, 324 So.2d 149, 152 (Fla. 3d DCA 1975), appeal dismissed, 336 So.2d 1180 (Fla. 1976), appeal dismissed, 429 U.S. 1032 (1977). The Maves court had the duty to harmonize both statutes, which is what the Third District did in Young. See State ex rel. School Bd. of Martin County v. Dept. of Educ., 317 So.2d 68 (Fla. 1975).

In summary, the Third District correctly interpreted Fla.Stat. 517.241 to preclude arbitration of Mrs. Young's claims.

## II.

## THE THIRD DISTRICT CORRECTLY HELD THAT THE FEDERAL ARBITRATION ACT DOES NOT COMPEL ARBITRATION OF MRS. YOUNG'S CLAIMS.

The policies behind the federal securities laws control all interstate securities transactions. Those transactions affect not only interstate commerce in general, but also the financial markets and banking industry. 15 U.S.C. §78b. The securities field has such significance for the nation that Congress has



BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

enacted a comprehensive set of laws to regulate it. The United States Supreme Court has held that the policy behind those laws is "better carried out" by judicial resolution of disputes arising out of interstate securities transactions. Wilko v. Swan, 346 U.S. 427, 438 (1953). The conflicting federal policy of promoting extra-judicial dispute resolution[11]/ steps aside to permit court litigation regarding interstate securities transactions -- the object of the federal securities laws.

Mrs. Young's transactions were in interstate commerce. Her arbitration contract with Oppenheimer is not enforceable under federal law -- it is invalid under federal law because Congressional purpose and intent in regulating the interstate securities field demand that it be so.

For that reason, the Third Distrct in Young held that the Federal Arbitration Act did not apply to enforce Mrs. Young's arbitration contract with Oppenheimer. In keeping with federal law, the Florida Securities Act affords this protection to claims arising out of interstate securities transactions, by virtue of Fla.Stat. §517.241. The Third District did not hold that all claims under the Florida Securities Act were exempt from the Arbitration Act. To the contrary, the court explicitly and repeatedly limited its holding:

---

11/ "Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment." 346 U.S. at 438, emphasis added.

> We reaffirm Vouis' first holding... as applied to claims arising out of interstate securities transactions....
>
> [434 So.2d 369, 371 n.2, emphasis added]
>
> [B]oth federal law, and the Florida law which borrows federal law, render unenforceable any pre-sale arbitration agreement involving securities transactions in interstate commerce.
>
> [at 373, n.7; emphasis added]
>
> * * *
>
> We have no quarrel with, and find distinguishable, authorities which hold that the Federal Arbitration Act applies to compel arbitration of claims filed in state courts based on agreements which affect interstate commerce other than those involving sales of securities.
>
> [at 373; emphasis in text]

The Third District's construction of Fla.Stat. §517.241 respects federal law and furthers the goals embraced by Congress in connection with interstate securities transactions. Such a construction makes sense. For it would be incongruous for federal law to promote the goals relating to interstate securities transactions only in federal court, but to defeat those very same goals -- regarding the very same transactions -- in state court.

Moreover, Congress has declared a policy of "Federal and State cooperation in securities matters, including... maximum effectiveness of regulation." 15 U.S.C. §77s(c)(2). Since the effectiveness of the regulatory provisions "is lessened in arbitration as compared to judicial proceedings," Wilko, 346 U.S. at 435, any attempt by the Florida Legislature to protect interstate

securities claims from arbitration could only be sanctioned under federal law.

The case of Southland Corp. v. Keating, 104 S.Ct. 852 (1984), does not negate the validity of Fla.Stat. §517.241, as construed by the Third District in Young. In Southland, the Court held that the Federal Arbitration Act preempted an anti-waiver provision in the California Franchise Investment Law. The law regulated franchises. The California Supreme Court had held, based on Wilko v. Swan, that the anti-waiver provision precluded arbitration. The state court stressed the similarity of the anti-fraud language between the franchise law and the federal securities laws; even the non-waiver clause was identical to the one in the Federal Securities Act. See Keating v. Superior Ct. of Alameda County, 645 P.2d 1192, 1198-99 (Cal. 1982). What was missing, however, was an identity of purpose, of goals, and of policies with the federal securities laws.12/ Despite this significant shortcoming, the California Supreme Court, by analogy, tried to transplant Wilko v. Swan to the franchise field. Id. at 1202-03. The United States Supreme Court justifiably rejected the analogy. 104 S.Ct.

---

12/ The apparent purpose of the franchise law was to subject franchises to anti-fraud regulation of the "securities" type. The California Legislature must have considered it necessary because franchise agreements are not "securities" and are therefore not covered by the securities laws. See, e.g., Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973); Nash & Associates, Inc. v. Lum's of Ohio, Inc., 484 F.2d 392 (6th Cir. 1973); Bitter v. Hoby's Int'l Inc., 498 F.2d 183 (9th Cir. 1974); Martin v. T.V. Tempo, Inc., 628 F.2d 887 (5th Cir. 1980). In other words, the California Legislature turned franchise agreements into "securities" -- through the back door.

at 861 n.11. As the Court stated, the question in Wilko was whether the federal securities laws -- not any federal franchise law -- had created an exception to the Federal Arbitration Act.13/

Oppenheimer contends that Southland "preempts all state statutes barring arbitration," and therefore preempts Fla.Stat. §517.241. Such a statement blurs the issues here. Firstly, Fla.Stat. §517.241 is not an attempt to exempt from the Federal Arbitration Act arbitration contracts that would otherwise be enforceable under federal law -- which is what the California Franchise Investment Law attempted to do. To the contrary, the arbitration contract regarding interstate securities transactions involved in this case is not enforceable under federal law.

Secondly, the notion of preemption must not be taken lightly, to contend that a preemption decision invalidates any state law that might arguably fit the description. For the United States Supreme Court itself has stated:

> Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question.

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973).

---

13/ There is no comprehensive regulation of franchises at the federal level, as there is in the securities field. Compare the Automobile Dealers Day In Court Act, 15 U.S.C. §1221, et seq., and the Petroleum Marketing Practices Act, 15 U.S.C. §2801, et seq.

> The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." * * * This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

The Federal Arbitration Act has been interpreted not to apply to interstate securities claims. Fla.Stat. 517.241, as construed, does no more than extend that exception, pursuant to federal law, to interstate securities claims brought in a state court.

The laws to be considered in the preemption analysis are not just Fla.Stat. §517.241 versus the Federal Arbitration Act, as Oppenheimer asserts. That kind of analysis may have been proper in a case such as Southland, where there was no overriding federal interest other than the policy favoring arbitration. In this case, however, much more is involved. This case involves a comprehensive regulatory scheme which extends from the federal to the state level, with a declared federal goal of uniformity and cooperation between the two. Under such circumstances, there is no principled reason to deny interstate securities claimants a "legally correct adjustment" of their claims, Wilko, 346 U.S. at 438, merely because they chose to claim under state law.

In Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983), on which Oppenheimer relies, the court held that the Federal Arbitration Act preempted a blue sky law's anti-waiver provision. The court

failed to consider the fact that the transactions in question were interstate securities transactions; it also failed to consider that both the Securities Act of 1933 and the Exchange Act of 1934 specifically provide for concurrent state regulation, see 15 U.S.C. §77r and 15 U.S.C. §77bb(a). And the court ignored the United States Supreme Court's analysis, in Wilko, of the reasons why a securities claim could not be arbitrated. In fact, the court did not even try to reconcile the operation of the two statutes. That would have been the proper approach. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973). A finding of "no preemption" is preferable because Congress can overrule it by appropriate legislation, while a finding of preemption cannot be changed by the states. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting).

Oppenheimer claims that Merrill Lynch, Pierce, Fenner & Smith v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981), directly conflicts with Young. In Melamed, the Fourth District held that:

> Florida courts must recognize the 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.
> [at 729]

The context of that holding was an arbitration agreement incorporating another state's laws. The agreement was unenforceable under Fla.Stat. §682.02, but enforceable under the Federal Arbitration Act. The court simply held that the Federal Arbitration Act superseded the inconsistent provisions of the state law, and made the agreement enforceable. However, the court did not pass on the


BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505

question -- which was not an issue in the case -- whether that agreement was unenforceable under federal law and under Fla.Stat. §517.241, which makes federal law its own. That was the issue in Young. There is therefore no conflict between Young and Melamed.[14]/ But to the extent there were conflict, Melamed should be overruled.

None of the decisions urged by Oppenheimer compels the invalidity or preemption of Fla.Stat. §517.241, as construed by the Third District. That court's analysis of the issues and of the regulatory schemes involved yielded a restrained and principled solution: the Federal Arbitration Act does not apply to claims arising out of interstate securities transactions brought in a Florida court. The Federal Arbitration Act applies in state court to all other arbitration contracts within its scope.

The Third District's decision should be affirmed.

---

[14]/ Oppenhimer asserts that Melamed "presaged" Southland Corp. v. Keating, 104 S.Ct. 852 (1984). Yet Southland overruled Melamed in one of its holdings -- that "the provisions of Section 3 of the Federal Arbitration Act apply to Florida state courts." 405 So.2d at 793. In Southland, the Court specifically stated, "we do not hold that §3... appl[ies] to the proceedings in state courts." 104 S.Ct. at 861. Oppenheimer also claims that Young conflicts with Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Westwind Transp., Inc., 442 So.2d 414 (Fla. 2d DCA 1983). That case held that the Federal Arbitration Act "is controlling" and "preempt[s] the provision of the Florida Arbitration Code." Id. at 417. The holding, of course, goes too far, for the Federal Arbitration Act does not preempt every provision of Fla.Stat. Ch. 682, as made clear in Southland. Be that as it may, the Westwind opinion does not even reflect the issues raised by the parties -- if any -- regarding the arbitrability of interstate securities claims under federal and Florida law; it is impossible to tell which points of law were decided. In any event, to the extent Westwind conflicts with Young, Respondent respectfully submits that it should be overruled.

III.

OPPENHEIMER WAIVED ITS RIGHT TO ARBITRATION

The Third District refused to decide whether Oppenheimer had in fact waived its arbitration right. A resolution of this issue in the affirmative would avoid the need to pass on the constitutionality of Fla.Stat. §517.241, as construed by the Third District.15/ As this Court stated in State v. Covington, 392 So.2d 1321, 1323 (Fla. 1981):

> It is a "settled principle of constitutional law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds." [Citations omitted]

The law in Florida is that when a party files an answer without asserting the right for arbitration, the party waives that right. Klosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678, 681 (Fla. 1973); Lapidus v. Arlen Beach Condominium Ass'n Inc., 394 So.2d 1102, 1103 (Fla. 3d DCA 1982); Hansen v. Dean Witter Reynolds, Inc., 408 So.2d 658, 659 (Fla. 3d DCA 1982), petition for review denied, 417 So.2d 328 (Fla. 1982).

In Mrs. Young's initial, federal court action, Oppenheimer repeatedly contested Mrs. Young's right to have her state claims heard in federal court. Not once did Oppenheimer argue that the

---

15/ Oppenheimer has also raised issues not encompassed by this Court's conflict jurisdiction. For example, it claims that Young conflicts with Southland Corp. v. Keating, 104 S.Ct. 852 (1984), and with the supremacy clause of the United States Constitution.

state claims were subject to arbitration. Oppenheimer did not even ask the court for a determination of that issue.16/ Cf. Merrill Lynch, Pierce, Fenner & Smith v. Westwind Transp., Inc., 442 So.2d 414, 417 (Fla. 2d DCA 1983)(no waiver where defendants filed an answer after the trial court had denied their initial, and prompt, motion to compel arbitration).

Oppenheimer filed its answer in federal court, again questioning the court's jurisdiction over the state claims, but never raising the defense that the claims were subject to an arbitration contract.

After Oppenheimer had answered, the court dismissed Mrs. Young's state claims. When Mrs. Young filed her suit in state court, Oppenheimer, almost as an afterthought, decided to rely on the arbitration clause.

---

16/ Oppenheimer argued in the trial court and in the Third District that the case of Sawyer v. Raymond James & Associates, 642 F.2d 791 (5th Cir. 1981), had precluded its raising the arbitration issue, and that the Federal claims were incapable of being severed to subject the state claim to arbitration. Both contentions are incorrect. In actual fact, the federal court severed the claims, so they were not incapable of being severed. A further discussion of these issues appears at pp. 4-8 of Mrs. Young's Petition for Writ of Certiorari [A. 93], and pp. 1-4 of the Reply to Response to Petition for Writ of Certiorari [A. 106]. Respondent does not rely here on the language of Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 518 F.Supp. 602 (S.D.Fla. 1981), which attempted to impose a stricter standard, closer to Florida's, for waiver of the right to arbitrate. That decision was overruled in Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982), a further example of the difference between the Florida and federal requirements for waiver.

Under such circumstances, it is clear that Oppenheimer waived a right to arbitration under Florida law.17/

Oppenheimer's waiver of a right to arbitrate is a procedural default arising from conduct inconsistent with that right. Waiver by inconsistent conduct is not a concept of the law of contracts, of their validity or of their enforceability. A contract may be valid and enforceable yet a party may have waived the right to demand compliance therewith. See 4 Fla.Jur. 2d Arbitration and Award §13 (1978). The issue of waiver must therefore be determined pursuant to state law.

Indeed, had Mrs. Young brought her claims in state court first, and Oppenheimer had defended on the merits, and the case thereafter had been removed, for any reason, to federal court, the federal court would apply, not Florida, but federal, law to decide the waiver issue. See Hanna v. Plumer, 380 U.S. 460 (1965).

Thus, even assuming arguendo that federal law were to govern the enforceability of this arbitration contract, the waiver issue would nevertheless be one to be decided under state law.

State law controls the issue of waiver. Under state law, the filing of an answer and affirmative defenses operates as a waiver. This Court should decide that Oppenheimer waived its arbitration

---

17/ Oppenheimer has insisted in this case that the Florida court should apply federal law to determine the issue of waiver, pursuant to the Federal Arbitration Act. That argument is incorrect. The United States Supreme Court made clear in Southland Corp. v. Keating, 104 S.Ct. 852, 861 n.10 (1984), that the Federal Arbitration Act does not go so far as to impose federal procedural law on the state courts.

right, or alternatively, direct the Third District to decide the issue in accordance with Florida law.

## CONCLUSION

The Third District correctly construed Fla.Stat. §517.241, according to its language, its policy, its legislative intent, and according to the special features of the federal-state regulatory scheme regarding interstate securities transactions. The Court should approve the Third District's decision in Young, and overrule the Second District's decision in Maves.

The Third District also correctly held that Mrs. Young's interstate securities claims cannot be arbitrated under the Federal Arbitration Act because the arbitration clause in question is not valid or enforceable even under federal law, so that the Federal Arbitration Act cannot serve to enforce it. This Court should approve the Third District's decision. And, to the extent Melamed or Westwind conflict, the Court should overrule those decisions.

In addition, the Court should pass on the issue of waiver to hold that Oppenheimer waived its arbitration right. Alternatively, the Court should remand to the Third District to decide the waiver issue in accordance with Florida law.

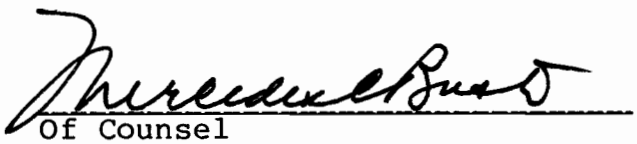
Respectfully submitted,

BAILEY & DAWES,
a professional association
Attorneys for Respondent
Fifth Floor
1390 Brickell Avenue
Miami, Florida 33131-3313
(305) 374-5505

By Mercedes Busto
Mercedes C. Busto

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Respondent's Answer Brief on the Merits were mailed to Stanley E. Beiley, Esquire, Richard E. Brodsky, Esquire, and David S. Garbett, Esquire, of Paul, Landy, Beiley & Harper, P.A., Attorneys for Petitioner, Penthouse, Peninsula Federal Building, 200 Southeast First Street, Miami, Florida 33131; Curtis Carlson, Esquire, Fowler, White, Burnett, Hurley, Banick & Stickroot, Attorneys for Defendants Bache and Elgart, Fifth Floor, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, and Bennett Falk, Esquire, Ruden, Barnett, McClosky, Schuster & Russel, P.A., Attorneys for Defendant McKinnon, 2000 One Biscayne Tower, Miami, Florida 33131, this 9th day of April, 1984.



Of Counsel



BAILEY & DAWES, A PROFESSIONAL ASSOCIATION
FIFTH FLOOR, 1390 BRICKELL AVENUE, MIAMI, FLORIDA 33131-3313 • TELEPHONE (305) 374-5505