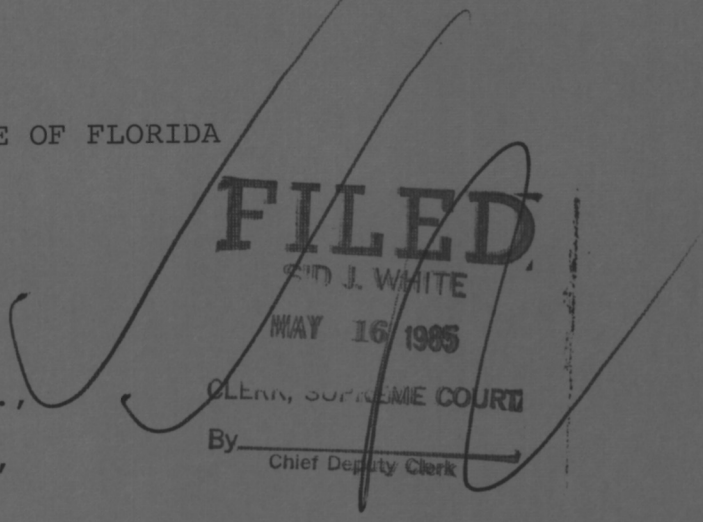
IN THE SUPREME COURT OF THE STATE OF FLORIDA

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 SUPPLEMENTAL BRIEF

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SUMMARY OF ARGUMENT

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. __ (1985), holds that an arbitration contract must be enforced to compel arbitration of state claims involving interstate securities transactions. This recent interpretation of the FAA brings into question this Court's prior decision on the preemption issue. The Court may wish to reconsider its decision.

The decision on the waiver issue was the logical conclusion of this Court's main holding -- that the FAA did not apply to disputes involving interstate securities transactions. The issue of waiver should also be reconsidered.

Oppenheimer waived the right to arbitrate. Its conduct preceding this suit manifested an acceptance of the judicial forum as to the state claim. That claim was not intertwined with the federal claim. The ultimate facts on the two claims differed, one requiring merely proof of negligence, the other requiring proof of scienter. In fact, it was because of the disparity between the federal and the state theories that the district court dismissed the pendent state claim on a defense motion joined by Oppenheimer. Had Oppenheimer moved to compel arbitration, the district court could have granted the motion on the same grounds that it granted the motion to dismiss for lack of pendent jurisdiction.

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Moreover, there are facts in this case supporting a finding of prejudice, were such a finding required on the waiver issue.

The Court should hold that Oppenheimer waived the right to arbitrate, and remand for further proceedings.

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INTRODUCTION[1]

This Court previously held in this case that an arbitration agreement concerning disputes in securities is unenforceable pursuant to Wilko v. Swan, 346 U.S. 427 (1953). Oppenheimer & Co. v. Young, 456 So.2d 1175, 1178 (Fla. 1984). This Court further held that its decision did not conflict with the Federal Arbitration Act ("FAA"), and therefore was not preempted by the FAA:

> We are obliged not only to look at federal statutes but at controlling case law from the Supreme Court interpreting these statutes. In Wilko the court interpreted both federal securities law and the FAA and held that the FAA did not require arbitration of disputes concerning interstate securities transactions.
>
> [Id. at 1179]

In view of Wilko, therefore, the Court also held that:

> [I]t would have been pointless [for Oppenheimer] to invoke the agreement in federal court because federal law prohibits

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[1] Respondent Marcia Young will be called "Respondent" or "Mrs. Young." Petitioner Oppenheimer & Co., Inc., will be called "Petitioner" or "Oppenheimer."

> enforcement of such agreements where the dispute concerns securities in interstate commerce.
>
> [Id. at 1177, n.1]

The United States Supreme Court has vacated this Court's decision. It remanded the case for reconsideration in light of Dean Witter, Reynolds, Inc. v. Byrd, 470 U.S. __ (1985)[2].

The Court having granted her leave to brief the issues for reconsideration in light of Byrd, Respondent files this supplemental brief.

I. THE BYRD DECISION

Byrd sued Dean Witter for violations of the Securities Exchange Act of 1934 and of various state law provisions. Byrd alleged that Dean Witter had conducted unauthorized and excessive trading in his account, and had misrepresented the account's status. Dean Witter moved to sever the pendent state claims, and to compel their arbitration.

The district court denied the motion. Based on the doctrine of intertwining, the Ninth Circuit affirmed. Byrd v. Dean Witter, Reynolds, Inc., 726 F.2d 552 (9th Cir. 1984), rev'd, 470 U.S. __ (1985). Pursuant to this doctrine, a district court could, in its discretion, deny arbitration of arbitrable claims, if arbitrable and nonarbitrable claims joined in the suit arose

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[2] A copy of the Court's slip opinion is annexed to this brief. Respondent will cite to the slip opinion.

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out of the same transaction, and were sufficiently intertwined factually and legally. Slip op. at 3. "Intertwining" meant that the same factual and legal conclusions would support both the federal and the state claims. Miley v. Oppenheimer & Co., 637 F.2d 318, 335-36 (5th Cir. 1981) The doctrine of intertwining is not viable after Byrd. See, e.g., Dimenstien v. Whiteman, __ F.2d __ (11th Cir., May 8, 1985), slip op. at 3550.

The intertwining doctrine had been a method of preserving the district court's exclusive jurisdiction over federal securities claims. By preventing arbitration, it avoided the threat of collateral estoppel in cases where an arbitrator might decide facts supporting the federal claim before those facts were determined in federal court. Another purpose was efficiency -- the avoidance of "redundant efforts to litigate the same factual questions twice." Slip op. at 4.

The federal courts of appeal were divided. Some had rejected the intertwining doctrine. The United States Supreme Court sought to resolve the conflict, and framed the question thus:

> [W]hether, when a complaint raises both federal securities claims and pendent state claims, a federal district court may deny a motion to compel arbitration of the state-law claims despite the parties' agreement to arbitrate their disputes.
>
> [Slip op. at 1]

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The Court answered the query in the negative. While recognizing the "federal interest in the federal-court proceeding," slip op. at 9, it held that neither purpose of the intertwining doctrine justified the refusal to enforce an arbitration contract as to arbitrable claims. Slip op. at 4-5.

The Court perceived that potential collateral estoppel problems were no threat to the federal courts' exclusive jurisdiction. In its view, the "federal interests warranting protection" could be accommodated by framing adequate preclusion rules. The Court therefore saw "no reason to require that district courts decline to compel arbitration...simply to avoid an infringement of federal interests." Slip op. at 10. The Court further said:

> The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. [Slip op. 8]

Such countervailing federal policy, articulated in Wilko v. Swan, 346 U.S. 427 (1953), was re-affirmed in Byrd to prevent arbitration of claims arising under §12(2) of the Securities Act of 1933, 15 U.S.C. §771(2). Though acknowledging Wilko's vitality in the lower federal courts in the context of claims under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5, the Court specifically declined to

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decide whether Wilko applies to those claims. Slip op. at 2-3, n.1[3]

II. BYRD'S EFFECT ON THE ISSUE OF ARBITRABILITY OF THE FLORIDA SECURITIES CLAIMS

This Court decided that, in enacting the Florida Securities Act, the Legislature had intended to rely on federal law in the securities field. The Florida Securities Act granted purchasers and sellers of securities "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." Fla.Stat. 517.241(3). Those remedies, pursuant to Wilko v. Swan, are judicial remedies.

The question now is whether, under Byrd, the FAA preempts the grant of judicial remedies and assurance of a judicial forum by the state.[4]

In Byrd, the Court did not consider the question here: whether the FAA preempts a state statute guaranteeing judicial

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[3] But see Justice White's concurrence, expressing his views on the subject.

[4] This Court's prior decision held there was no preemption, since the FAA did not, under Wilko, require arbitration of disputes concerning interstate securities transactions. 456 So.2d at 1179. This Court stated, however, that its decision would be different were the Court "to recede from Wilko by holding that arbitration agreements could be enforced to resolve disputes concerning interstate securities transactions." 456 So.2d at 1178, n.6.

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remedies in claims involving interstate securities transactions. But Byrd holds that the FAA applies, in appropriate circumstances, to compel arbitration of state law claims plainly arising from interstate securities transactions.

Byrd's underlying premise is that the protection and safeguards envisioned in Wilko for the investing public are to be implemented solely by federal courts, in federal claims.[5]

This Court may wish to reconsider its prior decision on the preemption issue in view of Byrd's interpretation of the FAA.

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[5] The Court may have overlooked the fact that the interests underlying the federal judicial safeguards transcend the federal domain and are shared by the states. But cf. Justice Stevens' dissent in Southland Corp. v. Keating, 104 S.Ct. 852, 862-63 (1984):

> [I]t is an understatement to say that "the legislative history of the...Act...reveals little awareness on the part of Congress that state law might be affected"....
>
> * * *
>
> We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the Act, can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government. I find no evidence that Congress intended such a double standard to apply....

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III. OPPENHEIMER WAIVED ITS RIGHT TO ARBITRATE

On the waiver issue, this Court held that Oppenheimer could not have waived a non-existent right:

> [I]t would have been pointless to invoke the [arbitration] agreement in federal court because federal law prohibits enforcement of such agreements where the dispute concerns securities in interstate commerce.
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> [456 So.2d at 1177, n.1]

The holding carried through with consistency this Court's interpretation of Wilko v. Swan -- that the FAA does not apply to compel arbitration when the dispute concerns interstate securities transactions.[6]

Since this Court's holding on the waiver issue is now open to revision, Respondent respectfully submits that Oppenheimer did waive its right to arbitrate.

A. Oppenheimer's Conduct In A Prior Action

The pertinent facts are as follows. In May, 1981, Mrs. Young sued Oppenheimer and others, in federal court, for violations of the federal and Florida securities laws. Oppenheimer moved to dismiss for failure to state a claim, and for lack of pendent jurisdiction [A-52], and filed a supporting memorandum. [A-54, 67] Attached to the memorandum was a copy of

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[6] But Oppenheimer has never espoused that view of Wilko, and could not argue now that it failed to demand arbitration in federal court based on such belief.

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an unpublished order of dismissal in Bissett v. Oppenheimer & Co., Inc., Case No. 79-8381-Civ-ACH (S.D. Fla., July 18, 1980), in which the court had, on Oppenheimer's motion, dismissed pendent state claims because of "the divergent legal theories necessary to establish" 10b-5 claims and common law fraud claims. [See A-70-71]

Mrs. Young filed an Amended Complaint, which Oppenheimer moved to dismiss on the same grounds [A-78], with supporting memoranda. [A-80] Oppenheimer again questioned the exercise of pendent jurisdiction, incorporating defendant Thomson McKinnon'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] 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 answered and raised affirmative defenses. But Oppenheimer did not raise as a defense the right to arbitrate. [A-43]

Defense motions challenging the district court's subject-matter, pendent jurisdiction were still pending when Oppenheimer answered. The district court later granted one such motion by defendant Thomson McKinnon, and extended the ruling to all defendants. The 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. As the court noted in Stowell, fraud is actionable under Florida law for mere negligence, whereas a Rule 10b-5 claim requires proof of intent to deceive. Id. at 1217. The district court thus ruled that there was no basis for exercise of pendent jurisdiction. [A-50]

To pursue her state claims, Mrs. Young had to refile her state claims in state court. It was then that Oppenheimer first raised its right to arbitrate.

B. Oppenheimer's Actions Were Inconsistent With a Right to Arbitrate and Therefore Waived the Right.

The issue of waiver of the right to arbitrate is a procedural matter, governed by Florida law. See Public Health Trust of Dade County v. M.R. Harrison Constr. Corp., 415 So.2d 756, 758 (Fla. 3d DCA 1982).[7]

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[7] Oppenheimer has previously contended in this case that federal law governs the waiver issue. It has claimed that once the FAA is invoked in a state court proceeding, federal law governs all questions of interpretation, construction, validity, revocability and enforceability of arbitration contracts. Even were this correct it would have no effect on the waiver issue here, for two reasons. First, waiver is not an issue of contract law, but is rather a procedural default. Matters of procedure are governed in state court by the law of the forum, even where the state court implements a federal substantive right. See Atlanta Joint Terminals v. Knight, 106 S.E.2d 417, 79 ALR 2d 539 (Ga. App. 1958). Second, as will be shown, the circumstances in this case satisfy the test for waiver under either Florida or federal law.

Under Florida law, waiver may be express or implied. Thomas N. Carlton Estate, Inc. v. Keller, 52 So.2d 131, 133 (Fla. 1951). Waiver occurs when a party takes action inconsistent with the right to arbitrate, Klosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678, 681 (Fla. 1973), by affirmatively manifesting an acceptance of the judicial forum, Public Health Trust, supra, or otherwise, Seville Condominium #1, Inc. v. Clearwater Dev. Corp., 340 So.2d 1243, 1244-45 (Fla. 2d DCA 1977).

Waiver may arise from conduct outside the confines of the suit in which the arbitration demand is made. A case on point is Seville Condominium #1, Inc., supra. There, Management Corporation, the party demanding arbitration, had contended in pre-suit correspondence that only some issues were arbitrable. The Management Corporation had then filed an injunction suit (which remedy is not obtainable in arbitration). When the defendants in the injunction suit filed a separate class action for damages and other relief, the Management Corporation moved to consolidate the class action with the injunction suit. Subsequently, it moved for arbitration of the class action. The Second District held:

> [W]hen the actions of the Management Corporation in connection with the suits are considered together with the positions it took during pre-suit skirmishing, we conclude that a waiver occurred.
>
> [340 So.2d at 1245]

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Similarly in this case, Oppenheimer's pre-suit actions compel the conclusion that Oppenheimer has waived arbitration.

As a defendant in Mrs. Young's prior federal suit, Oppenheimer manifested an acceptance of the judicial forum as to these claims. Oppenheimer could have but never asserted its arbitration right.

At the time, federal courts routinely followed the practice -- in cases involving federal and state securities claims -- of submitting the state claims to arbitration if the federal and state claims were not factually and legally intertwined.[8]

Where the claims were not intertwined, the courts perceived no impediment to submission of a state claim to arbitration. See, e.g., Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982), submitting to arbitration Florida state claims which had been undisputedly intertwined with the federal securities claim, but only after the court ruled that the federal securities claim was time-barred.

In Mrs. Young's federal court suit, nothing precluded Oppenheimer from demanding to arbitrate the state claims.

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8 The issue of intertwining required a case-by-case determination based on the district court's review of the legal theories and of the facts supporting those theories. Sawyer v. Raymond, James & Associates, 642 F.2d 791, 793 (5th Cir. 1981). As the Fifth Circuit explained in Miley v. Oppenheimer & Co., 637 F.2d 318, 335-36 (5th Cir. 1981), the doctrine of intertwining applied only where the same factual and legal conclusions had to be drawn from common evidentiary facts in order to resolve both the federal and the state claims. In other words, the same "ultimate facts" had to underlie each claim. In that way, federal courts guarded their exclusive federal jurisdiction.

Oppenheimer cannot claim now that the doctrine of intertwining would have prevented arbitration under then-controlling caselaw. The doctrine of intertwining clearly did not apply. Oppenheimer argued successfully that the state claim was not even properly pendent -- a threshold much easier to satisfy than the rigorous standard for intertwining. See Miley v. Oppenheimer & Co., 637 F.2d 318, 335 (5th Cir. 1981), stating that for a state claim to be pendent to a federal claim the evidentiary facts underlying the two claims must be largely identical; while for intertwining, an identity of factual and legal issues was required.[9]

In short, Oppenheimer manifested an acceptance of the judicial forum during the pendency of Mrs. Young's state claims in federal court. Oppenheimer could have demanded arbitration of the state claims but did not.

Were the fact of prejudice a requisite under Florida law for a finding of waiver -- which it is not -- that requirement would also be satisfied in this case. The mere inconvenience of falling prey to Oppenheimer's procedural chase is sufficient prejudice for this, or any, plaintiff. The effort and expense of refiling in state court constitutes a prejudice, especially since

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[9] In Mrs. Young's federal action, she asserted a 10b-5 claim and a blue sky claim -- the former requiring proof of intent to deceive, and the latter requiring only proof of negligence. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Byrne, 320 So.2d 436 (Fla. 3d DCA 1975), writ discharged, 341 So.2d 498 (1977). The legal issues, and the ultimate facts, were obviously different. There was no intertwining.

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the effort may have to be repeated if Respondent is ultimately relegated to an arbitral forum, which, pursuant to the arbitration contract, would be in New York. There are ample grounds here for a finding of prejudice.[10]

CONCLUSION

For any and all of the foregoing reasons, Respondent respectfully submits that Oppenheimer waived the right to arbitrate. The Court should so hold, and remand for further judicial proceedings.

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10 The trial court never passed, however, on the question whether Mrs. Young had been prejudiced in any way, because the trial court did not apply the "federal" standard for waiver. Cf. Graham Contracting, Inc. v. Flagler County, 444 So.2d 971 (Fla. 5th DCA 1984)(applying the federal waiver test without explanation of the reasons for such adoption).

Respectfully submitted,

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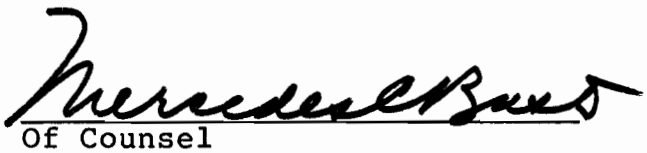
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 13th day of May, 1985 to: CURTIS CARLSON, ESQUIRE, City National Bank Bldg., Fifth Floor, Miami, Florida 33130; PATRICIA E. COWART, ESQUIRE, Ruden, Barnett, McClosky, Schuster & Russell, P.A., 2020 One Biscayne Tower, Miami, Florida 33131; and STANLEY A. BEILEY, ESQUIRE, Paul, Landy, Beiley & Harper, P.A., Penthouse, 200 S. E. First Street, Miami, Florida 33131.



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