IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 64,140

FILED
AUG 25 1983
SID J. WHITE
CLERK, SUPREME COURT
By
Chief Deputy Clerk

OPPENHEIMER & COMPANY, INC.,

Defendant-Petitioner,

vs.

MARCIA YOUNG,

Plaintiff-Respondent.

ON APPEAL FROM THE
THIRD DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

STANLEY A. BEILEY
RICHARD E. BRODSKY
DAVID S. GARBETT
Penthouse, Peninsula Federal Bldg.
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300

Attorneys for Petitioner

OF COUNSEL:

PAUL, LANDY, BEILEY,
HARPER & METSCH, P.A.
Penthouse, Peninsula Federal Bldg.
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

1. Introduction 1

2. Proceedings Below 2

ARGUMENT 4

I. THE OPINION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT ON THE ISSUE WHETHER THE FLORIDA SECURITIES ACT BARS ARBITRATION OF CLAIMS BROUGHT UNDER THAT ACT 4

II. THE OPINION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT ON THE ISSUE WHETHER THE UNITED STATES ARBITRATION ACT APPLIES TO AND COMPELS ARBITRATION OF STATE SECURITIES LAW CLAIMS 7

CONCLUSION 10

CERTIFICATE OF SERVICE 11

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.

PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

TABLE OF AUTHORITIES

Page

CASES

Coe v. ITT Community Development Corporation
362 So.2d 8 (Fla. 1978) 7

Damora v. Stresscon Int'l., Inc.
324 So.2d 80 (Fla. 1975) 7

Kroog v. Mait
[Current] Fed.Sec.L.Rep. ¶99,418 (7th Cir. 1983) 9, 10

Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed
405 So.2d 790 (Fla. 4th DCA 1981) 1, 2, 3, 7, 8, 9, 10

Moses H. Cone Memorial Hosp. v. Mercury Constr.
_____ U.S. _____, 103 S.Ct. 927, 941-42 (1983) 2

Nelle v. Loch Haven Homeowners' Ass'n., Inc.
413 So.2d 28 (Fla. 1982) 6

Raymond, James & Associates, Inc. v. Maves
384 So.2d 716 (Fla. 3d DCA 1980) 1, 4, 6, 7

Shearson, Hammill & Co. v. Vouis
247 so.2d 733 (Fla. 3d DCA), cert.
denied, 253 So.2d 444 (Fla. 1971) 5, 6

Wilko v. Swan
346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953) 5, 6

CONSTITUTIONS

United States Constitution, Art. VI, Clause 2 8

Florida Constitution, Art. V, §3(b)(3) 1

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

Page

STATUTES AND RULES

Federal

United States Arbitration Act, 9 U.S.C. §§2 and 3 . . . . . . 1, 2, 3, 4, 5, 7, 8, 9, 10

Securities Act of 1933, 15 U.S.C. §77n 4, 5, 6, 10

Florida

Florida Securities Act, Chapter 517, Fla. Stat. 1, 2, 4, 5, 6, 8, 9, 10

Sections 517.241(2) and (3), Fla. Stat. (1981) 4, 5

Rule 9.030(a)(2)(A)(IV), Rules of Appellate Procedure 1

P24o
81-6460/DSG

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

STATEMENT OF THE CASE

1. Introduction

Petitioner OPPENHEIMER & COMPANY, INC. ("OPPENHEIMER"), pursuant to Art. V., §3(b)(3), Fla. Const., and Fla.R.App.P. 9.030(a)(2)(A)(IV), has invoked the discretionary jurisdiction of this Court on the ground that the decision of the Third District Court of Appeal in Young v. Oppenheimer, _____ So.2d _____ (Fla. 3d DCA 1983), expressly and directly conflicts with the decision of the Second District Court of Appeal in Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), and with the decision of the Fourth District Court of Appeal in Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981).

Young v. Oppenheimer directly conflicts with the decision of the Second District in Maves, in that Young holds that the Florida Securities Act, Chapter 517, Fla. Stat., prohibits arbitration of a claim brought under the provisions of that Act, while Maves holds that arbitration of such claims is not barred by that Act. Young expressly acknowledges the existence of this conflict by stating that "[w]e respectfully disagree [with Maves]." Opinion at 4, n. 5 (brackets added). [1/]

Young directly conflicts with the decision of the Fourth District in Melamed in that Melamed holds that the United States Arbitration Act, 9 U.S.C. §§1 et seq., applies to and compels arbitration of claims brought under the Florida Securities Act, while Young holds that the United States Arbitration Act has no applicability to such claims. Young expressly recog-

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1/ References to "Opinion" are to the conformed copy of the opinion of the Third District Court of Appeal in Young v. Oppenheimer.

nizes this conflict by stating that "we disagree with the Melamed court . . . ." Opinion at 6.

Thus, there is now a conflict among the district courts of appeal on two important questions directly affecting judicial administration. These questions are not mere technical questions of statutory or even constitutional interpretation. Rather, in light of the large and increasing number of claims brought under the state securities act and the important, recognized role of arbitration in relieving congested court calendars and in providing an inexpensive and efficient means of resolving commercial disputes, these questions are of great practical importance to those affected by the securities laws and to the courts and Bar of this state. In addition, if the Third District is correct -- and the Second District incorrect -- on the question whether the Florida Securities Act bars arbitration of claims brought under that Act, there is then raised a second and important question of federal constitutional law, i.e., whether the United States Arbitration Act, which the United States Supreme Court has held is a statement of federal substantive law required to be applied in state courts, [2/] supercedes all provisions of state law barring arbitration of claims required to be arbitrated under the United States Arbitration Act.

2. Proceedings Below

YOUNG commenced this action in the trial court, alleging violations of the Florida Securities Act, as well as common law fraud, misrepresentation,

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2/ Moses H. Cone Memorial Hosp. v. Mercury Constr., _____ U.S. _____, 103 S.Ct. 927, 941-42 (1983).

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

negligence and breach of fiduciary duty. [3/] OPPENHEIMER moved for a stay and to compel arbitration of the claims on the basis of a provision in the agreement executed by both parties requiring arbitration of disputes. The trial court granted the motion to compel arbitration and stayed the proceedings pending arbitration. Expressly relying on the Fourth District's opinion in Melamed, the trial court found that since the agreement involved transactions in interstate commerce, the provisions of the United States Arbitration Act required the dispute to be arbitrated. [4/] The trial court also held that the United States Arbitration Act prevailed over contrary state law and required enforcement of the arbitration provision. Opinion at 2.

On YOUNG's petition for a writ of certiorari, the Third District granted the writ and quashed the trial court's order. The Third District held first

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3/ YOUNG originally filed suit in federal district court against OPPENHEIMER, alleging violations of both federal and Florida securities laws. The federal district court dismissed YOUNG's state claims for lack of subject matter jurisdiction. Opinion at 1-2.

4/ 9 U.S.C. §2 provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

that §§517.241(2) and (3) of the Florida Securities Act [5/] bar arbitration of claims brought under that Act. The Young court also held that the United States Arbitration Act does not apply to or compel arbitration of claims involving transactions in interstate commerce brought under the Florida Securities Act.

ARGUMENT

I. THE OPINION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT ON THE ISSUE WHETHER THE FLORIDA SECURITIES ACT BARS ARBITRATION OF CLAIMS BROUGHT UNDER THAT ACT.

The Young decision expressly and directly conflicts with the decision of the Second District Court of Appeal in Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), on the issue whether the Florida Securities Act bars arbitration of claims brought under that Act, i.e., whether that Act contains a specific counterpart to Section 14 of the Securi-

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5/ Section 517.241, Fla. Stat. (1981), provides in pertinent part:

> Remedies
>
> . . .
>
> (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.

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

ties Act of 1933, which renders void any contractual provision purporting to waive one's right to a judicial forum for claims arising under federal securities laws. 6/ This section of the Securities Act of 1933 is commonly referred to as the "anti-waiver" provision of the federal securities laws.

In support of its conclusion that YOUNG's claims were not arbitrable under the Florida Securities Act, the Young court relied upon its decision in Shearson, Hammill & Co. v. Vouis, 247 So.2d 733 (Fla. 3d DCA), cert. denied, 253 So.2d 444 (Fla. 1971). In Vouis, the Third District held that "arbitration of the issues of alleged fraud, misrepresentation, and breach of fiduciary duties is not consistent with the policy and language of the Florida Securities Law, which will control over provisions of the Florida Arbitration Act." Id. at 735 (footnote omitted). The Vouis court specifically relied upon the reasoning in Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), in which the United States Supreme Court held that the anti-waiver provision of the federal securities laws would control over the contrary provisions of the United States Arbitration Act.

On the basis of Vouis, the Young court reasoned that since the provisions of §§517.241(2) and (3) are specific counterparts to the anti-waiver provision of the Securities Act of 1933, then under Wilko v. Swan the provisions of the Florida Securities Act render unenforceable the arbitration provision in this case. Opinion at 5, n. 7.

The conclusion of the Young court that Florida law contains a specific counterpart to the anti-waiver provision of the Securities Act of 1933 directly

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6/ Section 14 of the Securities Act of 1933, 15 U.S.C. §77n, provides in pertinent part:

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

conflicts with the contrary conclusion reached by Maves. In Maves, plaintiff sued a brokerage firm for negligence and fraudulent misrepresentation in the handling of the customer's account. The defendant moved to compel arbitration and for a stay of proceedings pursuant to an arbitration provision in the agreement between the parties, which motion was denied by the trial court. On appeal, the Second District reversed, holding that the trial court was bound to enforce the arbitration provision. The Second District explicitly rejected the reasoning of Vouis, criticizing the decision for its reliance upon Wilko v. Swan:

> The [Vouis] court had refused to compel arbitration because of the policy of Florida securities law, citing Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). 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 [i.e., the anti-waiver provision of the federal securities laws] have no counterpart in Florida's securities legislation and no application at all to this case.

384 So.2d at 717-18 (emphasis and brackets added). Thus, the Second District held that the Florida Securities Act does not contain a specific counterpart to the anti-waiver provision of the Securities Act of 1933 and therefore the Florida Securities Act does not bar arbitration of a claim brought under that Act.

The Third District acknowledged that its conclusion was directly contrary to the Maves decision [7/] by stating:

> In Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), the Second District specifically rejected the reasoning of Vouis. The Maves

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7/ See Nelle v. Loch Haven Homeowners' Ass'n., Inc., 413 So.2d 28 (Fla. 1982), wherein this Court granted a petition for conflict certiorari where the Second District acknowledged that its decision was contrary to decisions of two other district courts of appeal.

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

> court claimed that Wilko was not dispositive in Florida, since that case dealt with federal securities law, and specific federal statutory requirements which have no Florida counterpart. We respectfully disagree, and find that the provisions of Sections 517.241(2) and (3) are specific counterparts of the federal securities law prohibiting a pre-sale arbitration agreement in the sense that the Florida Securities Act expressly provides that the remedy shall be the same as that provided by federal law.

Opinion at 4, n. 5 (emphasis added). Since Maves explicitly found that the federal anti-waiver provision has no statutory counterpart in Florida securities legislation, and Young expressly disagrees with the Maves conclusion and reaches the directly opposite result, this Court has jurisdiction to resolve the conflicting decisions. See Coe v. ITT Community Development Corporation, 362 So.2d 8 (Fla. 1978).

II. THE OPINION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT ON THE ISSUE WHETHER THE UNITED STATES ARBITRATION ACT APPLIES TO AND COMPELS ARBITRATION OF STATE SECURITIES LAW CLAIMS.

The Young decision also expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981), on the question whether the United States Arbitration Act applies to and compels arbitration of state securities law claims. In Melamed, plaintiff sued Merrill Lynch in connection with the handling of her brokerage account. The brokerage agreement contained an arbitration provision incorporating the laws of New York, which under Florida law rendered the provision unenforceable. 8/ The

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8/ Florida Arbitration Code §682.02, Fla. Stat. (1981). See Damora v. Stresscon Int'l., Inc., 324 So.2d 80 (Fla. 1975).

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

trial court therefore denied defendant's motion to compel arbitration and ruled that state courts were not bound to apply and follow the United States Arbitration Act. 405 So.2d at 791-92.

The Fourth District succinctly stated the issue on appeal:

> The issue before us is whether the United States Arbitration Act (Federal Arbitration Act), 9 U.S.C. §§1-14, supersedes inconsistent provisions of Florida law and the Florida Arbitration Code, Sections 682.01 to 682.22, Florida Statutes (1979).

Id. at 791. Relying upon the supremacy clause of the United States Constitution, Article VI, Clause 2, the Melamed court held that the United States Arbitration Act applies to and requires arbitration of claims brought under the Florida Securities Act, which involve transactions in interstate commerce. The Melamed court concluded that the state court is bound to follow the United States Arbitration Act, even if, under state law, the claim would not be arbitrable:

> The supremacy clause requires us to resolve any inconsistency between the two laws in favor of the federally created right, and to subordinate Florida law to the supreme law of the land. 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.

Id. at 792.

Young is expressly and directly in conflict with the holding in Melamed that the United States Arbitration Act applies to and requires arbitration of claims brought under the Florida Securities Act. In both cases, state laws were found to bar the enforcement of an otherwise enforceable arbitration clause. In Melamed, the Fourth District held that, notwithstanding Florida law, the United States Arbitration Act, being a substantive federal law, applied and preempted inconsistent state law. The Young court was faced

LAW OFFICES OF PAUL, LANDY, BEILEY, HARPER & METSCH, P. A.
PENTHOUSE, PENINSULA FEDERAL BUILDING, 200 S. E. FIRST STREET, MIAMI, FLORIDA 33131 · TEL. (305) 358-9300

with the same kind of inconsistency. It was also faced with the same claim brought under the same Florida law (the Florida Securities Act) as in Melamed. In Young, however, the Third District held that the United States Arbitration Act does not apply to claims brought under the Florida Securities Act. Clearly, these two results are diametrically and irreconcilably opposed and thus provide a basis for invoking this Court's jurisdiction.

Indeed, the Young court expressly recognized that, by its reaffirming Vouis, which was "directly contrary to Melamed" (Opinion at 3), Young necessarily conflicted with Melamed:

> The Melamed court found that under the Florida Arbitration Code, an otherwise valid arbitration agreement is not enforceable if it incorporates the law of another state. The court then reasoned that this result would be inconsistent with the Federal Arbitration Act, which makes an arbitration provision in an agreement involving interstate commerce "valid, irrevocable, and enforceable" unless the agreement would be revocable for a reason at law or equity. Applying preemption principles, Melamed held that state courts may not refuse to enforce an arbitration clause that is valid under federal law merely because the clause is unenforceable under state law. To discourage unfair forum shopping, the court found that the existence of the right to arbitrate "should not depend on whether the case is before a state or federal tribunal." 405 So.2d at 793.
>
> We are entirely in agreement with Melamed as to these general statements of law. However, we disagree with the Melamed court that such an agreement would be valid under federal law.

Opinion at 5-6 (emphasis added; footnotes omitted). [9/]

9/ The Young court, recognizing the importance of the preemption issue, acknowledged that its conclusion regarding preemption had been explicitly rejected by the United States Court of Appeals for the Seventh Circuit in the recent case of Kroog v. Mait, [Current] Fed.Sec.L.Rep. (CCH) ¶99,418 (7th Cir. 1983). Opinion at 7, n. 9. In Kroog, the Wisconsin state securities law contained an express provision prohibiting the pre-sale waiver of a judicial forum for claims brought under the

(continued)

Melamed holds that under the supremacy clause, the United States Arbitration Act preempts contrary state law and requires arbitration of claims brought under the Florida Securities Act. Young expressly and directly reaches the opposite conclusion. This Court therefore has jurisdiction to resolve the conflicting decisions.

CONCLUSION

For all of the foregoing reasons, this Court should accept jurisdiction to resolve the express and direct conflicts between the decision below and the decisions of the Second and Fourth District Courts of Appeal.

9/ (continued)

state securities laws, which contained the same wording as the anti-waiver provision of the Securities Act of 1933. The Seventh Circuit held that the Wisconsin anti-waiver provision was in direct conflict with Section 3 of the United States Arbitration Act, 9 U.S.C. §3, and that under the supremacy clause of the United States Constitution, federal law must prevail over the contrary state law prohibition. The Young court stated that it disagreed with the result in Kroog without further explanation. Opinion at 7, n. 9.

PAUL, LANDY, BEILEY,
HARPER & METSCH, P.A.
Attorneys for Petitioner OPPENHEIMER
Penthouse, Peninsula Federal Bldg.
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300

By:
STANLEY A. BEILEY

By:
RICHARD E. BRODSKY

By:
DAVID S. GARBETT

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Mercedes C. Busto, Esq., Bailey & Dawes, attorneys for Respondent YOUNG, Suite 1820, One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131-1366; Jerald A. Freshman, Esq., Freshman & Freshman, P.A., attorneys for Defendant NED ELGART, Suite 205, 2000 South Dixie Highway, Miami, Florida 33131; Curtis Carlson, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, attorneys for Defendant BACHE, City National Bank Building, 5th Floor, 25 West Flagler Street, Miami, Florida 33130; and Bennett Falk, Esq., Ruden, Barnett, McClosky, Schuster & Russell, P.A., attorneys for Defen-

dant McKINNON, One Biscayne Tower, Suite 2000, 20th Floor, Miami, Florida 33131, by mail this 25 day of August, 1983.

RICHARD E. BRODSKY

P24p
81-6460/DSG