0/A 6-8-84

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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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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ISSUES ON APPEAL

I.

WHETHER THE THIRD DISTRICT ERRED IN INTERPRETING §517.241 OF THE FLORIDA SECURITIES ACT AS BARRING ARBITRATION OF CLAIMS BROUGHT UNDER THAT ACT.

II.

WHETHER §517.241 OF THE FLORIDA SECURITIES ACT, AS INTERPRETED BY THE THIRD DISTRICT, DIRECTLY CONFLICTS WITH THE FEDERAL ARBITRATION ACT AND THUS VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE AND FACTS

1. Introduction.

Petitioner Oppenheimer & Co., Inc. ("Oppenheimer") has invoked the discretionary jurisdiction of this Court to review the decision of the District Court of Appeal, Third District, in Young v. Oppenheimer & Co., 434 So.2d 369 (Fla. 3d DCA 1983), on the ground that the Young decision expressly and directly conflicts with Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), and Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981), on the same questions of law. This Court has accepted jurisdiction and accordingly should resolve the following two questions of law raised by the conflicting decisions: (1) whether the Third District erred in interpreting §517.241, Fla. Stat. (1981), as prohibiting arbitration of claims brought under the Florida Securities Act; [1/] and (2) whether §517.241, as interpreted by the Third District, directly conflicts with the Federal Arbitration Act, 9 U.S.C. §§1-14 (1976), and therefore violates the Supremacy Clause of the United States Constitution.

On the first issue, the Young decision is contrary to Maves in that Young holds that §517.241 of the Florida Securities Act prohibits arbitration of claims brought under that Act, while Maves holds that arbitration of such claims is not barred by that Act.

On the second issue, the Young decision is contrary to Melamed in that Melamed holds that under the Supremacy Clause, the Federal Arbitration Act

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1/ Chapter 517, Fla. Stat. (1981), is known as the "Florida Securities Act." See §517.011, Fla. Stat. (1981).

supercedes inconsistent state law and requires state courts to compel arbitration of securities law claims involving interstate commerce, while Young holds that the Federal Arbitration Act has no applicability to such claims. 2/

After the briefs on jurisdiction were filed, the United States Supreme Court issued its decision in Southland Corp. v. Keating, 104 S.Ct. 852 (1984). In Southland the United States Supreme Court held that a state statute which barred arbitration of claims, such as those involved in this case, involving interstate commerce directly conflicts with §2 of the Federal Arbitration Act and therefore violates the Supremacy Clause of the United States Constitution.

The Southland decision is totally dispositive of the second issue raised in this appeal, and thus, even if the Third District were correct on the first issue, its decision in Young must be reversed.

2. Proceedings Below.

Respondent Marcia Young ("Young") sued Oppenheimer claiming that Oppenheimer violated the Florida Securities Act, Chapter 517, Fla. Stat. (1981), and committed common-law fraud, negligence and breach of fiduciary duty in its handling of Young's brokerage account. Oppenheimer moved to stay the action and to compel arbitration on the basis of a provision in the agreement between the parties requiring arbitration of disputes. The trial

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2/ The Second District Court of Appeal has recently held in Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Westwind Transp., Inc., 442 So.2d 414 (Fla. 2d DCA 1983), that the Federal Arbitration Act preempts inconsistent state law and requires arbitration of securities claims involving interstate commerce. By so holding, the Second District has aligned itself with the Fourth District in Melamed and has impliedly rejected the Young decision.

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court granted the motion and stayed the proceedings pending arbitration. Expressly relying on Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981), the trial court found that since Young's claims involved interstate commerce, the Federal Arbitration Act applied and required the dispute to be arbitrated. 3/ The trial court also ruled that the Federal Arbitration Act preempts inconsistent state law barring arbitration of state securities law claims. Young v. Oppenheimer & Co., 434 So.2d at 371.

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 that §517.241 of the Florida Securities Act bars arbitration of claims brought under that Act. The Third District further held that §517.241 does not contravene or conflict with the Federal Arbitration Act with respect to state securities law claims involving interstate commerce. Id. at 373.

3/ 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.

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Oppenheimer invoked the discretionary jurisdiction of this Court to review the Young decision contending that it directly and expressly conflicts with decisions of two other district courts of appeal on the same questions of law. This Court accepted jurisdiction of this cause by order dated February 23, 1984, and directed the filing of briefs on the merits.

ARGUMENT

I.

THE THIRD DISTRICT ERRED IN INTERPRETING §517.241 OF THE FLORIDA SECURITIES ACT AS BARRING ARBITRATION OF CLAIMS BROUGHT UNDER THAT ACT.

The Florida Securities Act does not contain an express prohibition against arbitration of claims arising under that Act, nor does the Act even discuss the subject of arbitration. Nevertheless, the Third District held in Young that the Act should be read to bar arbitration of state securities law claims. The Third District's conclusion that the Florida Securities Act bars arbitration of all claims in this case was based on a provision of the federal Securities Act of 1933, which has been interpreted as barring arbitration of claims arising under the 1933 Act. 15 U.S.C. §77n (1976); Wilko v. Swan, 346 U.S. 427 (1953). 4/ This bar against arbitration of federal securities law claims is commonly referred to as the "anti-waiver" provision of the Securities Act of 1933.

4/ Section 14 of the Securities Act of 1933, 15 U.S.C. §77n (1976), provides:

(continued)

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The Third District's reliance on the federal anti-waiver provision was soundly rejected by the Second District Court of Appeal in Raymond James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), which held that the anti-waiver provision contained in the Securities Act of 1933 has "no counterpart in Florida's securities legislation and no application at all to this case." Id. at 717-18.

The Third District's holding in Young that state securities law claims are not arbitrable under Florida law was based on its interpretation of §517.241, Fla. Stat. (1981), which 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.

In Young the Third District concluded that the provisions of §517.241(2) and (3) represent a specific counterpart to the anti-waiver provision of the

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4/ (continued)

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

In Wilko v. Swan, 346 U.S. 427 (1953), the United States Supreme Court held that the right to select a judicial forum for claims arising under the federal securities laws is a "provision" under 15 U.S.C. §77n which cannot be waived by an agreement to arbitrate such claims.

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federal securities laws and therefore preclude arbitration of state securities law claims:

> We . . . 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.

Young, 434 So.2d at 372 n. 5 (emphasis added). In effect, the Third District determined that the anti-waiver provision of the federal securities laws is a "civil remedy," which is specifically incorporated into Florida law by virtue of §517.241(3).

In Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), the Second District reached a totally contrary conclusion in interpreting the Florida Securities Act. In Maves the Second District held that the Florida Securities Act does not contain a specific counterpart to the anti-waiver provision of the federal securities law. In reaching that conclusion, the court recognized the strong public policy in Florida favoring arbitration of disputes: "The courts of this state have repeatedly approved arbitration clauses, giving effect to the letter and purpose of the Florida Arbitration Code, Sections 682.01-22, Florida Statutes (1977)." Id. at 717.

The Maves court also rejected the applicability of Wilko v. Swan, 346 U.S. 427 (1953), in which the United States Supreme Court held that the Securities Act of 1933 bars arbitration of claims brought under the federal securities laws:

> [T]he 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 federal anti-waiver provision] have no counterpart in Florida's securities legislation and no application at all to the case.

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Maves, 384 So.2d at 717-18 (brackets and emphasis added).

The Third District's interpretation of §517.241 in Young confuses forum with remedies. Section 517.241, entitled "Remedies," should not be interpreted to determine the appropriate forum for resolution of state securities law claims. The federal anti-waiver provision is not a "civil remedy" but rather is a forum selection provision. All §517.241 states is that the remedies provided under federal law apply to claims brought under the Florida Securities Act. Section 517.241 does not deal with forum selection, and should not be interpreted as dealing with forum in any way.

If the state legislature intended to prohibit arbitration of state securities law claims, it would have been a simple matter to say so. 5/ Interpreting §517.241 to mean that parties cannot arbitrate their disputes where the statute merely incorporates federal civil remedies is a strained reading of that section and at odds with its plain meaning. Accordingly, this Court should conclude, contrary to Young, that §517.241, Fla. Stat. (1981), does not bar arbitration of claims brought under the Florida Securities Act.

5/ Indeed, if the legislature had intended to preclude arbitration of state securities law claims, it certainly would have adopted the federal anti-waiver provision verbatim, as have several other states. See, e.g., the anti-waiver provision in the Wisconsin Uniform Securities Law, §551.59(8), Wisc. Stat., which is discussed in Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983). In Kroog the United States Court of Appeal for the Seventh Circuit held that the Wisconsin anti-waiver provision directly conflicted with §2 of the Federal Arbitration Act and that, under the Supremacy Clause, federal law prevailed over the state law prohibition. As discussed infra in Point II, the same result is mandated here.

II.

SECTION 517.241, AS INTERPRETED BY THE THIRD DISTRICT, DIRECTLY CONFLICTS WITH THE FEDERAL ARBITRATION ACT AND THUS VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Even if the Third District in Young were correct in interpreting §517.241 as barring arbitration of state securites law claims, that section, as so construed, violates the Supremacy Clause of the United States Constitution. This conclusion is unquestionably mandated by a recent decision of the United States Supreme Court in Southland Corp. v. Keating, 104 S.Ct. 852 (1984). In Southland the Supreme Court invalidated a state statute barring arbitation of claims, such as those involved in this case, arising in interstate commerce. The Court held that the Federal Arbitration Act, 9 U.S.C. §2 (1976), constitutes binding federal substantive law in the area of arbitration and thus preempts all state statutes barring arbitration. Consequently, under the Supremacy Clause of the United States Constitution, all such state statutes are invalid.

It is our view that even before the Supreme Court's decision in Southland, this was the law, 6/ but any doubts to the contrary were removed by the Southland decision.

The Third District held in Young that §517.241 does not contravene or conflict with the Federal Arbitration Act. Young, 434 So.2d at 373. The

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6/ See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 103 S.Ct. 927 at 941-42 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983); Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981).

Third District erred because it failed to address the irreconcilable conflict between the Federal Arbitration Act, which commands arbitration of state securities law claims, and the Florida Securities Act, which the court held bars arbitration of such claims. Instead, the Third District concluded that the Florida Securities Act did not conflict with the federal Securities Act of 1933. Whether these two securities acts conflict is not the issue. By ignoring the sweeping mandate of the Federal Arbitration Act that arbitration provisions are "valid, irrevocable, and enforceable," 9 U.S.C. §2 (1976), and by focusing instead on an irrelevant comparison between the state and federal securities acts, the Third District avoided the conclusion reached by the Fourth District Court of Appeal in Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981), i.e., that under the Supremacy Clause, the Federal Arbitration Act supercedes inconsistent state law and requires arbitration of claims arising under the Florida Securities Act.

The Third District in Young reached its conclusion in reliance on Wilko v. Swan, 346 U.S. 427 (1953), in which the United States Supreme Court held that the anti-waiver provision of the Securities Act of 1933 would prevail over the conflicting provisions of the Federal Arbitration Act with respect to claims brought under the federal securities laws. 7/ The Third District

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7/ In support of its conclusion that Young's state securities law claims were not arbitrable under the Florida Securities Act, the Young court reaffirmed Shearson, Hammill & Co. v. Vouis, 247 So.2d 733 (Fla. 3d DCA), cert. denied, 253 So.2d 444 (Fla. 1971), in which 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 Code." 247 So.2d at 735 (footnote omitted). The Vouis court had specifically relied upon Wilko in reaching its decision.

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reasoned that the principles of Wilko apply, by analogy, to prohibit arbitration of claims brought under state securities laws. Young, 434 So.2d at 373. In Southland Corp. v. Keating, 104 S.Ct. 852 (1984), the United States Supreme Court totally rejected this precise analogy:

> The California Supreme Court justified its holding by reference to our conclusion in Wilko v. Swan, 346 U.S. 427 (1953), that arbitration agreements are nonbinding as to claims arising under the federal Securities Act of 1933. 31 Cal.3d at 602, 645 P.2d at 1202-1203. The analogy is unpersuasive. The question in Wilko was not whether a state legislature could create an exception to §2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

Id. at 861 n. 11 (emphasis added).

In Southland the United States Supreme Court considered a case in precisely the same procedural posture as this case. The California trial court had required arbitration, but the California Supreme Court reversed. Relying on a provision in the California Franchise Investment Law essentially identical to the anti-waiver provision of the federal securities laws, the California Supreme Court held that the claims were not arbitrable under California law. 8/ The United States Supreme Court granted certiorari to consider the precise issue presented in the instant case: "[W]hether the

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8/ Section 31512 of the California Franchise Investment Law provides:

> Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.

Cal. Corp. Code §31512 (West 1977). This provision is virtually identical to the anti-waiver provision in the Securities Act of 1933. See supra note 4.

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California Franchise Investment Law, which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violates the Supremacy Clause. . . ." Southland, 104 S.Ct. at 855.

The United States Supreme Court held that the state statute, as interpreted by the California Supreme Court, directly conflicts with §2 of the Federal Arbitration Act and thus violates the Supremacy Clause. Id. at 858. The Court stated that by enacting §2 of the Federal Arbitration Act, 9 U.S.C. §2 (1976), "Congress [had] declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Id. (emphasis and brackets added). The Court reaffirmed that by enacting the Federal Arbitration Act, Congress had relied upon its plenary power under the Commerce Clause of the United States Constitution to regulate interstate commerce and had thereby established a "body of federal substantive law" equally applicable in state and federal court. Id. at 859. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S.Ct. 927 at 941-42 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

The United States Supreme Court also rejected the proposition, implicit in the Young decision, that a state statute containing an anti-waiver provision can validly limit the enforceability of arbitration provisions that are declared "valid, irrevocable, and enforceable" by §2 of the Federal Arbitration Act:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.

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. . . .

> In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.

Southland, 104 S.Ct. at 858, 861 (footnotes omitted; emphasis added). Thus, contrary to the holding in Young, once the Federal Arbitration Act is triggered by a state securities law claim "evidencing a transaction involving commerce," 9 U.S.C. §2, the claim must be arbitrated pursuant to substantive federal law, and any state law purporting to prevent such arbitration is invalid under the Supremacy Clause of the United States Constitution. 9/ Id. at 861.

9/ 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), presaged Southland. 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. See Florida Arbitration Code, §682.02, Fla. Stat. (1981); Damora v. Stresscon Int'l, Inc., 324 So.2d 80 (Fla. 1975). The trial court therefore denied defendant's motion to compel arbitration and ruled, as did the Young court, that state courts were not bound to apply and follow the Federal Arbitration Act.

Relying on the Supremacy Clause, the Fourth District in Melamed reversed and held that the Federal Arbitration Act supercedes inconsistent state law and requires state courts to order arbitration of securities law claims even if, under state law, the claims 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.

405 So.2d at 792. Accord Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Westwind Transp., Inc., 442 So.2d 414 (Fla. 2d DCA 1983).

CONCLUSION

Section 517.241, Fla. Stat. (1981), does not bar arbitration of claims brought under the Florida Securities Act. Accordingly, this Court should quash the decision of the Third District in Young and approve the decision of the Second District in Maves.

Alternatively, even if the Third District were correct in construing §517.241 as barring arbitration of state securities law claims, that provision, as so construed, directly conflicts with the Federal Arbitration Act and thus violates the Supremacy Clause of the United States Constitution. This Court should therefore quash the decision in Young, approve the decisions of the Second and Fourth District in Westwind and Melamed, respectively, and remand this case to the trial court with instructions to stay proceedings and to compel arbitration of Young's claims against Oppenheimer.

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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, Two South Biscayne Boulevard, Miami, Florida 33131-1366; Curtis Carlson, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, attorneys for Defendants Bache and Elgart, 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 Defendant McKinnon, One Biscayne Tower, Suite 2000, 20th Floor, Miami, Florida 33131 by mail this 14 day of March, 1984.

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