IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,872

FILED
SID J. WHITE
FEB 25 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

HELEN MELAMED,

Petitioner/Appellant,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC. and BRIAN SHEEN,

Respondents/Appellees.

ON PETITION FOR DISCRETIONARY REVIEW
AND
APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

* * * * *

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.'S ANSWER BRIEF ON THE MERITS

* * * * *

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	i
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
I. THE FEDERAL ARBITRATION ACT COMPELS ARBITRATION OF CLAIMS ASSERTED UNDER THE FLORIDA SECURITIES LAWS, CHAPTER 517	12
II. COMMON LAW CLAIMS ARE ARBITRABLE	23
III. FRAUD AND PUNITIVE DAMAGES CLAIMS ARE SUBJECT TO ARBITRATION	24
IV. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION BY ORDERING THAT APPELLANT'S FEDERAL CLAIM BE STAYED PENDING THE OUTCOME OF ARBITRATION	30
V. APPELLANT'S CLAIMS AGAINST BRIAN SHEEN ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT	34
VI. THE FOURTH DISTRICT CORRECTLY FOUND THAT THERE WAS NO WAIVER OF THE RIGHT TO ARBITRATE	40
CONCLUSION	46
CERTIFICATE OF SERVICE	47

TABLES OF CITATIONS

CITES	Pages
Baselski v. Paine, Webber, Jackson & Curtis Inc., 514 F.Supp. 535, 543 (N.D.Ill. 1981)	28
Belke v. Merrill Lynch, Pierce, Fenner & Smith Inc., 693 F.2d 1023 (11th Cir. 1982)	23, 41, 44
Berman v. Dean Witter & Co. Inc., 44 Cal.App. 3d 999, 119 Cal.Rptr. 130 (Ct.App. 1975)	36
Brown v. Dean Witter Reynolds, Inc., Case No. 84-6701-Civ-Gonzalez (Order Jan. 22, 1985).	18, 34, 36
Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552 (9th Cir. 1984) cert. granted __U.S.__, 104 S.Ct. 350 (1984)	16, 32
Capital Bank v. Schuler, 421 So.2d 633, 638 (Fla. 3d DCA 1982)	45
Community National Bank & Trust Co. v. Vigman, 330 So.2d 211 (Fla. 3d DCA 1976)	4
Corcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968)	41
Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009, 1018 (2d Cir. 1972)	41
Dickinson v. Heinold Securities, Inc., 661 F.2d 638 (7th Cir. 1981)	19, 24, 32
Hartford Financial Systems, Inc. v. Florida Software Services, Inc., 550 F.Supp. 10789 (D.C.Me. 1982) app'l. dism. 712 F.2d 724 (1st Cir. 1983)	37
Kershaw v. Dean Witter Reynolds, Inc., 734 F.2d 1327, 1329 (9th Cir. 1984)	33

CASES | Page

Klosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678 (Fla. 1973) 28-29

Liskey v. Oppenheimer & Co., Inc., 717 F.2d 314 (6th Cir. 1983) 19, 33

Mercede v. Mercede Park Italian Restaurant Inc., 392 So.2d 997, 998 (Fla. 4th DCA 1981) 45

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Haydu, 675 F.2d 1169, 1172 (11th Cir. 1982) 17, 24

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

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Melamed, 425 So.2d 127 (Fla. 4th DCA 1982) 7

Merrill Lynch Commodities, Inc. v. Richal Shipping Corp., 581 F.Supp. 933, 940 (S.D.N.Y. 1984) 37

Miley v. Oppenheimer & Co., Inc., 637 F.2d 318 (5th Cir. 1981) 18

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., __U.S.__, 103 S.Ct. 927 (1983) 25, 27, 29

Okcuoglu v. Hess, Grant & Co., Inc., 580 F.Supp. 749 (E.D.Pa. 1984) 37

Oppenheimer & Co., Inc. v. Young, 456 So.2d 1175 (Fla. 1984) .... passin

Paine, Webber, Jackson & Curtis Inc. v. McNeal, 143 Ga.App. 579, 239 S.E.2d 401 (Ct.App. 1977) 36

Parcel Tankers Inc. v. Formosa Plastic Corp. 569 F.Supp. 1459, 1467 (S.D.Tex. 1983) 41

Pierson v. Dean Witter Reynolds, Inc., 742 F.2d 334, 338 (7th Cir 1984) 26, 28

CASES | Page

Pierson v. Dean, Witter, Reynolds, Inc.,
551 F.Supp. 497, 504 (D.C.Ill. 1982) 28

Prima Paint Corporation v. Flood & Conklin Mfg. Co.,
388 U.S. 395, 87 S.Ct. 1801, __L.Ed.2d __ (1967) ... 20, 25

Raiford et al v. Buslease Inc.,
745 F.2d 1419 (11th Cir. 1984) 18, 24, 26, 32, 33

Shearson, Hammil & Co. v. Vouis,
247 So.2d 733 (3d DCA 1971) cert. den. 253
So.2d 44 (Fla. 1971) 28

Shearson Haydon Stone, Inc. v. Sather,
365 So.2d 187 (Fla. 3d DCA 1978) 4

Southland Corp. v. Keating,
__U.S.__, 104 S.Ct. 852 __L.Ed.2d__ (1984) .... passin

Starr v. O'Rourke,
5 Misc. 2d 646, 159 N.Y.S.2d 60 (Sup.Ct. 1957) 36

Surman v. Merrill Lynch, Pierce, Fenner & Smith Inc.,
733 F.2d 59 (8th Cir. 1984) 19, 26, 31,

Tamari v. Bache & Co. (Lebanon),
S.A.L. 565 F.2d 1194 (7th Cir. 1977) cert. den.
453 U.S. 905, 55 L.Ed.2d 495 (1977) 27

Travelers Indemnity Co. v. Swanson,
662 F.2d 1098 (5th Cir. 1981) 45

Vic Potamkin Chevrolet, Inc. v. Bloom,
386 So.2d 286 (Fla. 3d DCA 1980) 37-39

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

Willis v. Shearson/American Express, Inc.,
569 F.Supp. 821, 824 (M.D.N.C. 1983) 25-27

Willoughby Roofing & Supply Company v. Kajima
International, Inc., 598 F.Supp 353, 361
(N.D.Ala. 1984) 27

York Int'l v. Alabama Oxygen Co., Inc.,
433 So.2d 1158, (Ala. 1983), vacated, __U.S.__,
104 S.Ct. 1260 (1984), remanded, 452 So.2d 860 (1984) 30

STATUTES

Chapter 517, Florida Statutes
Chapter 517.241, Fla.Stat. (Supp. 1978)

9 U.S.C.A. §2 et seq. (1925)
United States Arbitration Act

15 U.S.C. §77a et seq.
Securities Act of 1933

15 U.S.C. §78a et seq.
Secutities Exchange Act of 1934

INTRODUCTION

In MERRILL LYNCH's jurisdictional brief in this cause, it recognized that the district court opinion now before this Court conflicts with Oppenheimer & Co., Inc. v. Young, 456 So.2d 1175 (Fla. 1984) to the extent Young holds that claims under Chapter 517, Florida Statutes are not arbitrable.

However, Young does not mandate that the instant case be reversed. The issues as they are presented herein are not identical to the presentation in Young. For example, Oppenheimer argued that under the facts of that case a federal court could not order arbitration. MERRILL LYNCH makes no such concession herein. Additionally, subsequent to this Court's opinion in Young, it has become obvious that the effect of the case has been to encourage - not discourage - forum shopping. These recent developments will be discussed herein. Moreover, Young contains no explicit holding as to whether common law claims resulting from securities transactions in commerce are arbitrable. It is asserted that this is a critical issue which must be clarified. MERRILL LYNCH submits that common law claims are definitely arbitrable under Wilko and under the Federal Arbitration Act and that the law of Florida should be made clear on this issue.

MERRILL LYNCH begs the Court's indulgence if certain arguments seem repetitive as it tries to clarify the nuances arbitration law. MERRILL LYNCH submits that once all arguments are before this Court it will become clear that in fact the Supremacy Clause does compel the conclusion that claims under Chapter 517 and common law claims are arbitrable pursuant to the Federal Arbitration Act.

As this Court must be aware, an appeal has been taken by Oppenheimer to the United States Supreme Court. However, MERRILL LYNCH does not ask for a stay of this appeal in the instant cause pending the decision of the United States Supreme Court inasmuch as MERRILL LYNCH is confident that this Court will correct the present state of Florida law on the issue of arbitration.

STATEMENT OF THE CASE AND FACTS

The present litigation arises out of a stock brokerage customer relationship. Plaintiff, HELEN MELAMED, opened an account with MERRILL LYNCH through BRIAN SHEEN, her account executive.[1] At the time of opening her account she entered into a written contract with MERRILL LYNCH containing an explicit agreement that all disputes would be submitted to arbitration. When a dispute did arise, however, Plaintiff filed an action in state court in Palm Beach County, Florida. Defendants responded that the matter should be submitted to arbitration as required by the contract.[2]

Plaintiff's complaint as originally filed contained common law counts, counts asserting causes of action under unspecified theories, a count specifically referring to the 1934 Securities Exchange Act and a count that purported to be brought pursuant to Chapter 517, Florida Statutes but which alleged damages for "churning" and margin violations. (A 1). At the inception of this suit - prior to answering the complaint - Defendants filed a motion to dismiss and moved to

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1. For the sake of consistency, MERRILL LYNCH will use the same method of identifying the parties herein as used in the Appellant/Petitioner's Initial Brief on the Merits, i.e., Plaintiff and Defendants.

2. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Melamed, 405 So.2d 790, 791 (Fla. 4th DCA 1981) ("Melamed I").

compel arbitration of the entire suit. (A 41). Defendants argued that the count specifically arising under the Securities Exchange Act of 1934 was subject to the exclusive jurisdiction of the federal courts and thus should be dismissed. At that time Defendants additionally asserted that the Chapter 517 count was not viable because, among other reasons, in alleging churning it asserted a cause of action which arises only under the Securities Exchange Act of 1934.

With respect to the Chapter 517 count, Defendants argued that the trial court should dismiss that count relying on Shearson Haydon Stone, Inc. v. Sather, 365 So.2d 187 (Fla. 3d DCA 1978) and Community National Bank & Trust Co. v. Vigman, 330 So.2d 211 (Fla. 3d DCA 1976) both of which held that churning claims are within the exclusive jurisdiction of the federal courts. (PSA 10-18, 62-68).[3/] Additionally, Defendants argued that if the trial court did not construe the Chapter 517 count to be a federal securities count, then as a matter of law it should be submitted to arbitration. (PSA 6-71 especially at 20).

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3. MERRILL LYNCH has not submitted an additional appendix herein inasmuch as the appendices from the Fourth District will be forwarded to the Court. Citations will be to Plaintiff's Appendix in this cause. Additionally, MERRILL LYNCH has cited a few instances to the Petitioner's Supplemental Appendix (PSA) filed with the Fourth District which has been transmitted to this Court.

Plaintiff argues in her statement of facts that Defendants "presumably" acknowledged and stipulated that §517.241(2) Florida Statutes prohibits arbitration. Nothing could be more incorrect. At the hearing held on the motion to dismiss and to compel arbitration, the following discussion took place:

> THE COURT: What do you mean by the paragraph "with the exception of the counts dealing with Federal and Florida Securities laws"? Are those, would they not be subject to arbitration?
>
> MR. FALK: If the court were to determine that the Federal Securities counts [1934 Act] existed, then the Court would be without jurisdiction to hear those counts.
>
> THE COURT: Right.
>
> MR. FALK: If the Court determined that the Florida Securities count existed, that would be submitted to arbitration under the Federal Arbitration Act.

(PSA 19-20).

At that time, the trial court did not reach the issue of whether the Chapter 517 count was legitimate, stating only that it was not adequately pled. (A 137-138; PSA 70). Additionally, at that time the court denied the motion to compel arbitration without prejudice and directed Defendants to raise arbitration as an affirmative defense. (A 138; PSA 60, 69).

Thereafter, Plaintiff filed its Amended Complaint and Defendants answered raising arbitration as an affirmative defense. (A 22, 28).

It was clear to both the Fourth District Court of Appeal and to Plaintiff that Defendants sought to arbitrate the entire controversy, including the Chapter 517 count. (A 120; Melamed III, 453 So.2d 862). Plaintiff's own 1981 Memorandum in Opposition to Arbitration affirmatively states that Defendants' Motion to Compel "seeks arbitration with reference to all pending counts of the Amended Complaint". (A 206). Plaintiff's continued assertion in her statement of "facts" that Defendants conceded or stipulated that claims under Chapter 517 were not arbitrable is inconsistent with the transcripts of hearings before the trial court (PSA 6; A 62; A 103; A 316 (same as A 62)); the briefs filed with the Fourth District Court of Appeal (A 251-282; A 283-311); and with Plaintiff's own pleadings (A 120). Such contention is a blatant attempt to twist the facts in order to buttress the argument that Defendants waived their right to arbitration. This very same attempt was soundly rejected by the Fourth District. Melamed III.

On June 8, 1981, the trial court issued an order denying Defendants' Motion to Compel Arbitration. The Court held that: (a) the Federal Arbitration Act did not apply to

state courts; (b) there had been no showing that statutory requisites were present; and (c) the phrase in the Arbitration Act "Court of the United States" included only federal courts. (A 100). This order was reversed by the Fourth District Court of Appeal which held that the Federal Arbitration Act supercedes inconsistent provisions of the Florida Arbitration Code and directed the trial court to reconsider the Motion to Compel Arbitration in light of its opinion. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981) ("Melamed I").

Thereafter, Plaintiff filed a Notice of Hearing styled "Continuation of Defendants' Motion to Compel Arbitration". At the hearing, Plaintiff's attorney refused to concede the issue of the authenticity of the document containing the arbitration agreement. See Melamed II, 425 So.2d at 129. MERRILL LYNCH's counsel suggested that an evidentiary hearing be scheduled. (A 111). The trial court did not do so and instead entered its February, 1982 order again denying the Motion to Compel Arbitration.

Defendants again petitioned for a Writ of Certiorari. The Fourth District Court of Appeal reversed the trial court's order and entered its opinion reported as Merrill Lynch, Pierce, Fenner & Smith Inc. v. Melamed, 425 So.2d 127 (Fla. 4th

DCA 1982) pet for discretionary review denied 433 So.2d 519 (1983) ("Melamed II"). The Court ordered that since Plaintiff had raised an issue as to the making of the agreement it was erroneous for the trial court to deny Defendants' Motion without first holding an evidentiary hearing. Plaintiff then filed a petition for discretionary review with this Court which was denied in June, 1983.

During the pendency of Melamed II, Plaintiff filed amendments to the complaint alleging for the first time causes of action under the Securities Act of 1933, 15 U.S.C. §77a et seq. (A 127-129).[4/] Defendants have at all times argued that Plaintiff's 1933 Act claims were concocted solely for the purpose of avoiding arbitration. (A 130-131).[5/]

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4. Plaintiff implies in her statement of facts that the original federal securities claims which had been dismissed in March, 1981 contained a claim under the 1933 Act. The trial court's order states that it was unequivocally clear that the federal securities claims were asserted under the 1934 Act over which the Court had no jurisdiction. (A 137-138).

5. Plaintiff asserted a claim §17(a) which was dismissed with prejudice. (A 136). The fact that Plaintiff's §12(2) count has withstood a motion for summary judgment does not mean that Plaintiff truly does have a valid claim under §12(2). Section 12(2) only applies to purchases (and not sales) of securities and by its terms exempts certain types of securities from its coverage including government securities. Plaintiff purchased only exempt securities. The trial court denied the motion for summary judgment without any comment. (A 241). Similarly, the denial of a petition for writ of certiorari is without substantive significance as far as establishing that Plaintiff's claim is valid.

Further, Plaintiff's continued attempts to malign defense counsel in her statement of the case and facts for unpreparedness are based entirely on statements taken out of context and are simply not borne out by the record. It is obvious they are included for the sole purpose of prejudicing Defendants in this matter and obfuscating the truly relevant issue before this Court - i.e., the propriety of ordering arbitration.[6]

Contrary to the Plaintiff's statement of facts, Defendants have never conceded that even if there was a viable claim under the 1933 Securities Act that this would bar arbitration of all other claims. The argument that MERRILL LYNCH's counsel did so concede at the August 18, 1983 hearing is belied by simply reading the entire text of the transcript at pages A 213-220. Defendants did state that a viable 1933 Act claim is not arbitrable and that it posed "an impediment" to arbitration. (A 218-219). But Defendants never conceded that there were any viable 1933 Act claims. Moreover,

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6. The same arguments in the guise of facts were made to the Fourth District and were responded to in that cause. If the court wishes to consider those arguments, MERRILL LYNCH would direct the Court's attention to the briefs submitted in Melamed III. (A 251; A 283). Otherwise, MERRILL LYNCH will not burden this Court with the degree of detail necessary to correct every misstatement of fact contained in Plaintiff's Brief.

Defendants certainly have never conceded that even if any 1933 Act claim was viable that it would bar arbitration of other claims.

At the conclusion of the hearing the court held that there was no genuine issue as to the making of the arbitration agreement; however, the other issues previously asserted to both the trial court and the Fourth District were again raised and supplemental memoranda filed. (Appendix to Petition for Writ of Common Law Certiorari filed in Melamed III at A 135-172). The trial court again denied the Motion to Compel Arbitration. A Petition for Writ of Certiorari was filed with the Fourth District which again reversed the trial court's order. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Melamed, 453 So.2d 858 (Fla. 4th DCA 1984) ("Melamed III").

The order which is now before this Court is the third opinion published by the Fourth District Court of Appeal reversing the trial court's denial of arbitration. In ordering the trial court to compel arbitration Melamed III held as follows:

> (1) Co-Defendant, Sheen, a former Merrill Lynch employee, is entitled to arbitration because he is within the respondeat superior doctrine;
>
> (2) fraud and punitive damage claims are subject to arbitration;

(3) pursuant to Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 188, 98 L.Ed. 168 (1953) a claim under §12(2) of the Federal Securities Act of 1933 is not arbitrable but its pendency is no bar to arbitration of the other counts;

(4) the arbitration agreement evidences a transaction involving commerce for purposes of the Federal Arbitration Act, thus the Federal Arbitration Act applies to this cause;

(5) (a) arbitration agreements are binding and enforceable to claims arising under the Florida Securities Laws; and (b) Defendants did not waive their right to arbitrate the Chapter 517 claim.

With the exception of the holding that the Federal Arbitration Act applies, Plaintiff challenges each holding of Melamed III.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal was correct in ordering the trial court to compel arbitration of all of Plaintiff's claims except the Securities Act of 1933 count. Under the Federal Arbitration Act, the trial court was required to enforce the arbitration agreement entered into by the parties and to compel arbitration of all arbitrable claims including the claims arising under Chapter 517, Florida Statutes and common law claims. Notwithstanding this Court's decision in Oppenheimer & Co, Inc. v. Young, 456 So.2d 1175 (Fla. 1984), recent decisions of both the United States Supreme

Court and other federal courts compel the conclusion that Plaintiff's Chapter 517 claim and her common law claims are subject to arbitration.

Further, having decided that Plaintiff's Chapter 517 and common law claims were arbitrable, the appellate court properly ordered that Plaintiff's federal claim be stayed pending the outcome of arbitration. The claims asserted against both MERRILL LYNCH and its former employee, SHEEN were appropriately required to be submitted to arbitration. The arbitration agreement is broad enough to include MERRILL LYNCH's employee under the doctrine of respondeat superior.

Finally, it is abundantly clear from the face of the record, notwithstanding Plaintiff's relentless inuendos and distortions of law and fact, that Defendants have not at any time waived their rights to compel arbitration of Plaintiff's arbitrable claims.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT COMPELS ARBITRATION OF CLAIMS ASSERTED UNDER THE FLORIDA SECURITIES LAWS, CHAPTER 517

The most important issue presented by this appeal is whether the Federal Arbitration Act compels arbitration of claims asserted under Chapter 517, Florida Statutes.

Defendants respectfully submit that this question must be answered in the affirmative notwithstanding this Court's recent decision to the contrary in Oppenheimer & Co., Inc. v. Young, 456 So.2d 1175 (Fla. 1984). Recent holdings of the United States Supreme Court compel the conclusion that these types of claims are arbitrable.

The Federal Arbitration Act provides that in any contract involving commerce, arbitration agreements are valid. Specifically, the statute states:

> A written provision in any maritime transaction or 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, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. §2. (Emphasis supplied).

This Act applies to state courts and they are bound to apply it when a contract evidences a transaction in commerce. Southland Corp. v. Keating, __U.S.__, 104 S.Ct. 852 (1984); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927 (1983). The Supremacy Clause of the United States Constitution forecloses "state legislative

attempts to undercut the enforceability of arbitration agreements." Southland, 104 S.Ct. at 861. This Court specifically recognized this fact and approved the holding of Melamed I. See Young, 456 So.2d at 1179. However, in Young this Court held that Florida courts are not bound to compel arbitration of claims under Chapter 517 because §517.241, Florida Statutes (1983) provides for the same remedies available under federal securities laws.

To determine the propriety of Young one must examine two issues: (1) what are the remedies available under federal law?; and (2) assuming a state law incorporates federal remedies by reference, does not the Supremacy Clause still require that the state law be considered as one adopted by a statute legislature and not by Congress? Each of these issues will be examined below.

1. Remedies Available Under Federal Law

In Wilko v. Swan, 346 U.S. 427 (1953) the United States Supreme Court held that a predispute agreement to arbitrate any future controversy arising under the Securities Act of 1933 is void as contrary to the anti-waiver provision contained in that Act. The analysis employed in Wilko makes it apparent that Wilko does not prohibit arbitration of claims involving securities transactions in interstate commerce but only those which arise under the 1933 Act.

As stated in Wilko, an action brought under §12(2) of the 1933 Act is a "special right to recover for misrepresentation which differs substantially from the common law action in that the seller is made to assume the burden of proving lack of scienter." 346 U.S. at 431 (emphasis supplied). Wilko held that the grant of concurrent jurisdiction in the state and federal courts was a significant separable right included in the 1933 Act for the purpose of protecting the unique causes of action created by the Act. The Court juxtaposed the creation of the cause of action, the existence of concurrent jurisdiction, and the "anti-waiver" section (which voids any stipulation waiving compliance with any provision of the 1933 Act). It concluded that an agreement to arbitrate is a "stipulation" and that "the right to select the judicial forum is the kind of provision that cannot be waived under §14 of the Securities Act." Id. at 435.

Wilko simply resolved the perceived tension between the 1933 Act and the Federal Arbitration Act. In doing so, the Court determined that the Federal Securities Act of 1933 would prevail over the Federal Arbitration Act enacted in 1925:

> Two policies, not easily reconcilable, are involved in this case. 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. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress [the 1933 Act] concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

Id. at 438 (emphasis supplied). Thus, as is clear from Wilko's own language, the Court limited its holding solely to claims under the 1933 Act. Moreover, the Supreme Court has never expanded the Wilko doctrine to include any other type of claim, including claims under the Securities Exchange Act of 1934.[7/]

Neither the Supreme Court nor any other federal court has extended the Wilko doctrine of nonarbitrability to a state securities act. To the contrary, federal courts have

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7. Certain circuits, including the Eleventh Circuit, have applied the Wilko doctrine to bar arbitration of claims under the Securities Exchange Act of 1934. The issue of whether Wilko should apply to the 1934 Act is now before the Supreme Court in Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552 (9th Cir. 1984) cert. granted 104 S.Ct. 350 (1984).

unequivocally consistently held that state statutory securities claims are arbitrable. Thus, for example, in Merrill Lynch, Pierce,Fenner & Smith Inc. v. Haydu, 675 F.2d 1169, 1172 (11th Cir. 1982) the court stated:

> Count I of the complaint seeks relief for fraud and misrepresentations in the management of plaintiff's account with defendant and alleges that defendant through its agents purchased securities without authority and failed to account for the authorized purchase of securities. Count II alleges claims under the Florida Securities Act. These two counts fall outside the Wilko rule and thus generally are arbitrable. [Emphasis supplied].

See also cases cited in note 9, infra.

Thus, it is clear that contrary to Young, the remedies available under the Securities Act of 1933 and incorporated by reference into Chapter 517 do not include a right to litigate all securities related claims but only those asserted under the 1933 Act. In Young this Court stated:

> In Wilko the court interpreted both federal securities law and the FAA [Federal Arbitration Act] and held that the FAA did not require arbitration of disputes concerning interstate securities transactions.

Id. at 1179. An examination of the Wilko opinion and the cases interpreting Wilko make clear that the only disputes involving interstate securities transactions which are not arbitrable are those brought pursuant to the unique cause of action created by

the Securities Act of 1933 and in certain circuits the Securities Exchange Act of 1934.[8]

Young sought to create consistency with federal law. Instead it has created inconsistency. In an action brought in federal court either under diversity jurisdiction or 1934 Act exclusive jurisdiction it is well recognized that claims asserted under Chapter 517 are arbitrable.

Most recently, in Brown v. Dean Witter Reynolds Inc. et al, Case No. 84-6701-Civ-Gonzalez (Order Jan. 22, 1985) the Federal District Court for the Southern District of Florida, after an extensive analysis of Young, Wilko and the intertwining doctrine[9] held that claims under Chapter 517 are

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8. See note 7 supra.

9. Briefly, the intertwining doctrine provides that where arbitrable state statutory or common law claims are brought together with nonarbitrable 1934 Act federal claims and are factually intertwined, the Court will either decline to sever the arbitrable claims and compel arbitration or will order arbitration but only after litigation of the federal claims. Apparently, the construction the Young case gives to the Wilko doctrine is based in part on Oppenheimer's mistaken concession that it could not have gotten arbitration of any of the claims asserted therein in federal court. However, that concession - apparently based on the intertwining doctrine - gives too broad a reading to the intertwining doctrine. All the intertwining doctrine does is protect the exclusive jurisdiction of the federal courts over claims asserted under the Securities Exchange Act of 1934. The court can compel arbitration of arbitrable claims as long as it stays the arbitration until litigation of the 1934 Act claims has taken place. In this way, both

arbitrable. The Court severed those claims and ordered Plaintiff to submit them to arbitration after litigation of the federal claims. Commenting on the Young opinion the Court concluded:

> In this case, the Oppenheimer court's interpretation of the Florida Securities Act was based on the court's own reading of both the Securities Act of 1933 and the Supreme Court's decision in Wilko v. Swan. While the Florida Supreme Court may engage in this analysis, a federal district court sitting in the State need not adhere to that decision, especially if it strays from its own interpretation of federal law... . Moreover, the majority of federal circuit and district courts that have taken up the intertwining doctrine and its related concepts have not completely banned arbitration of state securities claims. To the extent that Oppenheimer misconstrues federal law, it is of no precedential value to this court. [Emphasis supplied].

The Brown decision is due to be published in the Federal Supplement imminently. The citation will be submitted as supplemental authority prior to the close of briefing.

(Footnote No. 9 continued)

the concerns as to exclusive jurisdiction and that arbitration agreements be enforced is satisfied. Miley, supra. See Raiford v. Buslease, Inc., 745 F.2d 1419, 1423 n.7 (11th Cir. 1984); Miley v. Oppenheimer & Co., Inc., 637 F.2d 318 (5th Cir. 1981). See also Surman v. Merrill Lynch, Pierce, Fenner & Smith Inc., 733 F.2d 59 (8th Cir. 1984); Pierson v. Dean Witter Reynolds, Inc., 792 F.2d 334 (7th Cir. 1984); Dickinson v. Heinold Securities, Inc., 661 F.2d 638 (7th Cir. 1981); Liskey v. Oppenheimer & Co., Inc., 717 F.2d 314 (6th Cir. 1983).

As in Brown many if not most federal trial courts will sever arbitrable claims and stay those claims pending litigation of the federal claims. Even those federal courts which do not compel arbitration of Chapter 517 counts due to application of the intertwining doctrine acknowledge that such claims are arbitrable. In Southland, supra, the Supreme Court held that to allow a state to carve out separate rules on arbitrability violates the dictates of the Supremacy Clause and would result in forum shopping. Young's creation of separate rules of arbitrability in excess of those provided under Wilko, has created precisely the situation which the Federal Arbitration Act was designed to prohibit.[10/]

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10. Southland states: Under the interpretation of the Arbitration Act urged by Justice O'Connor, claims brought under the California Franchise Investment Law are not arbitrable when they are raised in state court. Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable. Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395 87 S.Ct. 1801, __L.Ed.2d__ (1967). The interpretation given by the of Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent of drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction. Such an interpretation would frustrate Congressional intent to place "[a]n arbitration

2. Chapter 517 Is A State Enactment Regardless Of Its Incorporation Of Federal Remedies

Melamed III is consistent with Southland, supra, in holding that arbitratability of Chapter 517 causes of action must be controlled by the Federal Arbitration Act. In Southland the Court held:

> In enacting §2 of the federal Act, Congress 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 in arbitration.
>
> * * * * *
>
> 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

(Footnote No. 10 continued)

agreement... upon the same footing as other contracts, where it belongs." H.R.Rep. No. 96, supra, 1.

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. We hold that §31512 of the California Franchise Investment Law violates the Supremacy Clause.

Southland, 104 S.Ct. at 860-61.

> broad principle of enforceability is subject to any additional limitations under State law.

Id. at 858.

In Young this Court rejected Southland as controlling, reasoning that "the Southland court simply recognized that a franchise is not typically a security and rejected the attempted analogy between franchise regulation and securities regulation." Young, 456 So.2d at 1179. However, Southland's entire focus was on whether states may enact any statute that would forbid arbitration as is made obvious by the previously quoted provisions. The United States Supreme Court adamantly and repeatedly stated that a state legislature may not enact a statute in conflict with the Federal Arbitration Act. Southland's reference to Wilko does not modify those statements.

The footnote from Southland quoted in Young also focuses on the distinction between those powers a state legislature may exercise and those which Congress may exercise:

> The question in Wilko was not whether a state legislature could create an exemption to §2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

Southland, 104 S.Ct. at 864 n.11, quoted in Young at 1179 (emphasis supplied). In Wilko the Supreme Court balanced two statutes enacted by Congress, as compared to Southland where

the Supreme Court held that the Federal Arbitration Act supersedes all inconsistent state statutes prohibiting arbitration. A state statute may not be transformed into a federal statute and thereby escape application of the Supremacy Clause simply by virtue of incorporation by reference of provisions of a federal statute.

Therefore, the Fourth District correctly held that if §517.214 is read to prohibit arbitration of claims asserted under Chapter 517, it is unconstitutional under the Supremacy Clause as in conflict with the Federal Arbitration Act.

II. COMMON LAW CLAIMS ARE ARBITRABLE

Young did not explicitly decide the issue of whether common law claims concerning transactions in interstate securities are arbitrable. However, even assuming *arguendo* that the Fourth District was incorrect in compelling arbitration on claims arising under Chapter 517, it was correct in ordering the trial court to require arbitration of the other claims.

There is no basis whatsoever for applying Wilko to common law claims. In *Belke v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 693 F.2d 1023, 1025 (11th Cir. 1982) the court recognized that common law claims are arbitrable:

> In this case Belke plead both Florida common law claims and federal securities law claims. On the face of the complaint, the Florida common law counts are subject to arbitration under the terms of a contract between the parties.

Similarly, common law claims asserted in Haydu, supra were all found to "fall outside the Wilko rule." 675 F.2d at 1172. See also, e.g., Raiford, supra, 745 F.2d at 1420; Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 642 (7th Cir. 1981).

Thus, there can be no question that Wilko is inapplicable to common law claims even when they do involve transactions in interstate securities. The Fourth District should be affirmed and all common law claims should be submitted to arbitration.

III. FRAUD AND PUNITIVE DAMAGES CLAIMS ARE SUBJECT TO ARBITRATION

The Fourth District was correct in holding that claims for fraud and punitive damages are subject to arbitration and that they should be severed for submission to arbitration. Arguments submitted by Plaintiff that the district court misapplied well established principles of law are without merit and amount to a distorted, misleading presentation of applicable law.

As a preliminary matter, issues pertaining to the scope of an arbitration agreement sought to be enforced under

the Federal Arbitration Act are to be resolved under standards enunciated by federal law. Moses H. Cone, supra, 103 S.Ct. at 941. Arbitration agreements are to be liberally construed with all doubts resolved in favor of arbitration.

> "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability."

Id. at 941-42 (emphasis supplied).

It is beyond dispute that claims of fraud are subject to arbitration under the Federal Arbitration Act.

Plaintiff first misconstrues the seminal case Prima Paint Co. v. Flood & Conklin, 388 U.S. 375, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). She argues that pursuant to Prima Paint claims of fraudulent activity occurring after the time the contract has been entered into are not arbitrable. However, under Prima Paint the only fraud claim which would be nonarbitrable is a claim that a party was fraudulently induced to enter into the arbitration agreement itself as opposed to the contract as a whole. See also Willis v. Shearson/American Express, 569 F.Supp. 821, 824 (M.D.N.C. 1983).

Similarly, Plaintiff overlooks the import of Blumberg v. Berland, 678 F.2d 1068, 1071 (11th Cir. 1982) which expressly holds:

> The provision in the customer's agreement that the parties would arbitrate 'any controversy... arising out of or relating to [the] contract or breach thereof...," necessarily included plaintiff's claim of fraud, and the [arbitration] panel therefore had authority to dispose of the issue.

Plaintiff has not cited any valid authority for the proposition that under the Federal Arbitration Act claims of fraud are not arbitrable. Moreover, there are numerous cases indicating that they are arbitrable. E.g., Raiford et al v. Buslease Inc., supra (common law claims for fraud and breach of fiduciary duty arbitrable); Pierson v. Dean Witter Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984) (held common law fraud claims arbitrable); Surman v. Merrill Lynch, Pierce, Fenner & Smith Inc., 733 F.2d 59, 63 (8th Cir. 1984); Willis v. Shearson/American Express, Inc., 569 F.Supp. 821, 824 (M.D.N.C. 1983) (where the court held that claims of fraud and breach of fiduciary duty are proper subjects for arbitration); Tamari v. Bache & Co. (Lebanon), S.A.L., 565 F.2d 1194 (7th Cir. 1977), cert. den. 453 U.S. 905, 98 S.Ct 1450, 55 L.Ed.2d 495 (1977).

Similarly, a demand for punitive damages is arbitrable. Cases addressing the issue hold that the punitive damage

claims are arbitrable under the Federal Arbitration Act. For example, Willis, supra, 569 F.Supp. at 824, held as follows:

> The Court perceives no public policy reason persuasive enough to justify prohibiting arbitrators from resolving issues of punitive damages submitted by the parties. Concluding that arbitrators may determine such issues comports with the principle that under the federal act 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration... .' Moses H. Cone Memorial Hospital v. Mercury Construction Co., ___ U.S. ___ at ___, 103 S.Ct. at 941, 74 L.Ed.2d at 785.

In Willoughby Roofing & Supply Company, Inc. v. Kajima International, Inc., 598 F.Supp. 353, 361 (N.D.Ala. 1984), the court also held that there is no public policy bar which prevents arbitrators from considering claims for punitive damages. This case presents an exhaustive analysis of the relevant case law and concludes that it is "clear that federal policy does not prohibit the award of punitive damages by arbitrators if the parties' agreement is found to confer upon them the authority to make such an award." Id. at 360. The language in the arbitration provision in the instant case is clearly broad enough to be inclusive of punitive damages claims. See also, Baselski v. Paine, Webber, Jackson & Curtis Inc., 514 F.Supp. 535, 543 (N.D.Ill. 1981) (held that claims for punitive damages do not preclude arbitration).

Plaintiff cites Pierson v. Dean, Witter, Reynolds, Inc., 551 F.Supp. 497, 504 (D.C.Ill. 1982), for the proposition that punitive claims are not arbitrable. In fact, the case cited by Plaintiff was reversed by the United States Court of Appeals for the Seventh Circuit and reported at 742 F.2d 334. Pierson now stands for the proposition asserted by Defendants, that arbitrable and nonarbitrable claims can be separated "in order to permit specifically agreed to arbitration so that the policy favoring arbitration would not be defeated." Pierson, 742 F.2d at 340.

Plaintiff also attempts to persuade this Court that the district court in Melamed III impliedly sought to overrule Klosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678 (Fla. 1973).[11/] In fact, however, that decision has no application to the facts of this case. First and foremost, Klosters dealt with the Florida Arbitration Act. The policy considerations which compelled the denial of arbitration in Klosters are not applicable with the possible exception of waiver to the Federal

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11. After arguing that the Klosters decision should have controlled the district court's disposition of this matter, Appellant states that Klosters "has been followed and cited with approval in Shearson, Hammil & Co. v. Vouis, 247 So.2d 733 (3d DCA 1971) cert. den. 253 So.2d 444 (Fla. 1971). In fact, Shearson pre-dated Klosters by over two years and thus, could not possibly have followed Klosters. Similarly, Plaintiff's attempt to rely on her replevin count to

Act. Furthermore, the decision in Klosters denying arbitration had little to do with the existence of a fraud claim. The defendant in Klosters had filed a counterclaim demanding a jury trial, and thus was deemed to have waived his right to arbitrate. Id. at 681. The Klosters decision was also based on the fact that numerous third parties were involved in the litigation who were not subject to arbitration,[12/] and also that the prior appointment of a receiver to resolve the plaintiff's claims constituted a jurisdictional act in confirmation of the need and necessity for equitable relief.[13/]

After concluding - erroneously - that Florida cases could prohibit arbitration of such claims, Plaintiff states:

(Footnote No. 11 continued)

claim that the trial court had exercised jurisdiction over a substantial claim is specious. The trial court never became substantially involved in the resolution of this claim. The parties, by agreement, transferred Respondent's cash and securities pursuant to her instructions. All that was required of the trial court was to enter an agreed order. (A 314-315). The replevin count simply cannot be said to have involved a substantial exercise of the court's jurisdiction. Moreover, even if the Court has exercised jurisdiction over one count, this does not appear to be a relevant factor under the recent United States Supreme Court decisions cited herein.

12. This factor would pose no bar under the Federal Arbitratio Act pursuant to the explicit holding of Moses H. Cone, supra.

13. See note 11, supra.

> It is indeed questionable as to whether a federal court would enforce an arbitration clause with respect to future disputes were [sic] state law prohibits such an agreement.

Plaintiff blythly ignores Southland which explicitly rejected this argument and instead cites to Ex Parte Alabama Oxygen Company, Inc., 433 So.2d 1161 (Ala. 1983).[14/] Of course, Plaintiff also ignores and fails to inform this Court that the cited case was summarily vacated and remanded for reconsideration in light of Southland by the United States Supreme Court. York Int'l v. Alabama Oxygen Co., Inc., __ U.S. __, 104 S.Ct. 1260 (1984). Thereafter, the Alabama Supreme Court entered a per curiam opinion adopting the former dissent as the majority opinion. Alabama Oxygen Co., Inc. v. York Int'l., 452 So.2d 860 (Ala. 1984).

There can be no doubt that fraud and punitive damage claims are subject to arbitration. The Fourth District's holding on this issue is correct.

IV. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION BY ORDERING THAT APPELLANT'S FEDERAL CLAIM BE STAYED PENDING THE OUTCOME OF ARBITRATION

The Appellate Court ordered Plaintiff's nonarbitrable claims be stayed pending the outcome of the arbitration of all other claims. Appellant argues that based upon this Court's

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14. See page 13 of Plaintiff's Initial Brief.

statements relative to judicial economy in Young, 456 So.2d at 1178, the district court "was acting erroneously in piecemealing this litigation." However, Moses H. Cone, supra, makes clear that judicial economy is insufficient justification to bar arbitration.

In Moses H. Cone, supra, 103 S.Ct. at, 939, the Supreme Court held that in situations where there are arbitrable and nonarbitrable claims resulting in piecemeal litigation, "the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement". (Emphasis in original). Following Moses H. Cone, the Eight Circuit considered this precise issue in the same context as presented herein and referring to Moses H. Cone stated:

> While we recognize that it might be more efficient to try all the related claims together, this is not sufficient grounds for finding an otherwise valid contractual arbitration provision unenforceable.

Surman, supra 733 F.2d at 63.

Plaintiff also argues that federal cases applying the intertwining doctrine should apply to this case in order to bar severance of arbitrable and nonarbitrable claims. However, under federal law the fact that arbitrable and nonarbitrable claims are joined is not an absolute bar as Plaintiff argues.

The intertwining doctrine is a judicially created exception to arbitration which has been adopted in some circuits and is applicable only in instances involving claims under the Securities and Exchange Act of 1934.[15] Under this doctrine, when nonarbitrable 1934 Act claims and arbitrable claims are factually intertwined, the Court must either direct that all claims proceed to litigation in the federal court or require that arbitration of arbitrable claims be stayed until after litigation is complete. See Raiford, supra. The second alternative is called "ordering". Id. at p.90,179.

The underlying basis for the intertwining doctrine is the fear of robbing the federal court of its exclusive jurisdiction over disputes under the Securities Exchange Act of 1934.

The primary concern underlying the intertwining doctrine is not that nonarbitrable and arbitrable claims should be tried together in the same forum for the sake of efficien-

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15. The intertwining doctrine has been disapproved in numerous federal circuits. E.g., Dickinson, supra. The pending United States Court decision in Byrd v. Dean Witte Reynolds, Inc., 726 F.2d 552 (9th Cir. 1984) cert. granted, ___U.S.___, 104 S.Ct. 3509 (1984), will likely be dispositive of the continued viability of the intertwining doctrine. See note 9, supra and accompanying text.

cy.[16] Rather, it is that arbitration should not be allowed to fetter or restrict the federal court's exclusive jurisdiction over and ability to resolve the 1934 Act claims.

In instances where the facts underlying both 1934 Act and arbitrable claims are identical, it is felt that if the arbitrable claims are severed and sent to arbitration while the nonarbitrable claims are stayed, the federal court would be required to apply the factual findings made by the arbitrator to the federal claims. Because this is considered to undermine the Court's exclusive jurisdiction by limiting or eliminating its power to resolve the factual issues underlying the federal claims de novo, arbitration is either denied or alternatively arbitration is stayed pending litigation of the federal claims. Raiford, supra.

As stated, the intertwining doctrine is not the law in all federal circuits and it has no applicability in state courts. The policies underlying the intertwining doctrine are not present in state court, where exclusive jurisdiction does not exist over federal securities claims. The only federal

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16. Surman v. Merrill Lynch, Pierce, Fenner & Smith Inc., 733 F.2d 59, 62 (8th Cir. 1984); Kershaw v. Dean Witter Reynolds, Inc., 734 F.2d 1327, 1329 (9th Cir. 1984); Liskey v. Oppenheimer & Co., Inc., 717 F.2d 314, 317 (6th Cir. 1983); Miley v. Oppenheimer, 637 F.2d 318 (5th Cir. 1981).

securities claims which may be brought in state courts are ones under the 1933 Act which specifically provide for concurrent nonexclusive jurisdiction.[17/] Thus, Plaintiff's reliance on federal cases applying the intertwining doctrine is misplaced.

Finally, Plaintiff's argument that the district court erred in ordering a stay of the 1933 Act claim pending arbitration of the arbitrable claims because this relief was not requested of the trial or appellate court, is completely without merit. Defendants had requested that the trial court stay litigation pursuant to 9 U.S.C. §3 which provides for stays pending arbitration. Melamed I. Accordingly, by first holding that the trial court should have compelled arbitration as to Plaintiff's arbitrable claims, the appellate court simply ensured compliance by the trial court with the requirements of law deemed essential to the administration of justice by staying all litigation pending arbitration.

V. APPELLANT'S CLAIMS AGAINST BRIAN SHEEN ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT

Melamed III correctly held that Plaintiff's claims against Brian Sheen, a former MERRILL LYNCH employee, are

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17. In Brown, supra the Court indicates that the intertwining doctrine does apply to 1933 Act claims.

covered by the arbitration agreement, as "the language of the contract is broad enough to include persons within the respondeat superior doctrine". 453 So.2d at 860. Plaintiff's argument that the clause in the customer agreement, "any controversy between us", serves to limit the applicability of the clause to signatories of the contract is without merit and contrary to the overwhelming majority of opinions in which this issue has been considered.

The agreement executed by Appellant provided that "any controversy between us arising out of your business or this agreement shall be submitted to arbitration... ." In Belke v. Merrill Lynch, Pierce, Fenner & Smith Inc., Case No. 77-2837-Civ-JCP (S.D.Fla. April 27, 1983), (Appendix to Petition for Writ of Common Law Certiorari filed in Melamed III at 159) the court, construing the identical arbitration provisions as involved herein, stated:

> It would be unreasonable to construe this arbitration clause as evincing an intent by the parties to exclude from its coverage disputes arising out of the business between the customer and Merrill Lynch's employees.

Numerous other courts have reached this same result in the same context of a suit by a customer against a securities brokerage firm and individual employees of the firm. For example, in Brown v. Dean Witter, supra, the court in construing a

similar arbitration provision with respect to Dean Witter's account executive, held:

> "[T]hat Richard Ten Eyck [the account executive] did not sign the Agreements does not alter this result, for the clauses are broad enough to include disputes arising out of business between plaintiff and other Dean Witter employees who are not signatorees to the contract."

In Berman v. Dean Witter & Co. Inc., 44 Cal.App. 3d 999, 119 Cal.Rptr. 130 (Ct.App. 1975), the court held that a stockbroker employed by Dean Witter, though not a signatory to the agreement for arbitration, acted as an agent for Dean Witter and was as entitled to the benefits of arbitration as was his principal. Also, in Paine, Webber, Jackson & Curtis Inc. v. McNeal, 143 Ga.App. 579, 239 S.E.2d 401 (Ct.App. 1977), the court expressly ruled that an employee would also be entitled to claim the benefit of an arbitration clause where the brokerage firm had an arbitration agreement with the plaintiff. See also Starr v. O'Rourke, 5 Misc. 2d 646, 159 N.Y.S.2d 60, (Sup.Ct. 1957) ("despite jurisdictional technicalities, a suit against both [the brokerage firm and stock broker employee] should be entertained in the forum

[arbitration] to which one [the brokerage firm] has a right to resort").[18]

Similarly, in Vic Potamkin Chevrolet, Inc. v. Bloom, 386 So.2d 286 (Fla. 3d DCA 1980) an action was brought for alleged fraud perpetrated by certain employees of the defendant automobile dealer in connection with the plaintiff's purchase of an automobile. The employees were also named as individual party defendants. The purchase agreement signed by plaintiffs contained an arbitration clause. Plaintiffs contended that because employees were not parties to the contract they were not entitled to arbitration. As in Melamed III, the Vic Potamkin court rejected this contention, holding:

> The answer to this contention is governed by the breadth and scope of the arbitration provision. In this case, the parties agreed to arbitrate '[a]ny controversy or claim arising out of, or, relating to this agreement...' which is broad enough to include persons within the respondent [sic "respondeat"] superior doctrine.

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18. Further, in Merrill Lynch Commodities, Inc. v. Richal Shipping Corp., 581 F.Supp. 933, 940 (S.D.N.Y. 1984), the court held, "[i]t is clear that non-signatories to a contract containing an arbitration clause may be deemed parties thereto, through ordinary contract principles for purposes of the [Federal Arbitration] Act". See also, Okcuoglu v. Hess, Grant & Co., Inc., 580 F.Supp. 749 (E.D.Pa. 1984); Hartford Financial Systems, Inc. v. Florida Software Services, Inc., 550 F.Supp. 1079 (D.C.Me. 1982), app'l dism. 712 F.2d 724 (1st Cir. 1983).

Id. at 288. If anything, the language of Plaintiff's arbitration agreement in this cause, which speaks in terms of any "controversy... arising out of your business or this agreement" is even broader than that involved in Vic Potamkin.

Indeed, such a result does not comport with common sense. A corporate entity such as MERRILL LYNCH can only act through its employees, of which there are thousands. It is both impossible and unreasonable to require each individual employee who might conceivably be charged with wrongdoing to separately execute arbitration agreements with the customer. The arbitration agreement would become a virtual nullity if the employee alleged to have committed the wrongful act is not deemed covered by the agreement since, as a practical matter, MERRILL LYNCH would be required to defend the suit in court notwithstanding its own right to arbitrate. Thus, the only reasonable construction of the arbitration agreement is that it was intended to encompass claims against MERRILL LYNCH employees, such as Brian Sheen, which relate to Appellant's dealings with MERRILL LYNCH.

In her initial brief, Plaintiff attempts to distinguish and criticize the above cited decisions on what amounts to immaterial and insignificant grounds. Initially, Plaintiff argues that the Vic Potamkin decision is an anomaly

in Florida law and represents "a departure from established Florida principles of law". Plaintiff simply refuses to recognize that Vic Potamkin is directly on point.

Plaintiff refers this Court to Interocean Shipping Company v. National Shipping & Trucking Corp., 462 F.2d 673 (2d Cir. 1972) as being directly on point. In fact, Interocean is not at all relevant to the issues being considered by this Court. Interocean held only that there were issues as to whether a contract even existed, and if so, who would be considered parties to the contract. Thus, trial on the issue of the making of an agreement to arbitrate was necessary prior to ruling on the motion to compel arbitration. Id. at 678. This decision has no relevance as to whether the language in MERRILL LYNCH's customer agreement with Plaintiff is broad enough to include persons within the respondeat superior doctrine.

Likewise, the remaining cases cited by Appellant, Aetna Casualty & Surety Company v. United States, 655 F.2d 1047 (Ct.Cl. 1981); Supak & Sons Mfg., Co. v. Pervel Industries, Inc., 539 F.2d 135 (4th Cir. 1979); Janmort Leasing, Inc. v. Econo Car International, Inc., 475 F.Supp. 1282, 1291 (D.C.N.Y. 1979); Moruzzi v. Dynamics Corporation of America, 443 F.Supp. 332 (D.C.N.Y. 1977); Simpson v. Robinson, 376 So.2d 415 (1st

DCA 1979); and Karlen v. Gulf & Western Industries, Inc., 336 So.2d 461 (3d DCA 1976) are either wholly inapposite or are completely mischaracterized and do not refute the ruling of the appellate court below.

VI. THE FOURTH DISTRICT CORRECTLY FOUND THAT THERE WAS NO WAIVER OF THE RIGHT TO ARBITRATE

As in previous sections, comparing Plaintiff's argument on waiver with the record and the case law it becomes apparent that Plaintiff has again missed the mark. The Fourth District correctly held that under the facts of this case and applicable law, there was no waiver of the right to compel arbitration.

The issue of waiver of arbitration under the Federal Act is a matter of federal law and, "the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital, 103 S.Ct. at 941-42. Accord, cases cited therein at n.31.

In order to constitute waiver of arbitration, there must be both delay and prejudice; delay alone cannot give rise to a waiver. Belke v. Merrill Lynch, Pierce, Fenner & Smith Inc., 693 F.2d 1023, 1025 n.2 (11th Cir. 1982); Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009, 1018 (2d Cir. 1972); Corcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968); Parcel Tankers Inc. v. Formosa Plastic Corp., 569 F.Supp. 1459, 1467 (S.D.Tex. 1983). As stated by the appellate court, even assuming there was any delay there were no allegations of undue advantage or prejudice to Plaintiff. Thus, the appellate court correctly reversed the trial court's holding of waiver.

Specifically, Melamed III rejected the arguments asserted by Plaintiff in her initial brief as to whether arbitration of the Chapter 517 claim had been waived. Plaintiff's insistence that the Chapter 517 claim was waived is a perfect example of how Plaintiff ignores facts which prove inconvenient to acknowledge. The circumstances surrounding the motion to compel arbitration of claims asserted under Chapter 517 are set forth in this brief in the first four pages of the Statement of the Case and Facts. After examining the factual background and Plaintiff's assertion of waiver, the Fourth District stated:

> There is, however, some question as to whether waiver has occurred because of Merrill Lynch's failure to promptly assert its intention to seek arbitration of the Chapter 517 claims. Merrill Lynch acknowledges that its initial Motion to Compel Arbitration stated that arbitra-

> tion was not sought as to the Chapter 517 claim. However, at a hearing held less than a month after the filing of the Complaint, counsel for Merrill Lynch argued to the trial court that what purported to be a Chapter 517 count was really a claim under the Securities Exchange Act of 1934, but further maintained that if the court upheld the viability of the Chapter 517 claim, it should be submitted to arbitration.
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> Moreover, in its Answer to Melamed's Second Amended Complaint, Merrill Lynch raised arbitration as an affirmative defense without specifying the counts to which it referred. Melamed obviously was aware of Merrill Lynch's altered position, as evidenced by its memorandum of law in opposition to the defendants' second motion to compel arbitration, where in it stated "It now appears that the Defendant has changed its position and seeks arbitration with reference to all pending counts of the Amended Complaint."

In Plaintiff's brief she ignores facts harmful to her position; instead she attempts to embarrass the Fourth District for a typographical error by professing not to know what the Court refers to by the statement that MERRILL LYNCH had asserted arbitration as an affirmative defense to the "second amended complaint". Plaintiff knows full well that the Fourth District refers to the amended complaint. (A 17). Moreover, Plaintiff's own pleadings acknowledge that she knew in 1981 that Defendants sought arbitration of all counts. (A 120).

Plaintiff also attempts to assert waiver by virtue of presentation of issues below. The following chronology

demonstrates that there was no delay and certainly no prejudice by virtue of presentation of the issues. In its first order denying arbitration the trial court ruled, inter alia, that state courts had no authority to compel arbitration under the federal act. This threshold ruling obviously rendered unnecessary a ruling on the specific issues of the arbitrability of this case. Thus, even if all issues had been fully argued and briefed to the trial court the result would have been the same, and it still would have been necessary to file the petition for Writ of Certiorari which culminated in Melamed I.

Even accepting arguendo the trial court's findings, Merrill Lynch did not cause any delay or prejudice to Plaintiff with respect to the proceedings which resulted in Melamed II. Indeed, the necessity for the filing of a second petition for Writ of Certiorari can be attributed solely to Plaintiff's stubborn insistance that Defendants were required to prove the genuiness of Melamed's signature on the contract, an "issue" which even the trial court finally characterized as "fatuous". (A 230). Although the trial court ultimately stated in its order that in denying arbitration the second time it assumed the genuiness of the signature and ruled on the basis of the legal arguments, this clearly was not apparent from the face of that order. (A 116). The trial court's most recent order concedes that "the court's decision was not explicit on that point." (A 229). Indeed, Melamed II focused on the dispute as to the genuineness of the signature,

requiring the trial court to hold an evidentiary hearing to resolve this specific issue. Accordingly, again, circumstances wholly unrelated to the perceived failure to timely raise arguments and cite authorities mandated the filing of a second petition for Writ of Certiorari. Again, even if these issues had been briefed and argued at that time, the proceedings which concluded in Melamed II would still have occurred.

It defies reason to conclude that the purported failure to make argument or citation at an earlier point could have changed the outcome as to arbitration considering that ultimately the trial court explicitly rejected each of Merrill Lynch's arguments.

As noted previously, waiver requires both delay and prejudice. Because there was no delay there could be no prejudice, thus rendering any inquiry as to the second element of waiver moot.[19] Belke, 693 F.2d at 1025 n.2. However, even if there was delay, no prejudice was established by the Plaintiff nor found by the trial court. As the party arguing waiver, Plaintiff had the heavy burden of proving that she was prejudiced but failed to do so. Belke, 693 F.2d at 1025 ("Because federal law favors arbitration, any party arguing waiver of arbitration bears a heavy

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19. Merrill Lynch does not concede that it did fail to timely proceed. The Fourth District briefs contain full argument on the issue but inasmuch as the above analysis demonstrates that there was never any prejudice the issue of delay it is irrelevant and Merrill Lynch will not burden the Court with additional detail.

burden of proof."). Although the order speaks in terms of the "delay and piecemeal presentation of issues" serving "to drag out indefinitely the resolution of the issue of arbitration" and of action contrary to the purpose of providing "speedy and effective disposition of the dispute", there is absolutely no finding of prejudice to Plaintiff resulting from such perceived delay. Accordingly, the Fourth District's holding is correct.[20]

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20. In connection with the issue of delay, the trial court also refers to estoppel as a reason for denying arbitration. However, it is clear that the principle of estoppel has no application in this cause. Like waiver, in order for an estoppel to arise one must induce another party to believe in a certain state of things and thereby cause the other person to act to his detriment. Capital Bank v. Schuler, 421 So.2d 633, 638 (Fla. 3d DCA 1982). Mere delay alone is insufficient to support a finding of estoppel. Mercede v. Mercede Park Italian Restaurant Inc., 392 So.2d 997, 998 (Fla. 4th DCA 1981). In order for there to be an estoppel there must be actual prejudice resulting from the reliance. Travelers Indemnity Co. v. Swanson, 662 F.2d 1098 (5th Cir. 1981) (applying Florida law).

    The elements required to establish an estoppel simply are not present under the facts of this case. Plaintiff cannot in good faith claim to have been mislead by Merrill Lynch regarding its intention to arbitrate. As early as May 22, 1981 Plaintiff expressed recognition that Merrill Lynch was seeking arbitration of the entire case. (A 120). The arguments and citations which the trial court stated were not timely presented to the court were certainly known to Plaintiff through the petitions and responses filed in the two previous appeals. Furthermore, there is nothing to indicate that Plaintiff relied upon any representations by Merrill Lynch pertaining to arbitration to her detriment or prejudice. Thus, the facts of this case do not give rise to an estoppel which would preclude MERRILL LYNCH from seeking enforcement of the agreement to arbitrate.

CONCLUSION

Based upon the law and the facts of record in this case, MERRILL LYNCH submits that the order of the appellate court below should be affirmed. MERRILL LYNCH cannot in the limited space of this brief correct every misstatement of law or fact presented by Plaintiff. Nor can MERRILL LYNCH anticipate every new twist of the facts Plaintiff will attempt to argue in her reply brief. However, it is clear that Chapter 517 and common law claims are arbitrable claims. Wilko is limited to 1933 Act claims. Nor may a state statute prohibit arbitration of claims that would otherwise be arbitrable under the Federal Arbitration Act. Moreover, for the reasons set forth above, Plaintiff is compelled to arbitrate not only with MERRILL LYNCH, but also with MERRILL LYNCH's former employee, SHEEN. The Fourth District correctly stayed litigation of the nonarbitrable 1933 Act claim and required that all other claims - including those for fraud and punitive damages - be submitted to arbitration. Thus, the order of the Fourth District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits was mailed this 22nd day of February, 1985 to MICHAEL EASLEY, ESQ., 701 Forum III, 1675 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, and F. KENDALL SLINKMAN, ESQ., 501 Forum III, 1665 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401.

By: Patricia E. Cowart