O/a 6-7-85

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,872

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 SUPPLEMENTAL BRIEF

* * * * *

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INTRODUCTION

As stated by MERRILL LYNCH's Answer Brief on the Merits, the most important issue presented by this appeal is whether the Federal Arbitration Act compels arbitration of claims asserted under Chapter 517, Florida Statutes. MERRILL LYNCH argued in its Brief that this question must be answered in the affirmative and asked this Court to overrule its contrary opinion rendered in Oppenheimer & Co., Inc. v. Young, 456 So.2d 1175 (Fla. 1984). Subsequently the United States Supreme Court vacated Oppenheimer & Co. Inc. v. Young, and remanded for reconsideration in light of Dean Witter Reynolds Inc. v. Byrd, 470 U.S. ___, 53 U.S.L.W. 4222 (March 4, 1985). It is respectfully sumbitted that inasmuch as Young has been vacated there is no longer any basis for the exercise of this Court's discretionary jurisdiction. Moreover, to the extent this Court does consider the merits the opinion of the Fourth District it should be affirmed.

ARGUMENT

I. THERE IS NO LONGER ANY BASIS FOR THE EXERCISE OF DISCRETIONARY JURISDICTION

Petitioner in her initial jurisdictional brief asserted that the opinion below, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Melamed, 453 So.2d 858 (Fla. 4th DCA 1984) (Melamed III),

conflicted with a potpourri of decisions of this and other courts. As was discussed by MERRILL LYNCH's Answer Brief to Invocation of Discretionary Jurisdiction served October 10, 1984, the only opinion with which Melamed III expressly and directly conflicted was this Court's opinion in Young, supra. Inasmuch as Young has been vacated, there is no extant decision by this Court or any District Court of Appeal with which Melamed III conflicts. Thus, there is no longer any conflict jurisdiction and it is respectfully submitted that this Court should appropriately refuse to exercise its discretionary jurisdiction to consider the opinion below.

MERRILL LYNCH is mindful that Petitioner's notice and jurisdictional Brief also asserted appellate jurisdiction on the basis that the Fourth District found §517.241(2) invalid as in conflict with the Federal Arbitration Act. As was discussed in MERRILL LYNCH's Brief on the Merits, and particularly in light of Byrd, there can be no doubt that any state statute which would conflict with the Federal Arbitration Act is invalid; therefore, to the extent §517.24(2) can be read as prohibiting arbitration it is invalid and superceded by the Federal Arbitration Act. Thus, although appellate jurisdiction may exist, it is apparent that the Fourth District should be affirmed on the issue which gives rise to appellate jurisdiction. It would therefore be an appropriate exercise of this Court's discretion to decline to address any of the

other issues decided below. In fact, in light of Byrd the appeal could well be said to be moot. Compare Gay V. Heller, 108 So.2d 610 (Fla. 3d DCA 1959).

II. BYRD COMPELS THE CONCLUSION THAT CHAPTER 517 CLAIMS ARE ARBITRABLE

MERRILL LYNCH initially requested that this Court grant it permission to supplement its Brief to discuss the impact of Byrd on the issues presented herein. There is no doubt whatsoever that Byrd compels the conclusion that the Fourth District was correct in requiring arbitration of all claims herein except those asserted under §12(2) of the Securities Act of 1933.

In Byrd the Supreme Court expressly refused to expand Wilko v. Swan, 346 U.S. 427 (1953) beyond its limited holding that predispute agreements to arbitrate claims under §12(2) of the 1933 Act are not arbitrable. Byrd also explicitly held that state law claims involving transactions in interstate securities are arbitrable. Thereafter, the Court vacated Young, supra, and remanded to this Court for consideration in light of Byrd.

Of course, even if the Supreme Court had not vacated Young this Court would have overruled Young in light of Byrd. Indeed this Court expressly recognized that its decision would be different if the Supreme Court gave Wilko a more expansive reading than this Court had:

> Petitioner suggests that the Wilko decision would be different today. We are aware of the increased interest in finding alternatives to judicial litigation and that arbitration is a suitable method of resolving many disputes. Rehnquist, A Jurists View of Arbitration, 32 Arb. J.1 (1977). If the Court were to recede from Wilko holding that arbitration agreements could be enforced to resolve disputes concerning interstate securities transactions, our decision would be different. In this connection, we note that the Court has recently agreed to review a case presenting either the issue here or, in a larger sense, the Wilko issue. Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552 (9th Cir.), cert. granted, U.S. , 104 S.Ct. 3509, 82 L.Ed.2d 818 (1984).

456 So.2d at 1178 n.6 (emphasis added). As discussed above, this is precisely what occurred in Byrd.

The Fourth District ordered that all claims save those asserted under §12(2) of the Securities Act of 1933 be submitted to arbitration. Petitioner has attacked this ruling as requiring piecemeal litigation.[1/] However, in Byrd the Supreme Court reaffirmed its previous holding that the Federal Arbitration Act must be enforced even when to do so results in multiple proceedings:

> The preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we vigorously enforce agreements to arbitrate,

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1. MERRILL LYNCH concedes that under Byrd it is argueable that if Plaintiff wishes to proceed simultaneously with arbitration and litigation she may do so.

even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute.

CONCLUSION

For the foregoing reasons together with the arguments advanced in MERRILL LYNCH's Brief on Jurisdiction and on the Merits it is respectfully submitted that this Court should decline to exercise its jurisdiction or in the alternative that it affirm the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Supplemental Brief was served by mail this 2nd day of April, 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