

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 76,520

SAM SKURNICK,

Defendant-Appellant.

v.

AL AINSWORTH,

Plaintiff-Appellee,

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF FLORIDA,
EX REL. GERALD LEWIS, COMPTROLLER OF FLORIDA.

FLORIDA DEPARTMENT OF BANKING
AND FINANCE

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STATEMENT OF THE CASE

The following question was certified to this Court by the Eleventh Circuit United States Court of Appeals in Ainsworth v. Skurnick, 909 F.2d 456 (11th Cir. 1990):

Whether, under the undisputed facts of this case, the transactions between the parties constituted a sale of securities in Florida within the meaning of Fla.Stat. Sec. 517.12.

SUMMARY OF ARGUMENT

Speaking with the authority derived from his role as the principal regulator of Florida's securities industry, the Florida Comptroller adopts the argument of the Plaintiff-Appellee Ainsworth that Florida law views the sale of securities from a broker outside the state, through the mail to a buyer within the state, as the sale of securities in the State of Florida. To hold otherwise would offend legislative policy (indicated by enactments in 1973 and 1978) to enforce strict standards of conduct for securities dealers.

ARGUMENT AND CITATIONS OF AUTHORITY

- I. THE QUESTION CERTIFIED TO THIS COURT SHOULD BE ANSWERED IN THE POSITIVE IN ORDER NOT TO FRUSTRATE THE STATE'S POLICY OF STRICT ENFORCEMENT OF ITS LAWS AGAINST SECURITIES AND INVESTMENT FRAUD.

By the terms of Section 20.12(1), Florida Statutes, the Comptroller of Florida is head of the Florida Department of Banking and Finance (hereinafter "the Department") and in this capacity is directed by the Legislature to administer and enforce the Florida Securities and Investor Protection Act, Chapter 517, Florida Statutes. The Comptroller is, therefore, the ranking state officer required to implement state policy on the regulation of securities transactions. This brief is submitted on behalf of the State of Florida to assist the Court in its consideration of the issues raised in this case.

This Court should respond to the Federal Court's invitation by affirming the trial court's determination that the sale of securities through the mail, from an office outside the state, is inherently a sale of securities in the state of Florida as proscribed by Section 517.12, Florida Statutes. The purpose of Chapter 517 is the protection of investors in securities offerings and other investment transactions. See Nichols v. Yandre, 9 So. 2d 157 (Fla. 1942); McElfresh v. State, 9 So. 2d 277 (Fla. 1942); State by Knott v. Minge, 160 So. 670 (Fla. 1935); Rudd v. State, 386 So. 2d 1216 (Fla. 5th DCA 1980); O'Neill v. State, 366 So. 2d 699 (Fla. 4th DCA 1976); Edwards v. Trulis, 212 So. 2d 893 (Fla. 1st DCA 1968) and Leithauser v.

Harrison, 168 So. 2d 95 (Fla. 2nd DCA 1964). As Florida's sole regulatory body of the securities industry, the Department must be able to control and discipline the financial agents who are dealing with the funds of citizens of this state. As a matter of policy, the Department is constantly policing and admonishing "players" in the financial arena and would be severely handicapped if a broker or dealer could avoid Florida's strict rules by simply locating in another state while soliciting Florida consumers.

The statute has recently undergone two legislative changes. Prior to 1973 the statute read:

(1) No dealer or salesman shall engage in business in this state as such dealer or salesman or sell such securities, including securities exempted in s. 517.05, except in transactions exempt under s. 517.06, unless he has been registered as a dealer or salesman with the department pursuant to the provisions of this section. Section 517.12(1), Florida Statutes (1971).

The legislature revised this language in Chapter 73-68, Laws of Florida, to include those persons effecting sales from outside Florida, with customers located within Florida, by changing it as follows: (1) No dealer or salesman shall engage in business ~~in this state as such dealer or salesman~~ or sell any securities, ~~in or from offices in this state or sell securities in this state to residents thereof from offices outside this state, by mail or otherwise,~~ including securities exempted in s. 517.05, except in transactions exempt under s. 517.06, unless he has been registered as a dealer or salesman with the department pursuant to the provisions of this section. Section 517.12(1), Florida

Statutes (1973).

These changes had the specific effect of including out of state operations which were availing themselves of Florida investor's monies. The Legislature revisited this statute in the 1978 session and with Chapter 78-435, Laws of Florida, completely rewrote section (1) as follows:

(1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities in this state to persons thereof from offices outside this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section. Section 517.12(1), Florida Statutes (1978).

The pertinent effect of this rewrite was to drop the requirement of "shall engage in business" and reduce the level of involvement by the dealer or broker to the offer or sale of securities. See, D. Rett, "The Florida Sale of Securities Law," Florida and Federal Securities Regulation 181 (Fla. Bar 2d ed. 1979). No other business contacts are necessary for this section to apply.

II. THE UNDISPUTED FACTS OF THIS CASE, AS PRESENTED IN THE APPENDICES OF THE ELEVENTH CIRCUIT OPINION, DEMONSTRATES SUBSTANTIAL TRANSACTIONS BETWEEN THE PARTIES.

The facts of this case, as stated by the Eleventh Circuit U.S. Court of Appeals in Appendices 1 & 2 of Ainsworth v. Skurnick, 909 F.2d 456 (11th Cir. 1990), reveal an extended and extensive series of contacts between the Appellant Skurnick as a securities broker and the Appellee Ainsworth as his client. In

Appendix 1, the underlying opinion of the United States District Court Southern District of Florida, the Court describes the nature of the actions taken by the Appellant and the Appellee and characterizes the functions which the Appellant performed as those of a dealer of securities as it is defined under Section 517.021(9), Florida Statutes. The Department agrees with the District Court finding that the statutory definition of a "dealer" clearly encompasses the term broker.

1. Any person, other than an associated person registered under this chapter, who engages for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person. Section 517.021(9) Florida Statutes.

Again the undisputed facts demonstrate that the Appellant Skurnick performed the functions of a dealer as defined by this section. Further, the facts as presented show there was constant correspondence from the broker Skurnick to his client Ainsworth at Appellee Ainsworth's Florida address and they show that this relationship continued for many years.

III. THE STATUTORY LANGUAGE OF SECTION 517.12(1), FLORIDA STATUTES, IS CLEAR AND UNAMBIGUOUS AS IT APPLIES TO THE QUESTION PRESENTED BY THE ELEVENTH CIRCUIT.

The language of Section 517.12(1), Florida Statutes (1989), states that:

(1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities in this state to persons of this state from offices outside

this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section.

The language of the statute is clear and unambiguous in this case and "[T]he rule in Florida is that where the language of the statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, the courts should not depart from the plain language used by the legislature." Citizens of the State v. Public Service Commission, 425 So. 2d 534, 541-42 (Fla. 1982); see also Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983) (per curiam).

The phrasing of this particular section only makes sense if the Plaintiff-Appellee Ainsworth's position of what constitutes a sale of securities "in the state" is accepted. The clause "from offices outside this state, by mail or otherwise" would be meaningless if this particular series of transactions is viewed as exempt from the statute. These securities transactions took place over many years, through several relayed telephone conversations and continuous and regular correspondence through the mails. The nature of a securities transaction requires that most if not all of the paperwork processing occur in the office of the broker or dealer, so the location of where the documents are processed cannot be the determining factor in this analysis. The residence and location of the investor are obviously the keys to determining whether or not Florida laws apply to a transaction. The Legislature addressed this issue by specifically including out-of-state brokers and dealers.

In the alternative, should the Court be of the opinion that there is room for statutory construction in this instance, the Department's construction of the statute which it administers is entitled to great weight. See P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988); Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So. 2d 987 (Fla. 1985); Department of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So. 2d 283 (Fla. 1973); Reedy Creek Improvement District v. Department of Environmental Regulation, 486 So. 2d 642 (Fla. 1st DCA 1986); Department of Professional Regulation v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984). In this regard, the Department views the Appellee Ainsworth's position on this issue as crucial to the effective regulation of the securities industry in its interaction with Florida investors. Another interpretation would greatly impede the Department's ability to protect the citizen's of Florida from irresponsible operators not physically located in this state.

The legislative intent behind this section is clearly designed to provide regulatory control and an avenue for civil relief in securities transactions across state boundaries. Furthermore, this vital ability to oversee brokers and dealers who are dealing with Florida investors through the mails and over phone lines is the linchpin to an effective regulatory structure. As was previously discussed, the Legislature has created a strong and vigorous system of statutes in order to protect the investors

from unscrupulous brokers and dealers and to maintain the integrity of the capital market. Brokers and dealers should not be allowed to circumvent the Department's authority simply by locating and operating their offices outside the State of Florida.

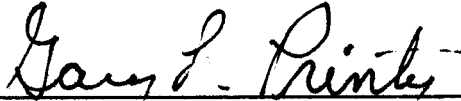
CONCLUSION

The State of Florida, through its senior official charged to regulate securities transactions in the state, commends to this Honorable Court the argument advanced by the Appellant Ainsworth as reflecting the correct application of Florida law to the question certified to this Court by the federal judiciary. It is the State's conclusion, therefore, that Florida law considers the sale of securities from a broker outside the state, through the mail to a buyer inside the state, to be the sale of securities in the State of Florida, as envisioned under Section 517.12(1), Florida Statutes. This view of interstate securities transactions is vital to maintain a coherent and viable regulatory system in this state. The Court is strongly urged to answer the certified question in the positive.

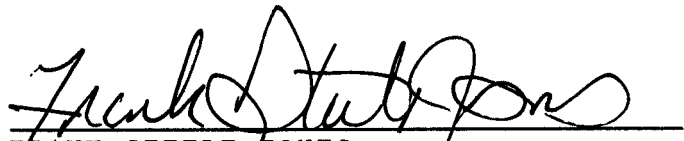
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief were provided by U.S. Mail to James F. Falco, Attorney for Appellee Ainsworth, at 800 Fairway Drive, Suite 260, Deerfield Beach, FL 33441 and to Sam Skurnick, Appellant, at 143 Hoyt Street, #5J, Stamford, CT 06905 this 8th day of October 1990.


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