IN THE SUPREME COURT OF FLORIDA

NO.: 76,520

11TH CIRCUIT NO.: 89-5701

SAM SKURNICK,

RESPONDENT/APPELLANT

vs.

AL AINSWORTH,

CLAIMANT/APPELLEE

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA

ANSWER BRIEF OF APPELLEE

Submitted By:

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STATEMENT OF THE CASE AND OF THE FACTS

The United States Court of Appeals, Eleventh Circuit, in a printed Opinion, dated August, 17, 1990, (hereinafter "Slip. Op."), pursuant to Article 5, Section 3(b)(6) of the Florida Constitution, certified a question to this Court as an important question which is determinative of the cause before it. The Eleventh Circuit included in its opinion the District Court's opinion, Slip. Op. App. 1, and a detailing of Skurnick's activities insofar as the Eleventh Circuit viewed these activities as they might relate to the approach taken by the District Court, Slip. Op. App.2.

By letter of September 4, 1990, to the Clerk of this Court, the Moving Party, Sam Skurnick, the Appellant/Respondent below, relied upon his brief before the Eleventh Circuit and declared that had no further arguments to make. However, on p. 2 of his letter, Skurnick made reference to issues and facts that are not in the record on appeal, discussed further, infra.

In his brief to the Eleventh Circuit, the Appelle/Claimant submitted an eleven-page Statement of the Case and of the Facts. Ainsworth adopts this Statement of the Facts before this Court with one correction, namely, on p.2 of the brief, § 517.12(1), Fla. Stat. is incorrectly quoted. This statute requires dealers to register with the Florida Department of Banking and Finance if they, "sell securities in this state to persons of this state from offices outside this

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otherwise." The underlined portion of the preceding quotation had been omitted inadvertently from the Ainsworth brief to the Eleventh Circuit.

In his letter-brief (p.2), Skurnick thought it appropriate to direct this Court's attention to a provision in his customer's agreement with Ainsworth that the agreement and its enforcemement were to be governed by New York law; and, he cited his brief to the Eleventh Circuit as the source of this provision in the record. In his brief to the Eleventh Circuit, Ainsworth addressed this issue that had not been raised before the arbitration or before the District Court, Br. 10-11, 26, as an issue not properly on appeal. The Eleventh Circuit's certification to this Court indicates that it agrees with Ainsworth.

In his letter-brief (p.2), Skurnick represents that interstate telephone calls to him from Ainsworth's nephew were telephone calls between New Jersey and Connecticut. No such facts appear in the record in which Skurnick testified as follows:

> THE WITNESS: Yes.
>
> And I spent the rest of the year just liquidating, getting off margin, as I've done right now.
>
> And also, I once received a telephone call -- once or twice from his nephew and I told him that I felt that he was exposed to great risk and asked for instructions for permission, you know, to sell his stocks and please get back to me.

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And this happened, I think, at least twice.

And at one time, I believe he asked for all his stocks. And his nephew said, well, I'll tell him -- if you don't hear from me, use your judgment to sell -- it would indicate use your judgment to get him off margin and send him his stocks. Tr. 48-49.

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SUMMARY OF THE ARGUMENT

§ 517.12(1) provides, "No dealer ... shall sell securities in this state to persons of this state from offices outside this state, by mail or otherwise." This statute contains terms defined elsewhere in Ch. 517. When the statutory definitions and the provisions of § 517.12(1) are considered together, the latter is readily perceived as containing no ambiguity so that its terms should be applied literally to a non-resident introducing broker such as Skurnick. The unique "long-arm" provision expressed in § 517.12(1); Florida's rejection of the approach of the Uniform Securities Act for determining when a selling of securities occurs "in" one State or another for interstate securities transactions; and, the interpretative Rule 3E-200.001; confirm that § 517.12(1) is to be applied literally. The District Court's approach was correct in applying the test of Florida's general long-arm statute to the unique and unambiguous language of § 517.12(1) in directly applying the latter.

If ambiguities are perceived in § 517.12(1), then, analogies from other jurisdictions that do not have statutory provisions similar to Florida but do have provisions similar to those expressed in the Uniform Securities Act, confirm that Skurnick was selling "in" Florida because of his "contacts" with a Florida resident - customer of his over a nine-year period under the "contacts" test used in these other jurisdictions. The Eleventh Circuit did not detail all of the acti-

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vities of Skurnick or attributable to him for determining if he was selling "in" Florida. Even in these jurisdictions, the issue of whether an interstate securities transaction occurred "in" one state or the other is resolved by reference to securities statutes and law and not common law, sales law, or UCC provisions relating to securities.

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ARGUMENT

I. THE FEDERAL DISTRICT COURT DID NOT ERR IN HOLDING THAT THE TRANSACTIONS BETWEEN THE PARTIES CONSTITUTED A SALE OF SECURITIES "IN THIS STATE ... FROM OFFICES OUTSIDE THIS STATE BY MAIL OR OTHERWISE" WITHIN THE MEANING OF § 517.12, FLA. STAT.

The Eleventh Circuit quoted the District Court concerning the issue the former had difficulty with: "Unless Skurnick actually sold securities in Florida within the meaning of Fla. Stat. § 517.12, no liability may be found pursuant to that section. This Court has found no cases directly under § 517.12 which explain what it means to sell a security in Florida." Slip Op. 4539. In context, it is plain that the District Court's language refers to the sub-issue of whether sales were made "in Florida from offices outside Florida, by mail or otherwise" and not whether "sales" occurred as well. The District Court had viewed a § 517.12(1) claim as having four elements and the District Court's language quoted by the Eleventh Circuit related to the third of these four elements, viz., "in Florida from outside Florida, by mail or otherwise," Slip. Op., App. I, 4542:

> The only issue which remains is whether the subject sales were made in Florida. Skurnick maintains that because he did all his business in his offices in New York and Connecticut, through brokerage houses also outside of Florida, that he never sold securities in Florida. Unless Skurnick actually sold securities in Florida within the meaning of Fla.Stat. §

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> 517.12, no liability may be found pursuant to that section. This Court has found no cases directly under § 517.12 which explain what it means to sell a security in Florida. However, cases interpreting Florida's long-arm statute help in this regard. Fla.Stat. Section 48.193(1)(a) provides that any person "... carrying on a business or business venture in this state ..." is subject to jurisdiction of the courts of Florida. The Supreme Court of Florida in Dinsmore v. Martin Blumenthal Assoc. Inc., 314 So.2d 561 (Fla.1975) discussed what it means to engage in a business venture in Florida: "The activities of the person sought ... must be considered collectively and show a general course of business activity in the State for pecuniary benefit." 314 So.2d at 564. Under this test, Skurnick is clearly subject to the jurisdiction of Florida courts and the registration requirements of Florida apply to him, despite his protestations to the contrary. Moreover, common sense indicates, that one who sells securities by mail to a person who is in Florida is selling securities in Florida.

For the reasons discussed more fully below, the holding of the District Court should not be disturbed.

A. NO AMBIGUITY EXISTS IN § 517.12(1) THAT APPLIES LITERALLY TO THIS CASE

At issue is the applicability of one of the registration provisions in Ch. 517, Florida Statutes, Florida's Securities and Investor Protection Act ("SIPA"), § 517.12(1), namely, "No dealer ... shall ... 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 ..." Both federal courts have asserted that "no cases" exist that control this issue of whether Skurnick had been selling "in this state." Appellee contends, as he did in all prior proceedings, however, that this issue is and fist resolved by the language of several provisions in SIPA and for which no ambiguity exists.

Skurnick is a "dealer" within the meaning of § 517.12(1). However, the term, "dealer", is a SIPA phrase of art. A "dealer" is defined in § 517.021(9)(a)1 to include, "Any person, other than an associated person registered under this chapter, who engages either 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." The term "broker" is defined to mean a "dealer" as defined in SIPA. § 517.021(7).

Pursuant to its duty to administer SIPA and its duty to adopt rules necessary or convenient for the proper interpretation of SIPA, § 517.12(1), the Florida Department of Banking and Finance has defined several types of "dealers", namely, "broker/dealer," "carrying dealer," "executing dealer," "introducing dealer," and "issuer/dealer." Rule 3E-200.001 (10) (11), (16), (18), and (21).

An "introducing dealer" is defined to mean, "any dealer maintaining a formal agreement/arrangement with another

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dealer whereby the introducing dealer does not carry (i.e. holds funds or securities, or confirms transactions) customer accounts." A "carrying dealer" is defined as a, "dealer maintaining a fully/principally disclosed agreement/arrangement with an introducing dealer, whereby the carrying dealer is responsible for customer monies and securities, and confirms transactions to the customer accounts introduced." Rule 3E-200.001(11) and (18).

In this case, Skurnick was an "introducing dealer" who had several "clearing dealers" or, as Skurnick characterized them, "clearing firms" (R2-31-16). In the securities industry, the parties are, actually, more commonly referred to as "clearing" and "introducing" "brokers". The Eleventh Circuit referred to Skurnick's clearing dealers as, "firms through which Skurnick dealt." Slip.Op., App.2, #5. Despite this fastidiousness, the relationship of Skurnick to his clearing dealers is not subject to dispute. Skurnick's clearing dealers sent Ainsworth his monthly statements with Skurnick's name prominently displayed thereon. Slip.Op., App.2, #5. These monthly statements were typical and, for example, Skurnick was identified as the account executive and his Connecticut address was shown as the "office" serving Ainsworth. These statements were sent regularly to Ainsworth in Florida from outside Florida during the nine-year period of the Ainsworth-Skurnick relationship from 1976-1985.

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When Skurnick replied by mail to Ainsworth's inquiry by mail, Skurnick included an application form and a letter for Ainsworth to sign (which he did), giving Skurnick authority to open a discretionary margin account and enclosing a check made payable to one of Skurnick's "clearing firms." (R2-31-16). Slip.Op., App.2, #3.

The Department of Banking and Finance's rules require both an "introducing dealer" and a "carrying dealer" to be registered pursuant to § 517.12. Rule 3-200.001(11) and (18). In this case, Skurnick's clearing brokers were registered in Florida but Skurnick was not.

Where an agency such as the Florida Department of Banking and Finance has no substantive rulemaking power, its construction of a statute is "entitled to great weight." FTC v. Mandel Bros., Inc., 359 U.S. 385, 391, 79 S.Ct. 818, 823, 3 L.Ed. 2d 893 (1959). Sub judice, the Florida Department of Banking and Finance did interpret § 517.12 and promulgated rules therefor. Its rules are entitled to "great weight" in this case.

A main argument of Skurnick's has been that he did not need to be registered because he did not perform clearing functions and because his clearing brokers were registered.

Nevertheless, Florida's legislature did define "dealer" and "broker." A statutory definition takes precedence and controls over all definitions and must be given effect.

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E.g., First Nat. Bank v. Florida Industrial Com., 154 Fla. 74, 16 So.2d 636 (1944). The definition of a "dealer" in SIPA is considered "very broad and inclusive" unlike definitions in Florida's UCC - Investment Securities laws. S. Harrison Jr., "Florida Code Comments to § 678.8-303, 'Broker'", reprinted in 19 Fla. Stat. Ann. 70, 71 (1976).

When a statute has no ambiguity, Courts are to give effect to the statute without resort to rules of construction. Reino v. State, 352 So.2d 853 (Fla. 1977); State ex rel. Florida Jai Alai, Inc. v. State Racing Com., 112 So.2d 825 (Fla. 1959); Wagner v. Botts, 88 So.2d 611 (Fla. 1956). When the definitions of ch. 517 are considered, no ambiguity in § 517.12(1) can be perceived and this Court should give effect to its literal terms, i.e., "apply the statute in a straight-forward, literal manner". State v. Butler, 325 So.2d 55, 56 (Fla. 3d DCA 1976).

Ch. 517, Florida's Blue Sky law, was originally enacted in 1931. Ch. 14899, Laws of Florida (1931). Florida's securities law experienced little change until 1977 when Florida's legislature passed the Investor Protection Act, Ch. 77-441, Laws of Florida; and, then, dramatically revised this legislation again in 1978, Ch. 78-435, Laws of Florida. See, D. Rett, "The Florida Sales of Securities Law," Florida And Federal Securities Regulation 181 (Fla. Bar 2d ed. 1979).

Prior to 1973, § 517.12(1) provided, "No dealer ...

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shall engage in business in this state as such dealer or sell any securities ... unless he has been registered as a dealer ..." By amendment in 1973, Ch. 73-68, § 3, Laws of Florida, § 517.12(1) was amended to delete the phrase, "in business in this state" and add the phrase, "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."

Further language of § 517.12(1) emerged from the 1978 amendments where, in essence, the language of "engage in business" was deleted, simplifying the statute further.

The Uniform Securities Act ("USA") was published in 1956. Florida is not one of the 37 jurisdictions that adopted the USA. Blue Sky L. Rep. (CCH) ¶¶5500 and 5596 (hereinafter "1956 USA"). The 1956 USA's registration provision, Section 201(a), provided: "It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this act." Blue Sky L. Rep. (CCH) ¶5521. The scope of this 1956 USA language "to transact business in this state" was specified by Sections 414 (a) and (b). Official Code Comment, Blue Sky L. Rep. (CCH) ¶5552.01. Section 414 of the 1956 USA, "Scope of the act and service of process," was an elaborate statute with many bright line rules for determining when the 1956 USA applied to persons who sell or offer to sell securities "in this State." Blue Sky L. Rep. (CCH) ¶5554. Florida never enacted any securities legislation

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similar to the 1956 USA's complex Section 414.

Florida's version of § 517.12(1) that existed in 1956 was, however, strikingly similar to the 1956 USA's requirement for registration of a dealer. This similarity is critical, therefore, for emphasizing the effects wrought in Ch. 517 by the 1973 amendments, discussed supra, that added the language prohibiting the selling of securities, "in this state ... from offices outside this state, by mail or otherwise, "Florida plainly rejected metaphysical approaches to identifying when the selling of securities to Florida residents occurred in Florida from offices outside of Florida, by mail or otherwise. Cf., Tyson v. Lanier, 156 So.2d 833 (Fla. 1963) (the primary guide to statutory interpretation is legislative purpose). Florida opted for its own rules for determining when interstate transactions were subject to Ch. 517 unlike the 1956 USA that opted for Section 414 (a)-(f) that, "defines and delimits the application of the Act in interstate or international transactions with only some of their elements in the state." Blue Sky L. Rep. (CCH) ¶5554.01, p. 1546.

The USA used the compound term "broker-dealer" in order,

> [T]o include either a broker or a dealer. The recognized distinction is that a broker acts for the benefit of another while a dealer acts for itself (e.g. in buying or selling from its own inventory). An individual who is merely a substantial trader in securities is not considered to be "engaged in the busi-

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> ness of effecting transactions." Blue Sky L. Rep. (CCH) ¶ 5601, Official Code Comment No. 3, p.1605.

The 1956 USA and its successor, the 1985 USA, had as an objective to prevent the application of a State's registration provisions to a non-Florida broker because a customer happened to be vacationing in Florida. Blue Sky L. Rep. (CCH), Official Code Comment, ¶5554.01(12) and ¶5612, Official Code Comment 2, p. 1622. Florida reached the same result two ways: (1) by the langugae of "engage in business in this state" (pre-1973) and "engage in business" (1973-1977); and (2) the language added to § 517.12(1) in 1973 prohibiting the selling of securities, "in this state to residents thereof from offices outside this state, by mail or otherwise" (emphasis added). Sub judice, it is uncontested that Ainsworth was and is a Florida domiciliary, much less a Florida "resident."

This Court should rule as the Third District Court of Appeals did in Merrill Lynch, Pierce, Fenner and Smith v. Byrne, 320 So.2d 436, 441 (Fla. 3d DCA 1975) writ discharged, 341 So.2d 498 (Fla. 1977) when it rejected a claim of ambiguity about statutory remedies in Ch. 517: "After due consideration of the points preserved by the assignments of error, we reach the conclusion that the answers to the questions presented for decision are found in the language of the Statute. This being so, it becomes not only unnecessary but unseeming to turn to other sources for guidance."

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B. METHODOLOGY FOR DETERMINING IF A SELLING IN VIOLATION OR § 517.12(1) OCCURRED "IN THIS STATE"

Whether a sale of securities has occurred "in" one State or another during interstate transactions or transactions with parts occurring in several States is not a new issue for cases containing issues of non-registration. Most often, this issue has occurred in cases in which a failure to register securities "in" a State has been the issue, e.g., Green v. Weis, Voisin, Cannon, Inc., 479 F.2d 462 (7th Cir. 1973), but at least one case has involved an issue of a securities dealer's failure to register "in" a State, Stimmell v. Shearson Hammill & Co., Inc., 411 F.Supp. 345 (D.Or. 1976); and, in one case, Petrites v. J.C. Bradford & Co., 646 F.2d 1033, 1036 (5th Cir. 1981), the language of the dealer registration statute, § 517.12(1), Fla. Stat., was relied upon in contending unsuccessfully that sales of securities did not occur "within Florida" for the purposes of applying the securities fraud statute, § 517.301, Fla. Stat.

In these cases, the issue of whether the transaction occurred "in" a State is resolved in a three-step process: (1) reference to the language of the securities statutes, especially definitions; (2) identification of "significant contacts", e.g., Petrites, supra., 646 F.2d, at 1036, with the State in which the non-registration offense is alleged to have occurred; and, (3) interpretation that promotes the policies

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and interests promoted or protected by the State's securities laws. E.g., Green, supra; Kreis v. Mates Investment Fund, Inc., 473 F.2d 1308 (8th Cir. 1973); Hardtke v. Love Tree Corp., 386 F.Supp. 1085 (E.D. Wis. 1975); Getter v. R.G. Dickenson & Co., 366 F.Supp. 559 (S.D. Iowa 1973).

This issue is not resolved by reference to principles of sales law but securities law, e.g., Getter, supra; Green, supra.

However, whether a sale of securities occurred "in" a State is intimately connected to the issue of whether a sale of securities within a State's securities laws occurred. As discussed in Part A, supra, the functions of either an introducing dealer or a clearing broker could be sales within the meaning of § 517.12. Furthermore, there is no question that a professional broker such as Skurnick is a seller within the meaning of securities laws. Pinter v. Dahl, _U.S._, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988).

At issue in this case is a registration statute in SIPA. As this Court has observed, "(T)he main intent of Ch. 517 is to protect investors by requiring registration". Date Lease Financial Corp. v. Barad, 291 So.2d 608, 612 (Fla. 1974). The purposes of SIPA are to enable potential investors to protect themselves through effects of registration requirements, id.; and, to protect the public from fraudulent and deceptive practices in the securities market. Rudd v. State, 386 So.2d

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1216, 1218 (Fla, 5th DCA 1980). The registration provisions of SIPA and SIPA itself are remedial legislation and, thus, entitled to a liberal construction to achieve their goals and to further underlying legislative intent. McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

§ 517.12(1) contains various terms defined in SIPA. Chief among these for purposes of this case are "dealer," discussed supra; "sell"; and, "in this state". However, this statute contains a provision that appears to be unique to Florida's Blue Sky Laws, namely, a dealer cannot sell securities "in this state" to persons of this state, "from offices outside this state, by mail or otherwise". This provision was added to securities legislation by amendment in 1973. Ch. 73-68, §3, Laws of Florida, amending § 517. 12, (1971). This 1973 amendment has long been recognized as inserting, "a 'long-arm' provision" aimed at nonresidents. D. Rett, "The Florida Sale of Securities Law," Florida and Federal Securities Regulation 181, 194 (Fla.Bar 2d ed. 1979). Thus, Florida's legislators went to unique lengths to insure usage of the mail by nonresidents will be a determining factor for requiring registration and not a factor for excusing it. Significantly, the District Court resorted to cases interpreting Florida's long-arm statute to help it determine if Skurnick's sales were "made in Florida". Slip Op., App. 1, 4543. Compare, § 517.07 requiring the registration of securities sold "within this sta-

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te" that does not contain language identical or similar to that discussed immediately above in § 517.12 added by an amendment in 1973 to SIPA.

As defined in SIPA, " sale or sell means any contract of sale or disposition of any investment, security, or interest in a security, for value". § 517.021 (20).

Sub judice, the District Court expressly recognized the importance of the definition of "sell". Slip. Op., App. 1, 4543. Securities legislation definitions, as discussed more fully infra, are critical starting points for identifying "significant contacts" used to determine if a sale occurred within a State in violation of registration provisions. The definition of a "dealer" is, also, a source for identifying "significant contacts," especially, "Any person ... who engages ... directly or indirectly, as broker ... in the business of offering, buying, selling, or otherwise dealing or trading in securities". § 517.021(9)(a)1 (emphasis added). The language in the securities definition of "sale" or "sell", namely, of a "disposition ... of a security for value," identical to that used in § 517.12(1), has been characterized as "all-encompasing". Green, supra, 479 F.2d, at 465 (quoting Silverman v. Chicago Ramada Inn, Inc., 63 Ill. App.2d 96, 211 N.E.2d 596, 599 (1965)).

The language "in this state" has been recognized as allowing a purchaser's state securities law of registration to be

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violated even if the seller has complied with the registration laws of the seller's state, provided, for the purchaser's state, "(T)here is some territorial nexus to a particular state". Lintz v. Carey Manor Ltd., 613 F.Supp. 543, 549 (D.Va. 1985). This statutory language does not raise a conflicts of law issue and is intended to and does recognize that a securities transaction can be covered simultaneously, by the securities statutory scheme of several states. Id., at 551.

Securities legislations' definition of a "sale" comparable to the definitions contained in §§ 517.021(15) and (20) are "broad and unambiguous" by which, "every step toward the completion of a sale would be a sale". Green, supra, 479 F.2d, at 465 (quoting Silverman, supra). See also, Benjamin v. Cablevision Programming Investments, 114 Ill.2d 150, 499 N.E.2d 1309 (1985) (a sale in securities law encompasses activities usually recognized as preliminary steps in the consummation of a sale).

C. ANALOGIES

In Stimmel, supra, residents of Oregon travelled to a broker's California office in which the Oregonians signed a margin agreement. In a one-year period, the Oregonians, subsequently, bought and sold securities by means of telephone calls and correspondence from Oregon. The California brokers were not registered to sell securities in Oregon although they knew their customers lived and worked in Oregon. 411 F.Supp.,

at 346-47. The Oregon Securities Law had a special provision defining offers and acceptances in traditional long-arm fashion. Id., at 348-49. The District Court held that the California brokers were required to be registered under the Oregon law but had failed to do so, entitling the Oregon customers to a rescission for the interstate transactions. The brokers had been "transacting business in Oregon". Id., at 348.

Stimmel necessarily is of limited value sub judice because of the specific Oregon legislation involved for which there is no express equivalent in Florida. However, the long-arm approach to determine if the transactions were "in Oregon" is obvious.

In Petrites, the defendants were a Georgia brokerage firm and its salesman against whom Florida securities buyers had alleged a violation of Florida's securities laws, § 517.301. The defendants claimed that § 517.12(1), "regulatory broker registration," 646 F.2d, at 1036, established that the sales at issue did not occur in Florida. A "significant contacts" approach was used to find that the sales had occurred in Florida. Among these were: (1) brokers' knowledge of residency of buyers; (2) reports of transactions were sent into Florida; (3) monthly statements were sent into Florida; (4) the Florida buyers received and signed account contracts in Florida; (5) Florida buyer mailed checks from Florida; (6) telephone calls from Florida to Georgia occurred. Id.

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The Petrites Court was the federal Fifth Circuit, the Eleventh Circuit's predecessor whose precedent is binding on the Eleventh Circuit. Yet, sub judice, the Eleventh Circuit found no controlling case. Slip. Op. 4539. In Petrites, Florida law was applied even though no Florida cases directly on point had been found in research. On these facts, the Fifth Circuit applied Florida law and affirmed that the sales had occurred in Florida. The Petrites Court relied, inter alia, on 1956 Op.Fla. Atty. Gen. 056-152 (May 17, 1956) that interpreted Florida's securities laws as applying to the negotiating for sale in any manner irrespective to where the sale finally was consummated. The Petrites Court cited, also, Kreis, supra, for applying Missouri law when the defendant mailed written confirmations of purchase to Missouri; and, Martin v. Steubner, 485 F.Supp. 88 (S.D. Ohio 1979) for applying Ohio law when defendants advertised in the Wall Street Journal with circulation in Ohio and mailed materials to the Ohio buyer including a contract signed in Ohio.

In the case sub judice, it makes no difference that Skurnick's clearing brokers made mailings of statements and of trade confirmations to Ainsworth in Florida. Otherwise the bifurcation of broker functions between introducing and clearing brokers that is widespread will have been deemed to create a loophole in Florida's "all encompassing" securities registration laws. Moreover, the Florida Department of Banking

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and Finance's Rule 3E-200.001 ensures that no such loophole occurs because steps in the securities transactions are allocated by brokers among themselves.

Another thread of Petrites is significant. The Fifth Circuit cited Travelers Health Association v. Virginia, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950) upholding a State's Blue Sky law "where business activities reach out beyond one State and create continuing relationships and obligations with citizens of another state," (Emphasis added). Sub judice, the District Court expressly invoked the long-arm provision of § 48.193(1)(a) as analogous to the provisions of § 517.12(1) applicable to selling "in this state." In the formal long-arm statute, jurisdiction is applied to a person carrying on a business or business venture in this state because, as this Court has ruled in Dinsmore v. Martin Blumenthal Assoc. Inc., 314 So.2d 561 (Fla. 1975), § 48.193(1)(a) focuses on the activities of a non-resident that are considered collectively and show a general course of activity in the State for pecuniary benefit. Slip.Op., App. 1, 4544. The District Court sub judice plainly was affected like the Petrites Court, by the continuing relationship and obligations between Ainsworth and Skurnick. These included a nine-year relationship between a customer and an introducing broker (as well as clearing brokers who were registered); and, Skurnick's having control over Ainsworth's discretionary

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account for this same nine-year period. No isolated act or fact is at issue sub judice.

In Green, supra, that confirmations and stock certificates were mailed from New York to the Illinois investors; and, the solicitation of offers to buy in Illinois; were key facts in applying Illinois law. The Court was wary, too, of creating loopholes in the Illinois Securities Law:

> Defendants became subject to the statute at least when they successfully completed the sale of London Ben stock after soliciting offers to buy in Illinois. To construe the language of the statute otherwise would permit an issuer or dealer to solicit sales at will in Illinois without complying with the statute, so long as an act entirely within the seller's control, such as placing the proceeds in a bank account or issuing stock certificates, were performed at or from some other place. Illinois residents should not be so helpless in obtaining protection through their own state legislature or dependent upon the possibility of aid from the laws of another state, particularly when they might be unable to even determine which state would be the state of sale at the time they accepted the offer to purchase. 479 F.2d, at 465.

In Getter, supra, "significant contacts with Iowa," 366 F.Supp., at 573, that led to a finding of a sale of unregistered securities in Iowa and not New York, included: the investors were Iowa residents; one of the defendants was an

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Iowa brokerage house; the investors were solicited by the brokers in Iowa; a purchase agreement was signed in Iowa; stock certificates were received in Iowa; and, the investors elected to rescind in Iowa. In Getter, there were multiple brokers-defendants. The comments, supra, about clearing brokers and introducing brokers would seem to apply here, as well. See also, Lintz, supra, 613 F.Supp., at 549, citing Neils v. Black & Co., [1971-78 Transfer Binder] Blue Sky L.Rep. (CCH) ¶ 71, 017 (D.Or. 1972), in which a Washington broker who called a client in Oregon advising the client about securities of a California corporation that caused the client to call the California company and buy the securities in a purchase for which the broker pecunarily benefited; was subject to Oregon's securities registration provisions.

In Hardtke, supra, various "contracts" were identified by the Court, 386 F.Supp., at 1087-1092, to establish sales of unregistered securities occurred in Wisconsin and not Iowa. Receipt of confirmations here, too, were relevant. Id., at 1091. The Court recognized, too, that the common law definition of a "sale" did not affect the interpretation of that term in Wisconsin's securities law. See also, Kreis, supra, 473 F.2d, at 1311 (Missouri law and not New York law applied, inter alia, because the confirmations were received in Missouri and the confirmation or delivery constituted an acceptance of the investor's offer to buy).

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Sub judice, although Skurnick exercised control over a discretionary account, the confirmations were sent by his clearing brokers to Ainsworth in Florida. Clearing brokers are not agents of the introducing broker. Ahn v. Rooney, Pace Inc., 624 F.Supp. 368 (S.D.N.Y. 1985); Lester v. Basner, 676 F.Supp. 481 (S.D.N.Y. 1987); Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 85 F.Supp. 104 (D.Ark. 1949).

In Feitler v. Midas Associates, 418 F.Supp. 735, 738 (E.D. Wisc. 1976), the Court interpreted the phrase, "sale ... made in this State [Wisconsin]," that was not defined, "in the light of common sense" and not common law despite an absence of a definition in the Wisconsin securities laws. Feitler, in this regard, merely stands for the proposition that the rule of statutory interpretation that unreasonable consequences are to be avoided, State v. Webb, 398 So.2d 820 (Fla. 1981), applies even to judicial interpretations of securities statutes.

D. SKURNICK'S § 517.12(1) CONTACTS WITH FLORIDA

§ 517.12(1)'s express language encompasses a dealer's selling of securities "in this state ... from offices outside this state by mail or otherwise". Plainly, the selling "in this state" is understood in part by reference to the phrases: (1) "from offices outside this state"; and, (2) "by mail or otherwise". (emphasis added).

In its Appendix 2, the Eleventh Circuit listed facts

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it considered as detailing, "the activities of Skurnick, insofar as they might relate" to the district court's approach to resolving the question certified, "by analogy to Florida's long-arm statute". Slip. Op. 4539. As discussed more fully below, Ainsworth submits that the Eleventh Circuit's Appendix 2 does not detail all of the activities and facts deemed relevant as "contacts" under a State's Blue Sky law in determining whether, under the State's securities law, a violation of that State's registration provisions in its securities laws occurred.

None of the authorities discussed supra, except, perhaps, Petrites (by implication in the Fifth Circuit's interpretation of Florida's Ch. 517) had a State securities statute that contained a long-arm provision such as that expressed in § 517.12(1). None of the authorities discussed, supra, had a regulation such as Rule 3E-200.001 to assist in determining whether the selling of securities laws occurred within a State in violation of the State's securities law registration provisions.

All of the authorities discussed, supra, direct that a resolution of the issue begins by reference to the statutory language. Other Courts have found language in their securities laws identical to Florida's to be clear, unambiguous, and all-emcompassing. These statutes differ only by Florida's unique securities long-arm provision in § 517.12(1). This long-arm language in § 517.12(1), Ainsworth submits, is, also, clear,

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unambiguous, and all-encompassing. Accordingly, on the facts submitted in the Eleventh Circuit's Appendix 2 alone, Skurnick's activities are plainly within the express statutory language of § 517.12(1). In this regard, reference to Rule 3E-200.01, distinguishing types of dealers, confirms that § 517.12(1) applies to Skurnick's activities detailed in Appendix 2 by the Eleventh Circuit from the perspective of Skurnick's being an introducing dealer: § 517.12(1) applies to any "dealer", without qualification, selling in Florida from offices outside of Florida by mail or otherwise.

The Eleventh Circuit's certified question, namely, whether Skurnick was selling securities in this State, is readily perceived as only a fragment of a question in the light of the language in § 517.12(1). The complete question for this Court to resolve is whether Skurnick, an introducing broker, was selling securities in this state from offices outside this state by mail or otherwise. § 517.12(1) should be construed in connection with every other part to produce an harmonious whole. E.g., 2A Sutherland Statutory Construction § 46.05 (4th ed. 1984). Cf., Greenleaf & Crosby Co. v. Coleman, 117 Fla. 723, 158 So. 421 (1934) (a statutory definition takes precedence and controls over all definitions).

What the Eleventh Circuit has characterized as "activities" of Skurnick are referred to by all other authorities as "contacts" of Skurnick. Using the Eleventh Circuit's

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Appendix 2 only, it is plain that Skurnick's "activities" or "contacts" literally fall within the plain language of § 517.12(1) and the statutory definitions of the terms used therein. Rule 3E-200.001 merely confirms this and, in doing so, recognizes types of dealers or brokers common in the securities industry.

The "activities" or "contacts" of Skurnick detailed by the Eleventh Circuit in its Appendix 2 are:

> 1. The article which Ainsworth read relating to Skurnick's success with small accounts appeared in Money's Worth, a New York publication.
>
> 2. Ainsworth wrote to Skurnick in his New York office after reading the magazine article.
>
> 3. In response to Ainsworth's inquiry, Skurnick wrote to Ainsworth in Florida, including an application form and a letter which Ainsworth signed, giving Skurnick authority to open a discretionary margin account and enclosing a check made to Bruns, Nordeman, Rea & Co.
>
> 4. Ainsworth completed the application form in Florida and returned it to Skurnick's New York office.
>
> 5. Monthly statements were sent to Ainsworth in Florida by the firms through which Skurnick dealt, Bruns Nordeman and Bache. Skurnick's name was prominently displayed on the statements.
>
> 6. Ainsworth is deaf and never spoke personally with Skurnick over the telephone. There were occasions when Skurnick spoke with Ainsworth's nephew. It is unclear from the record, however, whether Skurnick placed any of the telephone calls.

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7. Skurnick speaks of writing letters to his clients. (R) 46 and 47:25-1.

8. Skurnick testified that he wrote to Ainsworth in Florida, suggesting that he get off margin. (R) 47:9.

9. Skurnick sent a rebate form to Skurnick in Florida which Ainsworth returned through the mail. (R) 53.

Other "activities" or "contacts" of Skurnick were not detailed by the Eleventh Circuit in its Appendix 2:

1. Skurnick knew that Ainsworth was a resident of Florida.

2. Skurnick's offices were in New York originally but moved later to Connecticut.

3. In 1976, Skurnick was registered as a broker/dealer in three States, namely, New Jersey, New York and Connecticut. By 1985, Skurnick was registered only in Connecticut. Tr. 12

4. Skurnick chose the clearing broker for Ainsworth.

5. Skurnick's clearing broker at the time that the transactions with Ainsworth commenced in 1976 was Bruns, Nordeman, Rea & Co. (R2-31-19).

6. Early in the nine-year relationship of Ainsworth and Skurnick, the latter changed clearing brokers and switched to Prudential-Bache Securities Inc. as his clearing broker.

7. Skurnick's clearing brokers mailed confirmations of the securities transactions in Ainsworth's account to Ainsworth in Florida during the nine-years in which the securities account existed. Tr. 17.

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8. Skurnick was identified on the confirmations of securities transactions. Tr. 17.

9. There were numerous transactions in Ainsworth's account over the nine-year period.

10. Ratifications occurring because of the receipt of confirmations, statements, etc., occurred in Florida.

11. Skurnick testified he was "engaged in the business as a broker." Tr. 11.

12. Skurnick received commissions on all transactions effecuated in Ainsworth's account. Tr. 19.

13. When Ainsworth moved within the State of Florida during 1976-85, he notified Skurnick who, then, communicated by mail to the new address. Tr. 24.

14. Ainsworth signed two agreements sent to him by Skurnick, a standard customer's agreement and a joint account agreement. Tr. 27.

15. Skurnick became registered with the National Association of Securities Dealers, Inc. as a broker/dealer in 1972. Tr. 12.

16. Skurnick was registered with the S.E.C. in 1972. Tr. 12.

17. Skurnick testified: "I served as an introducing broker". Tr. 33.

18. Despite his clearing broker's performing of its clearing functions, Skurnick basically was responsible for the handling of the account. Tr. 33.

19. Skurnick had a special form for people like Ainsworth who wrote to Skurnick because of the Money's

Worth article; and, this form was among the papers mailed to Ainsworth completed by him, and mailed back to Skurnick. Tr. 37.

20. Skurnick or one of his assistants wrote to Ainsworth for instructions. Tr. 48.

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CONCLUSION

Because of the clear and unambiguous language of § 517.12(1), including that of this statute's unique long-arm provision; and, because of the statutory definitions of terms used in this statute; Skurnick was plainly selling securities to Ainsworth "in" Florida as an introducing broker from Skurnick's offices outside of Florida, by mail or otherwise. In addition, the Florida Department of Banking and Finance's interpretation of § 517.12(1) as well as an application of the "contacts" or activities test developed judicially to determine if securities were sold in a State in violation of a securities registration statute; both confirm the conclusion reached from a consideration of the statutory language alone. The District Court's analogy to Florida's general long-arm statute for purposes of applying the long-arm provision in § 517.12(1) was a proper analogy. The result reached by the District Court was correct.

The question certified by the Eleventh Circuit must be answered in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished via U.S. Mail to: MR. SAM SKURNICK, 143 Hoyt Street, 5J, Stamford, Connecticut 06905 this 7th day of September, 1990.

Respectfully submitted,

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