

# Supreme Court of the United States

MERRILL LYNCH, PIERCE, )  
FENNER & SMITH, INC., )  
Petitioner, )  
v. )  
DAVID WARE, ET AL., )  
Respondents. )

No. 72-312

LIBRARY  
SUPREME COURT, U. S.

Washington D. C.

October 9, 1973

Pages 1 thru 28

Duplication or copying of this transcript  
by photographic, electrostatic or other  
facsimile means is prohibited under the  
order form agreement.

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE  
OCT 18 11 25 AM '73

HOOVER REPORTING COMPANY, INC.

Official Reporters  
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

MERRILL LYNCH, PIERCE,  
FENNER & SMITH, INC.,

Petitioner,

v.

No. 72-312

DAVID WARE, ET AL.,

Respondents.

Washington, D. C.  
Tuesday, October 9, 1973

The above-entitled matter came on for argument  
at 2:37 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM H. ORRICK, JR., ESQ., 600 Montgomery Street,  
San Francisco, California 94111; for Petitioners.

JOSEPH C. BARTON, ESQ., 1100 Hearst Building,  
San Francisco, California 94103; for Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
William H. Orrick, Esq., For the Petitioners	3
In Rebuttal	32
Joseph C. Barton, Esq., For the Respondents	12

\* \* \*

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-312, Merrill Lynch, Pierce, Fenner & Smith, Inc. against David Ware, Et Al.

Mr. Orrick, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM H. ORRICK, JR., ESQ.

MR. ORRICK: Mr. Chief Justice and members of the Court:

With the permission of the Court, I would like to save my last ten minutes for rebuttal.

This case is here on a writ of certiorari to the First Appellate District of the Court of Appeal of California, which is our intermediate appellate court.

It is an action for declaratory relief and damages which was brought in the California Superior Court by Mr. Ware on behalf of himself and others, alleging that a forfeiture provision in a profit sharing plan violated a California law and was unenforceable.

Merrill Lynch answered and petitioned for arbitration, and it did so because it had agreed with Merrill Lynch -- with Ware that any and all disputes arising out of his employment would be arbitrated in accordance with the rules of the New York Stock Exchange.

The Judge in the Superior Court denied the petition and without findings and he was affirmed by the Court of Appeals,

notwithstanding the fact four months prior the very same court had held under identical facts that Merrill Lynch had the right to arbitrate. That case is the Ware case, which we have included in our Appendix and to which I shall make further reference.

Merrill Lynch then petitioned the Supreme Court of California to review these two conflicting decisions, and the Supreme Court denied it and we came here to ascertain whether or not there isn't a federal interest in maintaining the uniform application of these New York Stock Exchange rules.

Now, the pertinent facts are few and they can be stated simply: Ware was employed as an account executive by Merrill Lynch in July 1958. Merrill Lynch is a member of the New York Stock Exchange and, as such, it is required to abide by its rules which include the fact that all account executives must be registered representatives of the Stock Exchange.

Now, to become a registered representative of the Stock Exchange, it is necessary for the applicant to undergo a rigorous 26-week training course to pass an examination with respect to both his competence and his integrity, and then he must agree to abide by the rules of the New York Stock Exchange. The rules requiring this are set forth in the Appendix to our brief, Rule 345 and the rules governing arbitration, Rule 347, is on page 9 of the Appendix.

Mr. Ware did exactly this: He took the course, he



passed it, and he signed an agreement to abide by the rules of the New York Stock Exchange.

Q Mr. Orrick?

MR. ORRICK: Yes, sir.

Q The other case you refer to is Frame, and not --

MR. ORRICK: Frame, excuse me, yes, sir.

Q And I gather both, as I understand it, from Division 4, is that right?

MR. ORRICK: No, sir, they were both the same division.

Q In the First Appellate --

MR. ORRICK: In the First Appellate District.

Q And at least one judge was common to both panels, Judge Divine?

MR. ORRICK: That's correct, Judge Divine, yes, sir. That's correct.

Q They were decided just months apart?

MR. ORRICK: Four months apart, yes, sir.

Frame then went to work as a registered representative and --

Q Do you mean Ware?

MR. ORRICK: -- in the San Francisco office of Merrill Lynch.

Q Ware or Frame?

MR. ORRICK: I misspoke myself. Thank you, Mr.

Justice. Ware. This is the Ware case, yes, sir.

He then went to work for Merrill Lynch and he became eligible in January to become a participant in the Merrill Lynch Profit-Sharing Plan. Now, the Merrill Lynch Profit-Sharing Plan is a plan to which Merrill Lynch is the sole contributor. And the purpose of the plan is to provide an incentive for the employee to stay with Merrill Lynch and to provide him a future and additional source of income.

Q You regard both of these aspects, that is the arbitration clause and the retirement clause, as part of the contractual arrangement?

MR. ORRICK: No, sir. The plan specifically provides in Article 18 that it is not to be considered part of the contract of employment.

Q The arbitration clause is?

MR. ORRICK: The arbitration clause is. The plan has several other very important provisions. In section 22.1, it provides that it shall be interpreted under the laws of New York; and in Article 11.1, which brings about the instant law suit, it provides that if the employee voluntarily terminates his employment with Merrill Lynch and goes to work for a competitor, that his rights and benefits under the plan may be declared forfeited.

Now, to join the plan, Mr. Ware had to agree to the conditions of the plan, and this he did, his second agreement.

Q Mr. Orrick, why is it important in your argument that the contract provided it should be interpreted according to the laws of New York?

MR. ORRICK: Because what appeared to be the gravamen of Mr. Ware's action, namely that Business and Professions Code, Section 16600, made this forfeiture clause invalid and therefore the choice of law, therefore that created a strong public policy in California which would outlaw the choice of law provision. I don't know if I make myself clear.

Q I don't see why the argument you make here about in effect federal preemption would -- if they didn't prevail, as you make them, why it would make it improper for California, as a matter of public policy, to reject New York law?

MR. ORRICK: Well, I don't -- I haven't said that, Your Honor, except I want to make this point: The California statute which is Business and Professions Code, 16600, provides every contract by which anyone is constrained from engaging in a lawful profession, trade or business of any kind is to that extent void. That is what the statute says.

Now, the Supreme Court in this Muggill v. Reuben Donnelley held that the application of that statute to a provision in a plan that was similar to this would render this forfeiture clause unenforceable in California. However, that statute does not mean what it says, because the Supreme Court of California in another case, Gordon v. Landau, has said that



statute will not apply in a situation where there are trade secrets or customers lists or things of that nature involved, and that is what we clearly think we show here, if we get to arbitration. But we are asking here our right to arbitrate. We have an agreement to arbitrate with Mr. Ware, which is under the Federal Arbitration Act, and under the State Arbitration Act, valid, irrevocable and enforceable; and, in addition to that, we have --

Q Well, certainly not enforceable under the State Arbitration Act --

MR. ORRICK: Sir?

Q Certainly not enforceable under the State Arbitration Act, is it, because the California Court of Appeals ruled against you?

MR. ORRICK: That is why we are here. We think it is clearly enforceable under the State Arbitration Act, as it is under the Federal Act, and we think -- otherwise, the result would be form shopping, as the Chief Judge dealt with in the Mowinckels Raderi case. But we are entitled to it under that. In addition, Mr. Justice, we are entitled to it under the New York Stock Exchange rules, particularly 347(b).

Now, these rules were promulgated pursuant to section 6(c) of the Securities & Exchange Act of 1934, and they are in this industry, the only industry of its kind, where this Court has referred to it as the federally mandated self-regulation,

arbitration is a very important part of that self-regulation. And we have here a situation involving interstate commerce and we have here a situation involving the question of whether these rules of the New York Stock Exchange will be uniformly applied. If we were in New York, for example, it would be perfectly clear that there would be arbitration under the rules. So we think we are entitled to that, to arbitrate, and entitled both under the federal statute and under the rules of the Stock Exchange.

Now, Mr. Ware's --

Q What if the position of the Exchange rules was contrary to the laws of New York? Let's assume New York had a provision like California does about arbitration, or about this -- arbitration and this restrictive agreement?

MR. ORRICK: Well, the plan is to be interpreted under the laws of New York. Now, if New York had ruled it invalid, clearly the provision couldn't be interpreted in favor of Merrill Lynch.

Q Well, are you saying that it is just agreement in the contract that invalidates the California provision? Or are you saying that there is a provision in the federal law which says that the validity of the Exchange rules is to be governed by the law of the state in which it is located?

MR. ORRICK: Well, I --

Q And some other state attempts to invalidate what

is consistent with New York law, the federal law prevents the California provision.

MR. ORRICK: Well, the federal law says, in section 6(c), that the Stock Exchange shall adopt rules consistent with the rules of the state in which it is located, and the New York Stock Exchange is located in New York, and those rules are consonant with the laws of New York.

Q And then you are arguing that if California nevertheless attempts to invalidate a Stock Exchange rule, which is consistent with the law of New York, it is the federal law that prevents California from doing it?

MR. ORRICK: Well, that is right. I think that is --

Q Is that what your argument is?

MR. ORRICK: -- the doctrine of preemption --

Q You can call it what you want, but it is a conflict then, isn't it?

MR. ORRICK: That's quite exactly so. Now, I have been --

Q I mean that is your argument, that it is a conflict.

MR. ORRICK: Yes, and let me --

Q To look at it another way, Mr. Orrick --

MR. ORRICK: Yes, sir.

Q -- if I understand it, what you are really arguing is that by reason of the federal statute, section (c), that

statute makes California law inapplicable to the determination of this issue. Only New York law may be tested to see whether New York law or whether these regulations were inconsistent with New York law. Isn't that it?

MR. ORRICK: Correct, Mr. Justice, and that now brings me to a discussion of the California statute, Labor Code, Section 229 --

Q If you are right about that --

MR. ORRICK: Yes, sir.

Q -- what's left of the case?

MR. ORRICK: Arbitration.

Q But then you have won your case on arbitration then.

MR. ORRICK: Yes.

Q I mean, that is the only thing, the only issue that is here?

MR. ORRICK: Well --

Q The only issue that is here is arbitration?

MR. ORRICK: That's right. And then we go back to arbitrate.

Q All right.

Q Well, actually, I suppose more accurately the issue is whether that California statute was properly applied to deny arbitration.

MR. ORRICK: That's correct. And there are, Mr.

Justice, there are in effect two California statutes here in question. The one --

Q     Whatever they may be, if you are right in your interpretation of section (c) of the federal statute, and of the supremacy of the federal statute as applied here, we don't have to get into any California statute.

MR. ORRICK: That is correct.

May I reserve the rest of my time?

MR. CHIEF JUSTICE BURGER: All right.

Mr. Barton?

ORAL ARGUMENT OF JOSEPH C. BARTON, ESQ.

MR. BARTON: Mr. Chief Justice, may it please the Court:

I think it is important to put this case in perspective so that the Court can consider the narrow issues that are presented here.

This case is really about one-hundred or more former employees of Merrill Lynch who resided in California, and who worked for their employer with integrity and with competency.

Q     In California?

MR. BARTON: In California, Your Honor. And who by reason of their employment, and by reason of contributing to the success of Merrill Lynch, are entitled to be paid their earned wages.

Now, there is no dispute in this case that the profit



sharing that we are talking about is wages.

Q This was not a contributing plan, was it?

MR. BARTON: No, Your Honor, it was not. I believe Petitioner stipulated to the definition of wages as authoritatively construed by the California Supreme Court in the case of Wise v. Southern Pacific.

So they are asking that they be paid their lawfully accrued wages. Now, this case is not about any individuals who have violated any rules of the New York Stock Exchange, any regulations of the Securities & Exchange Commission --

Q How do we know that? Is there a record of evidence on that subject?

MR. BARTON: The determination of the class, Your Honor, was limited to those individuals who by reason of one fact, they went to work for a competitor where they opened a competing business, were denied their profit sharing rights. There is nothing in the case --

Q Well, under that, might there not be a showing that there was the use of customer lists, et cetera?

MR. BARTON: Your Honor, I believe that the interpretation of the Business and Professions Code, section 16600, forecloses that consideration, because it states on its very fact that any restraint, there is a different set of laws, Your Honor, in California that apply to customer lists and confidential information gained through employment.

Q Well, that is the question, whether a contract clause fixing the form and calling for arbitration is valid, isn't that what this case is all about?

MR. BARTON: Yes, that is correct.

Q Or is it a question of whether it can be enforced against the will of the forum state?

MR. BARTON: No, I don't think that is the question, Your Honor. Arbitration is not mandated by any rule of the Securities & Exchange Commission as amicus has pointed out in its brief, nor is it required by any ---

Q You mean the Stock Exchange? The Stock Exchange or the Securities & Exchange --

MR. BARTON: No, no, the Securities & Exchange Commission, Your Honor, has filed an amicus brief in the case, and it is their position that the rule is not required by any regulation, any legislation enacted by Congress in the Securities & Exchange Act particularly, and it is not required by any rule or regulation promulgated by the Securities & Exchange Commission.

Q If this action had arose in New York, I suppose the arbitration clause would have been enforced, wouldn't it?

MR. BARTON: Well, Your Honor is asking me a question about New York law.

Q Yes, I am.

MR. BARTON: Yes, sir. Well, according to the case

that I have cited in my brief --

Q Well, I will ask it another way, then.

MR. BARTON: It would not have been enforced, Your Honor, because it concerns a matter of illegality, which is unenforceable in the New York courts, pursuant to the decision of the highest court, the Court of Appeals.

Q Well, I will ask you another way: Your position in the case is that California law governs this case as to the enforceability of the arbitration clause?

MR. BARTON: Yes, Your Honor, not federal law.

Q Why isn't New York law applicable?

MR. BARTON: Why isn't New York law? Because, number one, Your Honor, the case was submitted to the California courts based on California law by the petitioner, and the petitioner asked for an interpretation of the RE-1 form and rule 347(b) --

Q Who brought the law suit?

MR. BARTON: The respondents did, Your Honor.

Q Yes. And you base it on New York -- on California law?

MR. BARTON: Well, the nexus of the complaint, Your Honor, is about the forfeiture provision in the profit sharing plan which has nothing to do with the securities business.

Q Well, the case was decided by the court on the basis of California law, wasn't it?

MR. BARTON: Correct, Your Honor.

Q The Court below applied California law?

MR. BARTON: Yes, it did, Your Honor, as to one little area.

Q Well, the area whether or not the arbitration clause is to be enforced in this case?

MR. BARTON: Well, that is the specific question, but the general question --

Q Well, I don't want to go any farther than that.

MR. BARTON: Yes, that is correct.

Q Now, about the arbitration, that is --

MR. BARTON: As to wage dispute.

Q -- you say that California law governs this, it was held to govern this case?

MR. BARTON: That is right, Your Honor, as to wage disputes, yes.

Q Now, let's assume that the arbitration clause was quite valid in New York.

MR. BARTON: Was valid in New York, yes, Your Honor.

Q Let's assume that it was.

MR. BARTON: All right.

Q Now, 6(c) says that the Stock Exchange may make rules as long as they are consistent with the law of the state in which they are incorporated.

MR. BARTON: That is correct, Your Honor.

Q Now, why should California be able to apply its law when the federal law says the Exchange rules are to be tested by the state, the law of the state in which it is located?

MR. BARTON: Excuse me, Your Honor. There has been no definition yet in the legislative history of the Act as to what "located" means. Now, I submit, Your Honor, the New York Stock Exchange is physically located in New York. That is certainly --

Q Well, let's assume that we decided here or some court decided that located means for the New York Stock Exchange, it means New York.

MR. BARTON: All right.

Q Let's assume that.

MR. BARTON: All right.

Q Let's assume it for purpose of section 6(c) --

MR. BARTON: Yes.

Q -- that the Stock Exchange is located in New York. Then what?

MR. BARTON: If the matter were to be decided under New York State law, New York State law would determine where the arbitration --

Q Contrary to the law that was applied in this case.

MR. BARTON: I don't believe that the New York State



law is contrary in outcome. I believe it would be the same result.

Q Well, that is just a --

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barton.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned.]

- - -