Wednesday, October 10, 1973

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MR. CHIEF JUSTICE BURGER: Mr. Barton, you may continue. You have 15 minutes left.

ORAL ARGUMENT OF JOSEPH C. BARTON, ESQ.

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

I believe at the conclusion of yesterday's session, the Court had addressed itself to the 6(c) argument concerning the application of state law, and in that connection I would like to point out to the Court that the Securities & Exchange Commission, in their amicus brief filed under the auspices of the Solicitor General, considered that very argument made by the Petitioner, and stated on page 9 of its brief that there is no basis for suggesting that Rule 347(b) was required to implement the literal language of the Act or any Commission rule.

It further concluded that the application of California law was proper in this case and urged affirmance of the California court decision.

I would like to point out regarding section 6(c) that it specifically provides that any rule enacted by any Exchange must conform to the rules and regulations of the Securities & Exchange Act, as well as the rules and regulations of the Securities & Exchange Commission; and that this Court has held

in Silver v. New York Stock Exchange that a rule of an Exchange may be judicially invalidated as being beyond the great purposes of the Securities & Exchange Act.

I submit that 28(c) and Rule 347(b) as adopted by the New York Stock Exchange is a stipulation within the meaning of section 78(c)(c)(a) of the Act and is void by reason thereof.

Moreover, it is inconsistent with the grant of judicial authority that Congress gave the courts in section 27 of the Act, which would be 15 USC 78aa, and that provides that the District Courts of the United States shall have exclusive jurisdiction of violations of this chapter with the rules and regulations thereunder.

In addition, Rule 347(b) is inconsistent with the provisions of the Federal Arbitration Act, since admittedly it is an agreement which concerns interstate commerce and which is a part of the employment contract.

As this Court noted in the Prima Paint decision, the Federal Arbitration Act was not meant to apply to contracts of employment between parties of an equal bargaining strength. Justice Black, in his dissenting opinion in that case, spelled out the legislative intent behind the Federal Arbitration Act, and that was that it was not meant to apply to contracts of employment.

Now, both this Court in Silver and the Senate Subcommittee on Securities, in its extensive analysis of the

functioning of the New York Stock Exchange, concluded that judicial review was necessary regarding the self-regulatory powers of the New York Stock Exchange. And I would like to observe at this point that it is not the New York Stock Exchange which is a party to this law suit but, rather, a private corporation that came into existence by virtue of state law, and that Merrill Lynch, like being a member of the New York Stock Exchange, is also a member of the Pacific Coast Stock Exchange, which is physically located in California.

Now, if Congress meant physical location in section 6(c), it would lead to disunity in decision because there are many stock exchanges located throughout the country which are not in New York, and that would give a stock exchange moreover the opportunity to physically locate itself in a state whose laws are favorable to its policies and thereby effectivaly emasculate the laws of 49 other states.

Q You are suggesting that if the Pacific Coast Exchange had a rule like the New York Stock Exchange does, it couldn't enforce it under Merrill Lynch's theory, because it is physically located in California?

MR. BARTON: Yes, I submit that would be correct under one rationale. I believe that Congress intended by location to mean the application of those laws of a state which have significant -- which have a significant interest in the case, such as California in this case.

Q Does the Pacific Coast Stock Exchange have any rules touching this area of relationship between -- or the termination of employment of a registered customer's employer?

MR.BARTON: Your Honor, the Pacific Coast Stock Exchange does have rules concerning arbitration which are very similar to Article VIII, section 1 of the New York Stock Exchange Constitution, which provides in essence that a member -- Merrill Lynch in this case -- cannot compel a non-member to arbitrate. That choice is given to the non-member, if he willingly wishes to invoke arbitration. And the rationale behind that distinction is that obviously Merrill Lynch has a voice in the exchange rules which an employee does not have, so they do not have equal bargaining strength. So they give the non-member --

Q An option?

MR. BARTON: -- an option to request arbitration.

Q Do you think the federal courts should order arbitration in a case like is now before us if the employee demands it?

MR. BARTON: If the employee demands it, I would --

Q Under California law?

MR. BARTON: Excuse me, Your Honor?

Q Under California law?

MR. BARTON: Yes, I think that if the employee demands it, that would be an exception to the application of --

Q Of California law.

MR. BARTON: -- a waiver of section 229 of the California Labor Code, yes, Your Honor.

Q You have no difficulty with the waiving of a provision that was made for his benefit in this context of the employer-employee relationships?

MR. BARTON: Is Your Honor referring to the arbitration provisions?

Q Yes.

MR. BARTON: Well, Your Honor, it is not my opinion that the arbitration clause or the rule was made for the benefit of the employee but, rather, to benefit the members of the New York Stock Exchange, because the employee would be compelled to arbitrate before what I consider a less than impartial panel.

Q Speaking of the California law, as you were engaged in a colloquy with Mr. Justice Stewart, waiving the benefits of California statute --

MR. BARTON: Can you waive that?

Q -- you have no difficulty with his waiving that?

MR. BARTON: Well, Your Honor, there is a body of decision that indicates that an individual may not waive a law enacted for his benfit, that represents public policy. I would say that the California courts would have to consider in a factual context whether or not --

Q Then I misunderstood you, because I thought you

just told Justice Stewart, in response to his question, that he could waive it.

MR. BARTON: Well, the employee could waive it, Your Honor, but whether the California courts would recognize that waiver is a different question. And I should also point out that Rule 347(b) does conflict --

Q Well, I don't follow that. If I read 229 correctly, what it says is that the individual may maintain an action without regard to the existence of any private agreement to arbitrate. Now, if the employee didn't bother bringing an action but, rather, submitted to arbitration, how would the California courts ever get to it?

MR. BARTON: In that context, Your Honor, they wouldn't unless the employer moves the court to compel the matter not be arbitrated but go to court. They would reach it in that case.

Q Well, after the arbitration was completed, the employee might then make a collateral attack or other attack on the arbitration claim --

MR. BARTON: That is not permitted under California law, Your Honor, if the employee --

Q I said it couldn't get there any other way, it might get there if he brought such an action.

MR. BARTON: In the courts, correct, Your Honor. If the employee submitted to arbitration and the employer rejected

that request, the employer would then be in the position of going to court to avoid arbitration. The issue would arise in that context, and I guess it could also arise in the context where both parties submitted to arbitration and then after the arbitration award was made the employee, being dissatisfied with it, would petition the courts. But under that circumstance, Your Honor, the California courts would not consider that objection, as I understand existing California law.

I should also --

Q Once he voluntarily goes to arbitration, he can't take advantage of 229, is that correct?

MR. BARTON: That is correct, Your Honor. He is bound by it, since 229, as it states on its face, is not compulsory. It doesn't say "must," it says "may."

Q May be maintained, without regard to the --

MR. BARTON: That's correct, Your Honor.

Q Mr. Barton, is this motion to arbitrate that the petitioner filed in response to your complaint in the Superior Court, is that an independent proceeding under California law, or is it just a part of the defense raised to your claim for wages?

MR. BARTON: Your Honor, under California law, it could be either an independent action or it could be part of a law suit. There are situations arising under California law where you may go in to court on just a petition to arbitrate.

Q But that isn't what happened here?

MR. BARTON: That isn't what happened, no.

Q And actually the decision of the Court of Appeals isn't a final disposition of this case, is it?

MR. BARTON: Well, Your Honor, under accepted -- well, under California law, no, it isn't. It established the law of the case as far as the illegality of the forfeiture provision, that is, the Court of Appeals indicated there are other issues that remain to be decided by the trial court.

Q And if the California Court of Appeals disposition were followed here, the case would go back to the Superior Court for trial to the court on your client's claim?

MR. BARTON: That is correct, Your Honor. However, in all fairness, I should note that if the court consider arbitration to be an outcome determinative, as was indicated in the Bernhard decision, then that part of the California decision would be final.

I should also like to note, Your Honor, that if I understood counsel's opening argument, he indicated that the profit-sharing plan by virtue of Article 18.1, which is contained on -- which is noted at page 41 of the Appendix --- specifically stated that the profit-sharing plan was not to be construed as part of the employment contract. And I submit under that theory, then Rule 347(b) would have no application in this case because it specifically relates to employment

disputes. And by the functioning of Article 18.1, it would be excluded from the application of Rule 347(b).

Now, concerning counsel's statement that Respondents have somehow been guilty of forum shopping, I submit that that is not accurate. Now, each and every respondent is a citizen, a resident of the State of California. All they have done is petition their own state courts for a decision regarding this dispute. They have not sought to go outside their home state to, for example, Nevada or Wyoming, to forum shop. This is not a case of forum shopping.

Now, the policy of California is spelled out in several cases. California courts deem it a matter of important strong public policy concerning the right of a wage earner to all lawfully accrued wages, and in this context I would like to note that although technically Merrill Lynch made all contributions to the profit-sharing plan, those contributions evolved because of the work and labor of the employees who contributed to the profit of Merrill Lynch. And it is no different than Merrill Lynch writing out a check to Mr. Ware or any other respondent for their weekly wages, because profit sharing, even as interpreted by a federal court, results because of a man's labor and is not construed as a gift.

Now, the concern of the courts to avoid forfeitures has been manifested I think most recently by the action of the Senate in adopting and passing H.R. 4200, which is the private

pension plan bill. And that states in no unequivocal terms that to qualify under the Internal Revenue Code, a pension plan may not contain a forfeiture provision. It also provides that an individual who works and is given retirement benefits can carry those benefits from employer to employer.

Now, this is more or less a parallel to profit sharing. It shows the great concern not only in the state courts but in Congress that a man not be deprived of his lawfully accrued benefits, and that he be paid them.

Now, I submit --

Q You still don't have a stronger case than for a contributory plan, do you?

MR. BARTON: Well, Your Honor, that is kind of a theoretical question, because if David Ware and the rest of the Respondents didn't work and contribute to Merrill Lynch's profit, they wouldn't get paid anything.

Q Well, Merrill Lynch probably feels this is a gratuity on their part, it is something that builds up loyalty. I mean there are two sides to the issue.

MR. BARTON: That is correct. I would agree to that, Your Honor. I do not make that distinction, though, between contributing to --

Q Well, in any event, that really goes to the merits of what would be tried in a court, if you're correct, or tried by an arbitrator, if your brother on the other side is

correct, doesn't it? It goes to the merits of the case?

MR. BARTON: That is correct, Your Honor.

Q There is no question, is there, but that -- isn't it conceded that these are wages, if that is what the statute --

MR. BARTON: That's correct, the Petitioner concedes that.

Q I didn't think there was any question.

MR. BARTON: There isn't, Your Honor.

Q Being tried on the merits, what is your idea of the scope of the issues that will be covered? Will they include, for example, any claim that there was a breach of the fiduciary duty, when you open?

MR. BARTON: Well, Your Honor, I believe that Merrill Lynch will make such a claim.

Q That is open, to be tried out, then?

MR. BARTON: Yes, there is a breach of a fiduciary duty.

Q Taking customers lists and that sort of thing, if they can establish that?

MR. BARTON: That is correct, as against each individual employee or former employee. That would be one of the issues that I believe the Court of Appeals in California left open, so obviously Merrill Lynch's rights were not prejudiced by having a trial, one trial, I should note, Your Honor, that

would include everyone in the class and to decide at one time and for all time what the respective rights of the parties are.

Now, on the opposite side of the coin, we have Merrill Lynch suggesting that it would be more efficient and effective to have 90, 100 or more separate arbitration hearings to decide each case individually. And, as the Court knows, there is no principle such as stare decisis that binds arbitrators. A group of arbitrators could decide one case one way, could decide the next case the other way. It is not a necessary corollary of arbitration under the New York Stock Exchange Plan that one panel of arbitrators would adhere each and every one of those cases.

Q Is there any indication as to why your state Court of Appeals changed its course by 180 degrees?

MR. BARTON: Yes, there is, Your Honor. When the case was presented, Frame v. Merrill Lynch, the Labor Code, section 229 argument was not made; neither was there an explication of the effectiveness of Rule 347(b) in relationship, for example, to the New York Stock Exchange Constitution, Article VIII.

Now, in the exhibits before this Court, after argument, oral argument before the Court of Appeals, the issue of Frame v. Merrill Lynch came up. Thereafter, the court sent a letter to respective counsel, which is Exhibit D, requesting --

Q Of the Appendix?

MR. BARTON: It is not in the Appendix, Your Honor, it is in the exhibits.

Q All right.

MR. BARTON: It is Exhibit D -- requesting further written argument regarding five separate points. One of those points was related to Labor Code section 229. The court specifically held in Ware v. Merrill Lynch that the court did not consider the application in Frame v. Merrill Lynch of Labor Code section 229, and I think the court should be commended for having the judicial courage to reverse what I considered an incorrect decision at the outset. And I should also note that under the class aspects of this case, that Mr. Frame I believe would be covered.

Q Even though he lost?

MR. BARTON: Well, he didn't lose on the merits, Your Honor. All it said was that there should be arbitration, and I believe --

Q Well, that is on the merits of the issue that is now before us.

MR. BARTON: Right.

Q That is the issue, isn't it?

MR. BARTON: Well, I should note -- that is the issue, Your Honor, arbitration -- I should note that there was extensive discussion between myself and Mr. Frame's counsel regarding his position before the argument on appeal, and there

was an invitation at that time that was extended to him to join in the class and, of course, we considered in great detail what position he was going to take on his briefs, which was different from the position that I took on behalf of the class in my brief.

I believe, Your Honor, in conclusion, that I would like to note that I just feel that it is inconceivable that Congress could have meant that New York law, which has no significant context with California residents in this case, should apply to the exclusion of the law of 49 other states, many of which would have significant context as far as their own residents are concerned, at least.

Q Well, that isn't really the issue, is it? Isn't the real issue whether this rule of the New York Stock Exchange should apply, which incorporates or refers to New York law? But it is a rule of the New York Stock Exchange.

MR. BARTON: That is correct, Your Honor, pursuant to its rule-making authority granted under 6(c).

Q Right.

MR. BARTON: Right.

If there are no further questions, I would like to thank the Court at this time for its attention.

MR. CHIEF JUSTICE BURGER: Mr. Orrick?

REBUTTAL ARGUMENT OF WILLIAM H. ORRICK, ESQ.

MR. ORRICK: Mr. Chief Justice --

Q Mr. Orrick, at some point would you mind dealing with the government's argument that, while 6(c), the language of 6(c) is very broad, any rule, it says, any rule --

MR. ORRICK: That's right.

Q But I read the brief amicus of the Securities & Exchange Commission as saying, no, any rule should be limited to rules related to investor protection, fair dealing or fair exchange administration, I gather based on what they give us in the way of legislative history of 6(c) and of the general purposes of the Act. And as I read their conclusion, it is that any rule does not embrace 347(b).

MR. ORRICK: No, sir, and with that I take exception. The legislative history of the Act is replete with discussions of the efficiencies in employees of the securities industry, both as to their competence and to their integrity, so even the 1964 special study mandated by Congress had similar references to these deficiencies. And indeed if the Court would look at the agreements made by Mr. Ware and his colleagues -- and I call attention to them, the one in question here, which is on page 8 of the Appendix to our brief, it is subsection (J) of Rule 345, and it reads in English as plain as it can be written, "I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in

accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange."

And then if you read Mr. Ware's affidavit, which appears in Volume I of the record, at page 171, and he says, "As far as I knew, this was nothing more than an application for registration. At no time were the provisions contained in that form discussed with me or explained to me, nor was I ever provided with any sort of study guide referencing the provisions before I signed it. I did not understand it to be a contract or agreement of any type."

I suggest that this record itself is reason enough for the Securities & Exchange Commission to regulate the conduct of employees. Here are these employees who were dealing with -- giving financial advice to widows and orphans who will say under oath that they don't understand what they read and back out on their agreements.

Q Is there anything in the record indicating whether Ware was also a member of the Pacific Coast Exchange as a result of his employment with Merrill Lynch?

MR. ORRICK: I don't recall that there is anything in the record on that.

Now, the position of Merrill Lynch is, first, we have an agreement to arbitrate under a rule of the New York Stock Exchange which is valid in the State of New York, and under 6(c)

that rule should be adhered to. Whatever veneer the SEC can put on the rule by saying that this is within oversight, the purview of our oversight safely enforces the status of this rule which we claim here has the --

Q Your whole case depends on 6(c), the language of 6(c), rules and regulations, including 347(b), doesn't it?

MR. ORRICK: The whole case -- yesterday, I said first we have a right to arbitration under the California Arbitration Act, which is the same as the Federal Arbitration Act. We have a right to arbitration under these --

Q But that is not a federal question, that is not our problem. So far as your case in this Court, it turns on your persuading us, does it not, that 6(c) covers 347(b)?

MR. ORRICK: Well, 347(b) was enacted pursuant to the same rules --

Q That is the same regulation within 6(c), isn't it?

MR. ORRICK: Well, I think it is also a rule and regulation enacted pursuant to Article III, section 6 of the New York Stock Exchange, and is an equally valid, binding agreement. What we have here is an agreement to arbitrate.

Q Well, where is the -- what is Article II, section 6? What is that?

MR. ORRICK: Article III, section 6, I don't believe that we have it printed, it is in the Constitution of the New

York Stock Exchange, which authorizes the directors to make such rules and regulations as are necessary.

Q Well, isn't part of your argument ---and it is certainly related to the 6(c) argument that the California rule such that not an important objective of the federal law --

MR. ORRICK: Exactly so, Mr. Justice.

Q -- wholly aside from 6(c), you would argue that?

MR. ORRICK: That's right, an important federal policy.

Q You don't need to argue that except in connection with 6(c), if you are right about it, 6(c) automatically picks it up.

MR. ORRICK: That is what I have been trying to say, the rules are set out by itself.

Q What about the important federal policy, is it uniformity or is it a preference for arbitration?

MR. ORRICK: The New York Stock Exchange and the securities industry has a federally mandated self-regulation. In order to accomplish this self-regulation -- and as Judge Medina has indicated in the Coenen case -- it is necessary, a necessary element of it if it is to be able to enforce arbitration. And if you are unable to force the arbitration with respect to a rule governing the conduct of employees in one state, where you can do it in another state, I think that defies the very purpose of this federally mandated self-

regulation.

Q Yet, if New York were to change its law tomorrow so that its law would be the same as California's, under your theory that arbitration rule couldn't be enforced anywhere.

MR. ORRICK: No, to be fair with the Court, I think if New York had a rule like 229, we would have a different case, and that is not our case here, however.

Q Well, so New York can set it not, this important federal preference for arbitration under your own theory.

MR. ORRICK: I would think that it could, yes.

Q If New York had a 229, then section 6(c) would rule out the arbitration provision of the New York Stock Exchange because the only rules that the exchange may adopt are rules and regulations not inconsistent with the applicable laws of the state in which it is located.

MR. ORRICK: Well, that is --

Q So, if New York had a 229, that would nullify, would it not, the arbitration provisions of 347(b)?

MR. ORRICK: That is correct.

Q But the commission itself required it by regulation.

MR. ORRICK: Right. Thank you, Mr. Justice.

One other point I want to make, Justice Rehnquist asked Mr. Barton as to whether or not that California court order is final. It is indeed final as to Merrill Lynch where

the petition to arbitrate is denied.

Q Well, this was something that you aised as a defense when you were brought into court by Mr. Barton's client, isn't it? It wasn't a separate action that you brought to compel arbitration.

MR. ORRICK: We filed in effect -- what we did, we filed an answer and we filed a petition to arbitrate, and the court denied the petition to arbitrate, and that was what was on appeal.

With respect to the question that Justice Stewart asked Mr. Barton as to whether or not section 229 was a part of the Frame case, he asked if there is any explanation for these two diametrically opposite opinions. Mr. Barton correctly said that it wasn't discussed in the Frame case, but it was briefed in the Frame case. I didn't take any part in the opinion.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Orrick, Mr. Barton. The case is submitted.

[Whereupon, at 10:33 o'clock a.m., the case was submitted.]

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