In the

Supreme Court of the United States

ORIGINAL

MARINE BANK,

Petitioner,

v.

SAMUEL WEAVER ET UX

No. 80-1562

Washington, D. C.

Monday, January 11, 1982

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

DANIEL L. R. MILLER, ESQ., Erie, Pennsylvania; on behalf of the Petitioner.

ANDREW J. CONNER, ESQ., Erie, Pennsylvania; on behalf of the Respondent.

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C O N T E N T S

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PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments now in Marine Bank against Samuel Weaver et ux.

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

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

This case involves two separate and distinct instruments: one, an FDIC-insured certificate of deposit in the amount of $50,000 bearing interest at 7 1/2 percent and maturing in six years; secondly, an agreement between a loan customer of the bank and a guarantor of the customer's loan to the bank about which the bank had no knowledge at the time the loan was made.

Petitioner Marine Bank requests that the Court reverse the judgment of the Circuit Court which found that both instruments were securities within the meaning of the definitions of the '33 and '34 Acts.

The FDIC-insured certificate of deposit is not specifically mentioned as an enumerated item in the '33 and '34 Act definitions. However, the Circuit Court of Appeals applied several tests: one, the "any note" test; and secondly, whether it was an investment contract.

In the investment contract issue, the Howey case decided by this Court clearly establishes what the test is and has been since 1946, and that test was further

elaborated upon by this Court in the Tcherepnin case cited a few years later; and that test being a document is a security if it's a contract, transaction or scheme whereby a person invests money in a common enterprise with the profits to come solely from the efforts of others.

We believe that that test has been misapplied by the Circuit Court, and there are three Circuit Court decisions, in the Fourth, Fifth and Seven Circuits: the Burrus case in the Fourth, the Bellah case in the Fifth, and the Fingland case in the Seventh, which hold that certificates of deposit are not securities within the meaning of those cases of this Court.

Is it any note? The statutes say unless the context otherwise requires any note and so forth. Is the CD any note? In this event we'd like you to address the matter the way you did in the Daniel case which looked at the substance of the transaction and not what it is called. If you look at the substance in Daniel, as you did, you found that a pension plan document did not establish a security.

Now, the Third Circuit here said that this was functionally the equivalent of a corporate note. We don't believe that that's correct. A corporate note contains an earnings risk and a risk of repayment. This FDIC-secured certificate of deposit does not have a payment or repayment risk being an insured deposit, and it has a fixed rate of

interest.

QUESTION: Mr. Miller, you haven't mentioned the facts. You don't have to because we know what they are. But you represent the bank here.

MR. MILLER: Yes, I do.

QUESTION: These old people are out their $50,000, aren't they?

MR. MILLER: Well, there was recovery, Your Honor, Mr. Justice, against other collateral, but there would be a substantial portion of that lost, yes, sir.

QUESTION: Is the officer of the bank who handled this transaction still employed by the bank?

MR. MILLER: Yes, he is.

QUESTION: Without reprimand?

MR. MILLER: He has not been reprimanded, to my knowledge.

I believe the Third Circuit erred in its analogy calling this an investment contract. The Tcherepnin case held there was no voting -- the fact of whether there is or is not a voting right connected with the instrument is important. In Tcherepnin that was a savings and loan certificate which contained the element of voting. The CD contains no element of voting.

QUESTION: Well, are you saying that in Tcherepnin the thing was more like a share of capital stock?

MR. MILLER: Yes. It was more like an investment in a savings and loan. The savings and loan had no other investment vehicle other than selling shares or investment certificates as they were called in Tcherepnin. But in this case the bank has, of course, capital stock issued pursuant to the Pennsylvania banking laws, which is where the investment would be in this case.

QUESTION: And you don't question that would be a security.

MR. MILLER: That certainly is a security. The legislative history of the enactment of the '33, I believe, and '34 Acts, in the congressional hearings one of the representatives of the banking industry clearly said that the stock of a national bank would be an investment.

In looking at this you might think of it as to whether it's a commercial instrument or an investment instrument. We believe that commercial instruments are not covered by the securities definitions and investment instruments are.

Legislatively, the '33 and '34 Acts were part of a package of acts that were enacted in those years and which regulated banking in several respects. One was the Glass-Steagall Act and another was the FDIC Act.

Now, those acts provided a parallel system of regulation of banking in this country, that is to say,

federally regulated banking institutions, through the FDIC or the comptroller of the currency. The legislative history of the Glass-Steagall Act shows that there was an attempt when it was passed to separate banking from investment activities. And the Third Circuit, we believe, erred in blurring that distinction and putting it back together agan.

The Respondent Weaver does have a remedy. The Pennsylvania Securities Act, as referenced in the complaint of the Respondent filed in the District Court, does claim account under the Pennsylvania Securities Act where there is essentially the same language as rule 10b-5. Also, there is a Pennsylvania common law fraud count alleged. Both of those are pendant claims, and so there is a state court remedy in this case.

QUESTION: Has a state action been instituted?

MR. MILLER: Yes, it has, Your Honor.

QUESTION: And what is it's status?

MR. MILLER: We understand it's been filed. I don't know whether it's been served.

QUESTION: I didn't get the latter.

MR. MILLER: I understand it has been filed. I do not believe it has been served.

QUESTION: No question of the statute of limitations or anything?

MR. MILLER: I wouldn't express an opinion on

that. There probably is a question on that.

Is the Piccirillo agreement an investment contract? I think there are four elements of investment contract that need to be looked at. One, is there a multiple investor situation? There is none here.

Is there a pooling of funds? There is none here.

Was there a public offering? None here.

Was it solely from the efforts of the promoter Piccirillo? No, for two reasons. This agreement provided that Mr. Weaver could pasture his cows and use the barn of Mr. Piccirillo. And secondly, and very most importantly, he could veto any future loans in Mr. Piccirillo's business. So it was not solely from the efforts of the promoter Piccirillo.

Even if -- and I don't admit that it is -- but even if this Piccirillo agreement is a security, the bank had no knowledge of it. The depositions of both Mr. Weaver and Mrs. Weaver, reproduced in the Joint Appendix and quoted in most of the briefs, clearly established that they did not tell Marine Bank of the existence of this side agreement between them; and Marine Bank therefore cannot be held under the Ernst and Ernst case decided in this Court as an aider and abettor in the securities fraud which has been alleged. We can't predicate 10b-5 liability on the alleged negligence of failure to inquire about something we didn't know was

there.

The closest case in the Circuit Court is in the Fifth Circuit, a case of Woodward v. Metro Bank cited about five years ago.

Whether a CD or the Piccirillo agreement is or is not a security is a matter of law and not of fact. The Circuit Court erred in reversing the judgment of the District Court in remanding for trial. A motion for summary judgment was and is the proper method to resolve the issue of jurisdiction.

The broad security definition cited by Judge Gibbons at the conclusion of the Third Circuit opinion is clearly in error. The SEC agrees, as do the other regulatory authorities, as to the result in this case.

Under the analysis of Howey, Tcherepnin and Daniel cases in this Court, these two instruments are not securities and cannot be the basis of 10b-5 liability or a 10b-5 claim.

Thank you.

CHIEF JUSTICE BURGER: Mr. Conner.

ORAL ARGUMENT OF ANDREW J. CONNER, ESQ.,

ON BEHALF OF RESPONDENT

MR. CONNER: Good morning.

To understand this case, the posture of this case, is to understand some of the factual background. I think

simply stated, Sam and Alice Weaver go to the bank at the bank's request in early March of 1978. They have acquired a $50,000 certificate of deposit a couple weeks ago prior to them going into the bank. They've already been solicited to make an investment in the Columbus business by the bank, and in early March of 1978 they in effect traded the certificate of deposit, the $50,000 certificate of deposit they had, which was of a maturity of six years, which you undoubtedly understand is critical because it gets it outside the exception within the '34 or the '33 Act that has the nine month exclusion, and they traded that for this particular agreement, that is, an investment position in the Columbus business.

All of these events occurred within a couple days of each other or a couple weeks of each other, and one was the consideration for the other; in other words, they trade their certificate of deposit for the right to obtain the profits from Columbus.

A critical thing here in the bank's involvement is that the bank induced this transaction for their own benefit, and the reason why it was to their own benefit is that they in effect were a risk lender to Columbus and unprotected at the time. And the reason why they were unprotected is they forgot to file their equipment liens properly in the right county; so in effect they had a

$30,000 or $40,000 loan outstanding that they couldn't collect. Columbus is insolvent at the time. Columbus is overdrawn at this bank in the checking account; in other words, there is a checking account and they're overdrawn. I think the record indicates way back in '77 that they had been overdrawn; they had been overdrawn continuously. The bank kept on honoring their checks to keep them afloat, if you will, to keep Columbus afloat so that they could stay in business, so that they could figure out a remedy to this problem, because the bank couldn't collect on their loans because they hadn't perfected their equipment.

So as a consequence of that, they had told Columbus, Mr. Piccirillo, to go get an investor, and they introduced -- that is, Mr. Piccirillo introduced Mr. Weaver to the bank because the bank in effect was approving whoever was going to get in business with Mr. Piccirillo, and Mr. Weaver in February of 1978 refused to get involved in the business. He refused. He said it was too risky; he didn't know Columbus' financial status.

So what happened was then the bank, realizing that Mr. Weaver was going to be the way that they could enhance their position, that is, that they could get their overdrawn checking account solved and get the loans taken care of, went out and actively went after Mr. Weaver to get involved in Columbus. And they solicited him out at his farm, and

they finally persuaded him to come in with his certificate of deposit and pledge it; and they told him that if he pledged the certificate of deposit, they would loan Columbus $65,000, and all or substantially all the $65,000 would go for working capital. This was perceived by Mr. Weaver to be a safe investment. It was perceived by Mr. Weaver to be safe for many reasons, one of which was the fact that the bank told Mr. Weaver that in fact the bank had filed proper liens against Columbus' equipment, and they were protected, and they had sufficient collateral to protect Mr. Weaver.

Those three statements, affirmative statements by the bank were false. They weren't going to lend Columbus $65,000. They were going to take the $65,000, just as they did in this case, and pay themselves off, leaving little or no money for Columbus. And the second and third statements were false, that is, that they had perfected liens, because they filed them in the wrong county. It's a quirk here. Columbus is right on the county line between Erie County and Warren County, and the bank's main office is in Erie County; and in any case they filed the equipment liens in the wrong county so they were unprotected. That was false, and the third statement was false, the third representation, that there was sufficient assets there that if anything went wrong with the loan that Weaver would collect.

Now, perceiving that to be a safe investment and a

safe transaction, that's what Mr. Weaver in effect did. He came in, he pledged it, and a couple days prior to that he had agreed to take this profit-sharing agreement with Columbus.

Now, you've got to understand the fact that there is absolutely no question we're here under a rule 56 motion for summary judgment, and the facts are to be construed favorably to the Weavers. The Weavers are elderly people. Sam is over 80 now. And to reasonably expect that he was going to actively participate in this business, a slaughterhouse business, which is hard physical labor, for generating profits is just unrealistic. And those facts are to be construed in our favor.

Now --

QUESTION: Mr. Conner.

MR. CONNER: Yes, sir.

QUESTION: Supposing the Weavers had simply come in and purchased a $50,000 certificate of deposit and then later been dissatisfied or thought there were fraudulent misrepresentations in connection with it, would you contend that was a security?

MR. CONNER: I would say that it was literally within the Act, but in the context of that transaction may not be a security. The distinguishing factor in this case is it is a secondary transaction that we're complaining

about. We are not complaining about the original issuance of the certificate of deposit, and this distinguishes many of the cases that have been decided in this particular field.

We're complaining about the second transaction, that is, the transaction which was -- the transaction in which he trades that position for an investment position. And I think there's a distinction between the primary issuance situation and the secondary transaction.

I think in the primary issuance transaction it may literally fall within the note or bond, or if you're within the '33 Act within the term "evidence of indebtedness." But within the context of that particular issuance, it may not be a security transaction.

But in the secondary transaction -- and we've cited the case with Meason v. Bank of Miami drawas that distinction, which is a Fifth Circuit case. There is no Fed Second citation because it's so recent. It's an August or September of 1981 decision. I don't think there's a Fed Second citation.

QUESTION: Mr. Conner, I asked your opposition whether a state claim had been filed.

MR. CONNER: A state claim has been filed, but there is a statute of limitations problems there specifically because there is a one-year statute for security violations in Pennsylvania. And in this particular

case we have a pendant state court claim attached to the federal claim, and the motion for summary judgment in this case was not filed until the eve of trial, which was a couple years after the events here; and hence, we would be late with regard to any securities violation in the state court even though it's been filed. We have a procedure in Pennsylvania where we file by a summons. So there is a substantial statute of limitations defense.

QUESTION: Well, are you conceding that that defense is a good one?

MR. CONNER: I'm not conceding that.

QUESTION: But you haven't pursued the state claim.

MR. CONNER: We have not pursued the state claim, that's correct. As you undoubtedly know, in this particular case the Third Circuit had directed the District Court to hear the pendant state court claims in this particular case. That was part of the order, the reversal in this particular case was to hear the pendant state court claims. And under the authority of Rosado v. Wyman, which was decided by this Court, the pendant claim considering all of the equities and the circumstances can be heard by the District Court no matter what this Court would do with regards to either of the securities contentions in this particular case.

QUESTION: Mr. Conner, is there a state common law

fraud claim as well as the security-type claim?

MR. CONNER: Yes, sir.

QUESTION: And is there a one-year statute as to that claim?

MR. CONNER: I believe there's a two-year statute with regard --

QUESTION: So you have the same problem of limitation.

MR. CONNER: Yes, sir.

Going back, there was --

QUESTION: I'm sorry, Mr. Conner. I didn't understand. Both these state claims you say are pendant claims in any event?

MR. CONNER: Yes, sir.

QUESTION: Are they, too, subject to a statute of limitations?

MR. CONNER: Well, not in this particular case they wouldn't be if they were resolved by the District Court because they were timely pled with the original federal securities claim.

QUESTION: In other words, if they were decided as pendant claims, even though state claims, there would be no statute of limitation.

MR. CONNER: That's correct. But if we were --

QUESTION: Well, that's because they were filed in

time.

MR. CONNER: The pendant state court claims in this case were filed timely.

QUESTION: Yes.

MR. CONNER: The problem was that after the statute had expired in the state court proceedings and just on the eve of the trial of this particular case, the court granted summary judgment on the entire case. And the District Court in this particular case dismissed not only the federal securities claim and also dismissed the pendant state court claim.

Now, going to the question of the certificate of deposit made reference to by the bank in this particular case, I think that a change, that is, if the Court were to hold that a certificate of deposit is not a security, that that would be a change in the law as opposed to the contrary. And the reason why I said that is this. The national bank administrator had specifically told the presidents of the national banks back in 1967 that time deposits, according to the SEC, were considered securities within the antifraud sections of the 1933 an 1934 Act. And that reference was identified specifically in the Federal Register and made reference to in the amicus briefs. So the national banks at least since 1967 up and through the present time have been on notice that certificate of

deposits were in fact held to be securities within the antifraud sections of the 1933 and 1934 Act.

QUESTION: Did the administrator express approval of that construction by the SEC or simply note it?

MR. CONNER: Your Honor, I think it was just noted. It didn't say one way or the other. It just said in so many words that the SEC at that point in time had taken the position that the deposits and share accounts are subject to the antifraud provisions of the Securities Act of 1933 and 1934. And this was also made reference to in the -- you might have a question as to whether or not the time deposit would be a certificate of deposit within that context. And in the Superintendent of Insurance v. Bankers Life the District Court so indicated. It did not express an opinion as to whether or not a certificate of deposit was a security, but so indicated that that's what they were alluding to.

So if the Court would -- it's our submission in this case that if you would hold to the contrary, that it's not a certificate of deposit or that it's not a security, that that would be a change in the law, because considering this has been out, we would submit that the banks have been on notice at least since that time period that certificate of deposits would be considered securities within the antifraud sections of the '33 and '34 Act.

One other point --

QUESTION: Counsel, has the SEC ever changed its position on that?

MR. CONNER: To my knowledge they have not, and to my knowledge the best answer that I can give to you with regard to that is that the SEC in various cases have appeared amicus taking various positions on whether or not a CD in the context of a transaction is a security. For example, in the Meason case v. Bank of Miami they appeared amicus, and in that case it was a secondary transaction. They contended it was a security within these acts. And I think that in the Burrus case that after -- there was a Burrus case that came down that originally held that a certificate of deposit was not a security. They filed amicus, and subsequently that decision by the court was withdrawn. So at various times they have appeared amicus and contended that a certificate of deposit is a security.

QUESTION: How do you account for the Solicitor General's brief then in this case?

MR. CONNER: I account for it in the following. I think they filed a joint brief --

QUESTION: A what?

MR. CONNER: A joint brief between the FDIC, the SEC, and the Comptroller of the currency, and I think they take the position that it's in the context of this

transaction as opposed to the literal question about whether or not it's a security for all purposes. And I would say that it sounds like -- it's just a guess -- that they voted between the other people that vote there in the government.

QUESTION: Well, the Chief Counsel of the Commission is on the brief.

MR. CONNER: I understand that. But they say specifically in the brief, they say specifically that it's only in the context of this transaction and not a question whether or not in other cases, because they're very careful to say that in other cases they may take a different position.

QUESTION: I thought I said that about the contract.

MR. CONNER: No, sir. They said that with regard to the CD.

One other thing that I think the Court should be aware of is the fact that the opposition has indicated that the fact that the certificate of deposit is not mentioned specifically in the definition, that that would indicate that because it's not mentioned specifically and/or because they mention the word "certificate of deposit" for a security, which we acknowledge is a different instrument, that that would be some indication that a certificate of deposit was not meant to be literally within the act.

This Court in Joiner in a very similar issue specifically held that that type of analysis was incorrect. There is a reference to oil leases, for example, in Joiner, and the question was whether or not a divided interest in oil leases as opposed to an undivided interest in oil leases was a security. And the Court held that just because they were making reference in the statute to an undivided interest and that they did not mention a divided interest, that that did not mean that the divided interest was held to be or would be held to be a security. In fact, the Court so held.

Now --

QUESTION: Mr. Conner, let me call your attention to page 6 of the Government's brief here where they say at the end of the first full paragraph, the conclusion that the certificate of deposit involved here is not a security subject to the antifraud provisions of the federal securities law harmonizes the federal securities and banking laws and avoids overlapping jurisdiction that would "serve no general purpose," citing our Daniel case.

Now, I had taken that as a fairly explicit statement of their position.

MR. CONNER: Your Honor, my understanding is on page 6, if you'll see that the -- right down at the bottom of paragraph 2 it says, "examination" -- excuse me. I'm

sorry.

My understanding is that in the brief here -- and I have lost the particular point where they have said this -- that in this particular brief they so indicate that they did not want it held for all purposes.

QUESTION: Well, on page 22 I thought the Government's position was that where you have a regulated bank you just don't treat CDs as securities. They didn't want any general rule about certificates generally in unregulated areas. But with respect to a bank that's regulated, I thought they just said put it aside; the other laws will take care of this, not the securities laws.

Is that right or not?

MR. CONNER: I don't think that's right. I don't think that that's their position. I think that -- because that would be inconsistent with the SEC's position in other cases, and specifically the Bank of Miami case that's so recent, because they are --

QUESTION: Well, that may be, that may be, but what about on page 20 beginning at paragraph 4? That just repeats what Justice Rehnquist said. Then it says, "The foregoing analysis, however, may not necessarily apply in other contexts."

MR. CONNER: And they say, "The better reasoned decisions of the lower court did not view the question of

whether a certificate of deposit is a security in the abstract."

QUESTION: I know, but I thought their position was if you're dealing with a regulated bank, the answer is clear.

MR. CONNER: Well, I'm sorry, Your Honor.

QUESTION: Okay.

MR. CONNER: My understanding is that they are not taking that firm a position, because obviously certificates of deposit can be traded in all sorts of secondary transactions. And I think that they recognize that, and I think that if they came out hard and fast that there would be all sorts of secondary transactions; and we just differ on the facts in this particular secondary transaction as to whether or not it formed a consideration for an investment position.

QUESTION: What are the practical advantages of proceeding under the Act as opposed to in the state causes of action?

MR. CONNER: Well, one primary practical advantage is the fact that in the securities law, that is, in the 10b case or the 17 case, it includes omissions, as opposed to commissions; that is, situations where a party fails to disclose, as would apply to this particular case, Your Honor. It would apply to a situation where the

misrepresentation was purely misrepresentation by silence, where they failed to tell people something.

In this case there is that element in that. They failed to tell the Weavers, for example, in this case that Columbus was insolvent and was going to be insolvent even though they went through this loan transaction.

QUESTION: And under state law?

MR. CONNER: They may not be a cause of action under the common law of Pennsylvania, because the common law draws a narrower line with regard to what is an actionable fraud.

I think the distinguishing factor with regard to this secondary transaction, we differ from the Government because I don't think the Government analyzes the facts in this particular case to identify that the bank specifically identified Weaver as an investor. They in their testimony in this case specifically identified Weaver as an investor as opposed to a guarantor or proposed guarantor. They said he was an investor, one. Two, they said that he was making an investment transaction. They testified to that in their pretrial depositions -- and we're entitled to the benefit or favorable construction of that -- and said that. They never said that he was just acting as a guarantor. And thirdly, they specifically identified the amount of his investment as being $50,000, and they so stated in the record in this

particular case.

Now, separate and apart from the certificate of deposit issue is the related issue of the Piccirillo agreement, as to whether or not that constitutes a security within the securities law. And we would submit that it fits within any one of the one, two, or three definitions within the subspecies of security such as profit-sharing agreement, certificate of interest, or in fact an investment contract. And the Court has laid down three basic guidelines as to whether or not a particular agreement constitutes an investment contract: whether or not you have an investment of money, whether or not it's a common enterprise, and whether or not there's a reasonable expectation of profits from the efforts of others.

And I think clearly in this case that we meet all of the elements. There is no question about it that there's a $50,000 investment. The bank in fact so stated that that was a channel which the money was being channeled into Columbus. And there's little question that on the facts of this case that the profits could be expected from the efforts of Piccirillo and not Weaver. There's absolutely no evidence that he was going to do anything that was going to contribute to the profits in this case.

The bank argues that it's not a common enterprise, but the $50,000 investment of Mr. Weaver gets pooled. They

say there is no pooling. It's in fact pooled with the assets of Columbus. It's no separated. It's co-mingled.

There's also another question about whether or not in this particular case, considering the bank is in an unsecured position, their assets are pooled there, too. And there were other people who were loaning money, the original seller of the business.

So if there is a question about just multiplicity of investors on a vertical standpoint as opposed to -- horizontal, excuse me, as opposed to a vertical standpoint --

QUESTION: Mr. Conner, may I ask you a question? If one owned farmlands and leased the lands to a farmer, the compensation to be a division of profits or a share of the profits under the lease arrangement, would that be analogous to the contract you are discussing here this morning?

MR. CONNER: That is, the landowner leases it to the farmer?

QUESTION: Yes. And the compensation to the landowner is a share in the profits, a very common arrangement.

MR. CONNER: That may be. I think there's a distinction, and the distinction is --

QUESTION: What is the distinction?

MR. CONNER: The distinction is that in our case we are contributing -- we are making a -- providing capital

at risk --

QUESTION: What about the land in the example I put?

MR. CONNER: The owner gets the land back, and we don't get the certificate of deposit back if the business fails. We lose it, where the owner of the land gets the land back. He has not made an investment at risk like Mr. Weaver does in this particular case.

QUESTION: Suppose the lease is for ten years?

MR. CONNER: There would be certain leasehold rights, that he would have the right, assuming that there is a written lease, he would have certain rights to take the land back. Eventually he gets -- Your Honor, I would submit that he would get his land back, and he does not make the commitment that an investor makes when he provides capital at risk that Mr. Weaver does in this particular case.

This particular case, the only chance he's going to get his deposit back is if in fact Columbus has sufficient working capital to make it.

QUESTION: In the example I put, the owner of the land might receive no profits whatever for years.

MR. CONNER: That's a possibility, yes, sir.

QUESTION: Well, supposing -- to modify Justice Powell's example a little bit -- supposing in addition to the arrangement with the tenant who would work the land and

provide a profit, they then pledged or mortgaged the land to the bank and borrowed the working capital to buy the farm equipment. Then I suppose you'd have the same case, wouldn't you?

MR. CONNER: You're getting closer to that particular case, and I'm sure that you can draw arrangements that get closer and closer to this particular situation. And I think that we meet all of the elements. The Court said they were not dealing with a full record in this particular case, and the question before the Third Circuit was not whether or not after a full trial whether or not we had met the full definitions of an investment contract or a profit-sharing agreement or a certificate of interest, if you will, but whether or not there was a genunine issue of fact as to whether or not we met those requirements.

And we would submit that on the record before that court and on the record before this Court there's certainly an issue of fact.

QUESTION: Well, are you saying that to make the investment contract aspect of this case a security you must have as a part of the overall transaction a pledge of the certificate of deposit?

MR. CONNER: That's correct, Your Honor. See, the original idea of this whole transaction was Mr. Weaver was just going to give Piccirillo $50,000, and then he backed

off because of the risk involved, and the bank became concerned and went back and told, well, listen, there is a less riskier way of doing this; you give us the $50,000 CD, we will loan the business $65,000. And the bank was doing that, you see, because that was the only way at that point that they could solve their own problems. And from Weaver's standpoint it seemed like a relatively safe investment, because he sees somebody who he trusts, the bank, and they're telling him that they have the equipment protected, that they're going to give him $65,000, and the bank themselves said that Piccirillo needed $10,000 to make it, and the bank knew that he wasn't going to get $10,000. He got $3,800 out of a $65,000 loan. Now, there was just no possible way that Columbus was going to make it; that they were headed for insolvency or bankruptcy irrespective of this loan transaction.

QUESTION: Well, if the bank had made misrepresentations about this company and convinced the people to make a loan directly to the company, same result? Say you took back a note from the company.

MR. CONNER: Certainly the courts have held that risky loans, a long-term loan at risk is a security. The Second Circuit specifically, I believe in the Zeller case that's made reference to in the briefs, has indicated that long-term loans like that are securities.

QUESTION: So any note issued by a borrower may be a security?

MR. CONNER: No, no. I didn't say that. I'm sorry. It's a loan that's at risk where the only chance of paying it back is a profit situation, and that was the only chance in this case. The only chance that Weaver was going to get his certificate of deposit back is in fact if Columbus somehow was going to make it.

And so we would submit that whether you call it an investment contract or whether you call it a profit-sharing agreement or a certificate of interest, that there is at least under rule 56 a factual issue that would allow a court or jury to make a conclusion that investment contracts or one of these other subspecies in fact exist.

And I think that the arguments about their not being a common enterprise are not correct. There was in fact a pooling of assets, a true pooling of assets. There was no specific segregation of Weaver's investment from Mr. Piccirillo's investment. And certainly the third element is made, would be satisfied in a full trial.

We would submit that the Third Circuit is correct, that there are factual support for our position that the Piccirillo agreement is a profit-sharing agreement or a certificate of interest or investment contract; that in this particular case the Third Circuit is also correct that the

certificate of deposit in this secondary transaction was made by an investor for investment purposes, that it was in fact a sale. This particular court held in the Rubin case that even though it was a loan transaction, the person got convicted under section 17 when they made a pledge, and that was just as much a commercial loan as this particular case. And if it applies in a criminal case, then it certainly would apply in a civil case.

And we would submit that the Third Circuit was correct in directing the District Court to remand the case to hear the pendant state court claims. And we would submit that under Rosado v. Wyman that that would be the outcome no matter what this particular Court would decide on the federal securities questions.

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Miller?

ORAL ARGUMENT OF DANIEL L. R. MILLER, ESQ.,
ON BEHALF OF PETITIONER -- REBUTTAL

MR. MILLER: I didn't ask for any time for rebuttal, but I will accept your invitation to make one comment.

CHIEF JUSTICE BURGER: There's no compulsion about it.

MR. MILLER: I'll say that there are a series of

cases, the note and mortgage cases, and all of them in the circuit courts have decided generally that a note and mortgage situation referenced by Justice Powell and Justice Stevens were not securities.

In response to one of the questions concerning the existence of the state court action, it is my clear understanding that the cases were filed in the state court on a timely basis but were not served on Marine Bank on a timely basis, and therefore, they are out of time as far as state court action goes.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:42 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Marine Bank, Petitioner v. Samuel Weaver Et Ux. No. 801562

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and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ryan Connelly