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The Arbitrability of Federal Securities Claims: *Wilko's* Swan Song

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CASENOTE

The Arbitrability of Federal Securities Claims: *Wilko's Swan Song*

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I. INTRODUCTION

Eugene and Julia McMahon entered into a broker-customer agreement with Shearson/American Express, Inc., in which Mary Ann McNulty, a Shearson account manager, undertook the management of certain investment accounts.¹ This agreement contained an arbitration provision granting both parties the right to compel arbitration of claims brought by or against the other party.² The McMahons sued McNulty and Shearson in federal district court, alleging that McNulty, with Shearson's knowledge and approval: traded excessively, or "churned" the McMahons' joint account for the sole purpose of maximizing commissions³—a common law fraud violation;⁴ intentionally and recklessly made false statements and omitted

1. *McMahon v. Shearson/American Express, Inc.*, 618 F. Supp. 384, 385 (S.D.N.Y. 1985), *rev'd*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987).

2. The arbitration provision stated in part:

Unless unenforceable due to federal or state law, *any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration* in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc., or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I [the customer] may elect.

Id. at 385 (emphasis supplied by court).

3. *Id.* at 386.

4. *Id.* at 387.

material facts when giving investment advice in violation of section 10(b) of the Securities Exchange Act of 1934⁵ and Rule 10b-5 of the Securities and Exchange Commission;⁶ and engaged in a "pattern of racketeering activity" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).⁷ Pursuant to the Federal Arbitration Act,⁸ Shearson moved to stay the district court proceedings pending arbitration of the McMahons' claims.⁹

The United States District Court for the Southern District of New York granted Shearson's motion to compel arbitration of the common law fraud and federal securities claims, but refused to compel arbitration of the RICO claim.¹⁰ The United States Court of Appeals for the Second Circuit affirmed the district court's order compelling arbitration of the common law claims and denying arbitration of the RICO claims, but reversed the district court's order compelling arbitration of the federal securities claims.¹¹ The Supreme

5. 15 U.S.C. § 78j(b) (1982); see *infra* notes 35-51 and accompanying text. For the relevant text of section 10(b), see *infra* note 39.

6. Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1987).

7. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1987). For the relevant text of this statute, see *infra* note 52. See *infra* notes 52-60 and accompanying text.

8. 9 U.S.C. §§ 1-14 (1982); see *infra* notes 14-20 and accompanying text.

9. *McMahon*, 618 F. Supp. at 386. Shearson also moved, in the alternative, to dismiss the amended complaint on the following grounds:

(1) failure to comply with the pleading requirements of Rule 9(b), Fed.R.Civ.P.; (2) lack of subject matter and pendent jurisdiction; (3) absence of an implied private cause of action for alleged violation of the rules of the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc.; (4) failure to state a claim under RICO; and (5) unavailability of punitive damages.

Id.

10. *Id.* at 389. The district court, though acknowledging that the Second Circuit had extended *Wilko v. Swan* to 1934 Act claims, held that such an extension was no longer proper in light of two decisions of the Supreme Court of the United States: *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). *Id.* Thus, the court concluded that 1934 Act claims were arbitrable. The district court, however, ruled that the RICO claims were not arbitrable "because of the important federal policies inherent in the enforcement of RICO." *Id.* at 387. For a discussion of the arbitrability of RICO claims, see *infra* notes 52-60 and accompanying text.

11. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 107

Court of the United States *held*, reversed: Because the Federal Arbitration Act favors rigorous enforcement of arbitration agreements, such predispute agreements¹² between brokers and customers are enforceable even if a customer's claim alleges a violation of the Securities Exchange Act of 1934, or the Racketeer Influenced and Corrupt Organizations Act. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987).

This Note analyzes the conflict between Congress' support for arbitration as evidenced by the Federal Arbitration Act, and the federal judiciary's reluctance to enforce predispute agreements to arbitrate claims arising under the Securities Act of 1933, the Securities Exchange Act of 1934 and the RICO Act. Section IIA of this Note describes the origin of this conflict and the seminal case of *Wilko v. Swan*,¹³ in which a plaintiff brought a claim under the Securities Act of 1933, and the Supreme Court of the United States denied the defendant's motion to enforce the parties' predispute arbitration agreement. Section IIB discusses application of the *Wilko* doctrine to claims brought under the Securities Exchange Act of 1934 and the RICO Act, and Section IIC describes the Supreme Court's movement away from the *Wilko* doctrine. Section III focuses on the *McMahon* decision, in which the Supreme Court held that *Wilko's* reasoning does not govern claims brought under the 1934 Act or the RICO Act. Section IV discusses the adequacy of arbitration as an alternative to litigation. Section V argues that the Court's decision in *McMahon* tacitly overruled *Wilko*, and that 1933 Act claims should therefore be arbitrable. This Note concludes that it is proper to enforce predispute arbitration agreements under the Securities Exchange Act of 1934, the RICO Act, and the Securities Act of 1933.

S. Ct. 2332 (1987). The Second Circuit "decline[d] the invitation" to overrule its prior extension of the *Wilko* doctrine to 1934 Act claims. *Id.* at 97. The court reasoned that, "[a]lthough *Scherk* and *Byrd* may cast some doubt on whether the Supreme Court, if presented with the issue, would hold claims under § 10(b) and Rule 10b-5 to be non-arbitrable, it would be improvident for us to disregard clear judicial precedent in this Circuit based on mere speculation." *Id.* at 98.

The Second Circuit then chastised the district court for failing to follow *stare decisis*: "We think that the orderly administration of justice will be best served if we as one of the inferior courts follow Supreme Court precedent and adhere to the settled law of this Circuit, and a fortiori the district courts should do likewise." *Id.*

12. Only predispute arbitration agreements were at issue in *McMahon*. There is no question that an agreement to submit an existing dispute to arbitration is enforceable.

13. 346 U.S. 427 (1953).

II. ARBITRATION OF SECURITIES CLAIMS UNDER *Wilko v. Swan*

A. *The Federal Arbitration Act, the Securities Act of 1933, and the Wilko Doctrine*

Congress passed the Federal Arbitration Act (FAA)¹⁴ in 1925 to promote the use of arbitration as an alternative to litigation and to overcome judicial hostility toward arbitration.¹⁵ The FAA mandates that all contractual agreements to arbitrate commercial disputes "shall be valid, irrevocable, and enforceable."¹⁶ Upon the initiation of a civil action between parties to an arbitration agreement, the FAA requires both federal and state courts to stay judicial proceedings in favor of arbitration upon the request of either party.¹⁷ In addition, if one party wishes to invoke a predispute arbitration provision before filing a complaint, but the opposing party refuses to comply, the first party may petition a United States district court for an order compelling arbitration.¹⁸

The Supreme Court has interpreted the FAA broadly, as evidenced by *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,¹⁹ in which the Court stated:

The FAA establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an alleged allegation of waiver, delay, or a like defense to arbitrability.²⁰

14. 9 U.S.C. §§ 1-14 (1982).

15. *Wilko v. Swan*, 346 U.S. 427, 431-32 & n.12 (1953) (citing H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924); S. REP. NO. 536, 68th Cong., 1st Sess. 3 (1924)); see Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139-42 (1986) (a historical analysis of the Federal Arbitration Act).

16. 9 U.S.C. § 2 (1982).

17. Section 3 of the FAA provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had.

9 U.S.C. § 3 (1982). For a discussion of how this provision controls state courts, see *infra* notes 67-75 and accompanying text.

18. Section 4 of the FAA provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (1982). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), Mitsubishi invoked this provision of the FAA by demanding arbitration of its dispute before either party had filed suit. See *infra* notes 83-93 and accompanying text.

19. 460 U.S. 1 (1983).

20. *Id.* at 24-25. The *Cone Memorial* decision comports with the Court's earlier decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), in which the Court

There is one general exception to *Cone Memorial's* holding: A plaintiff may avoid a predispute arbitration agreement if he can prove that Congress intended to create an exception to the FAA by enacting a statute that provides some "special right" not generally available at common law.²¹ The Supreme Court first articulated this "special right" theory in *Wilko v. Swan*²² as the basis for its refusal to compel arbitration of 1933 Act claims. Wilko had entered into a brokerage agreement with Swan, a partner in a brokerage firm. The contract contained a provision that all disputes between the parties would be resolved through arbitration. After Wilko sued Swan, alleging misrepresentations and fraudulent inducement in violation of section 12(2) of the 1933 Act,²³ Swan moved to compel arbitration, but the district court denied Swan's motion.²⁴ The United States Court of Appeals for the Second Circuit reversed the district court's order, holding that the FAA mandated enforcement of all arbitration agreements.²⁵ Confronted with what it perceived to be a conflict between the FAA and the Securities Act of 1933, the Supreme Court reversed the Second Circuit, holding that an agreement to arbitrate future controversies constitutes a binding waiver of the buyer's available remedies in violation of section 14 of the 1933 Act.²⁶

In so ruling, the Court reasoned that three unique aspects of sec-

compelled arbitration of a claim that the contract providing for the future arbitration of disputes had itself been induced fraudulently. The Court reasoned that "[t]he question [of the alleged fraudulent inducement of the contract] which Prima Paint requested the District Court to adjudicate preliminarily to allowing arbitration to proceed is one not intended by Congress to delay the granting of a § 3 stay." *Prima Paint*, 388 U.S. at 406-07.

21. The Supreme Court in *McMahon* declared that a party opposing enforcement of an arbitration agreement must demonstrate congressional intent "discernible from the text, history, or purposes of the statute," to overcome the presumption of arbitrability. *McMahon*, 107 S. Ct. at 2338. For a discussion of this "special right" in the context of the 1934 Act, see *infra* notes 39-45 and accompanying text.

22. 346 U.S. 427, 431 (1953).

23. Section 12(2) of the Securities Act of 1933 provides in relevant part:

Any person who . . . offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading . . . and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue . . . in any court of competent jurisdiction

15 U.S.C. § 771(2) (1982).

24. *Wilko v. Swan*, 107 F. Supp. 75, 76 (S.D.N.Y. 1952), *rev'd*, 201 F.2d 439 (2d Cir.), *rev'd*, 346 U.S. 427 (1953).

25. *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir.), *rev'd*, 346 U.S. 427 (1953).

26. *Wilko*, 346 U.S. at 438. For the text of section 14 of the 1933 Act, see *infra* note 30.

tion 12(2) of the 1933 Act gave plaintiffs a "special right" not found at common law which in effect overrode the arbitration agreement.²⁷ First, under section 12(2), the buyer does not carry the burden of proving the seller's scienter as required in a common law fraud action. There is a rebuttable presumption under section 12(2) that the seller knew, or in the exercise of reasonable care should have known, that the information given to the buyer was inaccurate or incomplete. The seller must overcome this presumption by proving his lack of scienter to avoid liability.²⁸ Second, a plaintiff has broad discretion in selecting a forum under the 1933 Act because both state and federal courts have jurisdiction over section 12(2) claims, and a claim filed in state court may not be removed to federal court.²⁹ Finally, section 14 of the 1933 Act prohibits any agreement that would serve as a binding waiver of compliance with any provision of the Act.³⁰ Though the *Wilko* Court purportedly based its refusal to enforce the arbitration agreement on its belief that such predispute arbitration agreements constitute exactly the type of waiver proscribed by Congress in section 14, other factors played a key role in its decision. Central to the Court's reasoning was the notion that arbitration is ill-suited to protect unwary buyers from unscrupulous sellers.³¹ Moreover, the *Wilko* Court contended that Congress specifically designed this "special right" to reduce the disparity in bargaining power between buyers and sellers inherent in the open securities market:

[I]t is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers.³²

The Court recognized that the FAA promoted important public policy goals by providing "an opportunity . . . to secure prompt, economical and adequate [re]solution of controversies."³³ The Court

27. *Wilko*, 346 U.S. at 430-33.

28. *Id.* at 431 & n.10.

29. *Id.* at 431. The *Wilko* Court recognized that "[t]he Act's special right is enforceable in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited." *Id.*

30. Section 14 of the 1933 Act provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1982).

31. *Wilko*, 346 U.S. at 435-37.

32. *Id.* at 435.

33. *Id.* at 438.

concluded, however, that Congress' deep concern for protecting investors, as evidenced by the enactment of the Securities Act of 1933, was superior to its concern for the expeditious resolution of disputes.³⁴

B. *Application of the Wilko Doctrine to the Securities Exchange Act of 1934 and the RICO Act*

The *Wilko* Court addressed solely the conflict between the Securities Act of 1933 and the FAA; it did not decide whether courts could compel arbitration under the Securities Exchange Act of 1934. The overwhelming majority of courts confronted with this issue, however, have concluded that the *Wilko* rationale applies to 1934 Act cases.³⁵ In *Wolfe v. E.F. Hutton & Co.*,³⁶ for example, the Eleventh Circuit held that claims brought under the 1934 Act, like those brought under the 1933 Act, could not be compelled to arbitration.³⁷ The *Wolfe* court articulated four reasons for its decision. First, the court noted that the Supreme Court had had ample opportunity to limit the *Wilko* doctrine to 1933 Act claims, but had never done so.³⁸ Second, the *Wolfe* court discussed the similarity between a section 12(2) claim under the 1933 Act and a section 10(b) claim under the 1934 Act,³⁹

34. *Id.* Courts have followed this reasoning unwaveringly in subsequent attempts to compel arbitration of section 12(2) claims. See, e.g., *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337, 1338 (11th Cir. 1986).

35. See *Benoay v. Prudential-Bache Sec., Inc.*, 805 F.2d 1437 (11th Cir. 1986); *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th Cir. 1986); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987); *AFP Imaging Corp. v. Ross*, 780 F.2d 202 (2d Cir. 1985); *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d 1023 (11th Cir. 1982); *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); see generally Hoellering, *Arbitrability of Disputes*, 41 BUS. LAW. 125 (1985); Krantz, May & Cohen, *The Sixth Circuit and the Securities Laws: A Survey of Decisions from 1983 through 1985*, 17 U. TOL. L. REV. 549 (1986); Schaller & Schaller, *Applying the Wilko Doctrine's Anti-Arbitration Policy in Commodities Fraud Cases*, 61 CHI.-KENT L. REV. 515, 530-33 (1985).

36. 800 F.2d 1032 (11th Cir. 1986).

37. *Id.* at 1038.

38. *Id.* at 1034-35; see *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (compelling arbitration of state claims, but refusing to decide the question of arbitrability of 1934 Act claims); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (enforcing the arbitration of 1934 Act claims, but limiting its holding to international transactions).

39. Section 10(b) provides in relevant part:

It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules . . . as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1982). Compare this language with that of section 12(2), which is provided *supra* note 23.

reasoning that both sections provide plaintiffs with a "special right."⁴⁰ The court reached this conclusion notwithstanding the fact that a section 10(b) plaintiff must prove scienter, which is not an element of a section 12(2) claim.⁴¹ Third, the *Wolfe* court recognized that the private cause of action given to buyers vis-a-vis sellers is expressly provided in the 1933 Act,⁴² but only implied in the 1934 Act. The court, however, found little significance in this distinction.⁴³ Further, the court asserted that even if the implied right in the 1934 Act was less "special," this difference is insignificant when analyzed in conjunction with the 1934 Act's exclusive federal jurisdiction provision.⁴⁴ Regardless of the express/implied distinction, therefore, Congress manifested its intention to give plaintiffs greater protection under the 1934 Act than in the 1933 Act by permitting only federal courts to hear 1934 Act claims, which in effect prohibited arbitration of such

40. The *Wolfe* court explained:

The purpose of the 1933 and 1934 Acts is the same: "to protect investors" by requiring "full and fair disclosure" in connection with securities transactions. One act concerns itself with the issuance of securities and the other with post-issuance transactions, but that does not suggest that they should be treated differently with respect to arbitration. . . . [Although a 10b-5 plaintiff, unlike a 12(2) plaintiff, must prove scienter], nevertheless, the 10b-5 action is also a special one unknown at common law.

Wolfe, 800 F.2d at 1035-36 (citations omitted).

41. Compare the text of section 12(2), which is provided *supra* note 23, with the text of section 10(b), which is provided *supra* note 39.

42. Section 12(2) of the 1933 Act expressly provides for the buyer's cause of action against the seller: "[The seller] shall be liable to the person purchasing such security from him, who may sue . . . in any court of competent jurisdiction . . ." 15 U.S.C. § 771(2) (1982) (emphasis added).

43. Section 10 of the 1934 Act merely states that "[i]t shall be unlawful for any person . . ." 15 U.S.C. § 78j (1982). This language does not expressly give the buyer of securities a cause of action against the seller. The federal courts, however, have determined that the statute implicitly gives a buyer the right to bring an action for violation of section 10(b). See *Kardon v. National Gypsum*, 73 F. Supp. 798, 802 (E.D. Pa. 1947) ("[The 1934 Act] does not even provide in express terms for a remedy, although the existence of a remedy is implicit under general principles of the law.").

In a concurring opinion in *Dean Witter Reynolds Inc. v. Byrd*, Justice White argued that the 1933 Act expressly provides plaintiffs a private right of action and the discretion to choose between a state or federal forum, while the 1934 Act merely implies a private right of action, and that therefore, a plaintiff's rights are less "special" under the 1934 Act. 470 U.S. 213, 224-25 (1985) (White, J., concurring); see *infra* notes 81-82, 149-52 and accompanying text.

44. Section 27 of the Exchange Act provides in relevant part:

The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

15 U.S.C. § 78aa (1982).

For a discussion of the exclusive federal jurisdiction provision in the 1934 Act as it affects state court jurisdiction, see generally Note, *The Securities Exchange Act and the Rule of Exclusive Federal Jurisdiction*, 89 YALE L.J. 95 (1979).

disputes.⁴⁵ Finally, the Eleventh Circuit referred to the 1975 amendments of the 1934 Act in which Congress "specifically permitt[ed] compulsory arbitration of securities claims between securities professionals," but declared that the amendment was to have no effect on the *Wilko* decision.⁴⁶ The court concluded that Congress, while considering the amendments, was aware of the many decisions extending the *Wilko* doctrine to 1934 Act claims and approved of that extension.⁴⁷

Judge Tjoflat, in his *Wolfe* concurrence, made perhaps the simplest and strongest argument in favor of treating arbitration of 1934 Act claims in the same manner as 1933 Act claims. Judge Tjoflat noted the similarity between section 14 of the 1933 Act,⁴⁸ and section 29 of the 1934 Act,⁴⁹ both of which provide that any agreement to waive compliance with the respective Acts is void. Judge Tjoflat argued:

Absent section 14 [of the Securities Act of 1933] the agreement to arbitrate [in *Wilko*] would have been enforceable pursuant to the Federal Arbitration Act

The 1934 Act contains a provision [section 29] that is nearly identical to section 14 of the 1933 Act. . . . Under the teaching of *Wilko*, therefore, we must conclude that section 29 of the 1934 Act overrides the Federal Arbitration Act and renders unenforceable agreements to arbitrate 1934 Act disputes.⁵⁰

The similarity between these two provisions is the most commonly espoused justification for extending *Wilko* to 1934 Act claims.⁵¹

45. The *Wolfe* court explained:

The 1934 Act provides that the federal courts are to have "exclusive jurisdiction of violations of this chapter . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter" 15 U.S.C. § 78aa (1982). This sweeping language applies to all actions brought under the 1934 Act, including implied actions such as the 10b-5 action. Regardless of whether the 10b-5 action itself is considered a "provision of this chapter," the exclusive jurisdiction provision is undisputably such a "provision," which, under the *Wilko* rationale, should not be considered waivable.

Wolfe, 800 F.2d at 1036.

46. *Id.* at 1037 (citing H.R. REP. NO. 229, 94th Cong., 1st Sess. 91, 111, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 179, 321); *see infra* notes 114-17 and accompanying text.

47. *Wolfe*, 800 F.2d at 1037.

48. Section 14 of the 1933 Act provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1982).

49. Section 29 of the 1934 Act provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78ec (1982).

50. *Wolfe*, 800 F.2d at 1039 (Tjoflat, J., concurring).

51. *See, e.g., McMahon v. Shearson/American Express, Inc.*, 788 F.2d at 96-97 ("[T]he

Although there is no comparable provision in the RICO Act⁵² prohibiting the waiver of statutory rights as exists in section 14 of the 1933 Act and section 29 of the 1934 Act,⁵³ courts have nevertheless held civil RICO claims to be nonarbitrable.⁵⁴ In *S.A. Mineracao Da Trindade-Samitri v. Utah International Inc.*,⁵⁵ for example, the United States District Court for the Southern District of New York held that RICO claims cannot be compelled to arbitration because racketeering activity has a substantial national impact:

[RICO's] enforcement involves concerns touching upon vital national interests. Although RICO claims may be brought by private individuals, the resolution of such claims will frequently have an impact on society at large. The Court must infer that Congress did not intend to entrust the enforcement of such laws to arbitrators, and consequently . . . claims asserted under RICO are not arbitrable.⁵⁶

non-waiver provision of § 14 of the 1933 Act has an almost identical counterpart in § 29(a) of the 1934 Act.”).

52. The RICO Act prohibits involvement in a “pattern of racketeering activity,” as well as the use or investment of money derived from such “activity.” 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1987). The heart of the RICO Act is contained in section 1962, which states in relevant part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise which is engaged in . . . interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C.A. § 1962 (West 1984).

The RICO Act provides both criminal penalties and civil remedies. 18 U.S.C.A. §§ 1963-1964 (West 1984 & Supp. 1987). Federal courts have jurisdiction to hear claims arising under the Act. 18 U.S.C.A. § 1965 (West 1984).

53. See *supra* text accompanying note 50.

54. See, e.g., *Smokey Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274 (8th Cir. 1986); *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 588 F. Supp. 735 (W.D.N.C. 1984).

55. 576 F. Supp. 566 (S.D.N.Y. 1984).

56. *Id.* at 575. The *Mineracao* court constructed its “vital national interests” theory from decisions prohibiting the arbitration of claims brought under the Sherman Act and the Bankruptcy Act. *Id.*; see *Allegaert v. Perot*, 548 F.2d 432 (2d Cir. 1977); *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). For a discussion of these cases, see *infra* note 90.

Surprisingly, most courts that have considered the arbitrability of civil RICO claims have mechanically accepted this rationale without debate.⁵⁷ At least one court, however, questioned the wisdom of barring the arbitration of civil RICO claims. Recognizing that there is no antiwaiver provision in the RICO Act, and that federal jurisdiction is not exclusive in the RICO Act as in the 1934 Act,⁵⁸ the Eleventh Circuit in *Greenblatt v. Drexel Burnham Lambert, Inc.*⁵⁹ observed that "whether a RICO claim is a 'non-arbitrable' federal claim' is an open question in this circuit."⁶⁰

C. *The Movement Away from the Wilko Doctrine*

The first indication that the Supreme Court was beginning to look unfavorably upon the *Wilko* doctrine came in the context of an international arbitration agreement.⁶¹ In *Scherk v. Alberto-Culver Co.*,⁶² an American company sued a German citizen, alleging misrepresentations in connection with the transfer of trademark rights in violation of the 1934 Act. The United States district court, applying the *Wilko* doctrine, denied Scherk's motion to compel arbitration of the 1934 Act claims.⁶³ The United States Court of Appeals for the Seventh Circuit affirmed.⁶⁴ In its decision reversing the Seventh Circuit, the Supreme Court came very close to rejecting application of the *Wilko* doctrine to 1934 Act disputes:

[A] colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12(2) of the Securities Act of 1933 There is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934 [T]he [1934] Act itself does not establish the "special right" that the Court in *Wilko* found significant.⁶⁵

57. See cases cited *supra* note 54.

58. Compare 15 U.S.C. § 78aa (1982) ("district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter") (emphasis added) with 18 U.S.C.A. § 1965 (West 1984) ("Any civil action . . . under this chapter . . . may be instituted in the district court of the United States") (emphasis added).

59. 763 F.2d 1352 (11th Cir. 1985).

60. *Id.* at 1361. See generally Note, *Another Hurdle Remains for Civil RICO Plaintiffs: Will a Predispute Arbitration Agreement Bar RICO Plaintiffs from a Federal Forum?*, 6 J. L. & COM. 283 (1986).

61. See *McMahon*, 618 F. Supp. at 338 ("The Supreme Court . . . first expressed reservations about the propriety of applying *Wilko* to claims arising under the 1934 Act in *Scherk*.").

62. 417 U.S. 506 (1974).

63. *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 612 (7th Cir. 1973), *rev'd*, 417 U.S. 506 (1974).

64. *Id.*

65. *Scherk*, 417 U.S. at 513-14.

The Court decided that the 1934 Act claims presented in *Scherk* were indeed arbitrable, but limited its holding to *Scherk*'s international context. The Court reasoned that regardless of *Wilko*'s applicability to *Scherk*, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement" would destroy the integrity of international transactions.⁶⁶ The *Scherk* Court never reached the question of arbitrability of domestic 1934 Act claims.

The Supreme Court further restricted the applicability of the *Wilko* doctrine in *Southland Corp. v. Keating*.⁶⁷ Keating had brought a class action suit in the Superior Court of California on behalf of approximately 800 Southland franchisees, alleging that Southland had violated the disclosure requirements of California's Franchise Investment Law.⁶⁸ The lower court granted Southland's motion to compel arbitration.⁶⁹ The Supreme Court of California reversed the lower court, holding that the California Code prohibits any agreement that allows a plaintiff to waive his rights under the Investment Law.⁷⁰ In deciding *Keating*, the Supreme Court of California followed *Wilko* because of the similarity between the Investment Law's antiwaiver provision and section 14 of the 1933 Act,⁷¹ reasoning that compelled arbitration of an Investment Law claim would indeed deprive the plaintiff of rights granted by the Investment Law.⁷² The Supreme Court of the United States, however, noted that the supremacy clause of the Constitution of the United States mandates that federal substantive law prevail over conflicting state law.⁷³ Holding that the Supreme Court of California's decision was in direct conflict with the FAA, which is substantive (rather than procedural) federal law, the

66. *Id.* at 517.

67. 465 U.S. 1 (1984).

68. *Keating v. Superior Court*, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982).

69. *Southland Corp.*, 465 U.S. at 855.

70. Section 31512 of the California Code provides: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." CAL. CORP. CODE § 31512 (West 1977).

71. See *supra* notes 48-50 and accompanying text.

72. *Keating*, 31 Cal. 3d at 597-98, 645 P.2d at 1198-99, 183 Cal. Rptr. at 366-67.

One author noted that the California court in *Keating* "found that since the California legislature had modeled the state's Franchise Investment Act after the Securities Act of 1933, then it must have intended the law to be interpreted in accordance with federal court decisions under the Securities Act of 1933." Note, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes*, 54 Miss. L.J. 571, 572 n.9 (1984).

73. The supremacy clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

Supreme Court of the United States reversed the decision of the California court and ordered arbitration of the dispute.⁷⁴

In *Southland*, the Supreme Court reaffirmed its support for arbitration as an alternative to litigation. Although the Court predicated its decision upon the supremacy of federal substantive law over state law, *Southland* also cast doubt upon the effectiveness of antiwaiver provisions, such as those found in the California Franchise Investment Law and section 14 of the 1933 Act (upon which the *Wilko* doctrine is premised).⁷⁵

The Court abolished another obstacle to arbitration one year later in *Dean Witter Reynolds Inc. v. Byrd*.⁷⁶ Dr. Byrd had entered into a brokerage agreement in which Dean Witter agreed to manage \$160,000 in securities derived from the sale of Dr. Byrd's dental practice. This agreement contained an industry-standard arbitration provision.⁷⁷ After Byrd's account lost over \$100,000 in one six-month period, Byrd sued Dean Witter alleging common law fraud and violations of the 1934 Act. Dean Witter moved to compel arbitration of the common law claim, but the district court denied the motion, and the Ninth Circuit affirmed.⁷⁸ Both the district court and the Ninth Circuit noted that the federal and common law claims were so "intertwined" that arbitration of the common law claims followed by federal court review of the federal claims would be costly, inefficient, and would eliminate any possible value that arbitration might otherwise offer.⁷⁹ The Supreme Court, however, rejected these arguments and reversed the Ninth Circuit's order. The Court insisted that arbitration agreements must be enforced even if their enforcement results in bifurcated proceedings:

74. *Southland Corp.*, 465 U.S. at 17; see Buchanan & Stevenson, *Developments in Litigation and Enforcement Under State Securities Laws*, 40 BUS. LAW. 705, 718 (1985) ("[T]he Federal Arbitration Act [is] substantive federal law which is enforceable in state as well as federal courts . . . [and] preempts the antiwaiver of judicial remedies provision found in many blue sky acts.").

75. See *supra* notes 27-32 and accompanying text.

76. 470 U.S. 213 (1985).

77. *Id.* at 215. The arbitration provision stated in part: "Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration." *Id.*

78. *Byrd v. Dean Witter Reynolds Inc.*, 726 F.2d 552 (9th Cir. 1984), *rev'd*, 470 U.S. 213 (1985).

79. Additionally, the lower courts believed that allowing arbitration of the state claims would impair a subsequent federal trial because the federal court would be bound by the arbitrators findings of fact under the doctrine of collateral estoppel. *Byrd*, 470 U.S. at 221-22; see generally Note, *Investor-Broker Arbitration Agreements: Dean Witter Reynolds, Inc. v. Byrd*, 20 U.S.F. L. REV. 101 (1985); Note, *Federal and State Securities Claims: Litigation or Arbitration?*—*Dean Witter Reynolds, Inc. v. Byrd*, 61 WASH. L. REV. 245 (1986).

The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Federal Arbitration Act was to promote the expeditious resolution of claims. The Act, after all does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements. The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs."⁸⁰

The Court ordered arbitration of the common law claims, but refused to consider the arbitrability of the federal securities claims because the parties had not properly presented the question to the Court.⁸¹ In a concurring opinion, Justice White agreed that the question was not before the Court, but argued that the *Wilko* doctrine was not necessarily applicable to 1934 Act claims. He contended that Congress provided plaintiffs with a more "special" right in the 1933 Act than in the 1934 Act, and that 1934 Act claims might be arbitrable. He acknowledged, however, that "the question remains open."⁸²

In its last consideration of the *Wilko* doctrine prior to *McMahon*, the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁸³ discussed the arbitrability of federal antitrust claims in the context of yet another international dispute. Mitsubishi, a Japanese automobile manufacturer, had entered into a sales agreement with Soler, a Puerto Rican automobile distributor and dealer. The agreement required arbitration by the Japanese Commercial Arbitration Association of all disputes arising under the contract.⁸⁴ After a dispute arose between the parties over the sale and shipment of new cars, Mitsubishi brought an action in federal district court seeking an order to compel arbitration. The district court ordered arbitration of all claims, including an antitrust claim.⁸⁵ On appeal, the First Circuit reversed, holding that antitrust claims are not arbitrable.⁸⁶ The Supreme Court, however, reversed the First Circuit, ruling that antitrust claims brought under the Sherman Act are arbitrable; but as in

80. *Byrd*, 470 U.S. at 219 (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924)).

81. Dean Witter, assuming that all federal securities claims (including 1934 Act claims) were not arbitrable under *Wilko*, moved to compel arbitration of the common law claims only. *Id.* at 217.

82. *Id.* at 225 (White, J., concurring); see *supra* notes 40-45 and accompanying text.

83. 473 U.S. 614 (1985).

84. *Id.* at 617.

85. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 157 (1st Cir. 1983), *rev'd*, 473 U.S. 614 (1985).

86. *Id.*

Scherk,⁸⁷ the Court limited its holding to *Mitsubishi's* international context.⁸⁸ The Court refused to overturn *American Safety Equipment Corp. v. J.P. Maguire & Co.*,⁸⁹ which held that antitrust claims are generally not arbitrable because of the public's vital interest in fully litigating such disputes.⁹⁰ Despite this refusal,⁹¹ the *Mitsubishi* decision certainly reads as a general endorsement of arbitration:

[A]daptability and access . . . are hallmarks of arbitration. The

87. See *supra* notes 61-66 and accompanying text.

88. The *Mitsubishi* Court admitted that the result may have been different in a domestic dispute:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi, 473 U.S. at 629.

89. 391 F.2d 821 (2d Cir. 1968).

90. In *American Safety*, the Second Circuit questioned the arbitrability of domestic federal antitrust claims. *American Safety* had sought to avoid a license agreement with Hickok on the grounds that it violated the Sherman Act. Maguire, Hickok's assignee of royalty rights, moved to compel arbitration of the dispute as provided in their agreement. The court denied Maguire's motion to compel arbitration, reasoning that Congress intended the judicial system to resolve disputes brought under the Sherman Act. *Id.* at 828.

The *American Safety* court had four basic reasons for its decision. First, because antitrust violations can affect the public at large, the private right of action under the Sherman Act is like "a private attorney-general who protects the public's interest," and that public interest is not adequately protected by arbitration. *Id.* at 826 (citing *Waldron v. Cities Serv. Co.*, 361 F.2d 671, 673 (2d Cir. 1966)). Second, arbitration agreements are usually found only in adhesion contracts. Third, antitrust claims are usually quite complex and arbitrators generally are not sophisticated enough in the area of antitrust to resolve such disputes properly. Fourth, because of their business expertise, many arbitrators may possess a natural bias in favor of big business; it would seem inappropriate, therefore, for these arbitrators to determine issues of such great public interest. *Id.*; see Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219 (1986) (discussing seven additional reasons that commentators have offered in support of this decision).

Courts also have used the "vital national interest" theory to explain why bankruptcy claims are not arbitrable. Relying on *American Safety*, for example, the Second Circuit expanded its arbitration prohibition to include bankruptcy claims in *Allegaert v. Perot*, 548 F.2d 432 (2d Cir. 1977). *Allegaert*, trustee for the bankrupt Walston, sued Perot to enjoin a realignment plan that allegedly would have resulted in preferential treatment for Perot. Perot moved to enforce an arbitration agreement that he and Walston had executed. The court denied the motion for two primary reasons: First, the Bankruptcy Act, like the Sherman Act, presents important federal questions that Congress did not intend to be arbitrable; and second, the existence of the federal securities claims, not arbitrable under *Wilko*, supports judicial resolution of the bankruptcy claims to avoid duplicate proceedings. *Id.* at 436-38. The court also reasoned that even if an enforceable arbitration agreement had existed between Perot and Walston, it would not bind *Allegaert* because a trustee in bankruptcy stands in the shoes of the creditors and not in the shoes of the bankrupt. *Id.* at 436.

Although *Allegaert* is the leading case on the question of the arbitrability of bankruptcy disputes, this issue is by no means settled. See Deitrick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 BUS. LAW. 33, 41 (1984) ("Should arbitration clauses be

anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts [T]he factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.⁹²

The *Mitsubishi* Court, therefore, undermined the very foundation of the *Wilko* doctrine by concluding that arbitration is an adequate (if not preferred) alternative to litigation.⁹³

The *Mitsubishi* decision is the product of a series of cases that began with *Scherk*, in which the Supreme Court demonstrated its support for arbitration and foreshadowed its refusal to extend *Wilko* to 1934 Act and RICO Act claims.⁹⁴ The federal courts of appeals, however, were reluctant to follow this trend, choosing instead to cling to *Wilko*.⁹⁵ In contrast, many district courts anticipated *McMahon* by enforcing arbitration agreements in 1934 Act and RICO disputes.⁹⁶ The Supreme Court's *McMahon* decision put an end to the guessing game and established a uniform treatment of such claims in the federal courts.⁹⁷

mandatorily enforced by bankruptcy courts? The Eighth Circuit seems to think so, but the Third and Sixth Circuits do not.").

Furthermore, courts have used the "vital national interest" theory to argue that RICO claims are not arbitrable. See *supra* notes 55-56 and accompanying text.

91. The *Mitsubishi* Court stated simply that "it [is] unnecessary to access the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions." *Mitsubishi*, 473 U.S. at 629.

92. *Id.* at 633-34. However, Justice Stevens in a dissenting opinion expressed his view that courts should *never* compel any federal claims to arbitration, including those under the Sherman Act. Reading the FAA closely, Stevens concluded that the Act requires arbitration of claims arising out of the parties' contract—not claims arising under federal statutes. *Id.* at 646 (Stevens, J., dissenting).

93. See *infra* notes 126-45 and accompanying text.

94. See *infra* text accompanying notes 98-116.

95. See, e.g., *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655 (11th Cir. 1987); *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986); *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th Cir. 1986). But see *Smokey Greenhaw Cotton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 1221 (5th Cir. 1986).

96. See *Intre Sport, Ltd. v. Kidder, Peabody & Co.*, [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 23, 1986); *Shamir v. Kidder, Peabody & Co.*, [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,511 (S.D.N.Y. Mar. 12, 1986); *Arent v. Shearson/American Express, Inc.*, [1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,523 (D. Mass. Dec. 20, 1985); *Bateh v. Prudential-Bache Securities, Inc.*, No. 84-526-CIV-J-14 (M.D. Fla. July 29, 1985); *Ackerman v. Drexel, Burnham, Lambert, Inc.*, No. 84-6739-CIV-Hastings (S.D. Fla. May 15, 1985); *Finn v. Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985).

97. See *Nesslage v. York Securities, Inc.*, 823 F.2d 231, 235 (8th Cir. 1987) ("[F]ollowing the Supreme Court's decision in *Shearson/American Express*, we hold that § 10(b)/Rule 10b-5 claims are arbitrable [and] civil RICO claims are arbitrable.").

III. *Shearson/American Express, Inc. v. McMahon*: PREDISPUTE AGREEMENTS TO ARBITRATE EXCHANGE ACT AND RICO ACT CLAIMS ARE ENFORCEABLE

The Supreme Court in *McMahon* answered the question that Justice White referred to as "open" in *Byrd*.⁹⁸ *Wilko* does not extend to 1934 Act and RICO Act claims, and therefore, such claims are arbitrable if a valid arbitration agreement exists between the parties.⁹⁹ The *McMahon* Court, however, did not expressly overrule *Wilko*.¹⁰⁰ Rather, the Court assumed arguendo that *Wilko* was decided correctly and that 1933 Act claims cannot be compelled to arbitration.¹⁰¹

The *McMahon* Court, in an opinion written by Justice O'Connor, began its analysis with a discussion of the Federal Arbitration Act.¹⁰² The Court noted that section 2 of the FAA requires enforcement of a written arbitration provision in any "contract evidencing a transaction involving commerce."¹⁰³ The Court also recognized that Congress intended that the FAA "[reverse] centuries of judicial hostility to arbitration agreements"¹⁰⁴ and reduce the cost and delay inherent in litigation.¹⁰⁵ Moreover, the Court noted that subsequent judicial decisions have required an expansive interpretation of the FAA.¹⁰⁶ The *McMahon* Court concluded, therefore, that the FAA creates a presumption that private contracts to arbitrate disputes are enforceable.¹⁰⁷ In order to overcome this presumption of arbitrability, the Court declared that the moving party must "demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act, an intention discernible from the text, history, or purposes of the statute."¹⁰⁸

The *McMahon* Court ruled that the requisite congressional intent to overcome the presumption of arbitrability is not present in the 1934 Act.¹⁰⁹ The respondents had argued that 1934 Act claims were not arbitrable because section 27 gives federal courts exclusive jurisdiction and section 29 prohibits a plaintiff from waiving compliance with the

98. See *supra* text accompanying notes 81-82.

99. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987).

100. For the proposition that the Supreme Court tacitly overruled *Wilko*, see *infra* text accompanying notes 146-55.

101. *McMahon*, 107 S. Ct. at 2338-39.

102. *Id.* at 2337.

103. 9 U.S.C. § 2 (1982).

104. *McMahon*, 107 S. Ct. at 2337 (quoting *Scherk*, 417 U.S. at 510).

105. *McMahon*, 618 F. Supp. at 386 (citing *Scherk*, 417 U.S. at 510-11).

106. See *Cone Memorial*, 460 U.S. at 25; see also *supra* notes 19-20 and accompanying text.

107. *McMahon*, 107 S. Ct. at 2337.

108. *Id.* at 2338.

109. *Id.* at 2343-44.

Act.¹¹⁰ The *McMahon* Court rejected this contention, pointing out that a predispute agreement to arbitrate a future claim does not waive compliance with any substantive aspect of the 1934 Act.¹¹¹ Rather, this type of agreement merely waives a procedural component of the Act that gives federal courts jurisdiction over 1934 Act disputes.¹¹² Such a procedural waiver is not contemplated in section 29.¹¹³

The *McMahon* Court also rejected the respondents' argument that Congress' reference to *Wilko* in a report accompanying a 1975 amendment to the 1934 Act indicated Congress' knowledge and approval of the various judicial decisions extending *Wilko* to 1934 Act claims.¹¹⁴ In that 1975 amendment, Congress modified section 28 of the 1934 Act to allow arbitration agreements between securities professionals. Although this bill did not address the broker-customer relationship, the Conference Report stated: "It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, . . . concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations."¹¹⁵ The *McMahon* Court acknowledged that the respondents' interpretation of the report was plausible, but noted that it was equally plausible that Congress intended the opposite effect:

110. See Brief for Respondents at 13, *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (No. 86-44) [hereinafter Respondents' Brief]; see also *supra* notes 44-45 and accompanying text.

111. *McMahon*, 107 S. Ct. at 2338.

112. *McMahon*, 107 S. Ct. at 2339. Judge Tjoflat noted in his *Wolfe* concurrence:

Were I writing on a clean slate, I might well be inclined to reach a result contrary to the *Wilko* Court. Section 14 of the 1933 Act renders void any provision binding a security purchaser to "waive compliance with any provision of this subchapter." . . . A fair reading of this statute would prevent a purchaser from waiving a seller's compliance with the substantive provisions of the Act By agreeing to arbitrate, the purchaser does not waive the Act's protections, but merely agrees to enforce the Act's provisions in a forum other than the courts.

Wolfe, 800 F.2d at 1039 (Tjoflat, J., concurring).

113. The *McMahon* Court explained:

What the antiwaiver provision of § 29(a) forbids is enforcement of agreements to waive "compliance" with the provisions of the statute. But § 27 itself does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under § 29(a).

McMahon, 107 S. Ct. at 2338 (1987).

114. Respondents' Brief, *supra* note 110, at 18.

115. H.R. REP. NO. 229, 94th Cong., 1st Sess. 91, 111, *reprinted in*, 1975 U.S. CODE CONG. & ADMIN. NEWS 179, 321.

Congress may have been approving the decisions that limited *Wilko* to the 1933 Act. Indeed, the majority of the Court remained unconvinced that one sentence from a Conference Report, unaccompanied by any affirmative legislative action, could overturn the clear language in section 29 of the 1934 Act.¹¹⁶

Four Justices dissented as to the 1934 Act portion of the opinion. Justice Blackmun, with whom Justices Brennan and Marshall joined, agreed with the respondents' contention that Congress had, in effect, legislated *Wilko* into the 1934 Act:

[If] there could have been any doubts about the extension of *Wilko*'s holding to § 10(b) claims, they were undermined by Congress in its 1975 amendments to the Exchange Act. . . . [I]n enacting these amendments, Congress specifically was considering exceptions to § 29(a) [the antiwaiver provision], designed with the protection of investors in mind. The statement from the legislative history . . . indicates that Congress did not want the amendments to overrule *Wilko*. Moreover, the fact that this statement was made in an amendment to the Exchange Act suggests that Congress was aware of the extension of *Wilko* to § 10(b) claims.¹¹⁷

The arbitrability of RICO claims was a much easier issue for the *McMahon* Court. All nine Justices agreed that, even if the respondents' 1934 Act statutory arguments regarding the antiwaiver provision¹¹⁸ and exclusive federal jurisdiction provision¹¹⁹ had merit, there are no analagous provisions in the RICO Act upon which the respondents could rely. The RICO Act contains no antiwaiver provision, and the RICO Act's jurisdiction provision does not specify that federal courts will have *exclusive* jurisdiction.¹²⁰ Indeed, the Supreme

116. Writing for the majority, Justice O'Connor reasoned:

We cannot see how Congress could extend *Wilko* to the Exchange Act without enacting into law any provision remotely addressing that subject. . . . [T]he committee may well have mentioned *Wilko* for a reason entirely different from the one postulated by the *McMahons*—[e.g., because] lower courts had applied § 28(b) to the Securities Act [of 1933], . . . the committee may simply have wished to make clear that the amendment to § 28(b) was not otherwise intended to affect *Wilko*'s construction of the Securities Act. . . . Finally, [the conferees] specifically disclaimed any intent to change [the existing law]. Hence, the *Wilko* issue was left to the courts: it was unaffected by the amendment to § 28(b). This statement of congressional inaction simply does not support the proposition that the 1975 Congress intended to engraft onto unamended § 29(a) a meaning different from that of the enacting Congress.

McMahon, 107 S. Ct. at 2343.

117. *McMahon*, 107 S. Ct. at 2347-48 (Blackmun, J., dissenting).

118. 15 U.S.C. § 78cc (1982). For the relevant text of section 29, see *supra* note 49.

119. 15 U.S.C. § 78aa (1982). For the relevant text of section 27, see *supra* note 44.

120. Section 1965 of the RICO Act provides in relevant part that "[a]ny civil action or proceeding under this chapter against any person *may* be instituted in the district court of the

Court stated that "there is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act."¹²¹ The Court also rejected the respondents' theory that RICO claims, like bankruptcy and antitrust claims,¹²² present "important federal questions" that should only be resolved in a judicial forum.¹²³ The Court stated:

The special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability [of] run-of-the-mill civil RICO claims brought against legitimate enterprises. The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute.¹²⁴

This display of unanimity on the part of the Supreme Court leaves no room for debate—Civil RICO disputes are clearly arbitrable if a valid arbitration agreement exists between the parties.¹²⁵

IV. THE ADEQUACY OF ARBITRATION

One theme that pervades the *McMahon* decision is the belief that arbitration provides both plaintiffs and defendants with an adequate forum for resolving their disputes.¹²⁶ This view, though consistent with the congressional intent behind the FAA,¹²⁷ is at odds with many of the traditional objections to the arbitration of securities claims. Those opposed to arbitration generally have based their objections on the following myths: First, arbitration agreements are adhesion contracts and the investor has little or no bargaining power; second, arbitration is the broker's "home court" because the arbitrator is biased in favor of the securities industry; third, the lack of adequate discovery and evidentiary proceedings in arbitration operates to

United States for any district in which such person resides." 18 U.S.C.A. § 1965 (West 1984) (emphasis added).

121. *McMahon*, 107 S. Ct. at 2343-44.

122. See *supra* notes 89-90 and accompanying text.

123. See Respondents' Brief, *supra* note 110, at 42.

124. *McMahon*, 107 S. Ct. at 2345; see Brief for Petitioners at 28-33, Shearson/American Express Inc. v. *McMahon*, 107 S. Ct. 2332 (1987) (No. 86-44) [hereinafter Petitioners' Brief].

The "important federal question" or "vital national interest" theory is flawed in two respects: First, only mob-type RICO violations present the type of public intrusion that are so important as to require judicial resolution; and second, every piece of legislation protects an important national interest—otherwise Congress presumably would not have passed the given statute.

125. *McMahon*, 107 S. Ct. at 2345-46.

126. *Id.* at 2340-41.

127. See *supra* notes 14-18 and accompanying text.

the disadvantage of the investor; fourth, the arbitrator is likely to be inexperienced or unsophisticated compared to a judge; and fifth, the lack of an adequate record of the proceedings and the absence of adequate judicial review impairs the investor's ability to enforce or appeal an arbitrator's award.¹²⁸

Although these concerns may have been legitimate at the time of the *Wilko* decision, they no longer are valid. In fact, one can easily dispel each of the five myths.¹²⁹ First, some brokers (especially discount brokers) do not require predispute arbitration agreements. The investor, therefore, has substantial bargaining power with brokers because he can demand the removal of an arbitration clause from the brokerage contract, and if the broker refuses, the investor is free to walk out the door and find a broker willing to forgo the arbitration provision.¹³⁰ Second, the investor usually may choose from a list of arbitration organizations, some of which have no connection to the securities industry, such as the American Arbitration Association.¹³¹ In addition, if the arbitration contract requires the use of a panel of arbitrators, the investor may insist that a majority of the panel come from outside the securities industry, and each party will usually have one peremptory challenge in the selection of an arbitrator.¹³² Third, the rules of arbitration permit the parties to subpoena witnesses and allow limited discovery and evidentiary hearings.¹³³ In fact, this limit on discovery is often beneficial to the investor because he is not burdened with the substantial expense often associated with discovery in a judicial proceeding; i.e., the brokerage firm cannot bury the investor with paperwork.¹³⁴ Fourth, the arbitrator is likely to be more knowl-

128. Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 445-55 (1987) (describing and dispelling the "myths" surrounding arbitration).

129. *Id.*; see also Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279 (1984) (Constantine Katsoris, a member of SICA, the Arbitration Committee of National Association of Securities Dealers, and an experienced New York Stock Exchange arbitrator, provides a detailed description of the arbitration of securities claims.).

130. See Fletcher, *supra* note 128, at 447.

131. For a description of the American Arbitration Association's contributions to securities arbitration, see Brief for the American Arbitration Association as Amicus Curiae Supporting Petitioners at 12-21, *Shearson/American Express Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (No. 86-44) [hereinafter Brief for the American Arbitration Association as Amicus Curiae]. In addition, the Securities Industry Conference on Arbitration (SICA) has proposed further refinement of the arbitral process with the adoption of the Uniform Code of Arbitration. See Petitioners' Brief, *supra* note 124, at 34-35.

132. *Id.* at 448; see *infra* notes 156-57.

133. See Brief for the American Arbitration Association as Amicus Curiae, *supra* note 131, at App. B.

134. See Fletcher, *supra* note 128, at 453.

edgeable in his area of specialization than the average judge.¹³⁵ Also, to ensure that the parties' interests are protected adequately and the arbitrator is fully apprised of the parties' respective legal positions, arbitration rules generally entitle all parties to have counsel present.¹³⁶ Finally, arbitration rules usually require written awards, and any party may request a stenographer to keep a record of the proceeding.¹³⁷ If a party refuses to comply with the arbitrator's award, the other party may seek enforcement of the award in a judicial proceeding. If one party believes that the arbitrator has abused his discretion, that party may petition a court to modify or vacate the award.¹³⁸

Resolving disputes in arbitration actually has many advantages.¹³⁹ The average arbitration hearing is faster and less costly than the average judicial proceeding. Thus, arbitration provides a means of reducing the time, expense and emotional stress that are natural consequences of the litigation process.¹⁴⁰ There is greater privacy in arbitration, as well as a lower level of intensity that preserves good will between the parties.¹⁴¹ Because the standard of review for an arbitrator's ruling is limited to instances in which he abuses his discretion, the arbitrator's decision will have greater certainty and finality than that of a judge.¹⁴²

Moreover, the crowded court dockets provide another compelling reason to encourage arbitration. A court's refusal to enforce an arbitration agreement causes a domino effect, delaying not only the parties denied arbitration, but all parties on the docket who must wait that much longer for their day in court.

Cooperation between arbitrators and the judiciary could play a large role in solving this dilemma. One commentator has suggested that rather than choosing an extreme position—either enforcing all arbitration agreements or prohibiting arbitration of all federal securities claims—judicial supervision over the arbitral process would obviate the concerns of the courts that have refused to permit such

135. See Brief for the American Arbitration Association as Amicus Curiae, *supra* note 131, at 14-15.

136. See Fletcher, *supra* note 128, at 451.

137. See Brief for the American Arbitration Association as Amicus Curiae, *supra* note 131, at App. B.

138. See Fletcher, *supra* note 128, at 455.

139. See Katsoris, *supra* note 129, at 312.

140. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 274 (1982) ("Even when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time lapse, the expense, and the emotional stress inescapable in the litigation process.").

141. See Fletcher, *supra* note 128, at 458.

142. See Katsoris, *supra* note 129, at 290-91.

arbitration.¹⁴³ In particular, judicial supervision of the arbitrator selection process is imperative to ensure that a knowledgeable, impartial person (or panel) presides over the hearing.

Chief Justice Burger noted in an address to the American Bar Association that "arbitration should be an alternative that will complement the judicial systems. There will always be conflicts which cannot be settled except by the judicial process."¹⁴⁴ He added, however, that "[t]here are important advantages in private arbitration of large, complex commercial disputes."¹⁴⁵

V. *Wilko v. Swan* TACITLY OVERRULED

In *Wilko v. Swan*, the Supreme Court determined that compelling arbitration of a dispute arising under section 12(2) of the 1933 Act would constitute a waiver of the plaintiff's rights in violation of section 14.¹⁴⁶ The Court based its conclusion primarily on the assumption that a plaintiff's substantive rights were not protected adequately by arbitration.¹⁴⁷ In addition to the 1933 Act's antiwaiver provision, the *Wilko* Court noted the absence of any scienter requirement in section 12(2) of the Act, and that the Act gave plaintiffs broad discretion to choose a forum.¹⁴⁸ The *Wilko* Court reasoned that these features of the 1933 Act created a "special right" which arbitration could not protect adequately.

Because the 1934 Act provides an implied cause of action, rather than the express cause of action found in the 1933 Act, Justice White had argued in his *Byrd* concurrence that the Court should not "mechanically transplant" the *Wilko* doctrine into the 1934 Act.¹⁴⁹ In fact, many observers had assumed that if the Supreme Court

143. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219 (1986). Allison concludes his article by quoting Jerome Frank:

The judge, at his best, is an arbitrator, a "sound man" who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. . . . The bench and bar usually try to conceal the arbitral function of the judge. . . . But although fear of legal uncertainty leads to this concealment, the arbitral function is the central fact in the administration of justice. The concealment has merely made the labor of judges less effective.

Id. at 275-76 (quoting J. FRANK, *LAW AND THE MODERN MIND* 157 (1930)).

144. Burger, *supra* note 140, at 277. *But see* Bayer & Abrahams, *The Trouble with Arbitration*, 11 LITIG. 30, 32 (Winter 1985) ("Arbitration aims at resolving disputes quickly and finally. It does that, but at a cost you may not want to pay.").

145. *Id.*

146. 346 U.S. 427 (1953); *see supra* note 30 and accompanying text.

147. *Id.* at 435-36; *see supra* notes 31-34 and accompanying text.

148. *Id.* at 431; *see supra* notes 27-29 and accompanying text.

149. *See Byrd*, 470 U.S. at 224-25 (White, J., concurring).

approved arbitration of 1934 Act claims, it would base its refusal on this express/implied distinction.¹⁵⁰ The SEC, however, urged the Court not to distinguish between express and implied causes of action in its *McMahon* decision, reasoning that "[s]ection 10(b) is just as much a 'provision' of the 1934 Act, with which persons trading in securities are required to 'comply,' as Section 12(2) is of the 1933 Act."¹⁵¹ Apparently, the SEC persuaded the Court on this point because the majority in *McMahon* never mentioned the express/implied distinction, which Justice Blackmun noted in his dissenting opinion: "That the Court passes over the [express/implied distinction] in silence, although petitioners have advanced it, . . . would appear to relegate that argument to its proper place in the graveyard of ideas."¹⁵²

The *McMahon* Court's refusal to make a distinction between the 1933 Act and the 1934 Act resulted in a decision that directly conflicted with its *Wilko* holding. The *McMahon* Court resolved this conflict by qualifying *Wilko*: "*Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the 'right to select judicial forum' . . . was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2)."¹⁵³ The Court then foreshadowed *Wilko*'s demise by acknowledging the vast improvement in the arbitral process since the *Wilko* decision. In fact, the Court admitted that:

[T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is especially so in light of the intervening changes in the regulatory structure of the securities laws. Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not

150. See Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners at 7, *Shearson/American Express Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (No. 86-44) [hereinafter Brief for the Securities and Exchange Commission as Amicus Curiae].

151. *Id.* at 24. The SEC also argued that:

[T]he Commission urges the Court not to premise its decision in this case on a distinction between express and implied remedies. That distinction is irrelevant to the proper analysis of the case and is incompatible with the importance of the Section 10(b) remedy in the arsenal of securities law protections. There is, in addition, an important practical consideration. Any reliance on such a distinction might be interpreted as suggesting that the Section 10(b) implied right of action is somehow inferior to express rights. The Commission urges the Court to avoid any suggestion that might thus interfere with the effective enforcement of the securities laws.

Id. at 26.

152. *McMahon*, 107 S. Ct. at 2347 n.2 (Blackmun, J., dissenting).

153. *Id.* at 2338 (citations omitted) (quoting *Wilko*, 346 U.S. at 435).

hold true today for arbitration procedures subject to the SEC's oversight authority.¹⁵⁴

In his dissenting opinion, Justice Blackmun went one step beyond the majority. He asserted that the *McMahon* decision "effectively overrule[d] *Wilko* by accepting the Securities and Exchange Commission's newly adopted position that arbitration procedures . . . have improved greatly since *Wilko* was decided."¹⁵⁵

One may ponder, What is left of the *Wilko* doctrine? This Note suggests that the answer is—nothing.

VI. CONCLUSION

By passing the Federal Arbitration Act in 1925, Congress mandated that the judiciary honor the express desire of private parties to use arbitration as an alternative to litigation. Even though judicial hostility toward arbitration may have been understandable at one time, arbitration procedures have improved tremendously due to the supervision of the Securities and Exchange Commission¹⁵⁶ and the development of strict procedural guidelines, such as those established by the American Arbitration Association.¹⁵⁷ These improvements obviate the need for judicial paternalism. As a general rule, courts should honor arbitration agreements, unless Congress has created a specific exemption to the FAA in a given statute.¹⁵⁸

154. *Id.* at 2341; see also *Wolfe*, 800 F.2d at 1039 (Tjoflat, J., concurring) ("Were I writing on a clean slate, I might well be inclined to reach a result contrary to the *Wilko* Court.").

155. *McMahon*, 107 S. Ct. at 2346 (Blackmun, J., dissenting). For the proposition that *McMahon* overruled *Wilko*, see *Noble v. Drexel, Burnham, Lambert, Inc.*, 823 F.2d 849, 850 n.3 (5th Cir. 1987) ("*McMahon* undercuts every aspect of *Wilko*; a formal overruling of *Wilko* appears inevitable—or, perhaps, superfluous."); *Drazdik v. Kidder, Peabody & Co.*, No. 86-3336 at n.1 (6th Cir. July 17, 1987) ("[W]e note that *McMahon* has cast considerable doubt over *Wilko*'s continuing validity."); *Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV 87-1057 RSWL(Gx) (C.D. Cal. July 7, 1987). But see *Chang v. Lin*, 824 F.2d 219 (2d Cir. 1987); *Schultz v. Robinson-Humphrey/American Express, Inc.*, No. 85-115-1-MAC (M.D. Ga. Aug. 14, 1987); *Continental Serv. Life & Health Insur. Co. v. A.G. Edwards & Sons, Inc.*, 664 F. Supp. 997 (M.D. La. 1987).

156. See Brief for the Securities and Exchange Commission as Amicus Curiae, *supra* note 150. In addition to the improvements discussed in the SEC Brief, the Securities Industry Conference on Arbitration, in response to *McMahon*, recently recommended further revisions to arbitration procedures "to ensure that 'public' arbitrators do not have significant professional ties to the [securities] industry." *SEC Staff to Urge Revisions*, 19 Sec. Reg. & L. Rep. (BNA) 1387 (Sept. 18, 1987).

157. See Brief for the American Arbitration Association as Amicus Curiae, *supra* note 131. In addition to the improvements discussed in the AAA Brief, the AAA recently released a new set of rules in response to *McMahon* "meant to give investors and brokers an improved avenue for arbitration that is more independent of the securities industry than arbitration carried out by the securities exchanges." *AAA Releases New Arbitration Rules*, 19 Sec. Reg. & L. Rep. (BNA) 1392 (Sept. 18, 1987).

158. See *supra* notes 102-08 and accompanying text.

In *McMahon*, the Supreme Court seized the opportunity to announce what it had been hinting for a long time: Nothing in the language of RICO or the 1934 Act evinces the requisite congressional intent to create an exception to the FAA. Although the 1934 Act prohibits a waiver of substantive compliance with the Act, a predispute arbitration agreement affects only procedural alternatives and does not involve a waiver of substantive compliance.¹⁵⁹ Furthermore, the Court unanimously held that RICO does not even come close to creating an exception to the FAA.¹⁶⁰ Courts must now enforce arbitration agreements between parties involved in 1934 Act or RICO disputes.

Finally, it is clear that *Wilko*'s "swan song" has begun to sound. The *McMahon* decision represents the culmination of a series of cases in which the Supreme Court undertook a piecemeal dismantling of the *Wilko* doctrine.¹⁶¹ Assuming that Congress does not step in and amend the securities laws to prohibit arbitration of securities claims,¹⁶² predispute arbitration agreements will soon be enforceable even if a plaintiff asserts a 1933 Act claim. In fact, one federal district court has already reached such a holding.¹⁶³ It is inevitable that a conflict will develop between the circuits over the continued vitality of *Wilko*, and litigants will ask the Supreme Court to consider the *Wilko* doctrine one last time. At that time, the Court most assuredly will retire *Wilko* to its proper place in the "graveyard of ideas."¹⁶⁴

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159. See *supra* notes 110-113 and accompanying text.

160. See *supra* notes 118-125 and accompanying text.

161. See *supra* notes 61-97 and accompanying text.

162. According to a recent article in the *Miami Review*, "Congress is planning to hold hearings on the *McMahon* decision later this year to consider whether the federal securities laws should be amended to limit or overrule the effects of *McMahon*." Gard, *McMahon Decision Recognizes Advances in Arbitration*, *Miami Review*, Sept. 14, 1987, at 11, col. 1.

163. See *Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV 87-1057 RSWL(Gx) (C.D. Cal. July 7, 1987) ("*McMahon* held that an arbitration held pursuant to . . . NYSE procedures did not effect a waiver of the 1934 Act. A similar conclusion is compelled for claims under the 1933 Act.") (citation omitted).

164. See *McMahon*, 107 S. Ct. at 2347 n.2 (Blackmun, J., dissenting).