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Michael A. Lindsay

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“PUBLIC” RIGHTS AND PRIVATE FORUMS: PREDISPUTE ARBITRATION AGREEMENTS AND SECURITIES LITIGATION

*Michael A. Lindsay**

INTRODUCTION

Private litigants today bring suit on a variety of rights arising under express federal statutory provisions or implied by statutory language or legislative history. The statutory right may be created by a public law that regulates conduct and defines private rights. On the other hand, the right may arise from a statutory scheme designed to effectuate a public policy through the use of “private attorneys general.” Frequently a litigant may seek vindication of such a “public” right in the context of a private relationship governed at least in part by contract. When this occurs, a conflict may arise between statute and contract.

One type of conflict that may arise between statute and contract involves the procedure by which a substantive statutory right may be vindicated.¹ This, of course, depends on how much procedural guidance the contract and the substantive statute provide. At one extreme the statute might set forth a procedure for vindication of the right, including provisions for venue and service of process; or it might specifically provide federal jurisdiction but say nothing more. At the opposite end of the spectrum, a statute might say nothing at all about procedural matters and instead rely on the general provision of federal question jurisdiction.² Likewise, a contract might contain procedural enforcement mechanisms, such as a forum- or venue-selection clause, or it might provide that its

* B.A. 1980, Marquette University; J.D. 1983, University of Chicago. Mr. Lindsay is an attorney associated with the firm of Dorsey & Whitney, Minneapolis, Minnesota, who participated in the appellate briefing on behalf of the broker-dealer in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3296 (U.S. Oct. 7, 1986) (No. 86-578), which held that predispute arbitration agreements are enforceable as to claims arising under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1982). The author wishes to thank Daniel Ernst, Philip Frickey, Marianne Short, James Vessey, and Michael Wahoske for their helpful comments on a previous draft of this Article, and to give special thanks to Michael Bress, J Jackson, and Edward Pluimer for their comments on several drafts. The views expressed in this Article are those of Mr. Lindsay and not necessarily those of Dorsey & Whitney or its clients.

1. Another type of conflict, certainly more serious, may arise where a contract excludes a substantive right or principle required by statute.

2. 28 U.S.C. § 1331 (1982).

parties will forego litigation altogether and resolve their disputes privately through arbitration. The conflict between statutorily created procedures and contractually required arbitration, if not the most frequently encountered, has perhaps been the most controversial—and for good reason. It raises a very serious question: where a statute creates a cause of action and provides a remedy, may private parties contractually agree in advance of a dispute to resolve “any controversy”—including controversies based on the provisions of that statute—in a private forum?

As a general matter, agreements to arbitrate are strongly favored and routinely enforced. The Federal Arbitration Act (Arbitration Act) provides that a written predispute arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³ But suppose the statute creating the right expressly provides a remedial procedure for its vindication. Can parties choose their own remedial procedures and ignore those provided by statute? Or suppose that the statute is designed to effectuate some public policy larger than the equities of the particular dispute. Can private arbitration be trusted to have as balanced and broad a view of public policy as the federal judiciary?⁴

In a variety of contexts, courts have found an implied exception to the Arbitration Act for rights based on federal statutes, and in particular, on statutes that the courts believe are designed to implement a significant public policy. This Article is concerned primarily with the validity of predispute agreements in one area of “public” rights—those asserted in disputes between the securities industry and its public customers.⁵ The complaining party in these disputes usually invokes one if not both of the principal securities statutes⁶—the Securities Act of 1933 (1933 Act),⁷ and

3. 9 U.S.C. § 2 (1982). The Federal Arbitration Act (Arbitration Act) applies only to contracts involving interstate or foreign commerce, *id.* §§ 1-2, but it applies to *all* such contracts, contrary state law notwithstanding. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

4. State judiciaries are excluded here because current controversies involve statutes providing exclusive federal jurisdiction, and indeed exclusivity is frequently offered as a justification for nonenforcement of arbitration agreements. *See infra* text accompanying notes 155-68. The seminal Supreme Court decision in the area, however, involved concurrent jurisdiction coupled with a prohibition of removal to federal court. *See Wilko v. Swan*, 346 U.S. 427 (1953).

5. “Public customer” is something of a term of art, referring to members of the general public who are not associated with the securities industry except as customers.

Intra-industry disputes are excluded because they are subject to a specific statutory authorization of predispute arbitration agreements. 15 U.S.C. § 78bb(b) (1982).

6. There are four securities statutes in addition to the principal statutes discussed in text that also contain the nonwaiver provisions that will be discussed below. For example, the Trust Indenture Act of 1939, ch. 411, 53 Stat. 1149 (current version at 15 U.S.C. §§ 77aaa-77bbbb (1982)), provides that “[a]ny condition, stipulation, or provision binding any person to

the Securities Exchange Act of 1934 (1934 Act)⁸—and sometimes the Racketeer Influenced and Corrupt Organizations Act (RICO).⁹ The courts are sharply divided on whether predispute agreements to arbitrate controversies under these statutes should be enforced.

The thesis of this Article is that predispute agreements to arbitrate securities disputes should be enforced in accordance with the Arbitration Act. Whatever the merits of the general “statutory rights,” “public rights” or “public policy” exceptions to the mandate of the Arbitration Act in other contexts, the securities laws present a fundamentally different case. The 1933 and 1934 Acts’ impact on predispute arbitration agreements turns on the construction of particular statutory language which prohibits waiver of statutory “provisions,” and not on any “policy” exception. This language should be construed to permit arbitration. RICO, on the other hand, contains no relevant and similarly specific provision. It must be analyzed in terms of the judicially created and policy-based “public rights” exception to the Arbitration Act and not in terms of statutory language. But though clothed in the garb of RICO, these securities disputes should remain fully arbitrable.

On three occasions the United States Supreme Court has considered the possibility that claims arising under the federal securities laws might not be arbitrable pursuant to predispute agreements.¹⁰ In the first of these three decisions, *Wilko v. Swan*,¹¹ the Court held that a public customer could not be compelled to arbitrate a claim arising under section 12(2) of the 1933 Act pursuant to a predispute agreement. In the other two decisions, *Scherk v. Alberto-Culver Co.*¹² and *Dean Witter Reynolds*

waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.” 15 U.S.C. § 77aaaa. The Investment Company Act of 1940, ch. 686, tit. 1, 54 Stat. 789 (current version at 15 U.S.C. §§ 80a-1 to 80a-64 (1982)), and the Investment Advisers Act of 1940, ch. 686, tit. 2, 54 Stat. 789 (current version at 15 U.S.C. §§ 80b-1 to 80b-21 (1982)), contain identical nonwaiver provisions. 15 U.S.C. §§ 80a-46(a), 80b-15(a). The Public Utility Holding Company Act of 1935, ch. 687, tit. 1, 49 Stat. 838 (current version at 15 U.S.C. §§ 79 to 79z-6 (1982)), contains an identical nonwaiver provision, except that it substitutes “chapter” for “subchapter.” 15 U.S.C. § 79z(a). The author deals with these statutes only by implication; none of these nonwaiver provisions have been subjected to judicial scrutiny.

7. 15 U.S.C. §§ 77a-77bbbb (1982).

8. 15 U.S.C. §§ 78a-78kk (1982).

9. 18 U.S.C. §§ 1961-1968 (1982).

10. The Court has not yet considered the enforceability of agreements to arbitrate under Racketeer Influenced and Corrupt Organizations Act (RICO) claims. That question is now pending in its docket. See *infra* note 14.

11. 346 U.S. 427 (1953).

12. 417 U.S. 506 (1974).

Inc. v. Byrd,¹³ the Court observed in dicta that claims arising under section 10(b) of the 1934 Act might not receive the *Wilko* treatment. From these three cases one can discern two basic models for understanding the relationship between the securities laws and the Arbitration Act: the Reed-Clark model that the *Wilko* Court adopted, and the White-Frankfurter model reflected in Justice Frankfurter's *Wilko* dissent and Justice White's *Byrd* concurrence.

The Reed-Clark model focuses on the special nature of the right created by section 12(2) of the 1933 Act. It concerns the ways in which the statutory right of action is distinct from the common-law action for fraud, and on the various procedural advantages and benefits that the 1933 Act gives to securities plaintiffs. It essentially considers the procedural benefits of the 1933 Act as goods in themselves. In contrast, the White-Frankfurter model considers the procedural aspects significant only insofar as they can be shown to affect the substantive right conferred by the statute.

Wilko was wrongly decided because the Reed-Clark model that it incorporated is based on two flawed assumptions: first, that predispute arbitration agreements in the securities context are not voluntary in any meaningful sense of the word; and second, that such agreements always diminish the securities plaintiff's ability to obtain justice in disputes with broker-dealers. In deciding the cases now pending before it,¹⁴ the Court ought to reject the Reed-Clark model, embrace the White-Frankfurter

13. 470 U.S. 213 (1985).

14. The Supreme Court granted the petition to review the Second Circuit's decision in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), cert. granted, 107 S. Ct. 60 (1986), on both the 1934 Act and RICO questions. Other appellate decisions include *Sterne v. Dean Witter Reynolds, Inc.*, 808 F.2d 480 (6th Cir. 1987) (section 10(b) claims not arbitrable); *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291 (1st Cir. 1986) (1934 Act claims arbitrable; RICO claims not arbitrable); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (section 10(b) claims not arbitrable), petition for cert. filed, 55 U.S.L.W. 3536 (U.S. Jan. 29, 1987) (86-1218); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986) (1934 Act claims not arbitrable; RICO claims arbitrable only if "underlying" claim arbitrable), petition for cert. filed, 55 U.S.L.W. 3325 (U.S. Sept. 25, 1986) (No. 86-487); *Badart v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 775 (9th Cir. 1986) (claims under §§ 9(a)(4), 10(b), 15(b), 15(c), and 20(a) of 1934 Act not arbitrable), petition for cert. filed, 55 U.S.L.W. 3317 (U.S. Oct. 10, 1986) (86-591); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1987) (section 10(b) claims not arbitrable), petition for cert. filed, 55 U.S.L.W. 3153 (U.S. Aug. 25, 1986) (No. 86-282); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986) (1934 Act claims arbitrable), petition for cert. filed, 55 U.S.L.W. 3296 (U.S. Oct. 7, 1986) (No. 86-578); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) (section 10(b) claims not arbitrable), petition for cert. filed, 55 U.S.L.W. 3159 (U.S. Aug. 29, 1986) (No. 86-321). There appears to be no correlation between a circuit's position on 1934 Act arbitrability and its position on RICO arbitrability. See *infra* notes 257-60 and accompanying text.

model, and effectively overrule *Wilko*. Even if the Court cannot bring itself to overtly disavow the Reed-Clark model, however, the Court can and should confine *Wilko* to its narrow holding by applying its rationale strictly.

I. THE FEDERAL ARBITRATION ACT: A PUBLIC POLICY FAVORING PRIVATE FORUMS

In 1925, Congress adopted the Federal Arbitration Act (Arbitration Act).¹⁵ In enacting this law, Congress recognized the historic “jealousy of the . . . courts for their own jurisdiction” and the consequent judicial refusal “to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction.”¹⁶ The Arbitration Act was designed specifically to overcome this tradition of hostility and to declare arbitration agreements enforceable.¹⁷ In short, reversing centuries of *stare decisis*, Congress established a public policy favoring arbitration and the enforceability of arbitration agreements.¹⁸

Section 2 of the Arbitration Act declares the validity, irrevocability, and enforceability of any written “contract evidencing a transaction involving [interstate or foreign] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁹ Section 3 provides for the stay of judicial proceedings on “any issue referable to arbitration” pending that arbitration;²⁰ section 4 establishes a procedure for compelling a party to submit to arbitration.²¹

Under these various presumptions and procedures, any party to a contract can enjoy the benefit of the bargain. A defendant to an action²²

15. Federal Arbitration Act, ch. 213, § 2, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 2 (1982)).

16. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924), *quoted in* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985).

17. *Id.*

18. *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3353-54, 3354 n.14 (1985); Southland Corp. v. Keating, 465 U.S. 1, 12-13, 16 (1984); *see also* Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219, 221 (1986).

19. 9 U.S.C. § 2 (1982).

20. *Id.* § 3.

21. *Id.* § 4.

22. The statute speaks of “issue[s]” rather than “actions.” This might be taken to suggest that Congress understood that a single action could include both arbitrable and nonarbitrable issues—possibly providing the linguistic basis for a “public policy” exception to the statute’s mandate. A more persuasive reading of this language, however, is that Congress knew that a predispute agreement might not require arbitration of all “issues” or causes eventually pleaded in a single “action.” For example, an agreement might provide for arbitration of disputes

properly referable to arbitration under a previous agreement may obtain a stay of judicial proceedings on that action "until such arbitration has been had"—that is, until the plaintiff submits to the bargained arbitration; similarly, a plaintiff²³ (or "claimant," in the language of arbitration) may force a recalcitrant respondent to proceed to arbitration.²⁴ Other sections of the Arbitration Act provide certain procedural rules governing the arbitration hearing, as well as providing for judicial enforcement of arbitration awards.²⁵

II. *WILKO V. SWAN*: THE POLICY REPEALED?

Just eight years after passing the Arbitration Act, Congress adopted the Securities Act of 1933²⁶ and created a regulatory scheme to govern the behavior of securities offerors, dealers, and brokers. The 1933 Act also provided new remedies for purchasers of securities. In section 12(2), Congress created a remedy for material misstatements or half-truths in connection with the sale or offer for sale of a security in interstate com-

arising "out of this agreement" instead of "out of the parties' relationship," thus requiring arbitration of contract claims but not necessarily tort claims. See Comment, *Arbitration of Investor-Broker Disputes*, 65 CALIF. L. REV. 120, 125 (1977) ("The standard arbitration clause is clearly designed to encompass almost any dispute which might arise between an investor and his broker."). See generally Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986).

23. One can envision circumstances where converse desires would exist. For example, a defendant wishing for some reason to obtain a quick resolution of a dispute might seek an order compelling arbitration under § 4 of the Arbitration Act. Similarly a plaintiff, after filing a complaint, might decide that he would prefer arbitration and seek to stay judicial proceedings under § 3. This plaintiff, however, might run into waiver problems by virtue of his previous filing.

24. The discussion in the text correctly describes the parties' mutual right to enforce an arbitration agreement pursuant to the Arbitration Act. Members of the American and New York stock exchanges, however, are required by the exchanges' constitutions to submit their disputes to arbitration at a customer's request even if there is no previous agreement to do so. See Constitution of the American Stock Exchange, Inc., art. VIII, § 1, reprinted in 2 Am. Stock Ex. Guide (CCH) ¶ 9062 (1986); Constitution of the New York Stock Exchange, Inc., art. XI, § 1, reprinted in 2 N.Y.S.E. Guide (CCH) ¶ 1501 (1986). Enforcing predispute arbitration agreements would correct this imbalance.

25. For a helpful summary of the procedures available in arbitration, see Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 285-91 (1984). Professor Katsoris is one of three "public" representatives to the Securities Industry Conference on Arbitration (SICA). In addition to the four public members, SICA's membership also includes ten self-regulatory securities organizations, as well as the Securities Industry Association. See *id.* at 283 n.15; see also SEC Release No. 16,390 (Nov. 30, 1979), 18 SEC DOCKET 1197, 1197 & n.3 (1979). SICA was organized in 1977 to assist the industry and the SEC in developing improved methods of dispute resolution. Katsoris, *supra*, at 283-84.

26. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77bbbb (1982)).

merce.²⁷ In the same section that created the right, Congress provided the remedy—a suit, “either at law or in equity in any court of competent jurisdiction”²⁸ The securities plaintiff was given the right to proceed in either state or federal court and was exempted from the general provisions permitting defendants to remove cases to federal court. Moreover, the requirement of scienter was eliminated, and the burden of proving (non-) negligence was shifted to the defendant.²⁹ To ensure that the securities industry did not deprive the customer of his statutory rights, Congress also provided in section 14 that “[a]ny 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 [Securities and Exchange] Commission shall be void.”³⁰

In *Wilko v. Swan*,³¹ the meaning of section 14’s “nonwaiver” provision came into question. In 1951, plaintiff Wilko purchased 1600 shares of common stock of Air Associates, Inc. for a price of nearly \$30,000. In his complaint, Wilko alleged that in selling the securities, defendants had falsely represented to him that Air Associates and Borg Warner Corporation had agreed to a merger, which would greatly increase the value of his stock. Wilko sold his stock two weeks after purchasing it at a loss of nearly \$4000, and he claimed this amount in damages.³² All in all, it was a fairly typical securities dispute.

Pursuant to a predispute arbitration agreement, the brokerage firm moved for a stay under section 3 of the Arbitration Act.³³ The predispute agreement clearly extended to Wilko’s claim;³⁴ the relevant clause provided that “[a]ny controversy arising between us under this contract shall be determined by arbitration”³⁵ The district court held that under section 14 of the 1933 Act, the arbitration agreement was unenforceable.³⁶ The Second Circuit reversed, holding the agreement enforce-

27. 15 U.S.C. § 77l(2) (1982).

28. *Id.*

29. *Id.*; see also *infra* note 76.

30. 15 U.S.C. § 77n (1982).

31. 346 U.S. 427 (1953).

32. *Id.* at 428-29.

33. *Id.* at 429.

34. *But see supra* note 22.

35. *Wilko*, 346 U.S. at 432 n.15.

36. *Wilko v. Swan*, 107 F. Supp. 75, 79 (S.D.N.Y. 1952), *rev'd*, 201 F.2d 439, *rev'd* 346 U.S. 427 (1953). The district court noted quite simply that the agreement provided for arbitration as “the sole method of deciding disputes,” but that “Congress has granted the right to a court remedy.” *Id.* at 78. The court observed that the effect of arbitration clauses (which it considered customary in the industry) was “to require the purchaser to sign away his rights to a court remedy for violation of the Act which was passed to protect him, as a preliminary to the purchase of stock.” *Id.* That was perhaps enough to justify the district court’s decision,

able; the Supreme Court sided with the district court and reversed.³⁷

Wilko has sometimes been read as standing generally for the proposition of a "public policy" exception to the Arbitration Act.³⁸ It has also been described (more accurately) as "rest[ing] on a foundation fundamentally different from the other public policy prohibitions on enforcement of arbitration agreements."³⁹ This foundation is the assumption that arbitration clauses are involuntarily agreed to by public customers and that the securities industry is somehow taking advantage of its customers. The Reed-Clark model embraces this assumption; the White-Frankfurter model rejects it.

A. *The Second Circuit and the Origins of the White-Frankfurter Model*

The White-Frankfurter model can be traced back to the Second Circuit's decision in *Wilko v. Swan*,⁴⁰ which the Supreme Court reversed. The Second Circuit began with the central assumption that the plaintiff

but the court went on to examine the nature of arbitration. It argued that arbitration did not provide a securities purchaser with protections "equivalent" to those that he would receive in court, and it noted that arbitration was "informal" and provided "looser approximations to the enforcement" of a plaintiff's rights. *Id.* (quoting *American Almond Prods. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944)). The district court also took into account the "facts" that arbitrators were usually laymen and that they may not understand the intricacies of the right provided by Congress. *Id.* (quoting *American Almond Prods. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) and CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, HANDBOOK AND GUIDE TO ARBITRATION UNDER THE NEW YORK AND UNITED STATES ARBITRATION STATUTES 3-4 (1932)).

The court then marshalled two last arguments for its conclusion. First, it noted the difficulty that a plaintiff might face if he had to divide his action, suing the non-signatory to the arbitration agreement in court, and arbitrating his dispute with the broker-dealer. *Id.* at 79. Second, the district court found that Congress "must have been aware of the lesser bargaining position of the purchaser of securities." *Id.* The court therefore concluded that enforcement of a predispute arbitration agreement "would accomplish in the same breath the contravention of both the language and the policy of the Securities Act, for such an arbitration clause would bar the purchaser from a remedy which the Act assures him." *Id.*

The first of these two arguments exposes a very real concern, for frequently a 1933 Act securities plaintiff may wish to sue the issuer as well as the broker-dealer (for example, where the issuer puts out an allegedly false press release which the broker-dealer republishes without undertaking sufficient efforts to verify it). Nevertheless, this problem is not unique to the securities context, and assuming that the agreement is in fact voluntary, it is exactly what the parties bargained for. In fact, a variant of the argument arose again thirty years after *Wilko* in the "intertwining" cases. The Supreme Court, however, rejected the argument in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218-20 (1985).

37. 201 F.2d 439, *rev'd*, 346 U.S. 427 (1953).

38. *See, e.g.*, Allison, *supra* note 18, at 233-34.

39. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 521 (1981).

40. 201 F.2d 439, *rev'd*, 346 U.S. 427 (1953).

had voluntarily agreed to arbitration. Where the district court had noted the seller's "superior bargaining power," the Second Circuit felt compelled to "assume that the plaintiff voluntarily entered into the agreement and fully understood its terms."⁴¹ Having before it what it considered a voluntary agreement, the Second Circuit turned to the question of whether that agreement was enforceable.

The appellate court first noted that the mere presence of a "statutory cause of action" did not preclude arbitration,⁴² citing a variety of other cases involving arbitration of statutory disputes.⁴³ At least in this context, the Second Circuit noted, there was no distinction between a predispute agreement and an agreement made after an action had been commenced.⁴⁴

The court turned next to the district court's argument that a predispute arbitration agreement constituted a waiver of the right to proceed in court. The Second Circuit noted that a plaintiff could voluntarily settle a claim without bringing a lawsuit. It therefore followed, by the Second Circuit's reasoning, that a customer could agree to settle his dispute by arbitration.⁴⁵ The Second Circuit then suggested that a plaintiff might want to do precisely this to take advantage of the "speedy remedy of arbitration" in contrast to the long delayed remedy of a court trial.⁴⁶

41. *Id.* at 442. This presumption of voluntariness stems in part from the plaintiff's procedural default. The court noted that Wilko had failed to file an affidavit in response to defendant's motion for a stay. Thus the court assumed that the agreement was voluntary and therefore valid.

42. Compare this view with Justice Brennan's statement for the Court in *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984): "Because § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable." This decision is discussed *infra* in text accompanying notes 245-54. For another comment on this issue, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3353 (1985) ("we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims").

43. *Wilko*, 201 F.2d at 443.

44. *Id.*

45. *Id.* at 444. This argument completely misses the point. Section 14 of the 1933 Act clearly provides that a public customer cannot be required to waive compliance with the Act as a condition for the purchase of a security. 15 U.S.C. § 77n (1982). The Second Circuit's suggestion that a plaintiff can be required to execute a settlement agreement as a condition of doing business is tantamount to holding that he can be required to waive his rights to compliance with the Act's substantive provisions, a waiver that clearly violates both the letter and the spirit of § 14's prohibitions. See *infra* note 128. Note, too, the Court's assumption that the agreement was "voluntary." See *supra* text accompanying note 41. As will be seen, the question of voluntariness ought to play no role in construing the nonwaiver provision, see *infra* text at notes 121-52; the Second Circuit's assumption was more appropriate than the district court's contrary assumption, see *supra* note 25, because the former lessened the significance of voluntariness *vel non* and permitted the court to focus on the real issue.

46. *Wilko*, 201 F.2d at 444. One begins to wonder whether federal courts have *always*

This would be particularly true in New York City, "where calendar congestion both in the state courts and the federal court is notorious and results in excessive delay."⁴⁷

Finally, the Second Circuit addressed the burden of proof of negligence which, under section 12(2) of the 1933 Act, is shifted to the defendant. The court determined that although this rule was unusual and arbitrators did not usually "consider themselves bound to decide strictly according to legal rules," they were required to do so if the arbitration agreement so provided.⁴⁸ The agreement at issue in *Wilko* provided that the parties' rights were "subject to" the 1933 Act.⁴⁹ The Second Circuit concluded that this required the arbitrators to obey the provisions of section 12(2),⁵⁰ and the court noted that the arbitrators' failure to comply with this rule would be grounds for vacating the award under section 10 of the Arbitration Act.⁵¹ The court did not, however, say how it could ever determine whether the arbitrators had failed to abide by section 12(2).⁵²

B. Judge Clark and the Origins of the Reed-Clark Model

Judge Charles Clark dissented from the Second Circuit's decision in *Wilko v. Swan*,⁵³ and offered several reasons for affirming the "wise and beneficent" decision of the district court.⁵⁴ First, he noted the general principle that arbitration should not be used "as a device to blunt or break social legislation."⁵⁵ Although Judge Clark did not so state, this argument is the counterpoint to the majority's view that the statutory nature of a right is not in itself sufficient to preclude arbitration. In Judge Clark's view, certain statutory rights embody public principles so

labored under this heavy burden of congested dockets. See generally R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

47. *Wilko*, 201 F.2d at 444.

48. *Id.*

49. *Id.* at 445. The Supreme Court did not consider this quite as obvious as the Second Circuit did. See *Wilko v. Swan*, 346 U.S. 427, 433 n.18 (1953). Nevertheless the Court did ultimately accept the proposition, as did the dissent. See *id.*; see also *id.* at 439-40 (Frankfurter, J., dissenting).

50. *Wilko*, 201 F.2d at 444-45.

51. *Id.* at 445.

52. But Justice Frankfurter did. See *infra* notes 82-84 and accompanying text.

53. 201 F.2d 439, *rev'd*, 346 U.S. 427 (1953).

54. *Id.* at 446 (Clark, J., dissenting). Judge Clark was a principal draftsman of the Federal Rules of Civil Procedure, and perhaps this involvement helps explain his preference for judicial resolution of securities disputes. For an interesting discussion of his and other drafters' beliefs and motivations in the Rules project, see Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498-515 (1986).

55. *Wilko*, 201 F.2d at 445 (Clark, J., dissenting).

important that their enforcement cannot be the subject of a predispute arbitration agreement.

Focusing more specifically on the 1933 Act, the dissent next noted that arbitration would not satisfy the specific policy of that Act, the “objective and sympathetic consideration of [the customer’s] claim”⁵⁶ Judge Clark did not offer any specific provision in the statute as the source for this pro-plaintiff policy; presumably, and no doubt fairly, he thought this goal implicit in the statute’s structure and language. More troubling than the specific source of this policy, however, is Judge Clark’s conclusion that arbitration would not provide the customer an “objective and sympathetic” hearing.⁵⁷

Judge Clark then responded to the majority’s treatment of the burden of proof issue. He noted first of all that it would be unrealistic to expect that arbitrators would or could “manipulate” this rule in the same way that judges and lawyers could.⁵⁸ In any event, he continued, this would be contrary to the purpose of arbitration, namely to avoid the “legal restrictions” and “fancy legalisms” of the courtroom.⁵⁹ He then noted that the summary nature of arbitration proceedings, records, and decisions would preclude judicial review of arbitrators’ behavior on this point, and that this amounted to “a clear loss of statutory right”⁶⁰

Next, Judge Clark responded to the majority’s discussion of the “speedy trial” and “congested calendar” issues. Here the dissent pointed to the concurrent jurisdiction and expansive venue rights granted by the statute. This jurisdictional right, the dissent argued, was the statutorily provided means by which a dissatisfied customer could avoid delay. If the customer thought the federal and state courts in New York were too congested, an action could be brought in another court or venue, where congestion was less of a problem.⁶¹ Finally, the dissent turned to the role of section 14 of the 1933 Act. Section 14, Judge Clark observed, was a general prohibition on required waivers of rights. Judge Clark opined that more specific prohibition of predispute arbitration agreements was unnecessary in light of this section, and indeed would have been highly unusual.⁶²

56. *Id.* (Clark, J., dissenting).

57. This point recurred in the Supreme Court’s opinion. See *infra* text accompanying notes 69-70.

58. *Wilko*, 201 F.2d at 445 (Clark, J., dissenting). The dissent assumed without saying in so many words that arbitrators were not lawyers.

59. *Id.* at 445-46 (Clark, J., dissenting).

60. *Id.* at 446 (Clark, J., dissenting).

61. *Id.* (Clark, J., dissenting).

62. *Id.* (Clark, J., dissenting). But compare the Commodities Exchange Act, which specif-

Perhaps Judge Clark's strongest argument was the analogy to releases under the Federal Employers' Liability Act (FELA).⁶³ The case law construing FELA held that pre-accident releases are unenforceable, while post-accident releases are generally enforceable if fairly and reasonably made as part of a settlement.⁶⁴ The dissent offered this analogy as appropriate guidance for distinguishing predispute and postdispute agreements.⁶⁵ Had Judge Clark been willing to tease out this argument a bit more, he might have noted that section 14 forbade the waiver of judicial remedies as a condition of sale, but not in the context of a postdispute settlement.

C. *The Supreme Court and the Reed-Clark Model*

The Supreme Court reversed the Second Circuit's decision in *Wilko v. Swan*.⁶⁶ In explaining the Court's decision, Justice Reed's majority opinion focused on section 14 of the 1933 Act and the critical question of whether the conferring of judicial jurisdiction over section 12(2) claims was a "provision" whose waiver the securities vendor could not require as a condition of doing business.⁶⁷ The reasons for the Court's decision

ically provides that the Commodities Futures Trading Commission shall devise a scheme to insure that arbitration agreements are voluntary. This statute is discussed *infra* in text accompanying notes 137-44.

Although the dissent said nothing of why this general prohibition should overrule the Arbitration Act's mandate, one might argue that the 1933 Act came later in time and therefore trumped the Arbitration Act. This, however, would ignore the general canon of statutory construction that repeal by implication is disfavored, *see, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88 (1982), although admittedly this canon has itself come into disfavor. *See generally* R. POSNER, *supra* note 46, at 281-82. One might also argue that the 1933 Act was the more "specific" legislation in that it purported to govern a specific transaction while the Arbitration Act governed "commercial transactions" more generally. Against this, however, could be placed the argument that the 1933 Act made a general grant of jurisdiction, while the Arbitration Act made a more specific provision for the types of agreements that might govern the courts' exercise of that jurisdiction. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). (This is *not* to say that the Arbitration Act *divests* courts of jurisdiction. *See infra* Part IV of this Article.)

63. 45 U.S.C. §§ 51-60 (1982).

64. *Wilko*, 201 F.2d at 446 (Clark, J., dissenting) (citing *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948)).

65. The dissent, however, declined to address the question whether postdispute arbitration agreements are enforceable. Compare Justice Jackson's concurrence in the Supreme Court's opinion, which argues in favor of the enforceability of postdispute arbitration agreements. *Wilko v. Swan*, 346 U.S. 427, 438-39 (1953) (Jackson, J., concurring).

66. 346 U.S. 427 (1953).

67. This view was perpetuated by the SEC at least as late as 1979. *See* Notice to Broker-Dealer Concerning Clauses in Customer Agreements Which Provide for Arbitration of Future Disputes, Exchange Act Release No. 15,984, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,122, at 81,975 (July 2, 1979) ("a predispute arbitration agreement constitutes a waiver of the right to a judicial forum") [hereinafter Exchange Act Release].

are not entirely clear. The Court stated that it reached its conclusion "for the reasons set out above in the statement of petitioner's contention,"⁶⁸ but it continued to supply somewhat different reasons.

The major premise of the petitioner's argument had been that Congress' purpose in enacting the 1933 Act was to prevent sellers from doing anything that might "weaken their ability to recover under the Securities Act."⁶⁹ The minor premise of the argument was that arbitration "lacks the certainty of a suit at law under the Act"⁷⁰ The conclusion was that section 14 (from which petitioner had divined his major premise) forbade a seller from requiring a buyer to agree to arbitration as a condition of doing business.

This syllogism is fundamentally flawed, for the conclusion does not follow from the premises. What the argument lacks is an additional minor premise—that arbitration results in a net disadvantage to securities customers or securities plaintiffs. Although it is far from clear that this additional minor premise would accurately reflect the true state of affairs either in 1953⁷¹ or today,⁷² it is apparently an assumption in which the

68. *Wilko*, 346 U.S. at 435.

69. *Id.* at 432.

70. *Id.*

71. The author has not found statistics for 1953, when the Supreme Court decided *Wilko*, or for 1952, when the action was commenced. The closest figures available are for the years 1957-61. During that period, claimants (i.e., securities plaintiffs) prevailed in 43.4% of the submissions that proceeded to award through the New York Stock Exchange arbitration procedures. See S.E.C., REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. ch. 12, at 559 (1963). The underlying statistics are reprinted in Comment, *Arbitration of Investor-Broker Disputes*, *supra* note 22, at 130 n.63.

72. For the period 1980-85, 52% of the public-customer cases were decided in the public customer's favor. See FIFTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, STATISTICAL REPORT, (Apr. 1986) (Exhibit A). For 1985 alone, the figure is 55%. Neither figure reflects arbitrations conducted before the American Arbitration Association. Since 1950, the New York Stock Exchange arbitrations apparently have become more pro-plaintiff. For the six-year period of 1980-85, 50.9% of its decided cases resulted in public-customer awards; for 1985 alone, the figure is 52.1%. *Id.* The figures provided here and in *supra* note 71, however, must be taken with a grain of salt. To begin with, it is unclear what percentage of claims are in some sense truly "just," that is, "ought" to be vindicated in some sense other than the purely probabilistic; perhaps it is more than 50%, perhaps it is less. Moreover, one might argue that these figures are consistent with a hypothesis of arbitral hostility to claimants. If the figures represent substantially more submissions under predispute agreements than under postdispute agreements, it may be that plaintiffs' lawyers, armed with a mature claim and the comparatively greater resources that a party will devote to obtaining information about the claim's vindication, are able to perceive arbitral hostility. The percentage of claimant victories nevertheless would have to remain high in order to persuade those already bound to arbitrate to go forward. If there were no substantial likelihood of success, the claimant would not expend the resources to prosecute a claim, although these resources would be less than required for litigation. Of course, it may be that the plaintiff's lawyer avoids arbitration for reasons independent of the merits of the claim. For example, he may lack

Court was willing to indulge.⁷³

Justice Reed put a bit more flesh on the bare bones of Wilko's argument. He noted that securities sellers have more information about the potential returns on a security than buyers have, and that one might therefore reasonably assume that Congress wished 'to place securities buyers in a different position from that of other kinds of purchasers. Justice Reed then commented on the particular significance of the 1933 Act's procedural provisions. He remarked that a buyer "has a wider choice of courts and venue than other types of purchasers." He also noted that the summary nature of arbitration proceedings⁷⁴ precluded judicial examination of arbitrators' conception and application of such statutory requirements as "burden of proof," "reasonable care," or "material fact."⁷⁵ Earlier in his opinion, Justice Reed had noted that section 12(2) "created a special right to recover for misrepresentation which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of *scienter*."⁷⁶ Justice Reed offered an analogy different from that which Judge Clark had offered in the court below. He observed that a predispute venue-restriction agreement had been held invalid under FELA. In so holding, the Court had said that "the right to select the 'forum' even after the creation of a liability is a 'substantial right' . . ." ⁷⁷ It is not clear whether Justice Reed intended to use "substantial right" to mean a substantive right, or merely a very significant procedural right.

familiarity with arbitration procedures or desire to impose discovery costs on the opposing party in the hopes of improving his own settlement posture. On the whole, the figures simply seem too favorable to claimants to support an "arbitral hostility" thesis.

73. The assumption is not intuitively obvious. Arbitrators are not mere stooges of the securities industry, and plaintiffs' lawyers will make sure that arbitrators are adequately apprised of the standards of section 12(2). If arbitrators indeed act in good faith, their uncertainty as to the application of the statute may cause them to give the customer an even greater benefit of the doubt than he is legally entitled to. For a more favorable view of the advantages of arbitration for securities customers, see generally Fletcher, *Privatizing Securities Disputes Through The Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393 (1987).

74. Records of arbitration proceedings are not usually kept. See, e.g., UNIF. CODE OF ARBITRATION § 37, NASD Manual (CCH) ¶ 3737, at 3720 (July 1, 1986).

75. *Wilko*, 346 U.S. at 436.

76. *Id.* at 431 (emphasis added). Actually, Justice Reed mischaracterized this burden. The defendant is required not only to prove a lack of *scienter* but also to prove his own lack of negligence. See *supra* text at note 29. (It thus becomes more of a "burden of *disproof*" than merely a shifted burden of proof.) Both the majority opinion and Judge Clark's dissent in the Second Circuit had correctly characterized this burden. See *supra* text at notes 48-51 and 58-60.

77. *Id.* at 438 (citing *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 266 (1949)).

D. Justice Frankfurter and the White-Frankfurter Model

Justice Frankfurter dissented from the Court's decision in *Wilko v. Swan*.⁷⁸ His opinion begins with the unstated assumption that the procedural provisions of the 1933 Act are not themselves "provisions" within the meaning of section 14. Only the substantive right, together with its special procedural requirement, is a "provision" within the meaning of that section. A predispute arbitration agreement would be prohibited by section 14 only if either of two conditions obtained: (1) If arbitration "inherently precluded full protection" of a customer's rights under section 12(2); or (2) if there were "no effective means of ensuring judicial review of the legal basis of the arbitration"⁷⁹

With regard to his first condition, Justice Frankfurter observed that neither the record nor judicial notice provided any reason to believe that "the arbitral system as practiced in the City of New York, and as enforceable under the supervisory authority of the District Court for the Southern District of New York, would not afford the plaintiff the rights to which he is entitled."⁸⁰ In a footnote, he noted some of the procedures governing arbitration under the rules of the American Arbitration Association.⁸¹

Justice Frankfurter's second condition is somewhat more problematic. He agreed with the Second Circuit that arbitrators were obliged to follow the rules set forth in section 12(2) as to burden of proof and other issues. Apparently, Justice Frankfurter thought that at least where the standards of section 12(2) differed from those of the common law, "appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal"⁸² Arbitration awards customarily do no more than state the result and the amount of the award, if any. Exactly how much more Justice Frankfurter expected of the "record or opinion" in arbitrations of section 12(2) claims is not clear. Nor is it entirely clear why an arbitration award should provide any greater detail (for purposes of judicial scrutiny) than a general jury verdict would offer.⁸³ Still, Justice Frankfurter's suggestion is consistent with recent calls for modification of arbitration procedures in order to

78. 346 U.S. 427 (1953).

79. *Id.* at 439 (Frankfurter, J., dissenting). Justice Minton joined the dissent.

80. *Id.* (Frankfurter, J., dissenting).

81. *Id.* at 439 n.* (Frankfurter, J., dissenting). This was one of the forums that the customer was permitted to choose under his contract. *Wilko v. Swan*, 201 F.2d 439, 442, *rev'd*, 346 U.S. 427 (1953).

82. *Id.* at 440 (Frankfurter, J., dissenting).

83. Of course, the court reviewing a jury verdict can at least determine whether the jury was properly instructed on the legal issues. In arbitration, a claimant may set out the proper

accommodate "public policy" concerns.⁸⁴

Finally, Justice Frankfurter noted that the voluntariness *vel non* of the arbitration agreement was immaterial to construction of section 14. A predispute arbitration agreement theoretically might be void because of overreaching, but that issue was not present in the case at bar. However, in Justice Frankfurter's view, the existence of this separate defense did not bear on the relationship between the 1933 Act and the Arbitration Act.⁸⁵

III. THE 1934 ACT AND THE *WILKO* FRAMEWORK

Section 29 of the 1934 Act contains a non-waiver provision that the Supreme Court has found substantially similar to that provided by section 14 of the 1933 Act.⁸⁶ The 1934 Act therefore presents a question very similar to that which the 1933 Act posed in *Wilko v. Swan*,⁸⁷ but precisely what that question is, is not clear. Is the "provision" at issue the procedural protections bestowed by the statute or the substantive right to bring a claim based on a violation of the statute? This section of the Article again considers precisely what question *Wilko* answered.

A. *Scherk v. Alberto-Culver Co.*

The Supreme Court first addressed the issue of predispute arbitration agreements under the 1934 Act in *Scherk v. Alberto-Culver Co.*⁸⁸ There the Court held that a predispute arbitration agreement was enforceable in the context of an international dispute arguably governed by the 1934 Act. The key factor in the Court's decision was the international nature of the dispute.⁸⁹ The Court accepted *arguendo* the general premise that the 1934 Act precludes enforcement of predispute arbitra-

standards in his arguments and in whatever papers the arbitrators will accept, but the respondent might put forth a less restrictive test.

84. See, e.g., Allison, *supra* note 18, at 269-75. Professor Allison makes the excellent point that one hardly need bother to look for specific statutory authorization of enhanced judicial intervention in the arbitral process:

By interpreting the Federal Arbitration Act as not permitting arbitration of antitrust claims under future-dispute clauses, the federal courts have clearly exhibited sufficient judicial power to accommodate the policies of the Act with other public policies in virtually any way they see fit. If the courts have the power to completely deny arbitrable status to antitrust claims, they certainly have the power to do *less* by permitting arbitration with a degree of [judicial] supervision.

Id. at 273-74 (emphasis in original).

85. *Id.* For a discussion of voluntariness, see *infra* text accompanying notes 121-52.

86. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 514 n.7 (1974).

87. 346 U.S. 427 (1953).

88. 417 U.S. 506 (1974).

89. *Id.* at 515-21. As to the arguability of this proposition, see *id.* at 514 n.8, 516 n.9.

tion agreements.⁹⁰ Before accepting the premise, however, the Court set forth two reasons why the 1934 Act might be construed differently from the 1933 Act. First, it noted that the 1934 Act contains no statutory counterpart to section 12(2) of the 1933 Act; and although the Court conceded that lower courts had inferred the existence of a private remedy under section 10(b) of the 1934 Act, "the Act itself does not establish the 'special right' that the Court in *Wilko* found significant."⁹¹ Second, the Court noted that the 1934 Act provided for exclusive federal jurisdiction of claims arising thereunder, in contrast to the 1933 Act's provision of concurrent jurisdiction coupled with a ban on removal to federal court. The Court described this difference as "significantly restricting the plaintiff's choice of forum."⁹²

The *Scherk* Court, commenting on the differences between the procedural provisions of the two Acts, described these provisions as the subject of the *Wilko* Court's holding in *Wilko v. Swan*⁹³: "[C]ertain of the 'provisions' of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate, find no counterpart in the 1934 Act."⁹⁴ Although this does seem to be a correct description of at least one of *Wilko*'s two rationales, it ignores the focus of Justice Frankfurter's dissent, which viewed the statutory specification of procedural benefits as incidental to the substantive "provision."

B. Dean Witter Reynolds Inc. v. Byrd

The Supreme Court next discussed *Wilko*'s boundaries in *Dean Witter Reynolds Inc. v. Byrd*.⁹⁵ Like the Court in *Scherk v. Alberto-Culver Co.*,⁹⁶ the *Byrd* Court described the holding of the Court in *Wilko v. Swan*⁹⁷ in terms of "a stipulation waiving the right to seek a judicial remedy . . ."⁹⁸ It repeated the *Scherk* Court's dissection of *Wilko*, but noted that lower courts have nevertheless applied *Wilko*'s analysis to claims arising under section 10(b) of the 1934 Act.⁹⁹ But since the defendant had failed to move for a stay pending arbitration of the 1934 Act

90. *Id.* at 515.

91. *Id.* at 513-14.

92. *Id.* at 514.

93. 346 U.S. 427 (1953).

94. *Scherk*, 417 U.S. at 514.

95. 470 U.S. 213, 215 n.1 (1985).

96. 417 U.S. 506 (1974).

97. 346 U.S. 427 (1953).

98. *Byrd*, 470 U.S. at 215 n.1.

99. *Id.*

claim, the Supreme Court in *Byrd* declined to reach the issue.¹⁰⁰

Justice White, however, in a separate concurrence emphasized the relevant differences between the 1933 Act and the 1934 Act.¹⁰¹ Although he noted the difference in the breadth of jurisdiction provided by the two Acts, he devoted more attention to the nature of the substantive right. First, he noted that the section 10(b) right of action "is implied rather than express."¹⁰² He then observed that the statutory language—"waive compliance with any *provision of this chapter*"¹⁰³—is thus "literally inapplicable."¹⁰⁴ Second, citing the "special right" language of Justice Reed's majority opinion in *Wilko*, Justice White noted that *Wilko's* "solicitude for the federal cause of action . . . is not necessarily appropriate where the cause of action is judicially implied and not so different from the common-law action."¹⁰⁵

1. Implied rights

The linguistic analysis that Justice White offered as his first point raises a thorny problem. The *Wilko* holding pertains to the judicial remedy for the substantive right, not to the substantive right itself. Justice White's suggestion that the implied right under section 10(b) is not a "provision" of the 1934 Act thus seems misplaced, at least under the *Wilko* majority's decision. Under the *Wilko* analysis, the "provision" at issue in the 1934 Act is the procedural right to bring the claim in federal court,¹⁰⁶ rather than the substantive antifraud right itself, judicially created under section 10(b). Arbitration agreements require waiver of this procedural right, but they do not even purport to require waiver of the substantive section 10(b) right.

But if Justice White is correct that the right implied under section 10(b) is not a "provision" of the 1934 Act, then at least theoretically, a broker-dealer could require his customer to "waive compliance" with the

100. *Id.* at 216 n.1.

101. *Id.* at 224 (White, J., concurring).

102. *Id.* at 225 (White, J., concurring).

103. *Id.* (White, J., concurring) (quoting 15 U.S.C. § 78cc(a) (1981)) (emphasis added by Justice White).

104. *Id.* (White, J., concurring).

105. *Id.* (White, J., concurring). Despite his remarks in *Byrd*, Justice White's current position is not clear. Compare Justice White's concurrence in *Byrd* with his joinder in Justice Douglas' dissent in *Scherk*. *Scherk*, 417 U.S. at 534 ("Section 29 of the 1934 Act . . . renders arbitration clauses void and inoperative . . .").

106. This "right" is also an obligation. If a customer chooses to assert the section 10(b) private right of action in a judicial forum, he can do so *only* in federal court. 15 U.S.C. § 78aa (1982). See also *infra* notes 113-15 and 155-68 and accompanying text.

statute's substantive command.¹⁰⁷ So perhaps what Justice White meant in his *Byrd* concurrence is simply that the greater power includes the lesser. If the broker-dealer can require his customer to waive the substantive right altogether, then the lesser exercise of that power—requiring the customer to vindicate the right through arbitration rather than judicial action—must also escape the ban of section 29(a).¹⁰⁸

107. This "extreme" result, however, would not be disastrous for securities customers. Even if required to waive his § 10(b) rights, a plaintiff would still have his state statutory rights. A broker-dealer who required waiver of § 10(b) rights might presumably also require waiver of state common-law rights, since blue-sky laws customarily forbid waivers only of rights granted by the statute or rules and orders promulgated pursuant to the statute. *See, e.g.*, UNIF. SECURITIES ACT of 1956 § 410(g), 7B U.L.A. 644 (1985); UNIF. SECURITIES ACT of 1985 § 802(b), 7B U.L.A. 93 (Cum. Supp. 1987). As Justice White notes (in his second point), the federal cause of action is "not so different from the common-law action" supplied by state law. Moreover, at least some of the interests protected by § 10(b) are also guarded by various state blue-sky laws. *See, e.g.*, UNIF. SECURITIES ACT of 1956 § 101, 7B U.L.A. 516 (1985); *see also id.* § 410(a), 7B U.L.A. 643, which is comparable to § 12(2) of the 1933 Act. Liability under the 1985 Uniform Act is limited to the causes of action expressly provided in sections 601-609. UNIF. SECURITIES ACT of 1985 § 609(b), 7B U.L.A. 83 (Cum. Supp. 1987). These sections create liability for violations of section 501(2) (untrue statements and omissions of material facts), but not section 501(1) ("device, scheme or artifice to defraud"), and so not all of the 1985 language that parallels section 101 of the 1956 Act will give rise to a private right of action. The nonwaiver provisions of both Uniform Acts, *supra*, would preclude a required waiver of these substantive statutory rights. Thus, a securities customer would still have his state law statutory remedies if a broker-dealer required him to waive compliance with section 10(b) and state common law.

The 1985 Uniform Act (which as of February, 1987, had been adopted only by the states of Maine and New Mexico, *see* 7B U.L.A. 30 (Cum. Supp. 1986)), specifically addresses the enforceability of arbitration agreements, but its resolution of the question is not clear. Under the 1985 Uniform Act, "[a] provision in a contract containing (i) an agreement to arbitrate or (ii) a choice of law provision in a contract between persons engaged in the securities business is not a provision waiving compliance with this [Act] and is enforceable in accordance with its terms." UNIF. SECURITIES ACT of 1985 § 802(b), 7B U.L.A. 93 (Cum. Supp. 1987). The compound prepositional phrase beginning with "in a contract" appears to modify only subclause (ii), meaning that all arbitration agreements are enforceable. But if the phrase modifies subclause (i) as well, then the Act itself does not render such agreements enforceable. The question is somewhat academic in light of *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and in light of the official comment to this section. *See* UNIF. SECURITIES ACT of 1985 § 802(b), comment (2), 7B U.L.A. (Cum. Supp. 1987) ("In general, contractual provisions waiving compliance with this Act are unenforceable. The two exceptions are agreements to arbitrate, as to which the Federal Arbitration Act overrides contrary state law, and agreements solely among persons engaged in the securities business specifying a particular choice of law.") Nevertheless, legislatures considering adopting the 1985 Uniform Act should consider forestalling litigation by a simple clarification: reverse the order of the phrase by placing all of subclause (i) after the words "securities business."

108. Section 29(a) of the 1934 Act provides that: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." Securities and Exchange Act of 1934, ch. 404, § 29(a), 48 Stat. 881 (current version at 15 U.S.C. § 78cc(a) (1982)).

One difficulty, however, with Justice White's analysis is this: if the section 10(b) implied right of action is not a "provision" within the meaning of section 29(a), then why do federal courts have exclusive jurisdiction of such claims pursuant to section 27?¹⁰⁹ Perhaps the answer lies in a continuation of Justice White's linguistic analysis. Section 27 nowhere speaks of "provisions"; instead it speaks of "suits . . . brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."¹¹⁰ Can the rights implied by section 10(b) and its subsidiary regulations be based on "liabilit[ies] or dut[ies] created" by the 1934 Act without also being "provisions" of the same statute? That is, can an action be within the exclusive jurisdiction of the federal courts, without also being based on a "provision" within the meaning of section 29?

Under Justice White's analysis, the answer is clearly "yes": federal courts can have exclusive jurisdiction over "nonprovisions" whose protection a broker-dealer can require his customer to waive. But this answer is limited to implied rights; express rights of action are undoubtedly provisions whose required waiver is prohibited. As Justice Frankfurter noted, "[i]f arbitration inherently precluded full protection of the rights § 12(2) of the Securities Act affords to a purchaser of securities . . . an agreement to settle the controversy by arbitration would be barred by § 14, the antiwaiver provision"¹¹¹

Perhaps an even more basic objection may be lodged against Justice White's analysis. Under the modern theory of private rights of action, a private action exists only if the legislature expressly provides it or implicitly intends it.¹¹² Courts are instructed to infer an implied private right of action only if there is evidence of legislative intent to provide it.¹¹³ But if an implied private right exists only if intended by the legislature, is it not also a "provision" of the statute? Judge Tjoflat, concurring in the Elev-

109. 15 U.S.C. § 78aa (1982) ("The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits . . . brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."). True, the Supreme Court has not yet decided whether federal courts have exclusive jurisdiction over claims arising under section 10(b), but it does not appear to be a matter that is, in Justice White's words, in "substantial doubt." See, e.g., *Brannan v. Eisenstein*, 804 F.2d 1041, 1044-45 (8th Cir. 1986).

110. 15 U.S.C. § 78aa.

111. *Wilko*, 346 U.S. at 439 (Frankfurter, J., dissenting).

112. See Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 548-69 (1986).

113. The point here is not that courts actually follow this admonition, or indeed, that this approach is intellectually defensible. But it is in any event the reigning theory of the age. See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975).

enth Circuit's decision in *Wolfe v. E.F. Hutton & Co.*,¹¹⁴ found this hurdle insurmountable for those who would distinguish the right implied in section 10(b) from the express right contained in section 12(2).¹¹⁵ It does not necessarily follow, however, that in implicitly creating a "liability or duty" for purposes of section 27 Congress also intended to create a section 29 "provision" as well. As used in section 29, "provision" should be given a narrow construction by the courts and apply only to express rights of action, at least where the implied right is little different from the common law. Otherwise, the presumption against implied repealers is twice violated—once in construing the nonwaiver provision to repeal the Arbitration Act *pro tanto*, and again to extend that repealer to implied rights of action.

Thus, the analysis again returns to the question so neatly side-stepped by the greater/lesser power reasoning. Even if a literal reading of section 29 would permit a broker-dealer to require his customer to waive the substantive rights of section 10(b) altogether, does a literal reading also permit him to dictate the procedures by which an unwaived substantive right may be vindicated? Initially the answer might seem to be negative. If the "provision" at issue is the judicial remedy, then the provision here is express. Section 27 grants the right to a judicial remedy for any right "created by this chapter." That is, there is an express "provision" for jurisdiction of any right impliedly "created" by the statute.¹¹⁶ This analysis, however, rests on an assumption that the procedural rule is itself a "provision" within the meaning of section 29. This is certainly not the White-Frankfurter model, in which the substantive right is the

114. 800 F.2d 1032 (11th Cir. 1986).

115. *Id.* at 1039 (Tjoflat, J., concurring). Judge Tjoflat reasoned that:

To say that a private cause of action is implied is to say that Congress intended such an action to exist. . . . It is as if Congress explicitly provided for the cause of action. Because Congress intended to create a section 10(b) cause of action, it also intended section 29 to be applicable to it, and the inquiry before us is no different than the one before the Court in *Wilko*.

Id. Judge Tjoflat's first statement is undeniable within the rhetoric of modern theory. His second sentence, however, is much too universal. It assumes that an implied right of action must be treated for all purposes in the same way as an express cause of action. Indeed, this is the conclusion that Judge Tjoflat's third sentence declares. Yet there is no particular reason why this assumption necessarily must hold true. One could more easily argue that in inferring a congressional intention that is not expressly stated in the statute itself, the courts ought to confine the judicial gloss as narrowly as possible, for there are really two questions involved in inferring a private right of action. First, did Congress intend the courts to recognize a private right, and second, what did Congress intend to be the relationship between the private right and the express provisions of the statute. Judge Tjoflat's approach collapses the two questions into one and assumes that in all cases Congress intended the implied right to be treated in the same way as an express right.

116. This again accords with Judge Tjoflat's analysis. *See id.*

“provision.” Neither does it accurately represent the *Wilko* majority’s approach, under which the procedural rule is the “provision” but only in the context of a “special right.”

2. “Special” rights

Justice White’s second consideration as to the substantive right involved does not depend on such rarefied linguistic analysis. In *Wilko*, the Court had characterized section 12(2) as creating a “special right” distinct from common-law rights because the “seller is made to assume the burden of proving lack of *scienter*.”¹¹⁷ Moreover, the *Wilko* Court offered this as one example of a benefit to securities buyers that the Court could never insure was afforded them in arbitration because an arbitration award “may be made without explanation of [the arbitrators’] reasons and without a complete record of [the] proceedings”¹¹⁸ As Justice White noted, the section 10(b) action is little different from the state common law action (and for that matter, from state law statutory actions) which the *Byrd* Court found were subject to arbitration by the Arbitration Act.¹¹⁹ If there are no particular distinctions between the federal action and the common-law action, then there is no reason to accord to the federal action the special protection that the Court has already found waivable as to the state action.¹²⁰

IV. VOLUNTARINESS AND *WILKO*’S FLAWED ASSUMPTION

In *Wilko v. Swan*,¹²¹ both the Supreme Court and the two lower courts commented on whether the predispute agreement could be called “voluntary” in any meaningful sense. Indeed, *Wilko* has been characterized as premised “on [the] recognition that arbitration clauses in securities sales agreements generally are not freely negotiated”¹²² and as avoiding “the disadvantages of a case-by-case approach to deciding whether an arbitration clause was a product of any inequality of bargaining power”¹²³

But whether an agreement is voluntary is entirely irrelevant to the question of whether the nonwaiver provision forbids its enforcement. Either an agreement constitutes a “stipulation . . . binding any person . . .

117. *Wilko*, 346 U.S. at 431 (emphasis added).

118. *Id.* at 436.

119. *Byrd*, 470 U.S. at 223-24.

120. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1 (1984).

121. 346 U.S. 427 (1953).

122. Sterk, *supra* note 39, at 519.

123. *Id.*

to waive compliance with [a] provision"¹²⁴ of the statute, or it does not. If it is such a stipulation, the statute provides that it shall be void; if it is not such a stipulation, the antiwaiver section does not bar its enforcement.¹²⁵ It does not matter whether the customer voluntarily agreed to the stipulation or not.¹²⁶ For example, if a customer willingly and with his eyes wide open persuaded a broker-dealer to reduce his commission fifty percent in exchange for the customer's waiver of the substantive protections of the 1933 Act,¹²⁷ the stipulation would nevertheless be void.¹²⁸

The White-Frankfurter model recognizes the irrelevance of an arbitration agreement's voluntariness *vel non*. Indeed, Justice Frankfurter made this point in his *Wilko* dissent.¹²⁹ The Court in *Scherk v. Alberto-*

124. 15 U.S.C. §§ 77n, 78cc(a) (1982).

125. This does not necessarily mean that the clause is enforceable. The Arbitration Act provides that an arbitration agreement shall be unenforceable for any reason that is generally applicable to contracts. 9 U.S.C. § 2 (1982). A contract of adhesion is subject to close judicial scrutiny. See Fletcher, *supra* note 73, at 446.

126. Against this it might be said that the statutory use of the word "waive" incorporates a requirement of voluntariness, because the usual definition of "waiver" is the "intentional or voluntary relinquishment of a known right." BLACK'S LAW DICTIONARY 1417 (5th ed. 1979). The key word in the nonwaiver provisions, however, is "stipulation." The usual meaning of waiver does not fit in this context. It simply makes no linguistic sense to say that the provision applies to stipulations that "bind" or require a consumer to "voluntarily relinquish a known right." If the customer is "bound," then he doesn't "voluntarily" do that which he is "bound" to do. "Waiver" here simply means to relinquish or forego.

127. This analogy—with the customer getting the discount in exchange for the agreement to waive his substantive rights—is helpful only because all reported cases seem to deal with securities plaintiffs unhappy with their predispute arbitration agreements. *Ex ante*, however, a public customer who wished to establish a long-term relationship with a broker might prefer a predispute arbitration agreement and be willing to pay a premium for it. Similarly, a public customer might also expect his potential losses to be relatively small and therefore want to assure himself a low-cost forum. One must always bear in mind that the standard predispute agreements work both ways, and that after a dispute has arisen there may be circumstances where a customer will want arbitration and a broker-dealer will not. Cf. Exchange Act Release, *supra* note 67, ¶ 82,122, at 81,978 (separate statement of views by Commissioner Karmel) ("arbitration is an effective and worthwhile alternative to litigation for resolving disputes which reduces the costs to both the customer and the broker-dealer"); see also *infra* note 135 (discussing one-way effect of arbitration agreements under exchange rules). The notice that the Commodities Futures Trading Commission (CFTC) requires brokers to give their customers also recognizes this point: "The CFTC recognizes that the opportunity to settle disputes by arbitration may in some cases provide many benefits to customers, including the ability to obtain an expeditious and final resolution of disputes without incurring substantial costs." 17 C.F.R. § 180.3(b)(6) (1986).

128. The historical background of the nonwaiver provision supports this interpretation. The nonwaiver provisions derive from English securities statutes containing similar provisions. Prior to enactment of the nonwaiver provisions, English common law courts had enforced agreements in which customers waived compliance with the securities statutes' requirements. See L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1189 (1983).

129. *Wilko*, 346 U.S. at 439-40 (Frankfurter, J., dissenting).

*Culver Co.*¹³⁰ also picked up on the argument that *Wilko* might be limited "to situations where the parties exhibit a disparity of bargaining power, . . ." ¹³¹ but declined to address the question. Likewise, the Court in *Dean Witter Reynolds Inc. v. Byrd*,¹³² remarked that the issue of whether a predispute agreement was "a contract of adhesion . . . subject to close judicial scrutiny" was not before the Court.¹³³ Thus, despite *Wilko's* blurring of the issues, the Court has subsequently recognized the distinct nature of this argument. And indeed, when courts openly face the question whether a particular arbitration agreement is a contract of adhesion, they routinely say "no."¹³⁴

In the end, in nullifying an entire class of agreements, *Wilko* and the cases that extend it to the 1934 Act may deprive the securities customer of the benefits of arbitration should the broker-dealer decline to submit to arbitration pursuant to a postdispute agreement.¹³⁵ It is unclear, therefore that *Wilko's* blanket rule redounds to the customer's advantage.

Moreover, *Wilko's* steamroller approach can be avoided through an appropriate regulatory or self-regulatory scheme. Were the SEC to adopt regulations requiring broker-dealers to give prospective customers an informed and particularized choice to accept an arbitration clause or not,¹³⁶ or were the securities industry to adopt such a policy voluntarily,

130. 417 U.S. 506 (1974).

131. *Id.* at 512 n.6.

132. 470 U.S. 213 (1985).

133. *Id.* at 216 n.2.

134. Cases to this effect are legion. *See, e.g.,* *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986); *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir. 1984).

135. The argument in text must be limited to the rights that a customer has under the Arbitration Act and the securities laws, for the constitutions of at least some exchanges require their members to arbitrate disputes with public customers even without an arbitration agreement. *See supra* note 24. But given that the exchanges' rules are generally not thought to give rise to a private right of action, *see, e.g.,* *Thompson v. Smith, Barney, Harris, Upham & Co.*, 709 F.2d 1413, 1419 (11th Cir. 1983); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 679-81 (9th Cir. 1980), it is doubtful that a claimant could enforce that obligation in his particular dispute. (The exchange member, however, might be subject to disciplinary proceedings for any violation of the exchange's rules. *See, e.g.,* *Constitution of the New York Stock Exchange, Inc.*, *supra* note 24, art. IX, § 5. The available sanctions include expulsion, suspension, fines and "any other fitting sanction." *Id.*) Still, if the customer's agreement with the broker-dealer is made subject to the rules and regulations of the exchange, the customer might argue that his agreement incorporates the one-way arbitration provision of the exchange's constitution. Furthermore, the customer might argue that he is a third-party beneficiary of the broker-dealer's membership agreement with the exchange and seek to enforce the membership agreement under the Arbitration Act, although it is not clear that he would have standing to do so. Holding predispute arbitration agreements enforceable would have the advantage of eliminating these uncertainties.

136. At least one commentator has suggested exactly this approach. *See* *Shell, Keep Bro-*

the basis of the Supreme Court's unfocused concern for voluntariness would vanish altogether. Such a scheme already exists in the related field of commodities trading.

In the Commodities Exchange Act (CEA), Congress made specific provision for predispute arbitration agreements.¹³⁷ Contract markets are required to "provide a fair and equitable procedure through arbitration or otherwise . . . for the settlement of customers' claims and grievances against any member or employee thereof."¹³⁸ Futures associations cannot be registered by the Commodities Futures Trading Commission (CFTC) unless "the rules of the association provide a fair, equitable and expeditious procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof."¹³⁹ Both sections contain the proviso that "the use of such procedure by a customer shall be voluntary."¹⁴⁰

The CFTC has endorsed the concept of predispute arbitration agreements and has taken measures to insure that such agreements are fair and equitable, as well as voluntary.¹⁴¹ For example, an arbitration agreement cannot be a mandatory condition of doing business;¹⁴² the arbitra-

ker-Client Disputes Out of Court, Wall St. J., Mar. 3, 1987, at 34, col. 3. It is not clear, however, that the SEC has the statutory authority to impose such a requirement. See *infra* notes 157 and 194-204 and accompanying text.

137. 7 U.S.C. §§ 1-26 (1982).

138. *Id.* § 7a(11). When originally adopted in 1974, the arbitration procedures of section 7(a)(11) were limited to claims of \$15,000 or less; the procedures of section 21(b)(10) were limited to claims of \$5,000 or less. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §§ 209, 301, 88 Stat. 1389, 1401, 1408-09. In 1982, Congress removed these limitations. Futures Trading Act of 1982, Pub. L. No. 97-444, § 217, 96 Stat. 2294, 2307. The House committee reporting the bill remarked "that arbitration is an equally viable forum for resolving customer claims in excess of \$15,000 and there is no logical reason why reparations should be the only out-of-court forum for resolution of these disputes." H.R. REP. NO. 565, 97th Cong., 2d Sess., pt. 1, at 56, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3871, 3905.

139. 7 U.S.C. § 21(b)(10).

140. *Id.* §§ 7a(11)(i), 21(b)(10)(i).

141. See 17 C.F.R. §§ 180.1 to 180.5. The regulation is reproduced in full *infra* in the Appendix to this Article.

142. There are two senses in which an arbitration agreement might be voluntary. The first is the CFTC sense: the arbitration agreement is independent of the remaining portions of the agreement, and the customer is free to accept it or not, as he chooses. The second sense is that the agreement is voluntary because the customer freely elects the entire agreement. This second sense is meaningful because there are legions of broker-dealers eager to secure business, and not all broker-dealers require arbitration agreements, particularly for cash accounts. See Fletcher, *supra* note 73, at 447-48 & nn.347-51; Katsoris, *supra* note 25, at 292 n. 86, 306-09. Of course, an arbitration agreement would also be voluntary in a third sense if it were independent of the remainder of the agreement, as in the CFTC arrangement, but the broker-dealer were permitted to charge his nonarbitrating customers an annual fee that bore a reasonable relation to higher expected costs of doing business.

tion clause must be separately endorsed and must contain a fairly substantial advisory statement to customers¹⁴³ concerning their legal rights and the implications of the predispute arbitration agreement.¹⁴⁴

Neither the 1933 Act nor the 1934 Act provides similarly specific instruction and authorization to the Securities and Exchange Commission (SEC) to regulate predispute arbitration agreements. Nevertheless, the SEC has already asserted the right to ban predispute arbitration agreements altogether.¹⁴⁵ Moreover, under section 19(c) of the 1934 Act, the SEC has the power to:

abrogate, add to, and delete from . . . the rules of a self-regulatory organization . . . as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this Chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this Chapter. . . .¹⁴⁶

Under this section, the SEC has the power to amend the exchanges' arbi-

143. The object of the notice (reprinted in full in Appendix), of course, is to provide information that will enable the customer to make his decision with relatively complete knowledge of the disadvantages of arbitration. It is in the broker's interest to disclose the advantages of arbitration, because it will motivate the customer to agree to arbitration. Still, failure to disclose the advantages of arbitration, while perhaps foolish, will not render the arbitration agreement unenforceable (provided that the broker does not attempt to enforce any portion of the agreement that is contrary to CFTC regulations). See *Olson v. Paine Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 742-44 (7th Cir. 1986) (Posner, J.).

Depending, of course, on the Supreme Court's holding and rationale in *Shearson/American Express v. McMahon*, lower courts may also wish to review Judge Posner's characteristically erudite opinion for the standards applicable in determining whether *Wilko* has been effectively overruled. *Id.* at 741-42; see also *infra* text accompanying notes 279-92.

144. 17 C.F.R. § 180.3(b)(6). The analogy between the securities context and the commodities context is admittedly imperfect. An aggrieved commodities customer has three means of pursuing his claim: a suit in court, civil reparations proceedings before the CFTC, and arbitration (if the customer's contract permits it). 7 U.S.C. §§ 7a(11), 18, 25. Even if a commodities customer has signed an arbitration agreement, he still has a choice between arbitration and reparations. 17 C.F.R. § 180.3(a). His situation is therefore somewhat different from that of a securities customer, who does not have this alternative.

145. 17 C.F.R. § 240.15c2-2 (1986). This regulation is discussed in *infra* text at notes 194-204.

146. 15 U.S.C. § 78s(c) (1982); see also *id.* § 78s(b) (governing changes of rules proposed by self-regulatory organizations); 17 C.F.R. § 240.19b-4 (1986) (regulations regarding same); SEC Release No. 16,390 (Nov. 30, 1979), 18 SEC DOCKET 1197, 1198 (1979) ("the proposed rule change is consistent with the requirements of the Act . . . the rules and regulations . . . that are applicable to national securities exchanges, and . . . with the requirements of Section 6(b)(5) of the Act that the rules of an exchange be designed to promote just and equitable principles of trade"); Exchange Act Release, *supra* note 67, ¶ 82,122, at 81,978 (separate statement of views by Commissioner Karmel) ("[t]o the extent the Commission considers changes in such [arbitration] clauses [in customer agreements] necessary or appropriate to comport with just and

tration rules,¹⁴⁷ as distinct from the arbitration agreements under which the arbitration occurs and pursuant to which the rules are applied.¹⁴⁸ Indeed, in its *amicus* brief in *Shearson/American Express, Inc. v. McMahon*,¹⁴⁹ the SEC has shifted gears completely and disengaged its long-standing opposition to predispute arbitration agreements, principally because of these powers.¹⁵⁰ Moreover, whether or not the SEC has the power to require the CFTC's "separate agreement" arrangement, it undoubtedly has the power to require the broker-dealer to make disclosures about the arbitration clause and its significance.¹⁵¹

Thus, to the extent that the voluntariness *vel non* of a predispute arbitration agreement concerns the courts as a practical matter, the SEC would appear already to have the power to address those concerns by at least imposing disclosure requirements similar to those in force under the CEA.¹⁵² Moreover, if the securities industry voluntarily adopts the procedures provided by the CEA and the CFTC, the Supreme Court may someday be required to reassess *Wilko* in the context of an agreement affirmatively shown to be fully voluntary.

V. BEYOND *WILKO*: ATTEMPTS TO REVAMP THE REED-CLARK MODEL

The Reed-Clark model that the *Wilko v. Swan*¹⁵³ Court adopted

equitable principles of trade, requested changes should have been directed to SICA or appropriate industry self-regulatory organizations").

147. See generally Comment, *Arbitration of Investor-Broker Disputes*, *supra* note 22; see also Brief for the Securities and Exchange Commission as *Amicus Curiae* Supporting Petitioners at 13, *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 60 (1986) [hereinafter SEC *Amicus Curiae* Brief].

148. 17 C.F.R. § 240.15c2-2 attempted to forbid arbitration agreements insofar as they pertained to federal claims.

149. 107 S. Ct. 60 (1986).

150. SEC *Amicus Curiae* Brief, *supra* note 147, at 13. This reversal of position is indeed a sea-change, for in *Wilko* the SEC had appeared as *amicus* at each stage of the judicial process and had vigorously opposed the enforceability of predispute arbitration agreements. See *Wilko*, 346 U.S. at 427-28, 428 n.*; *Wilko v. Swan*, 107 F. Supp. 75, 76, 77 (S.D.N.Y. 1952), *rev'd*, 201 F.2d 439, 441-42, *rev'd*, 346 U.S. 427 (1953); see also *SEC Switches Stand on Arbitration Agreements*, *The Nat'l L.J.*, Dec. 15, 1986, at 15, cols. 1-4.

151. Cf. 17 C.F.R. 240.10b-16 (1986) (mandatory disclosure of interest terms in margin account). Even a broker-dealer who will not do business with a customer who does not elect arbitration would benefit from such a requirement, at least to some extent. The disclosure would protect the broker-dealer from allegations of adhesion contracts if the disclosure advises that other brokers may accept "nonarbitrating" customers.

152. Although the applicability of *Wilko* to predispute arbitration agreements regulated by the CFTC is unsettled, the better view is that *Wilko* does not apply. Comment, *Predispute Agreements To Arbitrate Claims Arising Under The Commodity Exchange Act*, 42 WASH. & LEE L. REV. 939, 957-59 (1985).

153. 346 U.S. 427 (1953).

was built upon the interrelationship of several sections of the 1933 Act. Yet as Professor Katsoris has pointed out, the supporting provisions which buttress *Wilko's* holding are either absent from or imperfectly replicated in the 1934 Act.¹⁵⁴ District and appellate courts have suggested several other arguments to supply the synergy for the 1934 Act that the *Wilko* factors cannot. These are the exclusivity of federal jurisdiction, the 1975 amendments to the 1934 Act, and SEC administrative interpretation.

A. *Exclusivity: Exclusive of What?*

One of the factors the Court in *Wilko v. Swan*¹⁵⁵ found significant was the provision of concurrent jurisdiction over section 12(2) claims, coupled with nationwide service of process, wide choice of venue, and exemption from the general provisions for removal to federal court. In other words, the section 12(2) plaintiff was guaranteed his right to hale the broker-dealer into the plaintiff's chosen forum, and to keep him there, even though the broker-dealer might find that forum grossly inconvenient and perhaps substantially prejudicial. The 1934 Act curtailed the number of forums available to the securities plaintiff by providing exclusive federal jurisdiction.¹⁵⁶ The reduction is indeed dramatic: the number of forums is slashed from 1660 to 91.¹⁵⁷

Nevertheless, one might argue that by granting the federal courts exclusive jurisdiction of 1934 Act claims, Congress meant to exclude not only state courts, but all other forums as well.¹⁵⁸ On its face, this argu-

154. Katsoris, *supra* note 25, at 300-01.

155. 346 U.S. 427 (1953).

156. *See supra* note 104.

157. The first number is the combined total number of federal district courts and state courts of general jurisdiction; the second number is the number of federal courts (i.e. judicial districts) only. *See, e.g.*, 28 U.S.C. § 133 (Supp. III 1985); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, NATIONAL SURVEY OF COURT ORGANIZATION 3 (1973 & Supp. 1977). Of course, even with the broad venue provisions of the statutes, no single plaintiff would ever have the realistic opportunity to pursue his claim in any and every court in the country. Nevertheless these numbers point out the truly dramatic difference between the two statutes' jurisdictional provisions. Still, perhaps this numerical difference is not so much dramatic as it is melodramatic. The legislative history of the 1934 Act's jurisdictional provision might be read as indicating that Congress gave little thought to the question whether federal jurisdiction should be exclusive or concurrent. *See Note, The Securities Exchange Act and the Rule of Exclusive Federal Jurisdiction*, 89 YALE L.J. 95, 109 n.58 (1979). But the House of Representatives did give it at least some thought, as did the conference committee, *see id.*, and in examining the two statutes to find the exceedingly scarce indicia of congressional intent on the arbitration issue, the few clues found should not be ignored.

158. Note, *Federal and State Securities Claims: Litigation or Arbitration*—Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985), 61 WASH. L. REV. 245, 259 (1986); *cf. Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F. Supp. 125, 130 (S.D.N.Y. 1981) ("ac-

ment seems to work a kind of logical sleight of hand: "Heads I win, tails you lose." It is as if the *Wilko* Court had said, where there is concurrent jurisdiction then it follows that the forum-selection provision cannot be waived, but where there is exclusive jurisdiction, well, it still follows that the forum-selection provision cannot be waived. Moreover, the argument ignores the realities of other statutory schemes providing for exclusive federal jurisdiction. Although it is true that some such regimes have been held to exclude arbitration, others have not. For example, the Second Circuit's views in *American Safety Equipment Corp. v. J.P. Maguire & Co.*,¹⁵⁹ that federal antitrust claims cannot be submitted to arbitration pursuant to predispute agreements,¹⁶⁰ has been widely accepted.¹⁶¹ At the opposite side, the Second Circuit's view that copyright claims are arbitrable pursuant to predispute agreements¹⁶² has been said by another court to be free from doubt.¹⁶³ In other words, the mere fact of exclusive federal jurisdiction over a claim does not determine whether arbitration of such a claim is permitted.

Two other arguments might be advanced, however, for interpreting

tions arising under certain federal statutes which provide for exclusive federal court jurisdiction . . . even if between private parties, are considered to be of public concern, and thus as a matter of public policy, generally have been held to be not justiciable in state court, or referable to arbitration"), *aff'd*, 684 F.2d 228 (2d Cir. 1982); *Diematic Mfg. Corp. v. Packaging Indus.*, 381 F. Supp. 1057, 1061 (S.D.N.Y. 1974) ("[o]bviously, the patent infringement claim falls within the exclusive jurisdiction of the federal courts . . . and may not be decided by . . . arbitrators or . . . state courts"), *appeal dismissed*, 516 F.2d 975 (2d Cir. 1975). The argument that exclusive jurisdiction in itself precludes arbitration is also implicit in the "intertwining" cases. *See, e.g., Lane v. Dean Witter Reynolds, Inc.*, 505 F. Supp. 610, 612 (W.D. Okla. 1980) ("A court should deny arbitration [of state law claims] in order to preserve the exclusive jurisdiction of the federal courts over federal securities law claims. A party cannot render meaningless the federal court's exclusive jurisdiction over federal securities act claims by compelling arbitration of ancillary pendent disputes." (citations omitted)); *see also Note, Investor-Broker Arbitration Agreements: Dean Witter Reynolds Inc. v. Byrd*, 20 U.S.F. L. REV. 101, 105-06 (1985). The Supreme Court, of course, rejected this view in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 222-23 (1985).

159. 391 F.2d 821, 826-27 (2d Cir. 1968).

160. *Id.*

161. Six of the eleven circuits have held antitrust claims nonarbitrable. *See Allison, supra* note 18, at 235 n.123. Although the Supreme Court has not yet addressed this question, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3361 (1985), the Court held that private antitrust claims are arbitrable in the international context. The *Mitsubishi* Court found it "unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions," and the Court rejected several of the rationales that have been offered to justify *American Safety*. *Id.* at 3355-58. It is doubtful that the domestic antitrust exception to the Arbitration Act will long survive *Mitsubishi*.

162. *Kamakazi*, 684 F.2d at 231. The *Kamakazi* Court held only that copyright disputes on anything other than the validity may be arbitrated.

163. *American Concept v. Irsay*, No. 84 C 10026 (N.D. Ill. Oct. 4, 1985).

exclusive jurisdiction to be wholly exclusive. First, Congress might have been concerned for the integrity of 1934 Act jurisprudence. Second, it might have been concerned about uniformity.¹⁶⁴

The first argument is stated easily enough: by providing for exclusive federal jurisdiction of 1934 Act claims, Congress prevented construction of the statute from falling into the hands of non-Article III judges. Perhaps in doing so, Congress intended to insure that only those judges in whom it had confidence (and in whose selection and removal it had a say) would be able to establish binding precedents. This concern, however, is not implicated by arbitration, for as the *Wilko* Court noted, arbitrators not only do not create binding precedent, they create no precedent at all—they do not publish opinions.¹⁶⁵ Moreover, even if they did, it is unclear that exclusive jurisdiction would benefit securities plaintiffs. On the one hand, while a plaintiff may have a legal advantage on the burden of proof issue that might be lost in arbitration, a broker-dealer is more likely to have some purely legal defenses, such as ratification, which are at least as likely to be lost in arbitration. On the other hand, a broker-dealer, more than an unsophisticated investor, might be able to affect the selection¹⁶⁶ of state judges.¹⁶⁷

A second possible justification for exclusive federal jurisdiction is the concern for uniformity (as opposed to integrity) of judicial interpretation.¹⁶⁸ Reducing the number of forums from 1660 to 91 also reduced the number of judges who could construe the statute. Here perhaps the

164. See Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548, 566 & n.129.

165. Barrett, *Arbitration of a Complex Commercial Case: Practical Guidelines for Arbitrators and Counsel*, 41 THE ARBITRATION J., Dec. 1986, at 15, 23.

Unlike judges, arbitrators do not usually write opinions; indeed, they are discouraged from doing so. Nevertheless they, like judges, must reason the case out. They must feel that their award is firmly rooted in the record and is legally sound. Matters not related to law or evidence can be appropriate in an arbitration brief. Arguments addressed to business sense, the equities, and commercial realities, for example, will be appropriate in certain cases.

Id. at 23. Labor arbitrators, however, sometimes issue opinions.

166. The means for such a program would presumably be entirely proper—for example, contributions by a Political Action Committee (PAC) to a judge's campaign committee in a retention election.

167. Nationwide broker-dealers, of course, may have a problem in affecting the selection of so many judges nationwide, particularly as against their local institutional clients. Moreover, the broker-dealer might more rationally conclude that the benefits of affecting a sufficient number of judicial selections were significantly less than the costs of such a campaign.

168. That is, not whether judicial interpretations are correct, but whether they are relatively consistent. These are separate concerns, though obviously they are closely related. As to some issues, Congress may have been concerned that judicial interpretations be "correct" (and of course uniformly so). In other instances, Congress may not have cared about the substance of the interpretation, provided that whether "correct" or not, it was at least uniform.

private nature of arbitration offers no succor, for it necessarily increases the number of persons by whom a statute can be construed. Still, the private nature of arbitration at least precludes the publication of these "precedents," and it limits the effect of the construction to the particular case. And again, it is likely that broker-dealers benefit from uniformity of construction more than their customers (or at least their retail customers), for many broker-dealers are regional or national operations to which uniform interpretations may have greater value for planning purposes simply because of the regional or national scope of their operations. Moreover, the right to seek judicial confirmation or vacation of arbitration awards permits the federal courts to preserve at least some degree of uniformity and integrity.¹⁶⁹

B. The 1975 Amendments

In 1975, Congress enacted substantial amendments to the Securities Exchange Act of 1934.¹⁷⁰ The 1975 amendments did not specifically address the enforceability of predispute arbitration agreements between the securities industry and its public customers. The amendments did, however, enact an explicit exception for intra-industry disputes, rendering predispute agreements enforceable in that context.¹⁷¹ Although the statute itself did not speak directly to public-customer agreements, one sentence in the conference committee's report appears to comment on this subject. The sentence reads in full as follows: "It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko*, concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations."¹⁷²

There are several arguments buried within the seemingly simple history just narrated, and it is important to understand exactly which argument one is addressing. First, the conference committee's remarks might be read as evidence of the original enacting Congress' intent as to predispute agreements. Second, independent of the enacting Congress' intent, the committee's remarks might be taken as a ratification of judicial interpretation. Third, the statute itself, as distinguished from the committee remarks, might be taken as a similar ratification. Fourth, the logic of the

169. 9 U.S.C. §§ 9-11 (1982).

170. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

171. *Id.* § 21(1), 89 Stat. at 160 (codified at 15 U.S.C. § 78bb(b) (1982)).

172. H.R. CONF. REP. NO. 94-229, 94th Cong., 1st Sess. 111 (1975), *reprinted in part in* 1975 U.S. CODE CONG. & ADMIN. NEWS 321, 342.

statute might be such as to imply a position one way or the other on predispute agreements.

1. Evidence of intent of enacting Congress

The first of these arguments is the weakest. One might find support for the legal principle that a later Congress' views of a piece of legislation are evidence of the enacting Congress' intentions,¹⁷³ but this principle must be handled gingerly. Just as there are many reasons why a party might settle a case, there are many reasons why Congress might amend a statute. In other words, the subsequent legislative action may not be intended to communicate anything about a previous legislature's intent. Additionally, two other observations make clear the weakness of using post-enactment materials in this particular instance of legislative history. First, the committee remarks do not so much purport to interpret the 1934 Act as they do the case law. The argument thus merges into the second use of this history, congressional committee ratification. Second, as will be seen below, the import of the committee's remarks is far from clear.

2. Congressional committee ratification of judicial interpretation

The second form of the argument does not presuppose any particular intent on the part of the enacting Congress with respect to predispute arbitration agreements. Rather, it simply says that the committee's remarks ratified judicial construction of the statute. In other words, the committee discerned the interpretation that the courts have rendered and simply endorsed it. This use of legislative history is fraught with difficulties, both in theory and in this particular case.¹⁷⁴

To begin with, the conference committee sentence quoted above is quite ambiguous. At the outset, all it tells us is that the conferees had a "clear understanding" that the amendment did not change "existing law," but it does not say that the conferees had a clear understanding of what "existing law" provided. The conferees may have been deeply divided on the point, or they may have given it little thought; all they *did* know was that whatever the law was, they were not changing it. But even assuming the committee did have an understanding that all agreed upon, the quoted sentence does not disclose that understanding. All the committee said was that it was not changing the rule "articulated in

173. See, e.g., 2A SUTHERLAND, STATUTORY CONSTRUCTION § 49.11 (N. Singer 4th ed. 1984).

174. For an interesting discussion of this issue, see generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 363, 374-88 (1982); *id.* at 395-409 (Powell, J., dissenting).

Wilko.”¹⁷⁵ True, the committee might have been aware that lower courts had extended the *Wilko v. Swan*¹⁷⁶ holding to claims arising under the 1934 Act, but it might also have been aware that *Wilko* itself did not apply to the 1934 Act and that the Court in *Scherk v. Alberto-Culver Co.*¹⁷⁷ had expressed some doubt whether *Wilko* should apply to the 1934 Act. Perhaps if the committee had been correctly informed of the limits of *Wilko*, it would not have wished to extend that decision. Moreover, since the report refers only to *Wilko* itself, and not to the then few lower courts’ decisions expanding its reach, the conference committee’s remark may also be read as limited to the 1933 Act, which section 28 of the 1934 Act also affected.¹⁷⁸ The intra-industry exception set forth in section 28 applies to all of Title 15, and not simply to the 1934 Act,¹⁷⁹ and the committee may simply have wished to make clear that the intra-industry exception did not otherwise affect *Wilko*’s construction of the 1933 Act.

A final aspect of this ambiguity is that even if the conference committee had authoritatively pronounced an intention that *Wilko* be applied to the 1934 Act, this would not dispose of the special case of the right of action implied under section 10(b). *Wilko* dealt solely with an express right of action, and courts may well treat an implied right of action differently. In other words, the committee may have approved the extension of *Wilko* to express private rights of action under the 1934 Act, but not specifically to implied rights of action.

Given these ambiguities, the theoretical argument against committee ratification is much more persuasive in this context. It must be remembered that the non-waiver provision was not itself amended in 1975. And as Justice Scalia noted (in another context) while still a member of the Court of Appeals for the District of Columbia Circuit:

175. H.R. CONF. REP. NO. 94-229, *supra* note 172, at 111.

176. 346 U.S. 427 (1953).

177. 417 U.S. 506 (1974).

178. Some advocates have gone further still to say that since only one appellate court had extended *Wilko* to the 1934 Act when the committee remarks were penned, and since *Scherk* was decided during the same year as the remarks were written, the remarks actually meant that the committee shared the doubts expressed in *Scherk*. See, e.g., Petitioners’ Brief at 18, *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 60 (1986) [hereinafter *Petitioners’ Brief*].

179. 15 U.S.C. § 78bb(b); see also *Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 632 n.1 (5th Cir. 1977) (claims under 1933 Act and 1934 Act). If “the party seeking to avoid arbitration is a member of the Exchange . . . then . . . § 28(b) is applicable and overrides the nonwaiver provisions which were the basis of *Wilko*.” *Id.* at 636; see also *N. Donald & Co. v. American United Energy Corp.*, 585 F. Supp. 533, 534 (D. Colo. 1984) (applying § 28(b) to complaint raising claims under 1933 Act, 1934 Act, RICO, and state statutes).

[T]he authority of the committee report in the present case is even more suspect than usual. Where a committee-generated report deals with the meaning of a committee-generated text, one can at least surmise that *someone* selected these statutory words to convey this intended meaning. The portion of the report at issue here, however, comments upon language drafted in an earlier Congress, and reenacted, *unamended* so far as is relevant to the present point, in the 1985 law.¹⁸⁰

Congressional committees have no authority to legislate and courts ought to be extremely circumspect in relying on remarks uncovered in committee reports. That is particularly true when the court is simply reading the committee report, and not the statute against the back drop of the report.

3. Statutory ratification of judicial interpretation

The argument for ratification is stronger, however, when one turns away from the committee report and to the statute itself. It may well be that in the statute one might find language tending to imply ratification of previous judicial constructions, perhaps reading the statute against the background of a committee report. This argument of statutory ratification tends to merge with the argument based on the logic of the statute, so the two arguments are dealt with together.

At the general level, one might infer from legislative action on one aspect of a statute that Congress implicitly accepted the judicial construction of the remaining sections. At this level, the argument is not terribly persuasive. After all, the issue of predispute arbitration agreements is purely procedural. It is not central to the substantive regulations created by Congress—unlike, for example, the argument that Congress has ratified judicial inference of an implied right of action

180. *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring) (emphasis in original). While still a member of the D.C. Circuit, Justice Scalia generally took a dim view of relying on committee reports for anything other than broad outlines of congressional purpose:

But the authoritative, as opposed to the persuasive, weight of the Report depends entirely upon how reasonable it is to assume that that rejection was reflected in the law which *Congress* adopted. I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.

Id. at 7-8 (Scalia, J., concurring) (footnote omitted) (emphasis in original).

under section 10(b). The 1975 amendments, however, supply more specific material, and here the argument is stronger.

The 1975 legislation amended section 28 of the 1934 Act to provide, in essence, that arbitration agreements between or among members of the securities industry would be enforceable.¹⁸¹ From this statement of an exception to the supposed general rule precluding enforcement of arbitration agreements, one might infer that Congress intended to preclude any other exceptions—*expressio unius est exclusio alterius*.¹⁸² Indeed, the Eleventh Circuit recently accepted this argument:

Congress, in enacting a provision which it recognized would permit arbitration between securities professionals, declined to take further action. Congress was presumably aware that courts had begun to extend *Wilko* to 10b-5 claims, . . . and that the Supreme Court's only response had been to note in *Scherk* that there was a "colorable argument" that *Wilko* was "not controlling" in such cases. Yet Congress passed up a clear opportunity to disavow this trend.¹⁸³

As a formal matter, the argument assumes its own conclusion. It seizes upon section 28(b)¹⁸⁴ and labels it an "exception" to section 29(a)'s prohibition of required waivers.¹⁸⁵ It then says that from the existence of one express exception without similar expression of other exceptions one can infer that there are no other exceptions and that the general rule therefore controls. The fallacy in the argument arises because it uses the "exception" not to prove that there are no other exceptions but to prove

181. Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 21(1), 89 Stat. 97, 160 (codified at 15 U.S.C. § 78bb(b)). Section 21(1) of the 1975 Amendments added the following language to § 28 of the 1934 Act:

Nothing in this title shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

89 Stat. at 160.

182. For a general discussion of this legal maxim—"the expression of one is the exclusion of another," see SUTHERLAND, *supra* note 173, §§ 47.23-47.25. For an insightful and critical discussion of this maxim and its application, see Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 774-77, 778 (1987).

183. *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032, 1037-38 (11th Cir. 1986) (citations omitted).

184. 15 U.S.C. § 78bb(b). For the text of this section, see *supra* note 181.

185. See *supra* note 108 for the text of § 29(a).

the existence of the general rule. The logical form of the argument runs as follows:

- a. Section 29(a) repeals the Arbitration Act and precludes enforcement of predispute arbitration agreements as to claims raised under the 1934 Act;
- b. Section 28(b) is an express exception to this rule;
- c. The expression of one exception is the exclusion of others;
- d. There are no further exceptions to the general rule; and
- e. The general rule applies here and precludes enforcement of the predispute arbitration agreements.

The argument doubles back and incorporates its first premise into its conclusion. As a matter of logic, it proves nothing.

But perhaps the Eleventh Circuit was taking a much less formal approach, appealing not so much to the *expressio unius, exclusio alterius* canon of construction as to the much misunderstood expression "the exception proves the rule."¹⁸⁶ But an exception proves a rule only if the exception is of such a character that it naturally suggests the proposed rule,¹⁸⁷ and section 28(b) does not do this. The Eleventh Circuit's argument assumes that the principal purpose of section 28(b) was to exempt arbitration among exchange members from the antiwaiver provision of section 29(a). But this mischaracterizes section 28(b)'s chief aim, which was to preserve the self-regulatory function of exchanges.¹⁸⁸ Congress' goal in enacting section 28(b) was to preserve the exchanges' ability to promulgate rules governing their members' substantive behavior.¹⁸⁹ It is true that section 28(b) also permits arbitration of disputes arising under these rules,¹⁹⁰ but this is merely incidental to the principal goal of the section. Denying the exchanges control over the means of enforcing their substantive rules would severely undermine the policy of self-regulation.¹⁹¹ Consequently, the exchanges had to be given the power to

186. On the various meanings of this expression, see H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 176 (E. Gower 2d ed. 1965). In proper usage, the word "prove" seems to have lost its denotation of "testing" or "putting to trial." See 2 COMPACT OXFORD ENGLISH DICTIONARY 2339 (1971). The old proverb makes more sense with this meaning—an exception tests a rule to determine whether there really is a rule after all.

187. Note that this method of proof is inductive, not deductive. As a matter of deductive reasoning, an exception can never *prove*, that is, demonstrate, a rule—only undermine it, or at least force refinement of its terms.

188. *Tullis*, 551 F.2d at 638; *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838, 840-41 (2d Cir. 1971); *N. Donald & Co.*, 585 F. Supp. at 535-36.

189. *Axelrod & Co.*, 451 F.2d at 840 (citing SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. NO. 95, 88th Cong., 1st Sess., pt.1, at 3 (1963)).

190. *Id.*

191. Section 28(b) does not specifically mention arbitration. Rather, it preserves "the bind-

choose the most appropriate means of enforcing their rules.¹⁹² This "exception" simply is not the kind that implies the general rule that the Eleventh Circuit endorsed. Indeed, even the Eleventh Circuit was compelled to "recognize that an inference from congressional silence is of somewhat limited value."¹⁹³

C. *The SEC and Administrative Interpretation: Regulation 15c2-2*

In 1983, the Securities and Exchange Commission adopted a regulation making it

a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.¹⁹⁴

This regulation has been cited as authority for construing the 1934 Act to preclude enforcement of predispute arbitration agreements¹⁹⁵ although the SEC's recent change of position in its *amicus* brief in *Shearson/American Express, Inc. v. McMahon*¹⁹⁶ to some degree puts this regulation in limbo. An analysis of the history and logic of Rule 15c2-2, however, leads inescapably to the conclusion that it provides no authority for precluding enforcement of arbitration agreements, independent of the SEC's current position.

Regulation 15c2-2 finds its origins in a 1979 SEC interpretive release.¹⁹⁷ In this release, the SEC explained that under then-current law, predispute arbitration clauses were unenforceable under both the 1933 Act and the 1934 Act.¹⁹⁸ Because of this understanding, the Commission concluded that it would be "misleading to customers to require execution of any customer agreement which does not provide adequate disclosure about the meaning and effect of its terms, particularly any pro-

ing effect . . . on any member of . . . any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members" 15 U.S.C. § 78bb(b).

192. *Tullis*, 551 F.2d at 638. This choice, however, was subject to the SEC's oversight. See *supra* notes 145-51 and accompanying text.

193. *Wolfe*, 800 F.2d at 1038.

194. 17 C.F.R. § 240.15c2-2(a) (1986).

195. *Phillips v. Merrill Lynch, Pierce, Fenner & Smith*, 795 F.2d 1393, 1398 n.17 (8th Cir. 1986) (rejecting appellees' argument from Rule 15c2-2), *petition for cert. filed*, 55 U.S.L.W. 3296 (U.S. Oct. 7, 1986) (No. 86-578).

196. 107 S. Ct. 60 (1986).

197. Exchange Act Release, *supra* note 67, ¶ 82,122, at 81,976-81,977.

198. *Id.*

vision which might lead a customer to believe that he or she has waived prospectively rights under the federal securities law"¹⁹⁹

The SEC revisited this subject in 1983. At that time, the Commission once again looked to the statutes and the still-uniform judicial interpretation of the 1934 Act, and concluded that the "federal securities laws . . . provide that broker-dealer agreements purporting to bind public customers to the arbitration of disputes arising in the future are void and unenforceable as applied to claims arising under those laws."²⁰⁰ Quoting the Sixth Circuit's language in a recent decision,²⁰¹ the SEC said that "[c]ourts have consistently held that *Wilko's* holding and rationale [under the Securities Act of 1933] are equally applicable to cases arising under the 1934 Act."²⁰²

Viewing regulation 15c2-2 against this background displays the logical fallacy of relying on this regulation for any authority whatsoever. The SEC did not even purport to conduct an independent analysis of the statute, its history, or its application within the securities context. All it did was read the volumes of *Federal Reporter, Second Series*, and conclude that under the law, predispute agreements constituted "a fraudulent, manipulative, or deceptive act or practice."²⁰³ Yet this regulation and its history are offered as an authoritative interpretation of section 29 of the 1934 Act. The logic of this analysis, however, is deeply flawed; it proceeds as follows:

1. The Commission perceives the law to be *X*;
2. For a broker to say the law is *non-X* is to mislead the customer into believing that the law in fact is *non-X*;
3. If it is misleading to say that the law is *non-X*, then the law must in fact be *X*.

199. *Id.* ¶ 82,122, at 81,978. Commissioner Karmel disagreed with the views expressed in the Release. *Id.* (separate statement of views by Commissioner Karmel). Her views on arbitration are reminiscent of Justice Frankfurter's dissent in *Wilko v. Swan*.

200. Recourse to the Courts Notwithstanding Arbitration Clauses in Broker-Dealer Customer Agreements, Exchange Act Release No. 20,397, [1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,452, at 86,357 (Nov. 18, 1983) [hereinafter Exchange Act Release].

201. *First Heritage Corp. v. Prescott, Ball & Turben*, 710 F.2d 1205, 1207 (6th Cir. 1983).

202. Exchange Act Release, *supra* note 200, ¶ 83,452, at 86,357.

203. 15 U.S.C. § 78o(c) (1982); Exchange Act Release, *supra* note 200, ¶ 83,452, at 86,356. ("The Commission's Rule codifies its longstanding view that such clauses are inconsistent with the deceptive practice provisions of section 10(b) [15 U.S.C. 78j(b)] and section 15(c) [15 U.S.C. 78o(c)] of the Securities Exchange Act of 1934 . . ." (bracketed information in original)). The 1983 Exchange Act Release, *supra* note 200, did not conduct any new analysis of the 1934 Act's non-waiver provision, it simply pointed to "*Wilko* . . . and subsequent cases" and referenced the Commission's own "longstanding view . . ." *Id.* ¶ 83,452, at 86,356-57. In the 1979 Exchange Act Release, *supra* note 67, the Commission had mentioned *Scherk* but without addressing, much less answering, the questions raised there.

The circularity of this form of reasoning is painfully obvious. The argument collapses back into itself.²⁰⁴

Even assuming, however, that in promulgating Regulation 15c2-2 the SEC had analyzed the 1934 Act and interpreted it as barring enforcement of predispute arbitration agreements, one must hesitate to give this interpretation much credence. In offering such an interpretation, the SEC would not merely be interpreting the 1934 Act, with which it might be presumed to have some special expertise; rather, it would be considering the interplay between two statutes, the enforcement of only one of which is entrusted to the SEC. It is extremely doubtful that Congress intended to give the SEC authority to use its powers of expert interpretation to, in effect, repeal the Arbitration Act.

VI. STATUTORY AND PUBLIC POLICY ANALOGIES

Up to this point, the discussion has focused on arguments concerning the language and structure of specific statutory provisions of the securities laws. The judicially recognized exceptions to the Arbitration Act, however, extend beyond the 1933 and 1934 Acts. Courts have found exceptions to the Arbitration Act based on the public policy underlying patent, copyright, antitrust, civil rights, and other statutes, and although *Wilko v. Swan*²⁰⁵ was not based on a generalized public policy exception, it has frequently been cited for that proposition.²⁰⁶

The following discussion of a handful of these statutory exceptions will not attempt to offer a unified theory of these exceptions. Indeed, it

204. In fact, the language of Regulation 15c2-2 itself, as opposed to that of the interpretive releases, does not necessarily implicate the use of predispute clauses to compel arbitration of claims arising under the 1934 Act. The regulation makes it a fraudulent practice to create or preserve a clause requiring arbitration of a dispute arising "under the federal securities laws," but it does not say *which* federal securities laws. Although one answer might be "all of them (including the 1934 Act)," an equally plausible answer is "those under which such clauses are unenforceable." In other words, the regulation can be read as taking no position on *which* federal securities laws preclude enforcement of predispute arbitration agreements. The regulation's use of the phrase "purports to bind" makes the second readings perhaps a bit more linguistically plausible, since "purports" means "to have the appearance, often the specious appearance, of being, intending, claiming, etc. (that which is implied or inferred)." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2017 (2d ed. 1946); see also *United States v. 306 Cases Containing Sandford Tomato Catsup With Preservative*, 55 F. Supp. 725, 727 (E.D.N.Y. 1944), *aff'd*, 148 F.2d 71 (2d Cir. 1945).

205. 346 U.S. 427 (1953).

206. See, e.g., Allison, *supra* note 18, at 233-34. And, conversely, although *Wilko* was not based on a public policy exception, the *public* nature and purposes of the securities laws and the *public policy* exception to the Arbitration Act, have frequently been offered as arguments against the enforceability of predispute arbitration agreements in the securities context. See Comment, *Arbitration of Investor-Broker Disputes*, *supra* note 22, at 120.

may not be possible to explain these decisions coherently without resort to the crudest form of legal realism.²⁰⁷ Consideration of these cases, however, will at least engender a healthy skepticism which will prove useful when the arbitrability of RICO claims is considered.

A. *Arbitration Agreements and Intellectual Property Law*

The field of intellectual property law provides an oddly variegated application of the "public" rights exception. In the patents area, a long-standing judicial gloss (recently overruled by statute) held that validity and infringement claims were not arbitrable. Prior to enactment of the statute that reversed this line of cases, copyright infringement, but not copyright validity, was arbitrable. In the trademark field, even validity appears to have been arbitrable.

It is appropriate that the patent-disputes exception to the Arbitration Act should begin and end in a statute. First recognized in 1930, the patent exception is the granddaddy of all "public rights" exceptions. In *Zip Manufacturing Co. v. Pep Manufacturing Co.*,²⁰⁸ the federal district court in Delaware faced the novel question of construction of an act that had been passed a scant five years earlier, the Arbitration Act. The complaint alleged patent infringement, and a predispute agreement specifically provided that "the question of validity and infringement shall be determined by arbitration."²⁰⁹ Pursuant to this agreement, the defendant moved for a stay of judicial proceedings pending arbitration.²¹⁰ The court faced the initial question of whether an "issue referable to arbitration" in section 3 of the Arbitration Act meant the same as "controversy" in section 2.²¹¹ Determining that the two phrases were synonymous for the purposes at hand, the court then considered whether the questions of validity and infringement were "controversies" arising out of "a contract evidencing a transaction involving commerce"²¹² The court concluded that the validity and infringement questions "relate[d] to a controversy involving neither commerce nor a maritime transaction, as defined in the Act, and therefore [agreements to arbitrate these claims are] not enforceable under the Federal Arbitration Act."²¹³ The court based this finding on a brief examination of the Arbitration Act's legislative history and contemporaneous discussions of its pur-

207. For a valiant and helpful attempt, however, see generally Sterk, *supra* note 39.

208. 44 F.2d 184 (D. Del. 1930).

209. *Id.* at 185-86.

210. *Id.* at 184.

211. *Id.* at 185.

212. *Id.* at 185 (citing 9 U.S.C. § 2 (1982)).

213. *Id.* at 186.

pose.²¹⁴ After quoting a passage written by one of the Act's advocates concerning the typical questions that were expected to be resolved by arbitration under the Act, the court added this observation: "The determination of the status of a patent, its validity or invalidity, its infringement or noninfringement, is a matter that is inherently unsuited to the procedure of arbitration statutes."²¹⁵ This appears to have been the birth of the public policy exception to the Arbitration Act. Although the public policy issue was a secondary concern for the *Zip* court, that dictum is the language for which it is remembered. Its abstruse statutory analysis lost out to the much more easily wielded public policy argument.²¹⁶

In 1982, Congress legislatively overruled the patent version of the public policy exception.²¹⁷ The 1982 amendments to the patent laws specifically authorize both predispute and postdispute arbitration agreements extending to the issue of patent validity or infringement.²¹⁸ The amendments use the language of section 3 of the Arbitration Act to render such agreements enforceable.²¹⁹

214. *Id.*

215. *Id.*

216. *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55, 62-63 (7th Cir. 1970) ("patent validity questions . . . are inappropriate for arbitration proceedings and should be decided by a court of law, given the great public interest in challenging invalid patents"); *Diematic Mfg. Corp. v. Packaging Indus.*, 381 F. Supp. 1057, 1061 (S.D.N.Y. 1974) ("the public has an important interest in the determination of patent validity and infringement, even though those issues may be decided in the context of a private lawsuit. . . . [T]he grave public interest in questions of patent validity and infringement renders them inappropriate for determination in arbitration proceedings.") (footnotes omitted); *Leesona Corp. v. Cotwool Mfg. Corp.*, 204 F. Supp. 141, 143 (W.D.S.C. 1962), *aff'd*, 315 F.2d 538 (4th Cir. 1963). Interestingly enough, although *Beckman* is cited in conjunction with *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184 (D. Del. 1930), as one of the fonts of the public policy exception, the language just quoted is dictum. The holding of the court was that the patent validity question did not fall within the scope and intent of the arbitration agreement. *Beckman*, 433 F.2d at 62.

217. Act of Aug. 27, 1982, Pub. L. 97-247, 96 Stat. 322 (codified at 35 U.S.C. § 294 (1982)). The section is captioned "Voluntary Arbitration," underscoring the concern that arbitration should be voluntary. See *supra* notes 121-52 and accompanying text. In 1984, Congress similarly amended the patent interference statute, 35 U.S.C. § 135(d) (Supp. III 1985). Section 294 incorporates the language of § 2 of the Arbitration Act, 9 U.S.C. § 2 (1982), and both § 294 and § 135(d) provide for enforcement in accordance with the Arbitration Act, subject to the more specific provisions of the patent arbitration provisions. 35 U.S.C. §§ 135(d), 294(b).

218. 35 U.S.C. § 294. For the practical and procedural implications of this amendment, see Dresser, *Agreements to Arbitrate Patent Disputes*, 67 J. PAT. & TRADEMARK OFF. SOC'Y 551 (1985).

219. Section 294 is carefully drafted to ensure the proper balance between competing public and private concerns. It permits both predispute and postdispute arbitration agreements. 35 U.S.C. § 294(a). It explicitly requires arbitrators to consider the statutory affirmative defenses to patent infringement, *id.* § 294(b), but it also provides that an arbitration award has no binding effect on nonparties and that a subsequent judicial declaration of invalidity or unenforceability may be used to modify an arbitration award. *Id.* § 294(c). It also provides that the arbitration award is unenforceable until the patentee files notice with the Commissioner of

The enacting Congress took no position on whether the *Zip* line of cases had correctly interpreted the Arbitration Act or had properly created a public policy exception to the Act.²²⁰ The 1982 amendment, however, clearly rejects the public policy exception (at least in the patent context), and the remarks of the reporting committee support this conclusion: “[A] statutory authorization of voluntary agreements to arbitrate validity and infringement disputes would benefit both the parties to these disputes and the public.”²²¹ The committee cited two types of advantages to the public that would result from arbitrability of patent disputes. “First, the availability of arbitration with its numerous advantages will enhance the patent system and thus will encourage innovation Secondly, arbitration could relieve some of the burdens on the overworked Federal Courts.”²²²

The second of these two advantages to the public is directly transferable to the securities context, and it highlights a significant fallacy in the entire policy-based approach to enforcement of the Arbitration Act. In each of the “public policy statutes” that Congress enacts, there is obviously a public policy favoring the enforcement of the statute. The Arbitration Act, however, represents a “public policy” choice as well: it endorses as public policy the enforcement of agreements to use a form of dispute resolution that is undoubtedly less costly to the parties and the public.²²³ That decision represents a balancing of the public and private costs and benefits of judicial dispute resolution. Judicial refusal to accept the congressional decision of this balancing not only reflects a revived judicial hostility to arbitration, but it also upsets the congressional balance and imposes higher costs on the administration of congressional policies.

The first public advantage that the committee statement suggested can be found in the securities context as well, although it cannot be mechanically transplanted. The availability of arbitration for securities disputes has the net result of reducing broker-dealers’ expected costs, a savings which might be expected to result in lower prices to the customer. If the investor’s costs associated with investment are reduced (or, viewing the matter differently, if his return is increased), he can be ex-

Patents and Trademarks; the notice becomes part of the record of prosecution of the patent. *Id.* §§ 294(d)-(e).

220. See H.R. REP. NO. 97-542, 97th Cong., 2d Sess. 12 (1982).

221. *Id.* at 13.

222. *Id.*

223. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“failure to accord immediate review . . . might ‘seriously erode federal policy’ ”); (Congress created a “substantive rule” to protect the enforceability of arbitration agreements).

pected to increase his investments (or at least realize a greater return on his existing investments).²²⁴ In other words, the availability of arbitration in securities disputes might enhance capital formation.²²⁵

In the other two analogous areas of intellectual property law, the enforceability of arbitration agreements is unsettled. Some cases have held that, as in the patent area, copyright matters other than validity itself can be determined in arbitration,²²⁶ and one court appears to have held that all copyright claims, including validity, are arbitrable.²²⁷ In the trademark area, validity appears to be arbitrable.²²⁸ In any event, it would seem unlikely that any public policy exception to arbitrability in the intellectual property area will survive the 1982 amendments to the patent laws,²²⁹ particularly since the first court to address the issue of copyright arbitrability placed great reliance on the jurisprudence of patent arbitrability.²³⁰

224. The author concedes that this economic analysis is at best in skeletal form.

225. True, this economic analysis is by no means conclusive, and in any event the extent to which capital formation might be assisted is not at all clear. Nevertheless, this represents one of the outcomes of Congress' balancing of public policies, and that balance should not be upset by the courts.

226. *Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F. Supp. 125, 131 (1981) ("Various issues arising in a dispute involving a trademark, patent, and copyright may be arbitrated with the exclusion, perhaps, of the validity of the federally protected interest itself. . . ."), *aff'd*, 684 F.2d 228 (2d Cir. 1982). The court continued:

The only "public interest" in a copyright claim concerns the monopoly inherent in a valid copyright. The validity of the copyrights here, and therefore the existence of the monopoly, was not determined by the arbitrator, but by the District Court. Consequently, we see no public policy against arbitration of this claim for the infringement of a valid copyright.

Id. at 231.

227. *American Concept v. Irsay*, No. 84 C 10026 (N.D. Ill. Oct. 4, 1985) (copyright claims are arbitrable).

228. *Givenchy S.A. v. William Stuart Indus. (Far East)*, No. 85 Civ. 9911 (S.D.N.Y. Mar. 10, 1986) ("There is little question that, under the law of this circuit, both of these disputes are amenable to arbitration."); *Saucy Susan Prods., Inc. v. Allied Old English, Inc.*, 200 F. Supp. 724, 728 (S.D.N.Y. 1961) (dictum) ("[P]laintiff does not urge that there is a public policy against arbitrating plaintiff's claims of trademark infringement [I]t does not appear that an agreement to arbitrate future disputes would thwart Congressional policy.") (footnote omitted); *cf. Hikers Indus. v. William Stuart Indus.*, 640 F. Supp. 175, 177 (S.D.N.Y. 1986).

229. *See Warner & Swasey Co. v. Salvagnini Transferica S.p.A.*, 633 F. Supp. 1209, 1212 (W.D.N.Y. 1986) ("[T]he court in [*Diematic Mfg. Corp.*] . . . held that patent infringement claims may be heard only by federal courts, not arbitrators (or state courts). However, the force of the *Diematic* case has been undercut by statute, 35 U.S.C. § 294."). Only one other court has mentioned the 1982 amendment to § 294. *See Rhone-Poulenc Specialties Chimiques v. SCM Corp.*, 769 F.2d 1569 (Fed. Cir. 1985). The entire "discussion" follows: "Consistent with the intent of the parties when they entered into the contract here, the right to arbitrate has since been guaranteed by enactment of 35 U.S.C. § 294." *Id.* at 1572 n.1. The *Rhone-Poulenc* court enforced an agreement to arbitrate even though the agreement had been entered into more than three years prior to both the enactment and effective date of § 294.

230. *Kamakazi*, 522 F. Supp. at 130.

B. *Arbitration Agreements and Antitrust Law*

While the public policy exception to the Arbitration Act for patent law disputes is the oldest, the antitrust exception is perhaps the most debated. In 1968, the Second Circuit held in *American Safety Equipment Corp. v. J.P. Maguire & Co.*²³¹ that an agreement to arbitrate antitrust claims was unenforceable.²³² Technically, the court might have limited its holding to a predispute arbitration agreement, which was all that the facts of *American Safety* presented.²³³ The Second Circuit, however, initially ignored this distinction and held that “antitrust claims . . . are inappropriate for arbitration.”²³⁴

The Second Circuit based its decision on unabashedly policy-oriented concerns. The court noted first that an antitrust action involved more than merely the parties to the lawsuit. Rather, an antitrust violation, and therefore the outcome of an antitrust action, “can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage.”²³⁵ Next, the court noted the possibility that an arbitration agreement might be both a contract of adhesion and an instrument for furthering the monopolist’s scheme. Third, the court considered that antitrust issues were too complex and the evidence too extensive for arbitrators. Fourth, the court suggested that it would be inappropriate for the business community that was regulated by antitrust laws to supply the judges in disputes and that, in any event, commercial arbitrators would not have the expertise necessary to consider “issues of great public interest.”²³⁶

The considerations raised in *American Safety*, as well as those raised by other courts and commentators, have been refuted effectively, though perhaps not unanswerably, elsewhere.²³⁷ As Professor Allison has noted, an antitrust plaintiff will have an interest in vindicating his claim,

231. 391 F.2d 821 (2d Cir. 1968).

232. *Id.* at 828.

233. *Id.* at 822.

234. *Id.* at 828. Subsequently, however, the Second Circuit did limit the holding to predispute agreements. See *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972).

235. *American Safety*, 391 F.2d at 826.

236. *Id.* at 827. Perhaps even the Second Circuit recognized the dubious merits of one of its arguments, that arbitrators would not have the requisite expertise to decide antitrust cases. Given the language in which the court articulated its objection, antitrust arbitration would seem almost more a breach of etiquette than a violation of legal norms or public policy. The court’s language—“it hardly seems proper for them to determine these issues”—makes one wonder whether the public policy that the Second Circuit was enforcing had been decreed by Amy Vanderbilt. See *id.*

237. See, e.g., Allison, *supra* note 18.

whether its resolution is relegated to arbitration or the courts.²³⁸ The argument that a monopolist might use an arbitration agreement to further its scheme has been rejected; a monopolist is not likely to be so foolish as to expose its machinations to the inspection of outsiders, be they public judges or private arbitrators. The suggestion that antitrust issues are any more complex and the evidence any more extensive than in difficult commercial cases is highly suspect.²³⁹ Finally, the argument that the business community ought not to be a judge in its own cause is based on an unlikely premise: it assumes that arbitrators will favor the monopolist rather than the victimized fellow businessman.

This Article is not concerned, however, with addressing in detail the arguments for and against an antitrust public policy exception to the Arbitration Act. Whatever one may say of the merits of the *American Safety* doctrine, the doctrine has a different basis than the exception articulated in *Wilko v. Swan*.²⁴⁰ The author has already discussed the view that *Wilko* was rooted chiefly in a concern that predispute agreements were not voluntary.²⁴¹ A different point is made here, namely that *Wilko* does not support any broad policy-based exception to the Arbitration Act, even though the *American Safety* court cited *Wilko* in support of its own decision not to enforce the arbitration agreement. In the words of the Second Circuit, in *Wilko*, "the Supreme Court frankly recognized a similar collision of public policies and faced up to it; we must do no less here."²⁴² The Second Circuit simply misread *Wilko*.

At the end of its opinion, the *Wilko* Court included a paragraph which began as follows: "Two policies, not easily reconcilable, are in-

238. *Id.* at 255-59. True, the plaintiff may not have the *same level* of interest in arbitration as he might in judicial proceedings. For example, if it were empirically demonstrable that arbitrators never award treble damages, then the amount of resources that a plaintiff was willing to invest in his lawsuit would diminish if predispute arbitration agreements were enforceable. The same would not necessarily hold true for postdispute arbitration agreements, for presumably at that point the plaintiff determined that the benefits of arbitration exceeded the costs, including the lesser probable reward. In contrast, a predispute arbitration agreement would entail a different cost-benefit analysis; the parties seeking the arbitration agreement presumably could offer the would-be plaintiff benefits unrelated to a prospective antitrust action.

239. Perhaps antitrust cases are more complex than the *average* commercial case that does not raise antitrust issues, and perhaps antitrust cases as a class can be screened out of arbitration in a way that other complex cases cannot. It is, after all, easy to determine whether a case raises an antitrust claim, but at what point in the continuum does a purely "commercial" case become too complex for arbitrators? In any event, the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), dismissed the premise of the argument—that arbitrators are not equipped for complex cases. *Mitsubishi*, 105 S. Ct. at 3357-58.

240. 346 U.S. 427 (1953).

241. See *supra* text accompanying notes 121-28.

242. *American Safety*, 391 F.2d at 826.

volved in this case.”²⁴³ The difference between *Wilko* and *American Safety*, however, is quite obvious. *Wilko* was not concerned with a generalized public policy exception²⁴⁴ of judicial provenance. Rather, it was concerned with the policy of the statute; even more, it was concerned with construction of a particular section of that statute—the nonwaiver provision. The antitrust laws, however, have no similar provision precluding waiver of statutory rights or the procedures available to vindicate those rights. In other words, in *Wilko*, the Supreme Court at least had a linguistic peg on which to hang its policy hat. The antitrust laws are not so hospitable. Indeed, the *American Safety* court did not cite to *any* provision of the federal antitrust laws to support its conclusion that federal antitrust claims are exempted from the Arbitration Act.

C. Civil Rights, Labor Law, and Arbitration Agreements

In *Dean Witter Reynolds Inc. v. Byrd*,²⁴⁵ the Supreme Court briefly addressed the question of the preclusive effect to be accorded to arbitration awards in subsequent judicial proceedings, an issue that had troubled several lower courts in deciding the “intertwining” issue. The Court determined that ordinary preclusion rules would not necessarily apply to an unreviewed arbitration award rendered prior to judicial proceedings in a securities action.²⁴⁶ The reasons the Court offered for rejecting preclusion have some bearing on the analogous question of whether civil rights actions may be arbitrated under predispute agreements.

In *McDonald v. West Branch*,²⁴⁷ the Supreme Court held that a labor arbitration proceeding would not have preclusive effect in an action brought under section 1983.²⁴⁸ The Court offered four reasons for its decision. First, the Court believed that the labor arbitrator’s expertise lay in labor relations, not law. Second, an arbitrator may not have contractual authority to enforce section 1983 claims. Third, the labor union usually has exclusive control over whether and when to present a grievance through arbitration. Fourth, arbitration does not afford the same procedural and evidentiary advantages available in litigation.²⁴⁹

243. *Wilko*, 346 U.S. at 438.

244. *Cf. Sterk*, *supra* note 39, at 483: “To say that public policy prohibits arbitration in a particular instance explains little; ‘public policy’ is a catchphrase elusive of meaning without reference to the context in which it is used.”

245. 470 U.S. 213 (1985).

246. *Id.* at 222-23.

247. 466 U.S. 284 (1984).

248. *Id.* at 292. The Court’s holding applies to both claim preclusion and issue preclusion.

Id.

249. *Id.* at 290-91.

It must be stressed that in *McDonald*, the question before the Court was not whether a predispute agreement to arbitrate a section 1983 claim could be enforced; neither was the issue enforcement of a postdispute arbitration agreement. Rather, the question the Court addressed was whether a labor arbitration of a claimed violation of the collective bargaining agreement would have preclusive effect in judicial proceedings in a section 1983 action,²⁵⁰ given that the two claims were based on the same factual predicate.²⁵¹

With this background, the *McDonald* Court's first and second rationales have no applicability in the area of arbitrability of securities disputes. As to the first, the Uniform Code of Arbitration²⁵² provides that a public customer may insist that a majority of the arbitration panel consist of industry representatives; if he does not make this demand, then a majority of the panel must consist of public representatives.²⁵³ In other words, under the Uniform Code, the securities claimant is entitled to determine, within reasonable limits, the type of expertise that the arbitration panel will possess. The Court's second rationale is even more suspect in the securities context. The Court in *Wilko v. Swan*²⁵⁴ held that arbitrators are bound to apply the 1933 Act in the disputes that they adjudicate²⁵⁵ and there is no basis for distinguishing arbitrators' obligation to enforce the 1934 Act.

The *McDonald* Court's third reason obviously does not apply in the securities context. Because of the collective nature of the labor grievance procedure, the union controls the aggrieved party's case before the arbitrators. The securities claimant, on the other hand, retains full control over the arbitration proceeding.

250. *Id.* at 285.

251. In the arbitration proceeding, McDonald claimed that he had been discharged without "proper cause" and therefore in violation of the collective-bargaining agreement. *Id.* at 285-86 & n.2. In his section 1983 civil action, he alleged that he had been discharged "for exercising his First Amendment Rights of freedom of speech, freedom of association, and freedom to petition the government . . ." *Id.* at 286. (The jury rejected his additional claim for deprivation of property without due process. *Id.* at 286 n.4.) The arbitrator found that there was proper cause for McDonald's termination. *Id.* Presumably, McDonald's exercise of his first amendment rights would not constitute "proper cause," and the arbitrator's finding therefore meant that McDonald had been dismissed for other reasons. (There does remain the possibility of dual causation, however, and perhaps the arbitrator did not consider this possibility.)

252. UNIF. CODE OF ARBITRATION § 8(a), reprinted in FIFTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION (Apr. 1986) (Exhibit C).

253. *Id.* § 19, ¶ 3719 at 3716. Professor Shell has called for a redefinition of the term "public representative." See *supra* note 136.

254. 346 U.S. 427 (1953).

255. *Wilko*, 346 U.S. at 433-34.

The Court's last rationale is perhaps the strongest of the four in its application to the securities context, and it is also the most familiar. It is true that arbitration does not offer the full panoply of procedural safeguards available in litigation; that is both its virtue and its vice. But it is precisely those advantages that the securities claimant agrees to forego in a predispute agreement; this distinguishes a securities agreement from the collective bargaining agreement. The individual laborer is not a signatory to the labor agreement and cannot be presumed to have delegated to the union (perhaps as an agent against his will) the authority to arbitrate his civil rights, as opposed to his collective bargaining rights. Regardless of the degree to which the securities customer's agreement can be characterized as "voluntary," it is assuredly the *customer's* agreement, and not some union's. In other words, the question once again resolves itself into the voluntariness *vel non* of the predispute arbitration agreement and whether that is a material question in the construction of a nonwaiver provision.

VII. ARBITRABILITY OF RICO CLAIMS IN THE SECURITIES CONTEXT

When RICO claims are asserted in securities cases, they are routinely based on the same nucleus of facts as the claims under the conventional securities laws. And of course, the same predispute agreements that require arbitration of common-law claims also require arbitration of RICO claims—unless RICO forbids enforcement of such agreements.²⁵⁶

The appellate and district courts are deeply divided on this issue. In *McMahon v. Shearson/American Express, Inc.*,²⁵⁷ the Second Circuit held that RICO claims could never be compelled into arbitration pursuant to predispute agreements. In *Jacobson v. Merrill Lynch, Pierce, Fen-*

256. Much turns on identification of the statute from which the public policy exception emanates. If the substantive statute (e.g., the Sherman Act) is the source of the public policy exception, then the exception cannot apply to state statutes that create similar policy exceptions: the Supremacy Clause requires enforcement of the Arbitration Act. If the public policy exception is rooted in the Arbitration Act, then it is at least possible that the *federal* policy exception also protects *state* policies. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), however, the Court declined to extend any policy exception to state statutory claims. This refusal implies either that the policy exception (to the extent that it exists at all) emanates from the substantive federal laws, or that if it emanates from the Arbitration Act, its application is limited to federal statutes.

257. 788 F.2d 94, 99 (2d Cir.), *cert. granted*, 107 S. Ct. 60 (1986). The First Circuit agreed with the Second Circuit on the RICO issue, but agreed with the Eighth Circuit on the 1934 Act issue. *Page v. Mosley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291, 298-300 (1st Cir. 1986).

ner & Smith, Inc.,²⁵⁸ the Third Circuit held that RICO claims could be arbitrated under predispute agreements only if the predicate acts²⁵⁹ on which the RICO claim is based are arbitrable under such agreements. And in *Mayaja, Inc. v. Bodkin*,²⁶⁰ the Fifth Circuit held that at least in the securities context, all RICO claims are referable to arbitration under predispute agreements.

RICO contains no antiwaiver provision similar to section 14 of the 1933 Act or section 28(a) of the 1934 Act. Unless one accepts the Third Circuit's rather baroque approach, therefore, the enforceability of predispute arbitration agreements in the RICO context turns solely on the public policy exception to the Arbitration Act. If there is no such policy or if it does not apply in this context, then RICO claims are fully arbitrable.

The Second Circuit in *McMahon* embraced a "public policy" justification for precluding arbitration of RICO claims. Although the court referred to its decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*,²⁶¹ the court did not identify the specific public policy reasons to which it referred.²⁶² One might postulate as many policy arguments as have arisen in the antitrust context,²⁶³ but only one seems truly significant: the effect of the defendant's conduct on the general public and identifiable third parties. To understand this external effect, however, it is necessary to understand the type of conduct that RICO makes actionable.

RICO does not prohibit single acts in themselves. Instead it aims at whole series of acts that create a "pattern of racketeering activity."²⁶⁴ The extent of any "public policy" in RICO depends on the definition of "pattern." If a "pattern of racketeering activity" could be established simply by showing that a defendant has committed one or more isolated acts of fraud, then there would be little reason to preclude arbitration.

258. 797 F.2d 1197, 1203 (3d Cir.), *petition for cert. filed*, 55 U.S.L.W. 3325 (U.S. Sept. 25, 1986) (No. 86-487). The Eleventh Circuit has sided with the Third Circuit's decision in *Jacobson. Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337, 1338-39 (11th Cir. 1986). The Eleventh Circuit suggested that the Second and Third Circuits had come to the same result. Given that the Second Circuit relied on its decision in *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), however, it is impossible to read the decisions in tandem.

259. The term means the "independently prohibited acts" (defined as "racketeering activity" in 18 U.S.C. § 1961(1)(1982)) that form the "pattern of racketeering activity" (defined in 18 U.S.C. § 1961(5) (1982)).

260. 803 F.2d 157, 165-66 (5th Cir. 1986).

261. 391 F.2d 821 (2d Cir. 1968).

262. *See Jacobson*, 797 F.2d at 1202.

263. For a detailed list of these arguments and responses to each, see, e.g., Allison, *supra* note 18.

264. 18 U.S.C. § 1962 (1982).

The damages for each of the separate acts of fraud can be fully satisfied in arbitration because all relevant parties are present. However, under a stricter definition of "pattern," there is arguably more reason to preclude arbitration. For example, in *Superior Oil Co. v. Fulmer*,²⁶⁵ the Eighth Circuit held that a "pattern of racketeering" could not be predicated on "one isolated fraudulent scheme."²⁶⁶ That is, the court required more than two unconnected acts and more than even a series of connected acts. Under *Superior Oil*, a plaintiff must show that the defendant had "engaged in other criminal activities elsewhere."²⁶⁷ Pursuant to this stricter definition of "pattern," a defendant's conduct affects persons other than those represented in the given proceeding. One might argue that these third persons' interests should not be relegated to arbitration and excluded from the protections afforded by the federal judiciary.

This argument is flawed in at least two respects. First, the third persons affected by the defendant's conduct are by hypothesis identifiable. Unlike antitrust violations, the RICO offense in the securities context does not have widespread repercussions rippling indiscriminately through the market. They directly affect only identifiable individuals,²⁶⁸ and these individuals can pursue relief themselves should they so desire.²⁶⁹ Second, at least in the securities context, if one victim of the alleged racketeering pattern has signed an arbitration agreement, it is likely that the other alleged victims have done so as well.²⁷⁰ Permitting a plaintiff to evade arbitration by pleading RICO thus voids not one, but several arbitration agreements in one stroke.

The Third Circuit agreed that a general public policy exception could not justify precluding arbitration of RICO claims.²⁷¹ Having rejected this basis, the Third Circuit determined that it must look to the "predicate statutes" on which the RICO claim was based.²⁷² The *Jacob-*

265. 785 F.2d 252 (8th Cir. 1986).

266. *Id.* at 257.

267. *Id.*

268. There is, however, a general public interest in reducing the number of criminals at large and in decreasing their economic resources.

269. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977) (indirect purchasers have no standing to challenge federal antitrust violation).

270. If the particular broker-dealer has an arbitration clause in its standard agreement covering the named plaintiff's account, then presumably a substantial percentage of the broker-dealer's other customers with similar accounts signed the standard agreement with the same arbitration clause.

271. *Jacobson*, 797 F.2d at 1202. In the Third Circuit's words, "[i]t would appear therefore that determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Id.*

272. *Jacobson*, 797 F.2d at 1202. The structure of the RICO statute is unique (except for

son court considered itself bound by Third Circuit precedent to hold that section 10(b) claims were themselves not arbitrable. It also held that insofar as a RICO claim was based on a non-arbitrable section 10(b) claim, the RICO claim was also non-arbitrable. The Third Circuit reasoned as follows:

There is no evidence that Congress intended that the availability of RICO remedies for section 10(b) should suspend the operation of the anti-waiver provision of the Securities Exchange Act of 1934. Because the heart of the dispute still will be over whether the securities laws were violated, RICO plaintiffs relying on section 10(b) violations are, by virtue of section 29(a) of the 1934 Act, entitled to a judicial resolution of their RICO claims.²⁷³

The Third Circuit's assumption is flawed in two respects. First, it assumes that in all RICO disputes involving section 10(b) claims, the "heart of the dispute" will be whether section 10(b) was violated. It is at least equally likely that the "heart" will be whether there was an "enterprise" distinct from the defendant "person" alleged to have controlled it, or whether a series of section 10(b) violations constituted a "pattern." Second, it assumes that a single RICO count can be split into its predicate acts. As Judge Adams stated in his separate opinion in *Jacobson* (and as the Fifth Circuit stated in its criticism of *Jacobson*),²⁷⁴ the RICO claim is logically distinct from its predicate offenses.²⁷⁵ A RICO claim may consist of mixed violations—some under section 10(b)²⁷⁶ and some under the federal mail-fraud or wire-fraud statutes, for example.²⁷⁷ If the violations are indeed all facets of a single RICO "pattern," then how can the one claim for relief be subdivided? In a marginal case, it may be that segregation of the section 10(b) claims will be enough to preclude establishment of a pattern.

A further difficulty with the Third Circuit's position is its attenuation of the Arbitration Act. Even assuming that section 10(b) claims are not arbitrable under predispute agreements because of the antiwaiver provision, this does not prove the Third Circuit's case. The Arbitration

state statutes imitative of the federal law). It is aimed at racketeering activity defined in terms of other (predicate) federal and state statutes. *Id.* The "predicate statutes" are listed in 18 U.S.C. § 1961(1) (1982).

273. *Jacobson*, 797 F.2d at 1203.

274. *Mayaja*, 803 F.2d at 163 n.6.

275. *Jacobson*, 797 F.2d at 1209 (Adams, J., concurring in part and dissenting in part).

276. The § 10(b) violation, when considered as a criminal offense, is not arbitrable.

277. 18 U.S.C. §§ 1341-1343 (1982). Indeed, exactly this type of splitting was ordered in *Jacobson*, 797 F.2d at 1203.

Act requires arbitration except where there *is* evidence of a contrary legislative intent. Even if there is a contrary legislative intent for the section 10(b) claim, the fact that the Third Circuit found "no evidence" of congressional intent as to RICO arbitrability simply means that there is not enough evidence to overcome the Arbitration Act's presumption of arbitrability.

In the end, the Fifth Circuit has the better argument. In the securities context there is no significant public policy interest in precluding arbitration of RICO claims. Moreover, to the extent that there is such a policy interest, it is already well served by the SEC's regulatory oversight of securities arbitration rules. Although the SEC is not charged with enforcing RICO, the SEC's interest in ensuring fair procedures for resolving disputes under the 1933 and 1934 Acts will also effectuate the policies of RICO.²⁷⁸ Perhaps in some other field more compelling arguments could be mustered, but the policy argument simply does not exist for securities claims.

VIII. *WILKO* REVISITED

Having come this far in the examination, there is one last question that one might ask: will *Wilko v. Swan*²⁷⁹ remain good law after *McMahon v. Shearson/American Express, Inc.*?²⁸⁰ This issue is not presented to the Court in *McMahon*,²⁸¹ nor indeed in any of the other cases now pending before the Court.²⁸² Therefore, the Court cannot directly ad-

278. The SEC's regulatory role will also ensure that the arbitrators are reasonably independent. Thus the RICO analog of businessmen deciding antitrust cases—Al Capone's deciding RICO claims—is a preposterous scenario. Cf. Petition for Writ of Certiorari at 27, *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 60 (1986):

[I]t is highly unlikely that the enforceability of arbitration agreements will ever arise in the types of cases that RICO was meant to address. A "contract" between "a shopkeeper [who] is approached by an organized crime henchman for protection money . . . undoubtedly would not contain an agreement to arbitrate." There is thus no reason to hold that the public policy underlying RICO prevents civil RICO claims from being arbitrated.

Id. at 27 (citation omitted).

279. 346 U.S. 427 (1953).

280. 788 F.2d 94 (2d Cir.), *cert. granted*, 107 S. Ct. 60 (1986).

281. Although *McMahon* does not directly present the question, both the petitioner and the SEC have requested (or strongly suggested) that *Wilko* be overruled. Petitioners' Brief, *supra* note 178, at 37 n.22; SEC *Amicus Curiae* Brief, *supra* note 147, at 20; *see also* High Court Hears Argument Regarding Arbitrability of RICO, '34 Act Claims, 19 SEC REG. & L. REP. (BNA) at 320, 321-22 (Mar. 6, 1987) (petitioner asking Court to overrule *Wilko*; Solicitor General's position unclear as to arbitration not under SEC oversight).

282. None of the appellate courts addressed the issue, and none of the certiorari petitions raise the question. *See supra* note 14.

[EDITOR'S NOTE: If the Supreme Court enforces the arbitration agreement in *McMahon* as to the 1934 Act claim, the arbitrability of § 12(2) claims may become an issue on

dress the question of 1933 Act claims.²⁸³ The Court can, however, determine that the various possible distinctions between the 1933 Act and 1934 Act (e.g., jurisdiction and burden of proof) and between express and implied rights of action are insignificant and that it must base its decision on other grounds. If these distinctions are not persuasive, then in order to enforce predispute arbitration agreements as to section 10(b) claims, the Court must overrule *Wilko*.

Thus, if the Court decides to reverse the Second Circuit in *McMahon*, it can do so in either of at least two ways, and much will depend on the rationale that the Court employs to explain its decision. The Court might rest its decision exclusively on the grounds urged by Shearson/American Express, Inc. (Shearson), the petitioning broker-dealer. More probably, however, it will rely instead on the grounds urged by the SEC.

Shearson's argument is very much in the mode of *Wilko*. It restates the general principle that the Arbitration Act requires enforcement of arbitration agreements, absent a contrary congressional intent evidenced in another statute,²⁸⁴ and then argues that Congress has evinced no such intent with respect to section 10(b) claims. First, Shearson argues, the mere existence of a private right of action under section 10(b) does not provide an exception to the Arbitration Act.²⁸⁵ Second, the "special right" and procedural advantages analysis of *Wilko* does not preclude enforcement of agreements to arbitrate section 10(b) claims.²⁸⁶ Finally, Shearson argues that under contemporary arbitration procedure, securities customers receive more than adequate protection of their rights.²⁸⁷

The SEC's argument takes a substantially different approach. Rather than addressing the question immediately before the Court—the arbitrability of section 10(b) claims—the SEC focuses on the 1975 amendment to section 19 of the 1934 Act.²⁸⁸ Under the amended section 19, the SEC has authority to amend the exchanges' arbitration rules to ensure that customers' rights are fully protected. Whether or not *Wilko*'s assumptions concerning the adequacy of arbitration were valid in 1953,²⁸⁹ they most certainly are invalid in 1987. The SEC has specifi-

remand in the *Phillips* case, where Mr. Lindsay will continue to represent the broker-dealer. See *supra* note 14.]

283. Of course, the Court might include a significant footnote, or Justice White might write another powerful concurrence.

284. Petitioners' Brief, *supra* note 178, at 10-14.

285. *Id.* at 15-16.

286. *Id.* at 19-33.

287. *Id.* at 33-39.

288. SEC *Amicus Curiae* Brief, *supra* note 147, at 13-21.

289. See *id.* at 9-12.

cally approved existing arbitration procedures,²⁹⁰ and to the extent that it later perceives any previously neglected abridgement of customers' rights, the SEC can redress the inadequacy through its amendment powers. In addition to this positive argument, the SEC argues that the Court should discard distinctions between implied and express rights of action, and indeed, between the 1933 Act and the 1934 Act.²⁹¹

Obviously, Shearson's and the SEC's arguments overlap in many respects, and they intersect at the point of the adequacy and effectiveness of contemporary arbitration procedures. The SEC's approach, however, promises to hasten the demise of the *Wilko* doctrine in all contexts. Given the SEC's post-1975 powers, this approach makes the most sense. To the extent that the "private attorneys general" concept applies to securities disputes, the SEC's approach facilitates this quasi-private policing but does so through the less costly means of arbitration. The Supreme Court should encourage this development through the careful choice of its rationale in *McMahon*.

IX. CONCLUSION

Arbitration and the enforceability of arbitration agreements are greatly favored by a public policy statutorily declared and judicially embraced. The Supreme Court's decision in *Wilko v. Swan*²⁹² resolved what the Court itself recognized was a difficult question, and the underpinnings of *Wilko* have now been so completely undermined that the doctrine should be jettisoned. The question of enforceability of predispute agreements to arbitrate claims arising under the 1934 Act, though

290. The only three procedures the SEC states it has approved are those of the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers, plus the Uniform Code of Arbitration. *Id.* at 17-18 & n.13. The SEC might oppose enforcement of any agreement to arbitrate under rules over which it had no oversight authority, but not necessarily. If the rules were equivalent in their procedural safeguards to rules over which the SEC has oversight authority, the SEC might not object.

291. The SEC also addresses the one issue that might most trouble the Court in effectively overruling *Wilko*: the impact of the legislative history of the 1975 amendments. The conference committee report had included the remark that "[i]t was the clear understanding of the conferees that this amendment [to § 28 of the 1934 Act] did not change existing law, as articulated in *Wilko* . . . concerning the effect of arbitration proceeding provisions in agreements entered into" between public customers and broker-dealers. The remark itself is quite ambiguous, and it cannot be taken to indicate congressional approval of the *Wilko* doctrine. *See supra* notes 170-93 and accompanying text. The most that can be said of this remark is that it indicates Congress' disavowal of any intent to overrule *Wilko through the amendment to § 28(b)*. It says nothing of the impact of the amendment to § 19, particularly as those amendments have been expansively interpreted by the SEC. By leaving the question open, Congress has left room for courts to find the true significance of the SEC's new powers.

292. 346 U.S. 427 (1953).

not an easy question, is less difficult than that raised in *Wilko*. Neither the factors determinative in *Wilko* nor considerations arising outside of *Wilko* compel a conclusion that the 1934 Act was intended to effect a partial repeal of the Arbitration Act. The question is less difficult still for securities claims asserted under RICO, for that statute contains no antiwaiver provision; any exception to the Arbitration Act must be based on judicially created policy grounds, which recent Supreme Court decisions have consistently rejected. The Arbitration Act should be implemented in full to require enforcement of predispute agreements to arbitrate controversies in the securities context.

APPENDIX

17 C.F.R. §§ 180.1 to 180.5 (1986):

§ 180.1 Definitions.

(a) The term "claim or grievance" as used in this part shall mean any dispute which arises out of any transaction on or subject to the rules of a contract market, executed by or effected through a member of that contract market or employee thereof which dispute does not require for adjudication the presence of essential witnesses or third parties over whom the contract market does not have jurisdiction and who are not otherwise available. The term claim or grievance does not include disputes arising from cash market transactions which are not a part of or directly connected with any transaction for the purchase or sale of any commodity for future delivery or commodity option.

(b) The term "customer" as used in this part includes an option customer (as defined in § 1.3(ji) of this chapter) and any person for or on behalf of whom a member of a contract market effects a transaction on such contract market, except another member of that contract market.

§ 180.2 Fair and equitable procedure.

Every contract market shall adopt rules which provide for a fair and equitable procedure through arbitration or otherwise for the settlement of customer's claims and grievances against any member or employee thereof which shall include at least the following as *minimum* requirements for a fair and equitable procedure:

(a) The procedure shall be objective and impartial. Customers must be provided with the choice of a panel or other decision-maker composed of one or more persons, of which at least a majority are not members or associated with any member of a contract market, or employee thereof, and are not otherwise associated with a contract market. The rules of a contract market may, with proper notice, require the customer to request such a panel or other such decision-maker at the time of submission of the claim or grievance to the procedure. *Ex parte* contacts by any of the parties with members of any panel or other decision-maker shall not be permitted.

(b) The procedure shall grant each of the parties the right, if desired, to be represented by counsel, at his own expense, in any aspect of the procedure.

(c) The procedure shall provide for the prompt settlement of claims or grievances and counterclaims, if any (permitted by § 180.4 of this part). Unnecessary or unreasonable delay by any of the parties shall not be permitted.

(d) The procedure shall require adequate notice to the parties and opportunity for a prompt hearing as follows:

(1) Each of the parties shall be entitled personally to appear at such hearing, unless the contract market shall have adopted a procedure for the written submission of claims or grievances (and any counterclaims applicable thereto) which are in the aggregate under \$2,500. If the claim or grievance (and any counterclaim applicable thereto) is in the aggregate under \$2,500, then provision may be made for the claim or grievance of a customer to be resolved without a hearing through a submission on the basis of written documents.

(2) The formal rules of evidence need not apply at the hearing. Nevertheless, the procedures established may not be so informal as to deny due process. Each party must be given adequate opportunity to prepare and present all relevant facts in support of the claims and grievances, defenses or counterclaims (permitted by § 180.4 of this part), and to present rebuttal evidence to such claims or grievances, defenses or counterclaims made by the other parties.

(3) Each party shall be entitled to examine other parties and any witnesses appearing at the hearing and to examine all relevant documents presented in connection with the claim or grievance, defense or counterclaim applicable thereto.

(4) A verbatim record of the hearing may be required, the cost of which must be reasonable. There shall be no requirement that a verbatim record be transcribed unless requested by a party who shall bear the cost of the transcription, and contract markets shall otherwise seek to minimize the cost associated with such record.

(e) The procedure shall provide adequate notice to the parties in advance of a submission of a claim or grievance, or counterclaim (permitted by § 180.4 of this part), of the nature and amount of any fees or costs which may be assessed against customers utilizing the procedure. Fees or costs shall be reasonable, particularly in relation to the complexity and amount of the claim or grievance or counterclaim, if any, presented. Costs may be apportioned among the parties or may be assessed against the losing party as the panel or other decision-maker, in its discretion, sees fit. The rules of a contract market, however, must provide that a contract market member which is a party to an arbitration proceeding shall pay any incremental fees which may be assessed by a qualified forum for provision of a panel or other decision-maker which conforms to the requirements of paragraph (a) of this subsection, unless the arbitrators in a particular proceeding determine that the customer has acted in bad faith in initiating or conducting that proceeding.

(f) The procedure shall provide that the settlement award shall be rendered promptly in writing and be final. There shall be no right of appeal to any entity within the contract market which can overturn the settlement-procedure decision; the only right of appeal being as provided under applicable law.

(g) The procedure shall not impose any restrictions on the jurisdiction or venue of any court to enforce an award so rendered.

§ 180.3 Voluntary procedure and compulsory payments.

(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.

(b) No futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor, or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person.

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section;

(3) The agreement may not require the customer to waive the right to seek reparations under section 14 of the Act and Part 12 of these regulations. Accordingly, the customer must be advised in writing that he or she may seek reparations under section 14 of the Act by an election made within 45 days after the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when such person notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under

section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claims or grievances that are not subject to the reparations procedure (i.e. do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement.

(4) The agreement must advise the customer that, at such time as he or she may notify the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person that he or she intends to submit a claim to arbitration, or at such time as such person notifies the customer of its intent to submit a claim to arbitration, the customer will have the opportunity to elect a qualified forum for conducting the proceeding. Within ten business days after receipt of such notice from the customer, or at the time the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person so notifies the customer, the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person must provide the customer with a list of two or more organizations whose procedures qualify them to conduct arbitrations in accordance with the requirements of § 180.2 of this part, together with a copy of the rules of each forum listed. This list must include: (i) The contract market, if available, upon which the transaction giving rise to the dispute was executed or could have been executed or a registered futures association designated by such contract market; and (ii) At least one other organization which will provide the customer with the opportunity to select the location of the arbitration proceeding from among several major cities in diverse geographic regions and which will provide the customer with the choice of a panel or other decision-maker composed of a least one or more persons, of which at least a majority are not members or associated with a member of a contract market or employee thereof, and which are not otherwise associated with a contract market (mixed panel). The customer shall, within forty-five days after receipt of such list, notify the opposing party of the organization selected. A customer's failure to provide such notice shall give the opposing party the right to select an organization from the list.

(5) The agreement must acknowledge that the futures commission merchant, introducing broker, floor broker, commodity pool operator, commodity trading advisor or associated person will pay any incremental fees which may be assessed by a qualified forum for provision of a mixed

panel, unless the arbitrators in a particular proceeding determine that the customer has acted in bad faith in initiating or conducting that proceeding.

(6) The agreement must include the following language printed in large boldface type:

THREE FORUMS EXIST FOR THE RESOLUTION OF COMMODITY DISPUTES: CIVIL COURT LITIGATION, REPARATIONS AT THE COMMODITY FUTURES TRADING COMMISSION (CFTC) AND ARBITRATION CONDUCTED BY A SELF-REGULATORY OR OTHER PRIVATE ORGANIZATION.

THE CFTC RECOGNIZES THAT THE OPPORTUNITY TO SETTLE DISPUTES BY ARBITRATION MAY IN SOME CASES PROVIDE MANY BENEFITS TO CUSTOMERS, INCLUDING THE ABILITY TO OBTAIN AN EXPEDITIOUS AND FINAL RESOLUTION OF DISPUTES WITHOUT INCURRING SUBSTANTIAL COSTS. THE CFTC REQUIRES, HOWEVER, THAT EACH CUSTOMER INDIVIDUALLY EXAMINE THE RELATIVE MERITS OF ARBITRATION AND THAT YOUR CONSENT TO THIS ARBITRATION AGREEMENT BE VOLUNTARY.

BY SIGNING THIS AGREEMENT, YOU: (1) MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW; AND (2) ARE AGREEING TO BE BOUND BY ARBITRATION OF ANY CLAIMS OR COUNTERCLAIMS WHICH YOU OR [NAME] MAY SUBMIT TO ARBITRATION UNDER THIS AGREEMENT. YOU ARE NOT, HOWEVER, WAIVING YOUR RIGHT TO ELECT INSTEAD TO PETITION THE CFTC TO INSTITUTE REPARATIONS PROCEEDINGS UNDER SECTION 14 OF THE COMMODITY EXCHANGE ACT WITH RESPECT TO ANY DISPUTE WHICH MAY BE ARBITRATED PURSUANT TO THIS AGREEMENT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [NAME] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL HAVE 45 DAYS FROM THE DATE OF SUCH NOTICE IN WHICH TO MAKE THAT ELECTION.

YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [NAME]. SEE 17 C.F.R. 180.1-180.5.

Customer

(7) If the agreement specifies a forum for arbitration other than a

contract market or registered futures association, the procedures of such forum must be fair and equitable as defined by § 180.2 of this part.

(c) The procedure established by a contract market pursuant to section 5a(11) of the Act or this part may require parties utilizing such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the procedure was made in accordance with paragraph (b) of this section or that the agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

(d) The procedure established by a contract market pursuant to the Act or this part shall not establish any unreasonably short limitation period foreclosing submission of customers' claim or grievances or counterclaims (permitted by § 180.4 of this part) by contract market members or employees thereof.

§ 180.4 Counterclaims.

A procedure established by a contract market under the Act for the settlement of customers' claims or grievances against a member or employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought. The contract market may permit such a counterclaim where the counterclaim arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties or third persons over whom the contract market does not have jurisdiction. Other counterclaims are permissible only if the customer agrees to the submission after the counterclaim has arisen, and if the aggregate monetary value of the counterclaim is capable of calculation.

§ 180.5 Member-to-member settlement procedures.

A contract market may establish a procedure for compulsory settlement of claims or grievances or disputes which do not involve customers. If adopted, the procedure shall be independent of, and shall not interfere with or delay the resolution of, customers' claims or grievances submitted for resolution under the procedure established pursuant to the Act. Such a procedure shall provide procedural safeguards which must include, at a minimum, fair and equitable procedures conforming to those set forth in § 180.2 of this part, except that the election of the mixed panel and the prohibition of appeal to any entity within the contract market, contained in § 180.2 (a) and (f) of this part, respectively, need not be required.

