Journal of Dispute Resolution

Volume 2009 | Issue 1 Article 11

2009

# Confidential Arbitration of Whistleblower Actions: A Loophole That Could Effectively Undo the Sarbanes-Oxley Act of 2002

Nicholas E. Eckelkamp

# Confidential Arbitration of Whistleblower Actions: A Loophole That Could Effectively Undo The Sarbanes-Oxley Act of 2002

*Guyden v. Aetna, Inc.*[1]

## I. INTRODUCTION

In Fall 2001, the American people and the American business community were shaken to their core, not only by deplorable acts carried out by foreign terrorists, but also by deplorable acts carried out by what amounted to domestic terrorists with MBAs. Throughout the fall of 2001 and early 2002, the financial world was attempting to process the massive accounting frauds that transpired at Enron and WorldCom, eventually leading to the collapse of each company.[2] Congress responded swiftly, enacting the Public Company Accounting Reform and Investor Protection Act of 2002, more commonly known as the Sarbanes-Oxley Act of 2002 ("SOX").[3] SOX, which has its fair share of critics, attempts to ensure that corporate disasters like the ones at Enron and WorldCom will never again have such a devastating effect on the American economy.[4]

Among SOX's many requirements and protections are protections for whistleblowers, the Sherron Watkins' and Cynthia Coopers' of the world,[5] who are the first to take risks to alert others of a potential fraud. These whistleblowers normally would be able to utilize the court system to vindicate their rights in the event of a retaliatory employment action. Recently, however, employers have begun using mandatory arbitration agreements to keep potentially embarrassing whistleblower actions out of the court system. *Guyden v. Aetna, Inc.* is a recent Second Circuit case that examined the enforceability of such agreements, ultimately holding that whistleblower claims under SOX can be heard in confidential arbitration proceedings.[6]

---

1. 544 F.3d 376 (2d Cir. 2008).

2. *See generally* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (Penguin Group 2004); Simon Romero & Riva D. Atlas, *WorldCom's Collapse: The Overview; WorldCom files for Bankruptcy, Largest U.S. Case*, N.Y. TIMES, July 22, 2002, *available at* http://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html?partner=rssnyt&emc=rss (last visited Mar. 30, 2009).

3. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified in scattered sections of 15 & 18 U.S.C.).

4. *See generally* Michael F. Holt, THE SARBANES-OXLEY ACT: COSTS, BENEFITS AND BUSINESS IMPACTS (CIMA Publishing 2008).

5. *See* Richard Lacayo & Amanda Ripley, *Persons of the Year: Cynthia Cooper, Coleen Rowley and Sherron Watkins*, TIME, Dec. 30, 2002, at 30. Sherron Watkins and Cynthia Cooper blew the whistle on massive accounting fraud at Enron and WorldCom, respectively. *Id.*

6. 544 F.3d 376, 384 (2d Cir. 2008).

## II. FACTS AND HOLDING

### *A. Guyden's Employment and Initial Concerns with Aetna's Internal Controls Methods*

In December 2003, Aetna, Inc. offered Linda Guyden a position as Director of Aetna's Internal Audit Department ("the Department").[7] As part of the application process, Guyden submitted a signed application stating that any offer of employment from Aetna was conditioned upon Guyden's agreement to use Aetna's mandatory arbitration program to solve any "employment-related legal disputes."[8] In addition to the employment application's arbitration provision, Guyden's offer letter also included an arbitration provision.[9] Guyden accepted Aetna's offer and began her employment in January 2004.[10]

Shortly after beginning her employment, Guyden began to encounter problems with the Department, describing it as "ineffective, demoralized, and without independence or objectivity."[11] Based upon her evaluation of the Department and its procedures, Guyden believed Aetna was in danger of violating SOX.[12] Specifically, she was concerned that the ineffectiveness of the internal audit department would "become a material weakness in the company's internal controls."[13]

Guyden initially attempted to remedy the problem internally by rehabilitating the Department.[14] In an effort to acquire the resources and authority necessary to effectively implement the desired changes to the Department, Guyden approached Aetna senior management, requesting that she be allowed to bring in an outside auditor to restructure the department.[15] Aetna's senior management did not agree with Guyden's plans; so, in Spring 2004, Guyden approached Aetna CFO Alan Bennett directly to help her remedy the situation, but she was unsatisfied with his response.[16]

When Guyden found the responses from Aetna's CFO and other members of senior management lacking, she voiced her concerns directly to Aetna's Chairman & CEO John Rowe, President Ron Williams, and General Counsel Lou Briskman

7. Guyden v. Aetna, Inc., No. 3:05cv1652, 2006 WL 2772695, at *1 (D. Conn. Sept. 25, 2006). Aetna is "one of the nation's leading diversified health care benefits companies, serving members with information and resources to help them make better informed decisions about their health care." Aetna Web site, http://www.aetna.com/about/index.html (last visited Mar. 30, 2009).

8. Guyden v. Aetna, Inc., 544 F.3d 376, 380 (2d Cir. 2008). The arbitration provision of the application read: "I understand that if I am offered employment that begins on or after January 1, 2003, a condition of the offer and my acceptance of that offer is that I agree to use Aetna's mandatory/binding arbitration program rather than the courts to resolve my employment-related legal disputes." *Guyden*, 2006 WL 2772695, at *1.

9. *Guyden*, 544 F.3d at 380. The offer letter stated "[t]his offer and [Guyden's] acceptance of that offer also are contingent upon [her] agreement to use the Company's mandatory/binding arbitration program rather than the courts to resolve employment-related legal disputes." *Id.*

10. *Id.* at 379.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

during a meeting with the three executives.[17] One week after meeting with Rowe, Williams, and Briskman, Guyden received a poor performance review, which stood in stark contrast to the positive review she received one month earlier.[18]

Following the meeting and poor performance review, Aetna eventually allowed Guyden to bring in an outside auditor to examine Aetna's internal controls.[19] The auditor's report was distributed to Aetna executives one week after the audit committee held its regularly scheduled September meeting.[20] Because Guyden was unable to discuss the auditor's findings at the September meeting, she planned on using the audit committee meeting on December 2, 2004, to discuss the results of the audit and present the auditor's report.[21] Ten days prior to the December meeting, however, Aetna terminated Guyden.[22] Following her termination, Guyden requested to speak at the December meeting of the audit committee, but the committee denied her request.[23]

### *B. The Arbitration Agreement(s)*

In April of 2004, well before her meeting with Rowe, Briskman, and Willams, Guyden signed a stock incentive agreement that contained yet another mandatory arbitration agreement.[24] This arbitration agreement provided that "all employment-related legal disputes between [Guyden and Aetna] will be submitted to and resolved by binding arbitration. . . . "[25] The agreement allowed only limited pre-hearing discovery, consisting of a "deposition of one person and anyone designated by the other as an expert witness," the opportunity to submit one set of ten written questions, and the opportunity to "obtain all documents on which the other party relies in support of its answers to written questions."[26] The agreement stated that further discovery may be permitted by the arbitrator "upon a showing that it is necessary for that party to have a fair opportunity to present a claim or defense."[27] The agreement also contained a confidentiality clause mandating that all proceedings, including the final decision of the arbitrator, would be "private and confiden-

17. *Id.* at 379-80. The meeting between Guyden, Mr. Rowe, Mr. Williams and Mr. Briskman occurred on August 16, 2004. *Id.*

18. *Id* at 380. The review characterized Guyden's performance as "withering." *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* The agreement was signed on April 22, 2004. *Id.* Guyden has previously agreed to a mandatory arbitration provision as part of her original acceptance of employment with Aetna. *Id.*

25. *Id.* at 381. The arbitration agreement did not include workers' compensation claims, unemployment compensation claims, and ERISA claims. *Id.* The agreement also states that any disputes as to what it covers are to be decided by the arbitrator, and that any arbitration will be administered by the American Arbitration Association ("AAA"). *Id.*

26. *Id.*

27. *Id.*

tial."[28] Additionally, the agreement provided that the final decision of the arbitrator would be "in writing with a brief summary of the arbitrator's decision."[29]

### C. Procedural History and Parties' Positions

Within ninety days of her termination, Guyden filed an administrative complaint with the Secretary of Labor.[30] After 180 days, the Department of Labor had taken no action, and Guyden filed suit against Aetna in the U.S. District Court for the District of Connecticut.[31] Shortly after Guyden filed her complaint, Aetna moved to dismiss the complaint and compel arbitration in light of the signed arbitration agreements.[32] Guyden opposed Aetna's motion to dismiss, arguing that SOX whistleblower claims were "categorically nonarbitrable" and that the arbitration process would "prevent her from vindicating her statutory rights."[33] The district court granted the motion to compel arbitration, holding that there was no inherent conflict between arbitration and the purposes of SOX and that the characteristics of the agreements did not render the process unfair.[34]

Guyden appealed the district court decision, arguing that under federal law, SOX whistleblower claims cannot be subject to arbitration because mandatory arbitration of whistleblower claims is at odds with the policy objectives behind SOX.[35] Guyden further argued that the agreement, if enforced, would leave her unable to vindicate her statutory rights.[36] Specifically, she claimed that the brief summary provision would prevent effective appellate review of the decision and that the agreement did not provide for sufficient discovery."[37]

The Second Circuit Court of Appeals affirmed the district court, holding that the retaliation claim under the SOX whistleblower protection provision was arbitrable and that the challenges to the confidentiality clause, the brief summary provision, and the limited discovery provision were precluded.[38] As a result, the complaint was dismissed and Aetna's motion to compel arbitration was granted.[39]

---

28. *Id.* The confidentiality clause reads as follows: "All proceedings, including the arbitration hearing and decision, are private and confidential, unless otherwise required by law. Arbitration decisions may not be published or publicized without the consent of both the Grantee and the Company." *Id.* at 384.

29. *Id.* at 381.

30. *Id.* at 380. The complaint alleged that Guyden was terminated in violation of the SOX whistleblower protection provision. *Id.* In pursuing a whistleblower termination action under Section1514A of the SOX, the wronged employee must file a complaint with the Secretary of Labor for review. 18 U.S.C. § 1514A(b)(1) (2006).

31. *See* Guyden v. Aetna Inc., No. 3:05cv1652, 2006 WL 2772695, at *2 (D. Conn. Sept. 25, 2006).

32. Guyden v. Aetna Inc., 544 F.3d 376, 380 (2d Cir. 2008).

33. *Id.* at 381.

34. *See Guyden,* 2006 WL 2772695, at *5-*8.

35. *Guyden*, 544 F.3d at 381-82. Guyden claims that the SOX whistleblower protections exist not just to establish a private cause of action, but also to enable whistleblowers to act as a "private attorney general" in carrying news of accounting irregularities to the general public. *Id.*

36. *Id.* at 382.

37. *Id.* at 384.

38. *Id.* at 385-87.

39. *Id.* at 387.

## III. LEGAL BACKGROUND

### *A. Federal Arbitration Act*

The Federal Arbitration Act ("FAA") governs the enforceability of arbitration agreements between employers and employees.[40] The FAA represents an embodiment of the "liberal federal policy favoring arbitration agreements," which has been interpreted to mean that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[41] The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract."[42] District courts do not have discretion in granting motions to compel arbitration under the FAA, as the Supreme Court has held that the FAA requires district courts to compel arbitration of arbitrable claims upon a motion by one party.[43] In the absence of grounds which would allow for the revocation of the contractual agreement, the agreement to arbitrate must be enforced.[44] While the FAA discusses enforceability in terms of contract law, it makes no mention of the effect of federal legislation, such as SOX, on an agreement to arbitrate.[45]

### *B. The Sarbanes-Oxley Act of 2002*[46]

SOX brought about a host of changes to corporate auditing and governance in the wake of the creative accounting scandals that rocked the American economy in late 2001 and early 2002.[47] SOX was intended to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws" and to regulate the accounting and auditing practices of publicly traded companies.[48]

Among the most notable changes was the creation of the Public Company Accounting Oversight Board ("PCAOB"), a private nonprofit corporation established to oversee audits of publicly traded companies, "in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which

40. 9 U.S.C. § 2 (2006).

41. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

42. 9 U.S.C. § 2.

43. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985); 9 U.S.C. § 3 (2006) (providing that district courts, in the presence of an arbitration agreement, *shall* direct parties to proceed to arbitration on arbitrable claims).

44. *Dean Witter Reynolds*, 470 U.S. at 218.

45. *See* 9 U.S.C.§2

46. The SOX Act of 2002 is an expansive and wide reaching piece of legislation. This note examines the act in terms of the whistleblower provision and the overall purpose of the act as a whole. For a more comprehensive review of the entire act, see TERENCE SHEPPEY & ROSS MCGILL, SARBANES-OXLEY 27-62 (Palgrave Macmillan 2006); *see also* John Paul Lucci, *Enron—The Bankruptcy Heard Around the World and the International Ricochet Of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 221-34 (2003).

47. Lucci, *supra* note 46, at 214-16.

48. Sarbanes-Oxley Act of 2002, *supra* note 3.

are sold to, and held by and for, public investors."[49] SOX also requires firms to prepare an internal control report, which assesses the effectiveness of the firms' internal control structure, to be included with the firm's annual report.[50]

In addition, SOX includes a clause designed to protect whistleblowers.[51] The whistleblower provision prevents any officer, employee, contractor, subcontractor, or agent of a company which falls under SOX's coverage from taking some adverse employment action or otherwise discriminating against an employee who alerts superiors or government authorities to possible violations of federal securities regulations, including SOX.[52] If an employee wishes to pursue an action under the whistleblower provision, he or she must file a complaint with the Secretary of Labor, who has 180 days to pursue an action against a company.[53] If, after 180 days, the Secretary has not taken action, the plaintiff may file a lawsuit in the appropriate district court of the United States.[54] The statute also provides damages in the event of a favorable judgment for the plaintiff, awarding make-whole relief.[55] SOX makes no mention of punitive damages, or damages of any kind to compensate for harm to investors at large.[56]

The whistleblower provision of SOX does not proscribe alternative forms of adjudicating claims.[57] Prior to passing the final version of SOX, both the Senate and House of Representatives separately rejected versions of the bill that would have prevented arbitration agreements from applying to whistleblower claims.[58] As a result, the Senate Judiciary Committee amended the bill to remove a provision proscribing arbitration, effectively leaving issues of arbitrability up to the courts.[59]

### *C. Assessing the Arbitrability of Federal Statutory Claims*

In assessing the arbitrability of statutory claims, courts first examine if the parties agreed to submit statutory claims to arbitration and second, whether Congress intended for arbitration of rights under the statute to be precluded.[60] Ultimately, courts examine the ability of the claimant to vindicate his or her statutory rights through arbitration.[61]

---

49. 15 U.S.C. § 7211 (2006).
50. 15 U.S.C. § 7262 (2006).
51. 18 U.S.C. § 1514A (2006).
52. *Id.*
53. 18 U.S.C. § 1514A(b)(1).
54. 18 U.S.C. § 1514A(b)(1)(B).
55. 18 U.S.C. § 1514A(c)(2). Damages include "(A) reinstatement with the same seniority status the employed would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." *Id.*
56. *See* 18 U.S.C.§ 1514A.
57. *See id.*
58. *See* S.2010, 107th Cong. § 1514A(d)(2) (Mar. 12, 2002 version) ("No employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement"); H.R. 4098, 107th Cong. § 1514A(d)(2) (Apr. 9, 2002, version) (same).
59. S. Rep. No. 107-146, at Pt. V (May 6, 2002). The clear implication of these actions is that Congress did not intend to remove whistleblower provisions generally from arbitration proceedings.
60. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).
61. *Id.*

When examining attempts to stay judicial proceedings pending arbitration in cases involving a claim arising under a federal statute, the Second Circuit has articulated a four-prong test.[62] Of particular relevance to this case is the prong mandating that "if federal statutory claims are asserted, [the court] must consider whether Congress intended those claims to be non-arbitrable."[63] The fact that a claim arises under a statutory right is not itself indicative of Congressional intent.[64] The FAA mandates enforcement of agreements to arbitrate statutory claims, though it may be overridden by a "contrary congressional command."[65] Still, Congress' expectation in enacting the FAA was that a party that has agreed to arbitrate a statutory claim would not lose any substantive rights created by the statute because the agreement merely changes the forum from which the wronged can obtain relief.[66]

A party who wishes to prevent enforcement of the arbitration agreement relating to the statutory claim must show that Congress intended to preclude a waiver of judicial remedies relating to the statute in question.[67] A Congressional intent to preclude arbitration under a particular statute will be apparent from the text of the statute or its legislative history, or alternatively, from an "inherent conflict between arbitration and the statute's underlying purposes."[68]

### *D. Vindication of Statutory Rights*

In 1985, the Supreme Court ruled that arbitration of federal statutory claims may be appropriate so long as the potential litigant may effectively vindicate his or her statutory claim in the arbitral forum.[69] The Court has elaborated upon and reaffirmed that ruling many times.[70] The Fourth Circuit Court of Appeals recently articulated the vindication of statutory rights principle, declaring "[e]ven if an arbitration clause is broad enough to encompass a statutory claim for which Congress has not precluded arbitration, arbitration will not be compelled if the pros-

62. Oldroyd v. Elmira Sav. Bank, 134 F.3d 72, 75-76 (2d Cir. 1998).

63. *Id.* The other three prongs of the test are: (1) to determine whether the parties agreed to arbitrate; (2) determine the scope of the agreement; and (3) if the court decides that some but not all of the claims are arbitrable, it must decide whether to stay the balance of the proceedings pending arbitration. *Id.*

64. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (holding that actions under §10(b) of the Securities Exchange Act and RICO Act were arbitrable); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (noting that actions under the Sherman Act, the RICO Act, the Securities Exchange Act or 1933, and the Securities Exchange Act of 1934 have all been held to be arbitrable).

65. *Shearson/Am. Express Inc.*, 482 U.S. at 226.

66. *Gilmer*, 500 U.S. at 26.

67. *Shearson/Am. Express Inc.*, 482 U.S. at 227; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (A party which has made a "bargain to arbitrate should be held to it unless Congress itself has evinced an intention" to preclude arbitration of claims under the statute).

68. *Shearson/Am. Express Inc.*, 482 U.S. at 227.

69. *Mitsubishi Motors Corp.*, 473 U.S. at 637.

70. *See, e.g., Gilmer*, 500 U.S. at 20; Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000); Cole v. Burns Int'l Sec. Servs,.105 F.3d 1465 (D.C. Cir. 1997); *but see* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (holding that procedures under arbitration agreement were so egregious that plaintiff would be unable to vindicate statutory rights, as such the agreement was unenforceable).

pective litigant cannot effectively vindicate his statutory rights in the arbitral forum."[71] Though a prospective litigant must have the ability to effectively vindicate his or her statutory rights in the arbitral forum, the arbitral forum does not necessarily have to provide all of the procedural devices available to litigants at trial.[72]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court heard a challenge to the arbitrability of an employment discrimination claim under the Age Discrimination in Employment Act ("ADEA").[73] The plaintiff in *Gilmer* raised several challenges to the procedures utilized by the arbitration agreement.[74] Among his challenges, the plaintiff alleged that the arbitrator was less impartial than the court.[75] The Supreme Court dismissed this challenge to the agreement, reasoning that the arbitration agreement in question, based on the New York Stock Exchange ("NYSE") arbitration rules, contained its own measures to ensure an unbiased decision maker, such as preemptory challenges of arbitrators and arbitrator disclosure agreements; and as such, the plaintiff was sufficiently able to vindicate his right to an impartial decision maker.[76] Gilmer's second challenge alleged that the discovery allowed under the arbitration agreement was more limited that what would have been allowed in the federal courts.[77] The Supreme Court dismissed this challenge as well, reasoning that when a party agrees to arbitrate a claim, he or she trades the procedures of the courts for the "simplicity, informality, and expedition of arbitration."[78] Gilmer's third challenge alleged an inability to vindicate his statutory rights; generally speaking, arbitrators will not issue written opinions, which would prevent the public from becoming aware of the employer's discriminatory policies.[79] Under the rules in question, the decision of the arbitrator was, in fact, required to be in writing and available to the public, and as a result, the Supreme Court dismissed this challenge, reasoning that because NYSE rules require decisions be in writing and contain the names of parties, arbitration would produce information available to the public in a similar fashion as would be produced through the courts.[80]

The Supreme Court's ultimate holding in *Gilmer* was that Gilmer was required to arbitrate his ADEA claim because "[b]y agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum."[81] Thus, under the arbitration agreement, Gilmer did not lose any substantive rights; he only lost some of the procedures he would have enjoyed in the courts.[82] In 1997, the U.S. Court of Appeals for the D.C. Circuit applied this decision to the arbitrability of a statutory claim under Title VII, summarizing the Supreme

71. *In re* Cotton Yarn Antitrust Litig. 505 F.3d 274, 282 (4th Cir. 2007).
72. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999).
73. *Gilmer*, 500 U.S. at 20.
74. *Id.* at 30.
75. *Id.*
76. *Id.* at 30-31.
77. *Id.* at 31.
78. *Id.* (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymoth Inc., 473 U.S. 614, 628 (1985)).
79. *Id.*
80. *Id.* at 31-32
81. *Id.* at 26.
82. *Id.* at 31-32.

Court's test.[83] The court held that an arbitration agreement would be enforceable so long as it satisfied the five factors articulated in *Gilmer*: (1) neutral arbitrators, (2) more than minimal discovery, (3) requirement of a written award, (4) allows all types of relief available in court, and (5) does not require employees to pay unreasonable costs as a condition to the forum.[84]

As indicated by the legal history, both the arbitration of statutory claims and the legal history of SOX are relatively well settled within the law. Clear tests exist to determine the arbitrability of statutory claims, and the legislative history of SOX suggests that Congress did not intend to preclude the arbitration of claims arising out of it. The Second Circuit, in *Guyden v. Aetna, Inc.*, examined one of the remaining gray areas of this area of law: the *confidential* arbitration of whistleblower claims under SOX.[85]

## IV. INSTANT DECISION

In *Guyden v. Aetna, Inc.*, the Second Circuit was faced with the question of whether or not an employee who claims she was wrongfully terminated as a whistleblower may seek a remedy through the courts, though the employee had agreed to arbitrate all employment-related disputes on multiple occasions.[86] The Second Circuit analyzed the case in two parts: first, examining the arbitrability of whistleblower claims under SOX, and second, examining whether or not the conditions of Aetna's arbitration agreement prevented Guyden from vindicating her statutory rights.[87]

### *A. Arbitrability of SOX Whistleblower Claims*

Guyden argued that Congress intended SOX whistleblower claims to be non-arbitrable.[88] Guyden argued that there was an "inherent conflict" between the purpose of SOX and using arbitration as a means to resolve related disputes.[89] The underlying premise of Guyden's argument was that the SOX whistleblower provision serves a public purpose as much as it does a private one, in that the resulting litigation—relating to retaliatory employment actions—provides a public record of information regarding the company's fraudulent activities.[90] As support for this contention, Guyden pointed to the fact that Aetna did not disclose the accounting irregularities she claimed to have uncovered, and she planned to use the litigation regarding her termination to alert Aetna shareholders and investors at large to Aetna's accounting problems.[91]

83. *See* Cole v. Burns Inter. Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).
84. *Id.* at 1479-82.
85. Guyden v. Aetna, Inc., 544 F.3d 376 (2d Cir. 2008).
86. *Id.* at 379-81.
87. *Id.* at 382-87.
88. *Id.* at 382.
89. *Id.* The Court articulated the general purpose of SOX was "to enforce the accountability and transparency needed for well-functioning capital markets." *Id.*
90. *Id.*
91. *Id.*

While Guyden focused her argument primarily on the purpose underlying SOX as a whole, the Second Circuit focused heavily on the primary purpose of the SOX whistleblower protection statute.[92] After reviewing the legislative history of SOX, the court concluded that the primary purpose of the whistleblower provision was "to provide a private remedy for the aggrieved employee, not to publicize alleged corporate misconduct."[93] The court reasoned that while the purpose of SOX as a whole is to "strengthen the integrity of capital markets," the whistleblower provision of SOX had a much narrower purpose—primarily to protect employees and to "make [the] victim whole."[94] The court said that protections designed to "make [the] victim whole" compensate whistleblowers as private citizens, and "they do little to publicize the conduct of the corporate defendant."[95] In further support of its conclusion that whistleblower claims are indeed arbitrable, the court pointed out that the House of Representatives and the Senate separately rejected versions of the bill that would have explicitly removed all SOX whistleblower claims from arbitration.[96] Finally, to further strengthen its conclusion that the purpose of the SOX whistleblower protection provision is to make the victim whole, the court focused on the statutory language which provides that an employee needs only to prove that he or she "'reasonably believed' that the defendant's conduct violated federal law."[97] The court reasoned that because this provision focused on the plaintiff's mental state, as opposed to the defendant's conduct, it was inconsistent with Guyden's argument that the primary purpose of this whistleblower protection is to publicize corporate malfeasance.[98]

The Second Circuit concluded that because the whistleblower protection contained in SOX is designed primarily to make the victim whole, and the victim may be made whole through an arbitration award, the whistleblower provision is "entirely consistent with mandatory arbitration;"[99] and because the purpose of the whistleblower provision of SOX was consistent with mandatory arbitration, the whistleblower claims under SOX are arbitrable.[100]

### *B. Vindication of Statutory Rights*

In addition to Guyden's challenge to the arbitrability of her claim, she also attacked the terms of the agreement.[101] Guyden objected to the agreement's confi-

92. *Id.* at 383.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* (citing S.2010, 107th Cong. § 1514A(d)(2) (Mar. 12, 2002 version) ("No employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement."); *see also* H.R. 4098, 107th Cong. § 1514A(d)(2) (Apr. 19, 2002 version) (same); S. Rep. No. 107-146, at pt. V (May 6, 2002) (reporting unanimous vote in favor of amendment that removed "provision dealing with arbitration agreements")).
97. *Id.* at 384 (quoting 18 U.S.C. § 1514A(a)(1) (2006)).
98. *Id.*
99. *Id.* The court did recognize that Guyden will not have the same ability to publicly expose Aetna's alleged wrongdoing, but relying on its holding in *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72 (2d Cir. 1998), the court went on to write that the loss of a public forum does not undermine whistleblower protections. *Id.*
100. *Id.*
101. *Id.*

dentiality clause, the requirement that the arbitrator's decision be rendered as a brief written summary, and the limits on discovery.[102]

Guyden argued that the confidentiality clause contained in the arbitration agreement is in conflict with one of the purposes of the SOX whistleblower provision, in that it would prevent her from "communicat[ing] to other employees that their rights [would] be protected if they report wrongdoing."[103] The Second Circuit acknowledged that a confidentiality agreement in an arbitration provision may "reduce whatever incentive the fact of publicity instills in potential whistleblowers," though it did not find the issue dispositive.[104] The court cited the Fifth Circuit, reasoning that confidentiality clauses have become so prevalent in arbitration agreements that an "attack on the confidentiality provision is . . . an attack on the character of arbitration itself."[105] The Second Circuit then deferred to the reasoning of the Supreme Court, that generalized attacks such as the one brought by Guyden "rest on suspicion of arbitration as a method of weakening the protection afforded in the substantive law to would-be complainants" and, as such, are in conflict with the Supreme Court's strong endorsement of arbitration as a means to resolve federal disputes.[106] Therefore, because the court had upheld the arbitrability of whistleblower claims generally, and because confidentiality "is a paradigmatic aspect of arbitration," the challenge to the confidentiality provision was precluded.[107]

Additionally, Guyden challenged the enforceability of the "brief summary" provision of the agreement.[108] Guyden argued that the provision would prevent her from obtaining effective judicial review of the arbitrator's decision because, due to the brevity of the summary, the arbitrator would be free to ignore the law because "no one would be the wiser."[109] The Second Circuit quickly rejected that challenge by reasoning that it was based on an unsupported assumption that the arbitrator would "knowingly refuse or fail to apply controlling law and then insulate that failure from review through the form of its written decision."[110]

Guyden's third challenge to the enforceability of the arbitration agreement was directed at its limited discovery provision.[111] Guyden argued that she would need access to third-party discovery, subpoenas, and document production in excess of what was provided for in the agreement.[112] Aetna's counterargument was that the arbitrator could allow for additional discovery provided Guyden

---

102. *Id.*
103. *Id.* For the text of the confidentiality agreement see *supra*, text accompanying note 28.
104. *Id.* at 385.
105. *Id.* (quoting Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004) (holding that a confidentiality provision did not render an arbitration agreement unconscionable)).
106. *Id.* (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (holding that Congress did not intend to preclude arbitration of ADEA claims)).
107. *Id.*
108. *Id.* For the text of the brief summary provision see *Guyden*, 544 F.3d at 381.
109. *Id.*
110. *Id.* at 386.
111. *Id.*
112. *Id.*

showed it was necessary.[113] In response, Guyden argued that she had limited resources and would be unable to make the required showing.[114]

The Second Circuit first examined the issue without giving consideration to Guyden's argument that she would be unable to make the required showing to compel further discovery.[115] The court indicated that the limited discovery provision contained in the arbitration agreement raised serious questions as to Guyden's ability to vindicate her statutory cause of action in arbitration and that a provision limiting discovery to a deposition of one fact witness might well be unenforceable.[116] However, because the agreement in this instance gave the arbitrator power to order additional discovery upon an adequate showing from the requesting party, the agreement was enforceable.[117] The court dismissed Guyden's argument that she would be unable to meet the standard to compel further discovery because the argument was based on her unfounded fear that the arbitrator would not permit her request for further discovery.[118]

### *C. Summary of the Second Circuit's Opinion*

In reaching its holding, the Second Circuit reasoned that the controlling congressional purpose for review in this instance was that of the whistleblower provision, not the purpose of SOX as a whole; as such, no deference need be given to the broader policies underlying the entire act.[119] After examining the legislative history behind SOX, the court concluded that the purpose of the whistleblower protection was to make the whistleblower whole, not to provide a mechanism for public disclosure.[120] Thus, the goal of the whistleblower provision was consistent with the purposes of arbitration.[121] As a result, the Second Circuit rejected Guyden's argument that there was an inherent conflict between the purposes of arbitration and the SOX whistleblower protections.[122] Finding no inherent conflict, the Second Circuit held that SOX whistleblower claims are arbitrable.[123]

The Second Circuit also rejected all three of Guyden's procedural challenges.[124] In finding the confidentiality provision enforceable, the court reasoned that because confidentiality provisions are essentially inherent in the arbitration process, a finding that the dispute is arbitrable precludes Guyden's attack on the confidentiality agreement.[125] Guyden's argument challenging the brief summary provision was quickly rejected because the court could not uphold a challenge that

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* In addition to referencing the terms of the agreement, the court also indicated that the terms of the FAA would allow the arbitrator to order further discovery, which could render the agreement enforceable even in the absence of the explicit terms of the agreement allowing for further discovery. *Id.* at 386-87.
118. *Id.* at 387.
119. *Id.* at 383.
120. *Id.*
121. *Id.* at 384.
122. *Id.*
123. *Id.*
124. *Id.* at 384-87.
125. *Id.* at 384-85.

relied on an unsupported assumption that the arbitrator would knowingly refuse to apply the applicable law and use the brevity of his or her findings to shield that decision from appellate review.[126] The Second Circuit then turned its attention to the issue of adequate discovery, ruling that because additional discovery was possible at the discretion of the arbitrator, the limited discovery provision was enforceable.[127]

## V. COMMENT

The Second Circuit in the instant case was presented with a choice: it could either follow established precedent while performing a rather narrow, though correct, analysis of the legal issues before it, or it could step back and examine the wide-ranging consequences of its decision in this case, deciding the case by taking into account the stated purpose of SOX as a whole.[128] Unfortunately, perhaps, for the investing public, it elected to take the narrower alternative, and in effect, has created a loophole which will allow public corporations to effectively bypass the requirements implemented by SOX.[129]

The consequences of the Second Circuit's decision in this case are alarming. By allowing publicly held corporations to dispose of whistleblower claims in the absence of public record, the investing public—the very people SOX is meant to protect—will lose a key vehicle through which accounting irregularities are exposed. The strongest incentive corporations have to keep honest accounting records is the fear that irregularities will become public knowledge and trigger an Enron-like stock collapse.[130] Many employees will not turn directly to federal authorities or to the media, but first to their employer, in an attempt to remedy the problem, therefore becoming a whistleblower and falling under the purview of SOX.

SOX was enacted in mid-2002, in response to the corporate accounting scandals such as Enron, WorldCom, and Tyco that rattled the American financial markets and financial markets the world over.[131] The general purpose of SOX, as stated in the Act, is to "protect investors by improving the accuracy and reliability of corporate disclosures."[132] The whistleblower provision, by its terms, exists to provide a remedy for an aggrieved party through which that party can be made whole.[133] This purpose, together with the strong rebuke from both houses of Congress in rejecting versions of SOX that removed the possibility of arbitrating whis-

126. *Id.* at 385-86.
127. *Id.* at 386-87.
128. *See* Sarbanes-Oxley Act, *supra* note 3, at Statement of Purpose.
129. It is also worth noting that the Second Circuit contains New York, the undisputed financial capital of the United Sates. Due to the high percentage of Fortune 500 companies whose primary place of business is in New York, the effects of this decision are likely to be more far-reaching than a typical Circuit Court decision.
130. Enron stock plummeted from a high of roughly $90 per share in September 2000, to nearly $0 before cessation of trading in December 2001. The Fall of Enron Stock, http://ca.encarta.msn.com/media_701610605/the_fall_of_enron_stock.html (last visited Mar. 30, 2009).
131. SHEPPEY & MCGILL, *supra* note 46, at 7.
132. Sarbanes-Oxley Act, Pub. L. 107-204, 107th Congress, 2d Session (Jan. 23, 2002).
133. 18 U.S.C. § 1514A(c)(1) (2006) .

tleblower claims,[134] was the basis for the Second Circuit's reasoning in the instant decision.

All of SOX's provisions should be interpreted with its general purpose in mind. Interpreting each piece of an expansive legislation such as SOX without giving consideration to its main purpose will eventually lead to interpretations of its parts that are contrary to the purpose of the whole. This is precisely what has happened in *Guyden*. By not giving sufficient deference to the purpose of SOX as a whole, the Second Circuit has created a loophole in securities regulation that may act as a de facto repeal of SOX. Generally speaking, allowing the arbitration of whistleblower claims under SOX would not create any such issues. The policy reasons for favoring arbitration over litigation are many, and a great majority of them hold up when examined in light of the greater purpose of SOX.[135] These policies are easily reconcilable with SOX in most instances since utilizing arbitration instead of litigation essentially only changes the forum of a dispute's resolution, so long as a plaintiff is able to effectively vindicate his or her statutory rights.

However, the characteristics of the whistleblower provision in this instance render it significantly opposed to the policies underlying SOX in that the arbitration proceedings under the instant agreement are to be kept confidential.[136] This requirement of confidentiality is not reconcilable with the greater purpose of SOX. While arbitration should be a satisfactory method of resolving SOX whistleblower claims, allowing confidential arbitration threatens to create an exception to SOX that swallows the rule.

If fraud permeates a company to the point where senior management is involved, this ruling could render SOX compliance, and the investor reassurance that accompanies it, a thing of the past. If an employee uncovers an irregularity and reports it to his or her supervisor—a likely scenario if the employee simply stumbles across what she believes is a simple accounting mistake—what incentive is there for the company to change? Relying on *Guyden*, the company could simply discharge the whistleblower and handle any claims against it in a confidential arbitration. The whistleblower would be compensated for her troubles in the form of back pay and other compensatory damages, but the matter would remain confidential, escaping the realm of public knowledge.[137] While, theoretically, the employee could go public with her claim following the arbitration, she is unlikely to do so in the presence of a confidentiality clause for fear that the corporation will bring an action against her, threatening her livelihood.

Sherron Watkins and Cynthia Cooper, the whistleblowers at Enron and WorldCom, respectively, both alerted higher-ups within their own firms, not a

134. *See supra*, text accompanying notes 57-59.

135. Policies such as lightening the docket of the courts and speedy resolution of disputes are well served by arbitration, and generally speaking provide no inconsistencies with the purpose of SOX.

136. *See Guyden*, 544 F.3d at 381, 384.

137. Though beyond the purview of this note, the author feels it is worth examining the legal effect of a confidential arbitration agreement on a former employee's stock ownership in the company. For instance, if an employee is discharged for blowing the whistle on accounting irregularities and is subject to a confidential arbitration agreement, is that employee allowed to divest his or her stake in the company, or would such a divestment subject the employee to criminal and civil liability under federal insider trading laws because the information upon which the divestment was based was material, non-public information?

government organization or media outlet.[138] Suppose Ms. Watkins had been terminated as a result of her actions, and was subject to the arbitration agreement in the instant case.[139] Enron might have only had to deal with the arbitration of her individual claim, leading to a judgment against it in the form of compensatory damages awarded to Ms. Watkins. The information uncovered during the arbitration, however, would remain private unless Ms. Watkins elected to violate the confidentiality agreement, exposing herself to litigation. While Enron likely would have failed anyway, it would have been able to further perpetrate its fraud, exposing even more investors to the titanic losses that would ultimately take place, leaving an even larger scar on the American economy.

Under a system that results in a public record, either through a trial record or an arbitration proceeding transcript, there is an incentive for corporations to comply with SOX. If the element of public disclosure is greatly diminished from the risk-reward calculus via a confidential arbitration agreement, a financial incentive for non-compliance begins to form. According to basic management theory, a firm should undertake projects that result in a positive expected present value ("EPV").[140] When presented with mutually exclusive options (such as compliance or non-compliance), a manager will take the action that results in the highest EPV for his or her firm. Under a system with public disclosure, the chances of being able to achieve a benefit from non-compliance that would create a positive EPV are minimal, as the risk of public disclosure of the company's non-compliance would be significant. On the other hand, in a system where non-compliant conduct is highly unlikely to be exposed, it is more likely that such conduct will result in a positive EPV; essentially, as the chances of getting caught cheating decrease, the potential gain from the illegitimate conduct outweighs the potential harm that would result from getting caught.

The purpose of the SOX as a whole is clear based both on its language and timing. SOX was enacted to protect the investing public in the wake of multiple corporate accounting disasters. While it is true that the whistleblower provision exists to make the whistleblower whole in the event of an adverse employment action, and to a lesser extent, true that arbitration in the instant controversy provides the plaintiff with an adequate opportunity to vindicate her statutory rights, the Second Circuit should have examined the secondary consequences of its decision. The instant decision missed the forest for the trees. While the court focused exclusively on the consequences of its decision on the instant dispute, it missed the wider ramifications of its decision. The Second Circuit has created an exception—in the form of confidential arbitration agreements—that threatens to be a de facto repeal of The Sarbanes Oxley Act of 2002.

Though the loophole created by the Second Circuit in this decision has the potential to be enormous, an efficient remedy to this potential problem is not out of reach. The most efficient way to remedy this situation is simply for Congress to add a single line to the text of SOX, declaring that arbitration of whistleblower claims under SOX is indeed permissible, but that no arbitration agreement may

138. *See* Lacayo & Ripley, *supra* note 5.

139. This is not what happened, and is merely a hypothetical situation presented by the author.

140. John Edmunds & Roberto Bonifaz, *Expected Present Value*, *in* THE CONCISE BLACKWELL ENCYCLOPEDIA OF MANAGEMENT 209-10, (Cary L. Cooper & Chris Argyris eds., Blackwell Publishing 1998).

include a confidentiality clause that would limit the investing public's access to material accounting information. A congressional remedy is necessary due to the time that would be required for the Supreme Court to resolve the issue through the appeals process. The time delay involved would provide ample opportunity for unethical managers to create a new wave of creative accounting scandals. Such a timely congressional solution satisfies both the strong federal policy favoring arbitration of disputes and the intended protections of SOX; it directs an increasing number of disputes to arbitration, while at the same time, provides a mechanism through which the investing public may discover important accounting irregularities.

## VI. CONCLUSION

The Second Circuit Court of Appeals, through its ruling in *Guyden v. Aetna, Inc.*, has opened the door to a de facto repeal of one of the most noteworthy pieces of legislation of the twenty-first century. It is apparent that the purpose of SOX as a whole was to restore the confidence of the investing public through assurance of the accuracy of corporate financial records. By examining Guyden's challenge to her confidential arbitration agreement without deference to this overall purpose, the court has created a loophole that threatens to overtake the rule.

The court is correct in its conclusion that arbitration of whistleblower claims, generally speaking, is not contrary to the purpose of SOX. Furthermore, it is correct in its determination that a confidential arbitration agreement satisfies the purposes of the whistleblower provision of SOX, so long as the claimant is able to properly vindicate rights afforded to him or her under the law. The Second Circuit erred, however, in not examining the effect of enforcing a confidential arbitration agreement of a whistleblower claim in light of the purpose of SOX as a whole.

By not considering the big picture, the Second Circuit has endorsed a vehicle through which companies may quietly and efficiently dispose of whistleblower actions. If a fraudulent system is perpetuated by a firm on enough corporate levels, as it was at Enron and WorldCom, the company may be able to terminate the whistleblower and keep all procedures relating to that termination in-house. Unless the whistleblower is inclined to violate his or her confidentiality agreement, thereby risking exposure to litigation, this information will never become public. Without the threat of accounting irregularities becoming public knowledge, there is less incentive to comply with SOX, and SOX's goals are eroded.

Unfortunately, the Second Circuit did not step back and look at the ramifications of its decision in this case. This is a troubling result for all of us. Any potential resurgence of investor confidence in the integrity and accuracy of corporate financial reporting may slow because of this decision. As a result, it may take even longer for the American financial markets, which are presently suffering from a new wave of gross financial mismanagement, to recover. Due to the Second Circuit's decision in this case, there now exists a way for companies to legally circumvent the regulations created by SOX, which has the potential to lead us right back to where we were in the fall of 2001.

NICHOLAS E. ECKELKAMP