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ERISA ARBITRATION—PARTICIPANT IN UNFUNDED DEFERRED
COMPENSATION PLAN REQUIRED TO SUBMIT CLAIM TO ENFORCE
TERMS OF PLAN TO ARBITRATION

Barrowclough v. Kidder, Peabody & Co. (1985)

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)¹ in response to the increasing significance of employee benefit plans, and in recognition of the importance of these plans to the financial security of the workforce, the revenue of the federal government, and the free flow of commerce.² In order to assure the soundness and equitable administration of these plans, ERISA provides a comprehensive regulatory scheme that governs reporting and disclosure,³ par-

1. Employee Retirement Income Security Act of 1974 (ERISA), §§ 1-4082, 29 U.S.C. §§ 1001-1461 (1982).

2. 29 U.S.C. § 1001(a). ERISA was introduced in the 93rd Congress after an extensive Senate study of private pension plans in the United States. 119 CONG. REC. 130 (1973), *reprinted in* 1 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 90 (1976). The study revealed that there had been rapid growth in the size, scope, and number of employee benefit plans. 29 U.S.C. § 1001(a). Moreover, the Senate found the well-being of employees and their families to be directly affected by private pension plans, noting that pension plans had become a major factor "affecting the stability of employment and the successful development of industrial relations." *Id.* Senator Williams of New Jersey expressed deep concern about the security of many pension plan participants:

Our study shows that private pension plans repeatedly fail to fulfill their promise of retirement security. The subcommittee provided a public forum, for the first time, for workers who have suffered because of such failures, and we listened to one heartbreaking story after another of dashed hopes, broken promises, and the bleak despair of a poverty-stricken old age.

119 CONG. REC. 130 (1973), *reprinted in* 1 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 90 (1976) (quoting Senator Williams). The study further found that these plans had become an important factor in commerce due to the interstate nature of the activities of employers, employee organizations, and plan participants. 29 U.S.C. § 1001(a).

Once aware of the critical role that pension income plays to an average retiree, Congress became concerned that plan participants were not adequately informed about the operation of benefit plans, and that as a result, their financial interests were not being adequately safeguarded. 119 CONG. REC. 130 (1973), *reprinted in* 1 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 90 (1976). For these reasons, Congress, through ERISA, established reporting and disclosure requirements. *See* 29 U.S.C. § 1001(a). In addition, ERISA set forth minimum standards for participation, vesting, and funding, and also defined the fiduciary responsibilities of plan administrators. *See id.*

3. The reporting and disclosure requirements of ERISA are set forth at 29 U.S.C. §§ 1021-1031.

(1166)

participation and vesting,⁴ funding,⁵ and fiduciary responsibility.⁶ In addition, the Act provides for the enforcement of its substantive provisions and the terms of individual plans.⁷

In *Barrowclough v. Kidder, Peabody & Co.*,⁸ the Third Circuit Court of Appeals considered an issue of first impression that arose out of a dispute involving an employee benefit plan covered by ERISA.⁹ The court

4. The participation and vesting standards of ERISA are set forth at 29 U.S.C. §§ 1051-1061.

5. The funding of employee benefit plans is governed by 29 U.S.C. §§ 1081-1086.

6. The fiduciary responsibility provisions of ERISA are set forth at 29 U.S.C. §§ 1101-1114.

7. 29 U.S.C. § 1001(b). Remedies for violations of the requirements of ERISA are established by the administration and enforcement provisions. 29 U.S.C. §§ 1131-1145. These remedies include civil and criminal penalties. *See id.* §§ 1131-1132. The Act also provides for the award of reasonable attorney's fees and costs of action. *See id.* § 1132(g).

8. 752 F.2d 923 (3d Cir. 1985). The panel consisted of Circuit Judges Sloviter and Becker, with Judge Fullam of the United States District Court for the Eastern District of Pennsylvania sitting by designation. *Id.* at 926. Judge Sloviter wrote the opinion of a unanimous panel. *Id.*

9. *Id.* The court first had to determine which of ERISA's various regulatory provisions apply to unfunded deferred compensation plans for management and highly compensated employees. *Id.* at 929-31. The court concluded that ERISA does not grant a blanket exemption for such plans, but does exempt them from some of its substantive provisions. *Id.* at 941. For a discussion of the court's reasoning, see *infra* notes 31-32 and accompanying text.

ERISA does not define "unfunded plans." The Act does, however, exempt certain unfunded plans from its participation and vesting, funding, and fiduciary responsibility requirements. 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). For a discussion of these provisions, see *infra* note 32 and accompanying text. ERISA grants the Department of Labor authority to issue regulations to exempt benefit plans from its disclosure and reporting provisions, and to issue such regulations as are necessary to carry out the regulatory provisions of the Act. 29 U.S.C. §§ 1024(a)(3), 1135. To date, the regulations issued by the Department of Labor indicate that unfunded plans are those in which benefits are paid solely from the general assets of the employer, and in which plan assets are not segregated in any way from the general assets of the employer. For example, one regulation exempts unfunded or insured welfare plans, maintained by an employer for the purpose of providing benefits to a select group of management or highly compensated employees, from the reporting and disclosure requirements of ERISA. 29 C.F.R. § 2520.104-24 (1985). The regulation limits the exemption to plans "[f]or which benefits (i) are paid as needed solely from the general assets of the employer, or (ii) are provided exclusively through insurance contracts or policies, the premiums for which are paid directly by the employer from its general assets. . . ." *Id.* at 2520.104-24(c)(4); *see also* 29 C.F.R. § 2510.3-1(k) (1985) (unfunded scholarship plans excluded from Title I of ERISA are those under which payments are made solely from general assets of employer or employee organization); 29 C.F.R. § 2520.104-27 (1985) (alternative method of compliance with reporting and disclosure requirements available to benefit plans maintained by employee organization when plan is paid for out of organization's general assets).

A primary purpose underlying unfunded arrangements is to enable employees to defer income to a future taxable year. *See generally* R. OSGOOD, *THE LAW OF PENSIONS AND PROFIT SHARING* § 10 (1984). Under such arrangements, the

addressed the question whether an employee waives access to federal court for a dispute involving a benefit plan by agreeing to arbitrate all disputes arising out of his employment.¹⁰ The court held that where an employee asserts a contractually based claim to establish or enforce rights to benefits under the terms of a plan, the arbitration agreement will be upheld.¹¹ The court further held, however, that where an employee's claim presents a purely statutory issue, that is, where the employee asserts a violation of a substantive provision of ERISA, the claim is properly brought before a federal court, notwithstanding the existence of an arbitration agreement.¹² Because resolution of the question of arbitrability of claims brought under ERISA will have a significant impact on Third Circuit practitioners and benefit plan participants alike, it will be the focus of this casebrief.

William Barrowclough joined the investment firm of Kidder, Peabody & Co. (Kidder, Peabody) in 1980, as a vice-president, account representative, and investment advisor.¹³ As a condition of his employment, Barrowclough signed an agreement to arbitrate all disputes arising from his employment or its termination.¹⁴ Both the New York and American Stock Exchanges require that all brokers with member firms sign these arbitration agreements.¹⁵ During his employment Barrowclough participated in an unfunded, deferred compensation plan (Plan) established by Kidder, Peabody for its executives who earned more than

employee has not received income, which would be taxable immediately, but merely a promise of later payment. *Id.* However, if an asset has been set aside from the employer's general assets, the employee is considered to have received income that is taxable immediately. *Id.*; *see also* Goodman and Stone, *Exempt Compensation Arrangements under ERISA*, 28 CATH. U.L. REV. 445 (1979) (discussing unfunded deferred compensation arrangements).

Deferred compensation plans are specifically covered by ERISA, which defines "employee pension benefit plans" to include "any plan, fund, or program which . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . ." 29 U.S.C. § 1002(2).

10. 752 F.2d at 937.

11. *Id.* at 939.

12. *Id.* at 939-41.

13. *Id.* at 926. Barrowclough was affiliated with Kidder, Peabody's Morristown, New Jersey office. *Id.*

14. *Id.* at 927-28.

15. *Id.* at 928. The agreement with the New York Stock Exchange provided in part:

Any controversy between me and any member or member organization arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and Rules then obtaining of the Exchange.

Id. at 928 n.3. The American Stock Exchange agreement was essentially the same, except it provided that disputes be arbitrated according to the Rules of the American Stock Exchange, unless the employer was also a member of the New York Stock Exchange, in which case, the Rules of the New York Stock Exchange would apply. *Id.*

\$75,000 per year.¹⁶ Late in 1982 Kidder, Peabody discharged Barrowclough, claiming that the company was obliged to recredit losses of approximately \$165,000 to two customers due to Barrowclough's mismanagement of their accounts.¹⁷ Before discharging him, Kidder, Peabody obtained Barrowclough's signed agreement to pay the company the amount returned to the customers.¹⁸

After his discharge, Barrowclough wrote to Kidder, Peabody on four separate occasions requesting an accounting and payment of the amount in his deferred compensation account.¹⁹ Kidder, Peabody did not provide the requested accounting, and instead indicated its intention to set-off the amounts credited to customers for losses attributable to Barrowclough's mismanagement against the amount due Barrowclough from the Plan.²⁰ In June, 1983, Barrowclough filed suit against Kidder, Peabody in the United States District Court for the District of New Jersey.²¹ Barrowclough alleged violations of the substantive provisions of ERISA and breach of the terms of the Plan, seeking damages and attorneys fees.²²

Kidder, Peabody filed a demand in a New York state court for arbitration of Barrowclough's claims, relying on Barrowclough's agreements

16. *Id.* at 926. The plan allowed highly paid executives to reduce their tax liability by deferring some of their income. *Id.* For a discussion of deferred compensation plans, see *supra* note 9. The sums were kept in an interest-bearing account credited to the participant. 752 F.2d at 926. Title to and beneficial interest in the account, however, remained with the company until disbursement. *Id.*

17. *Id.* at 927.

18. *Id.*

19. *Id.* The Plan provided that the sums maintained by Kidder, Peabody were payable to the participant or beneficiary upon the occurrence of the employee's retirement, death, disability, or termination. *Id.* at 926.

20. *Id.* at 927. One letter from Robert Krantz, Vice-President, Secretary, and General Counsel of Kidder, Peabody's New York office, advised Barrowclough that "[i]n view of the amounts involved, this means we do not anticipate that we shall be making any further payments to you." *Id.* Once suit was filed, Kidder, Peabody did send Barrowclough an "Annual Deferred Compensation Statement," showing an account balance of \$89,072.70 as of December 31, 1982. *Id.*

21. *Id.* Barrowclough also joined as defendants the Board of Directors, the Management Committee of Kidder, Peabody, the Kidder, Peabody & Co., Inc. Deferred Compensation Plan, and individual members of the Deferred Compensation Committee charged with administration of the Plan. *Id.* The beneficiaries of the account were named as additional plaintiffs. *Id.*

22. *Id.* The complaint consisted of 19 counts, including: 1) a claim to enforce the terms of the Kidder, Peabody plan; 2) a claim for liquidated damages for failure to provide an accounting as required under the reporting and disclosure provisions of ERISA; 3) an allegation of breach of fiduciary duty under ERISA and common law; 4) an allegation that Kidder, Peabody's set-off of Barrowclough's alleged debt against the sum in his account diverted benefits to the use of non-participants in violation of the fiduciary responsibility provisions of ERISA; and 5) various state law theories, including breach of contract and conversion. *Id.*

with the American and New York Stock Exchanges to arbitrate all disputes that arose from his employment.²³ Kidder, Peabody also filed motions in the federal district court to compel arbitration,²⁴ to stay the district court proceedings pending arbitration,²⁵ and to dismiss or grant summary judgment on the ERISA claims.²⁶ Barrowclough filed a cross-motion in the New York state court to enjoin the arbitration, arguing, *inter alia*, that federal law and public policy require that courts not compel arbitration of ERISA claims.²⁷

The district court issued two separate opinions in this case. In its first opinion, the court granted Kidder, Peabody's motion to compel arbitration.²⁸ In its second opinion, the court addressed the ERISA claims presented.²⁹ Failing to find merit in the allegations of violations of ER-

23. For the text of these agreements, see *supra* note 15.

24. 752 F.2d at 928. Kidder, Peabody filed its motion to compel arbitration pursuant to the Federal Arbitration Act, which provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

9 U.S.C. § 4 (1982).

25. 752 F.2d at 928. Kidder, Peabody filed its motion to stay the district court proceedings pursuant to the Federal Arbitration Act, which provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1982).

26. 752 F.2d at 928.

27. *Id.* Barrowclough also argued that the presence of plaintiffs and defendants who had not signed the arbitration agreements precluded arbitration of the dispute. *Id.* For a list of the additional parties to the action, see *supra* note 21.

28. 752 F.2d at 928. In its first opinion, the district court found that the "arbitration agreement was valid and binding and covered the dispute between the parties." *Id.* The court also ruled that the joinder of Barrowclough's beneficiaries as plaintiffs did not affect the applicability of the agreements to the dispute, even though they had not signed the agreements. *Id.* In addition, the court found that "the joinder of defendants other than Kidder, Peabody did not preclude arbitration." *Id.* The court granted Kidder, Peabody's motion to compel arbitration and denied Barrowclough's motion to stay arbitration, subject to modification by its subsequent decision on Barrowclough's ERISA claims. *Id.*

29. *Id.* The district court addressed three separate ERISA claims. First, the court considered whether Barrowclough stated a valid claim for a violation of the ERISA provision forbidding diversion of plan funds to the employer. *Id.* The relevant ERISA section, otherwise known as the exclusive benefit rule, provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants

ISA, the district court granted summary judgment for Kidder, Peabody on all the substantive ERISA claims, and entered an order compelling arbitration before the New York Stock Exchange of Barrowclough's claim for breach of the terms of the Plan.³⁰

in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). The court concluded, however, that the Plan was exempt from the exclusive benefit rule. 752 F.2d at 928. In support of its conclusion, the court relied on a provision in ERISA stating that the fiduciary responsibility provisions do not apply to "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. . . ." 29 U.S.C. § 1101(a)(1).

Second, the court considered whether Barrowclough stated a valid claim for violation of the ERISA provision requiring an accounting on request. 752 F.2d at 928. The accounting requirement of ERISA provides:

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

- (1) the total benefits accrued, and
- (2) the non-forfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become non-forfeitable.

29 U.S.C. § 1025(a). The Act also provides for damages of up to \$100 a day for failure to comply with the reporting provisions. *See* 29 U.S.C. § 1132(c). In addition, the Act authorizes the Secretary of Labor to prescribe alternative methods of compliance with the reporting and disclosure requirements. 29 U.S.C. § 1030. In 1975, the Secretary established alternative methods of compliance for administrators of unfunded or insured pension plans maintained by an employer for a select group of management or highly compensated employees. *See* 29 C.F.R. 2520.104-23 (1975). Finding that the regulation providing alternative methods of compliance negated the need to supply the requested accounting, the district court held that the disclosure and reporting requirements of ERISA did not apply to the Plan. 752 F.2d at 928.

Finally, the court ruled that Barrowclough did not state a valid claim for damages and attorney's fees under the administrative and enforcement provisions of ERISA because these provisions did not grant independent substantive rights. *Id.*; *see* 29 U.S.C. § 1132(c) (authorizing liquidated damages for failure to comply with Act's reporting provisions); § 1132(g)(1) (authorizing award of reasonable attorney's fees and costs of action at court's discretion).

30. 752 F.2d at 929. Barrowclough relied upon the following language of the Plan in support of his claim that Kidder, Peabody had breached the express terms of the Plan:

Unless otherwise permitted by the Committee, the right of any Participating Employee or his Beneficiary to any payment under the Plan shall not be subject in any manner to attachment or other legal process for the debts of such Participating Employee or his Beneficiary and any such payment shall not be subject to anticipation, alienation, sale, transfer, assignment or encumbrance in each case to the extent permitted by applicable law.

Id. at 926 n.2. Barrowclough claimed Kidder, Peabody had breached the terms of its agreement by holding his accrued benefits in satisfaction of an alleged debt. *Id.* at 927.

In compliance with the district court's order, the case went to arbitration. 752 F.2d at 929. The arbitrators' decision instructed Kidder, Peabody to pay Barrowclough \$89,072.70, plus interest, representing the amount due on his ac-

On appeal, the Third Circuit dealt first with the applicability of ERISA and its specific provisions to the Kidder, Peabody plan. The court concluded that ERISA does cover unfunded deferred compensation plans,³¹ and that, contrary to the assertions of Kidder, Peabody, such plans are not exempt from the reporting and disclosure or from the administration and enforcement provisions of the Act.³²

count. The arbitrators awarded Kidder, Peabody \$100,000 on its counterclaim. *Id.* at n.6.

31. *Id.* at 930. The court based its conclusion on the broad definition of "employee pension benefit plans" in ERISA, which includes "any plan, fund, or program which . . . results in a deferral of income by employees. . . ." 29 U.S.C. § 1002(2)(B).

32. 752 F.2d at 930. The court based this conclusion on the fact that the provisions relating to reporting and disclosure and the provisions relating to administration and enforcement did not contain language exempting unfunded deferred compensation plans, similar to that found in other provisions. *Id.* at 930-31; *see* 29 U.S.C. §§ 1021-1031 (governing reporting and disclosure); §§ 1131-1144 (governing administration and enforcement). Parts 2, 3, and 4 of ERISA, which respectively concern participation and vesting, funding, and fiduciary responsibility, each provides: "This part shall apply to any employee benefit plan . . . other than . . . a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. . . ." 29 U.S.C. §§ 1051, 1081(a), 1101(1). The Appellate Court considered this language to demonstrate a clear congressional intent to exempt unfunded deferred compensation plans from these provisions. 752 F.2d at 930.

Accordingly, the court reversed the district court's grant of summary judgment on Count I, which alleged breach of the terms of the plan. 752 F.2d at 937. The district court concluded that a violation of a substantive provision of ERISA is a condition precedent to an action under the Act to recover amounts due under the terms of a benefit plan. *Id.* at 935. Because the district court believed the Plan to be exempt from these substantive provisions, the district court reasoned that Barrowclough had no cause of action under the administrative and enforcement provisions of ERISA. *Id.* For a discussion of the court's reasoning concerning the Plan's exemption from the substantive provisions of ERISA, *see supra* note 29.

In reversing, the Third Circuit held that ERISA contemplates two separate causes of action: 1) to redress violations of the substantive provisions of the Act, and 2) to recover amounts due under the terms of a plan. *Id.* at 935. Thus, the court reasoned that participants in benefit plans covered by ERISA are entitled to access to federal courts to enforce the terms of their plans, regardless of whether a substantive provision of ERISA has been violated. *Id.* at 937. In reaching its conclusion, the court relied upon express language of ERISA. *Id.*; *see* 29 U.S.C. § 1132(a)(1) (participant or beneficiary may bring civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan. . . ."); 29 U.S.C. § 1132(a)(3) (participant, beneficiary, or fiduciary may bring civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.").

Additionally, the civil enforcement provision of the Act provides that federal district courts have exclusive jurisdiction of all civil suits brought under ERISA, except that state courts and federal district courts have concurrent jurisdiction of actions brought to recover benefits due under a plan, to enforce the

Turning to the arbitration issues, the Third Circuit began its analysis by addressing Barrowclough's contention that the district court erred in compelling arbitration under the Federal Arbitration Act.³³ First, Barrowclough claimed that he had not agreed to submit disputes arising under the Plan to arbitration.³⁴ He argued that the agreement, which provided for arbitration of all disputes "arising out of my employment or the termination of my employment," did not encompass disputes arising under the Plan.³⁵ In response, the court observed that similar arbitration agreements executed by other brokers with the stock exchanges had been broadly construed to cover "all disputes" arising from employment or termination of employment.³⁶ Moreover, the court

terms of a plan, or to clarify rights to future benefits under a plan. 29 U.S.C. § 1132(e)(1). The *Barrowclough* court reasoned that the provision for concurrent jurisdiction would be meaningless if a participant could not bring a claim for breach of the terms of a plan under ERISA alone. 752 F.2d at 936.

The court also vacated the district court's grant of summary judgment on Count II, which alleged failure to provide a requested accounting of accrued pension benefits. *Id.* at 934. For a discussion of the reporting and disclosure requirements of ERISA, see *supra* note 29. On this issue, the district court ruled that Barrowclough did not state a cause of action, because the Kidder, Peabody plan had been exempted from the reporting and disclosure requirements of ERISA by an administrative regulation. 752 F.2d at 932. The Third Circuit agreed that the Plan was exempt from these requirements, but noted that the regulation granting this exemption prescribed alternative procedures for satisfying the reporting and disclosure requirements, and remanded for resolution of material issues of fact as to whether Kidder, Peabody had complied with these alternative procedures. *Id.* The regulation relied upon was promulgated by the Department of Labor and is codified at 29 C.F.R. 2520.104-23 (1985).

The court affirmed the district court's grant of summary judgment on Count IV, which alleged breach of fiduciary responsibility under ERISA, finding that the Kidder, Peabody plan was exempt from the Act's fiduciary responsibility provisions. 752 F.2d at 935. Barrowclough alleged that the withholding of plan benefits in satisfaction of a debt violated the "exclusive benefit rule" of ERISA, and, therefore, constituted a breach of fiduciary responsibility under the Act. *Id.* The court found that because the Kidder, Peabody plan was exempt from the fiduciary responsibility provisions of ERISA, the exclusive benefit rule did not apply. *Id.* For a discussion of this exemption and the text of the exclusive benefit rule, see *supra* note 29 and accompanying text.

Count III of Barrowclough's complaint alleged a breach of fiduciary duty under ERISA and common law. 752 F.2d at 927. For a discussion of Count III, see *supra* note 22. Barrowclough did not raise Count III on appeal, but the court noted that because it raised the same issues as Count IV, its disposition would follow that of Count IV. 752 F.2d at 928 n.4.

33. 752 F.2d at 937. The district court ordered submitted to arbitration only Barrowclough's state law claims, having granted summary judgment for Kidder, Peabody on the ERISA claims. *Id.* The Third Circuit observed that its holding that Counts I and II possibly stated claims under ERISA altered the arbitration question. *Id.* To provide guidance on remand, the court addressed the arbitration issues raised by Barrowclough's reinstated ERISA claims. *Id.*

34. *Id.*

35. *Id.* at 937-38. Barrowclough argued that because the arbitration agreements did not expressly refer to the Plan or waive any rights under the Plan, he had not agreed to submit disputes arising under the Plan to arbitration. *Id.*

36. *Id.* at 938. The court relied on a Sixth Circuit decision to support its

noted that “a ‘healthy regard’ for the federal policy favoring arbitration requires that ‘any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration.’”³⁷ Thus, the court concluded that the arbitration agreement covered the dispute at hand.³⁸

Next, Barrowclough argued that the district court erred in compelling arbitration since the stock exchanges imposed the arbitration agreements on him as a condition of registration as a broker.³⁹ The court refused, however, to rule that the arbitration agreements were invalid solely because they were required of all brokers who registered with the stock exchanges.⁴⁰

position that the dispute was covered by the arbitration agreement. *Id.* (citing *Stokes v. Merrill Lynch, Pierce, Fenner & Smith*, 523 F.2d 433 (6th Cir. 1975) (dispute over profit sharing plan arose out of employment or termination of employment; arbitration ordered)).

The Third Circuit had reached a different conclusion on similar facts in *Ayres v. Merrill Lynch, Pierce, Fenner & Smith*. 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976). For a discussion of *Ayres*, see *infra* note 118.

37. 752 F.2d at 938 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

38. 752 F.2d at 939. The court also rejected Barrowclough’s argument that the arbitration agreements were unenforceable because Barrowclough’s contingent beneficiaries had not signed them. *Id.* at 938. In support of its conclusion that the arbitration agreements were enforceable, the court stated that “[F]ederal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.” *Id.* (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis supplied by court) (footnotes omitted)).

The court stated that “‘as a matter of its discretion to control its docket’ [the district court] may ‘stay litigation among the nonarbitrating parties pending the outcome of arbitration.’” 752 F.2d at 938 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 20 n.23). However, the court concluded that because the interests of the nonparties to the agreement were so closely related to those of the principals, the district court did not abuse its discretion in refusing to stay the arbitration of Barrowclough’s claims. *Id.*

In addition, the court found that other circuits had recognized that nonsignatories may be bound by arbitration agreements under common law contract and agency principles. *Id.* (citing *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789 (7th Cir. 1981) (plaintiff may not assert agency relationship as basis for claims in judicial forum and then disavow agency relationship in order to defeat arbitration agreement); *Fisser v. International Bank*, 282 F.2d 231 (2d Cir. 1960) (nonsignatory’s amenability to arbitration under arbitration clause in contract is decided by determining whether signatory entered into contract as alter ego of nonsignatory)).

In a related argument, Barrowclough contended that the arbitration agreements were unenforceable because of the presence of defendants who had not signed the agreements but were being sued as representatives of Kidder, Peabody. 752 F.2d at 938. The court rejected this argument because the additional defendants did not object to arbitration. *Id.*

39. *Id.* at 937.

40. *Id.* The Barrowclough court cited several cases in support of its conclusion that the arbitration agreements were not void as contracts of adhesion. *Id.* (citing *O’Neel v. National Ass’n of Sec. Dealers*, 667 F.2d 804, 806 (9th Cir.

Finally, the court addressed *Barrowclough's* contention that arbitration undermines the strong policy of ERISA in favor of providing benefit claimants access to the federal courts.⁴¹ The court acknowledged that the enactment of ERISA had indeed established a strong policy in favor of access to the courts, but observed that the Federal Arbitration Act embodied a conflicting federal policy favoring enforcement of arbitration agreements.⁴² Confronted with these two conflicting principles, the Third Circuit held that "claims to establish or enforce rights to benefits under [ERISA's enforcement provisions] that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate."⁴³ Under the accommodation reached by the *Barrowclough* court, claimants asserting contractual violations of a benefit plan subject to an arbitration agreement must arbitrate, while those asserting substantive violations of ERISA will have access to federal court.

In holding that contractually based pension claims are subject to arbitration, the court relied on the parallel drawn in a House conference report on ERISA between section 502 of ERISA and section 301 of the Labor Management Relations Act of 1947 (LMRA), each of which provides for concurrent state and federal court jurisdiction over contractually based claims.⁴⁴ The court concluded that in enacting ERISA,

1982) (experienced businessman presumed to have read and understood arbitration agreement signed when he joined member firm of National Association of Securities Dealers; obligation to arbitrate not extinguished by resignation from Association and brokerage firm); *Drayer v. Krasner*, 572 F.2d 348, 353-54 (2d Cir.) (exchange requirement of arbitration of all disputes between registered representatives and member firms does not violate antitrust laws), *cert. denied*, 436 U.S. 948 (1978)).

41. 752 F.2d at 939. For a discussion of the policy of ERISA favoring access to federal courts, see *supra* note 32.

42. 752 F.2d at 939. The Federal Arbitration Act provides that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity or for the revocation of any contract." 9 U.S.C. § 2 (1982). The legislative history of the Act reveals that Congress intended to place arbitration agreements "upon the same footing as other contracts," and to overrule the traditional refusal of courts to enforce such agreements. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924).

43. 752 F.2d at 939 (citations omitted).

44. *Id.* The LMRA is codified at 29 U.S.C. §§ 141-187 (1982). For a discussion of the purpose of the LMRA, see *infra* note 80 and accompanying text. The court noted the legislative history of ERISA suggests that its civil enforcement provision was patterned after that of the LMRA:

The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under title I. However, with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in state courts of competent jurisdiction. All such actions in Federal or State courts are to be re-

Congress intended that contractually based pension claims, like contractually based claims for breach of collective bargaining agreements, remain subject to valid arbitration agreements.⁴⁵ Applying this conclusion, the court held that Count I of Barrowclough's claim, seeking to enforce the terms of the Plan, was subject to arbitration.⁴⁶

In contrast to the contractually based claim of Count I, Count II, which sought damages for failure to provide an accounting as required by ERISA,⁴⁷ presented the court with a purely statutory issue.⁴⁸ In holding that Count II should not be referred to arbitration, the court relied primarily on two considerations. First, the court emphasized the "inherent incompatibility" in compelling arbitration of a claim that Congress has placed within the exclusive jurisdiction of the federal courts under a comprehensive federal statutory scheme designed to protect a group of individuals.⁴⁹ Second, the court noted the need for federal courts to exercise jurisdiction over statutory issues in order to carry out the intent of Congress that fiduciaries, administrators, and participants have a consistent source of law to assist them in determining the legality

garded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. The U.S. district courts are to have jurisdiction of these actions without regard to the amount in controversy and without regard to the citizenship of the parties.

H. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 327, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639, 5107.

45. 752 F.2d at 939. The LMRA provides: "Suits for violations of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

However, the Supreme Court, in three landmark decisions known as the *Steelworker's Trilogy*, instructed that courts should defer to arbitration in disputes concerning the meaning, interpretation, and application of collective bargaining agreements. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46 n.6 (1974). The three decisions of the *Steelworker's Trilogy* are: *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (courts should decline to review merits of arbitration award under collective bargaining agreement); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (judicial inquiry must be limited to question of whether parties agreed to arbitrate grievance; doubts concerning interpretation of scope of arbitration clause to be resolved in favor of coverage); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (court confined to issue of whether grievance is covered by arbitration agreement; court may not weigh merits of grievance). In *United Steelworkers v. Warrior & Gulf Navigation Co.*, the Court stated, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. 363 U.S. at 582-83. Doubts should be resolved in favor of coverage." *Id.* at 583.

46. 752 F.2d at 940.

47. See 29 U.S.C. §§ 1025, 1132(c). For a discussion of these sections, see *supra* note 29 and accompanying text.

48. 752 F.2d at 940.

49. *Id.*

of proposed actions affecting benefit plans.⁵⁰ The court stated that “[t]his intent would be frustrated if arbitrators, who are not bound to consider law or precedent in their decisions and who decide issues primarily on contractual grounds, had a conclusive role in deciding such claims.”⁵¹

In *Barrowclough*, the court identified several parallels between ERISA and the LMRA.⁵² The court observed that both are enabling statutes designed to provide access to federal courts to establish or enforce contractual rights, and both contemplate the development and application of federal common law principles to contractual disputes.⁵³ Having established this similarity, the court noted that when confronted with the conflicting policies favoring arbitration and access to federal court in a labor context, the United States Supreme Court has consistently held that contractually based claims arising from a breach of a collective bargaining agreement are subject to a presumption of arbitrability.⁵⁴ Relying on the parallel between ERISA and the LMRA, the *Barrowclough* court held that when conflict between access to court and arbitration arises in the context of benefit plan disputes, contractually based benefit plan claims should also be subject to arbitration.⁵⁵

50. *Id.* at 941.

51. *Id.* The court remanded Count II to the district court in light of its conclusion that purely statutory issues are within the exclusive jurisdiction of the federal courts. *Id.* The court based its decision on the jurisdiction provision of ERISA, which states, “Except for [contractually based claims to enforce the terms of a plan], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary.” 29 U.S.C. § 1132(e). Federal district courts and state courts of competent jurisdiction have concurrent jurisdiction of actions by participants or beneficiaries to recover benefits due under the terms of a plan, to enforce rights under a plan, and to clarify rights to future benefits under the terms of a plan. *See* 29 U.S.C. §§ 1132(a)(1)(B), 1132(e)(1). For a more complete discussion of the jurisdiction provision of ERISA, see *supra* note 32 and accompanying text.

52. 752 F.2d at 939.

53. *Id.* Specifically, the court found that:

Both [ERISA and the LMRA] provide for concurrent federal jurisdiction over contractually based claims for benefits, and neither provides specific federal legal content to govern these federal contractual claims, thus permitting development of common law principles based at least partly on state law experience. Given this parallelism, it is reasonable to conclude that Congress intended that contractually-based pension claims would remain subject to arbitration, just as contractually-based claims for breach of collective-bargaining agreements have been held to be subject to arbitral resolution.

Id. One author has noted the possibility that, in referring to § 301 of the LMRA, Congress might merely have intended to indicate that federal courts were to develop a body of federal common law pertaining to pension claims, which was to be accepted in both federal and state courts. Donaldson, *The Use of Arbitration to Avoid Litigation under ERISA*, 17 WM. & MARY L. REV. 215, 279 n.60 (1975).

54. For a discussion of arbitration under the LMRA, see *supra* note 45.

55. 752 F.2d at 939.

It is submitted, however, that a deeper look into the legislative history of ERISA raises strong doubts about the court's reliance on the conference committee's reference to section 301 of the LMRA.⁵⁶ The version of the bill passed by the Senate and sent to the House⁵⁷ required that each benefit plan provide an opportunity for arbitration of disputes between the plan administrator and any plan participant.⁵⁸ During the floor debate on the Senate bill, the sponsor of the amendment that called for arbitration explained, "[t]he Department of Labor will provide by regulation for the type of arbitration service provisions which are to be incorporated in the [plans]."⁵⁹ It is evident from this language that the Senate contemplated the use of arbitration procedures only if they were carefully regulated to assure the preservation of the rights of plan participants.

Furthermore, the Senate did not contemplate that arbitration would be an exclusive remedy. The Senate bill provided that a participant

56. For a discussion of the court's analysis of the parallels between ERISA and § 301 of the LMRA, see *supra* note 53.

57. H.R. 4200, 93d Cong., 1st Sess. (1973), *reprinted in* 2 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 1883 (1976).

58. Section 691 of the Senate bill provided:

(a) **ARBITRATION PROCEDURE**—Each employee pension benefit plan subject to this part shall provide—

(1) a procedure for the fair and just review under the plan of any dispute between the administrator of the plan and any participant or beneficiary of the plan, and

(2) an opportunity after such review and a decision by the administrator (or a failure to make a decision within a reasonable period of time by the administrator), for the arbitration of such disputes.

(b) **CIVIL ACTIONS**—A participant or beneficiary of such a plan may bring a civil action . . . in lieu of submitting the dispute to arbitration under the plan.

(c) **ALTERNATIVE PROCEDURES**—If a dispute under a plan is subject to procedures established by collective bargaining for the resolution of such dispute, the Secretary of Labor, upon written request by a plan administrator, may waive the application of subsections (a), (b), and (e) to such dispute if he determines that the procedures provided for are reasonably fair and effective.

(d) **APPLICATION OF LAW RELATING TO SECTION 301 OF LABOR MANAGEMENT RELATIONS ACT, 1947**—The arbitration of disputes in accordance with the requirements of this section, and judicial proceedings relating thereto, shall be governed by the laws, decisions, and rule applicable to the arbitration of disputes under section 301 of [the LMRA].

(e) **PAYMENT OF ARBITRATION COSTS**—The cost of any arbitration proceedings required under this section (including arbitrators' fees) shall be paid by the plan under which the dispute arises, unless the arbitrator determines that a participant's or beneficiary's allegations are frivolous and assesses all or a portion of such cost to that party.

H.R. 4200, 93d Cong., 1st Sess. § 691 (1973), *reprinted in* 2 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 1883, 2096-98 (1976).

59. 119 CONG. REC. 30,041 (1973) (remarks of Sen. Nelson), *reprinted in* 2 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 1632 (1976).

could choose to bring a civil action instead of submitting the dispute to arbitration.⁶⁰ This right was qualified, however, in the case of participants in plans covered by collectively bargained arbitration procedures. In such cases, the Secretary of Labor was authorized to require use of the collectively bargained procedures, if he determined them to be "reasonably fair and effective."⁶¹ Finally, with respect to collectively bargained arbitration agreements, the bill made the law developed under section 301 of the LMRA applicable to the arbitration of disputes "in accordance with the requirements of this section, and judicial proceedings relating thereto. . . ."⁶²

The bill as passed by the House did not contain any dispute resolution procedures.⁶³ As enacted, ERISA requires only that every employee benefit plan afford a reasonable opportunity for review of any decision denying a claim for benefits.⁶⁴ The conference committee report explained that the House conferees rejected the Senate arbitration provisions because they might be too costly to plans and encourage frivolous disputes.⁶⁵ There is no indication that the members of the conference committee believed that private, unregulated arbitration presented an acceptable method of settling disputes between plan administrators and participants. In fact, a counter-inference is raised by the fact that the conference committee deleted the language making the dispute res-

60. H.R. 4200, 93d Cong., 1st Sess. § 691(b) (1973), *reprinted in* 2 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 1883, 2097 (1976). For the text of this provision, see *supra* note 58.

61. H.R. 4200, 93d Cong., 1st Sess. § 691(c) (1973), *reprinted in* 2 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 1883, 2097. This provision authorized the Secretary of Labor to waive the application of subsection (b), which permitted a plan participant to bring a civil action in lieu of submitting a dispute to arbitration, in cases where a plan was covered by collectively bargained arbitration procedures. *Id.* For the text of subsections (b) and (c), see *supra* note 58.

62. H.R. 4200, 93d Cong., 1st Sess. § 691(d) (1973), *reprinted in* 2 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 1883, 2097 (1976). However, if H.R. 4200 had been enacted, the right to select a judicial forum would only have been restricted in cases where a plan was governed by a collectively bargained arbitration procedure, because the bill specifically gave participants in all other plans the right to choose a judicial forum in lieu of arbitration. *Id.* § 691(b). For the text of both provisions, see *supra* note 58.

63. H. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 328, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 5108.

64. 29 U.S.C. § 1133(2) (1982).

65. 120 CONG. REC. 29,941 (1974) (remarks of Sen. Williams upon introduction of H. CONF. REP. NO. 1280), *reprinted in* 3 LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 4769 (1976). Senator Williams expressed regret at the decision of the conference committee to drop the requirement that plans contain an arbitration procedure, stating "I regret [their] decision since I believe the Senate bill would have provided a relatively inexpensive way for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the courts." *Id.*

olution principles developed under section 301 of the LMRA applicable to disputes arising under ERISA.⁶⁶ The sole remedy authorized for plan participants is a civil action.

Putting aside the legislative history suggesting that Congress did not intend to authorize the arbitration of ERISA claims, it is submitted that the *Barrowclough* court unduly emphasized the parallels between the LMRA and ERISA in deciding that arbitration is a proper forum in which to resolve an individual's benefit claims under ERISA. In a labor context, the issue of arbitration typically arises where an employee attempts to enforce rights created by a collectively bargained agreement.⁶⁷ *Barrowclough*, however, asserted individual rights arising from a private agreement.⁶⁸ It is submitted that different policy considerations underlie the question of whether arbitration of individual rights under ERISA is appropriate.

In *Schneider Moving & Storage Co. v. Robins*,⁶⁹ the United States Supreme Court reaffirmed the well-settled principle that a presumption of arbitrability is an appropriate rule of construction in determining whether an arbitration agreement covers disputes between a union and an employer arising out of a collective bargaining agreement.⁷⁰ The

66. The deleted language appeared in § 691(d) of H.R. 4200. For the text of this subsection, see *supra* note 58.

67. See, e.g., *Schneider Moving & Storage Co. v. Robins*, 466 U.S. 364 (1984) (trustees of multiemployer trust funds not required to submit dispute over interpretation of terms in collective bargaining agreement to arbitration); *Viggiano v. Shenango Div. of Anchor Hocking Corp.*, 750 F.2d 276 (3d Cir. 1984) (union required to exhaust grievance procedures in dispute over employer's termination of group hospitalization plan); *Air Line Pilots Ass'n v. Northwestern Airlines*, 627 F.2d 272 (D.C. Cir. 1980) (union required to arbitrate dispute with airline over alleged violations of terms of collective bargaining agreement).

68. For a discussion of the Kidder, Peabody plan, see *supra* note 16 and accompanying text.

69. 466 U.S. 364 (1984). In *Schneider*, the trustee of two multiemployer trust funds filed suit in federal district court, claiming that the employers had failed to meet the contribution requirements established by the applicable collective bargaining agreements. *Id.* at 366. The district court dismissed the suits pending arbitration of disputed interpretations of terms of the collective bargaining agreements. *Id.* at 366-67. The Eighth Circuit Court of Appeals reversed and remanded for further proceedings. *Id.* On certiorari, a unanimous Supreme Court affirmed, holding that the trustees could bring suit in federal court to enforce the terms of the trust against a participating employer, without first submitting to arbitration the underlying dispute over the interpretation of terms in the collective bargaining agreement. *Id.* at 376.

The Court based its decision in large part on the fact that the trustees were not parties to the collective bargaining agreements, which required arbitration of any disputes between the union and the employers concerning the meaning of provisions in the agreement. *Id.* at 375. Thus, the Court held that the presumption of arbitrability typically applied to parties to the collective bargaining agreement did not apply in this instance. *Id.* at 371-72.

70. *Id.* The Court observed that the presumption "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with

Schneider Court declined, however, to apply the presumption outside that context to a dispute between an employer and the trustees of an employee benefit fund.⁷¹ The Court acknowledged the vital role of arbitration in the labor context, noting that “[a]rbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lock-outs.”⁷² Yet the Court reasoned that where, as in *Schneider*, the parties to the dispute did not have recourse to weapons of economic self-help such as strikes and lock-outs, applying a presumption of arbitrability would be inappropriate.⁷³ Because Barrowclough did not have recourse to any weapons of economic self-help, it is submitted that the presumption of arbitrability should not have been applied.

Support for the proposition that individual claims should not be subject to the same presumption of arbitrability applied to disputes arising under a collective bargaining agreement is found in *Barrentine v. Arkansas-Best Freight Systems*,⁷⁴ in which the Supreme Court focused on the need to distinguish between arbitration of collectively bargained rights and arbitration of individual rights. In *Barrentine*, a group of truckdrivers asserted their rights under the Fair Labor Standards Act (FLSA)⁷⁵ to

the parties’ presumed objectives in pursuing collective bargaining.” *Id.* (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 582-83 (1960)). The Court cautioned, however, that there is “less to recommend the presumption in construing the applicability of arbitration clauses” to disputes involving nonsignatories to the collective bargaining agreement. *Id.* at 372. It is submitted that the Court’s caution applies also to situations such as that presented in *Barrowclough*, where the national labor policy is not implicated and there is no collectively bargained agreement at all.

71. *Id.*

72. *Id.*

73. *Id.* The Court stated that “requiring [the parties] to arbitrate disputes with the employer would promote labor peace only indirectly, if at all.” *Id.*

74. 450 U.S. 728 (1981). In *Barrentine*, truckdrivers who were not paid for time spent in a required pre-trip safety inspection submitted their wage claims to a joint grievance committee as required by their union’s collective bargaining agreement. *Id.* at 730. The drivers alleged that they were entitled to compensation under the collective bargaining agreement. *Id.* The grievance committee rejected the claim without comment. *Id.* at 731. The drivers then filed an action under the Fair Labor Standards Act (FLSA) seeking statutory remedies of actual and liquidated damages, costs, and attorney’s fees. *Id.* at 731-33. The district court refused to consider the FLSA claims. *Id.* at 733. The court of appeals affirmed, holding that the drivers’ voluntary submission of their grievances to the grievance committee precluded them from asserting the same claims in a subsequent civil action. *Id.* at 733-34. The Supreme Court reversed, holding that because the rights asserted by the drivers were independent of the collective bargaining process and nonwaivable, the wage claims could be brought in a federal court, despite the prior, unsuccessful submission of the claims to a grievance committee. *Id.* at 744-45.

75. 29 U.S.C. §§ 201-219 (1982). Congress enacted the FLSA pursuant to its commerce power, having found that “detrimental” working conditions would adversely impact interstate commerce. *Barrentine*, 450 U.S. at 739 n.14 (citing *United States v. Darby*, 312 U.S. 100, 109-10 (1941); 29 U.S.C. § 202(a) (1982)).

compensation for time spent in required pre-trip safety inspections.⁷⁶ The plaintiffs had previously submitted the same claim to a grievance committee, alleging breach of the collective bargaining agreement.⁷⁷ The Court held that a claim arising under the FLSA could be brought in federal court, and was not barred by the prior unsuccessful submission of the claim to a grievance committee.⁷⁸

The Court described the FLSA as legislation intended to give “to *individual* workers” specific minimum protections from substandard wages and oppressive working conditions.⁷⁹ In contrast, the Court characterized the LMRA as legislation “designed to minimize industrial strife and improve working conditions by encouraging employees to promote their interests *collectively*”⁸⁰ Although section 301 of the LMRA provided for access to the federal courts, the *Barrentine* Court observed that the enforcement of collectively bargained agreements to ar-

76. 450 U.S. at 732. The employees alleged that the time spent for pre-trip safety inspections was compensable under 29 U.S.C. § 206(a). *Id.* at 732 n.7.

77. *Id.* at 730-31.

78. 450 U.S. at 745. The Court gave two reasons for refusing to adopt the position that submission of a wage claim to arbitration precludes a later suit in federal court. First, the Court observed that wage claims submitted to arbitration under a collective bargaining agreement are handled by union officials, not by the individual employees involved. *Id.* at 742. The Court expressed concern that union representatives might refuse to vigorously support an individual's meritorious claim, noting that “a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.” *Id.* (citing *Humphrey v. Moore*, 275 U.S. 335, 349 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-39 (1953)).

Second, the Court expressed concern that an employee's statutory rights might not be adequately protected in arbitration because FLSA claims involve complex questions of law that arbitrators frequently are not competent to decide. *Id.* at 743. The Court added that the problem of an arbitrator's competence to decide FLSA claims is further exacerbated by the complex nature of the statute. *Id.* In a related argument, the Court questioned whether an arbitrator would have the contractual authority to apply statutory law. *Id.* at 744. The Court noted that an arbitrator's power is limited by the collective bargaining agreement, and that an arbitrator “has no general authority to invoke public laws that conflict with the bargain between the parties.” *Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

79. 450 U.S. at 739 (emphasis supplied by Court). Congress enacted the FLSA in order to protect against “labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” *Id.* (quoting 29 U.S.C. § 202(a) (1982)).

80. *Id.* at 739 (emphasis supplied by Court). In part, the LMRA provides:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1982).

bitrate was necessary in order to effectuate that Act's purpose.⁸¹ The Court recognized, however, that different considerations apply in determining the validity of arbitration agreements when the rights asserted are individual, nonwaivable rights, such as those granted by the FLSA.⁸²

Although a parallel between ERISA and the LMRA exists, it is submitted that the purpose of ERISA, the protection of individual benefit plan participants and beneficiaries, more closely parallels that of the FLSA. Congress enacted the FLSA to protect individual workers from "the evil of 'overwork' as well as 'underpay'"⁸³ by establishing mandatory wage and work week standards.⁸⁴ Similarly, Congress enacted ERISA to protect individual workers from the loss of their pension benefits by imposing vesting, funding, fiduciary and disclosure requirements on pension plan sponsors and administrators.⁸⁵ Given this similarity of purpose and the focus of both acts on the preservation of individual rights, it is submitted that participants and beneficiaries of benefit plans governed by ERISA should be assured of the same unrestricted access to federal courts that the Court found appropriate for workers who assert claims under the FLSA.

Because *Barrowclough* asserted individual rather than collectively bargained rights and had no recourse to economic weapons threatening labor peace, it is submitted that the *Barrowclough* court could have more appropriately justified its decision by relying exclusively on cases that did not arise in a collective bargaining context.⁸⁶ A more appropriate

81. 450 U.S. at 739.

82. *Id.* at 745. The Court stated:

In sum, the FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable. Because Congress intended to give individual employees the right to bring their non-waivable claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, we hold that petitioners' claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures.

Id.

83. *Overnight Motor Transp. Co. v. Missal*, 316 U.S. 572, 578 (1942) (quoting President Franklin Roosevelt's message to Congress, 81 CONG. REC. 4983, 4984 (1937)).

84. See 29 U.S.C. § 206(a) (establishing minimum wage requirements); 29 U.S.C. § 207(a) (mandating maximum forty hour work week and requiring that worker be compensated for overtime "at a rate not less than one and one-half times the regular rate at which he is employed").

85. For a discussion of the purpose of ERISA and its regulatory provisions, see *supra* note 2 and accompanying text.

86. The facts that gave rise to the dispute over arbitrability in *Barrowclough* differ in several key respects from the facts that normally exist in a traditional labor context. First, neither the Plan nor the arbitration agreements were collectively bargained. For a discussion of the Plan, see *supra* notes 16 & 19 and accompanying text. For a discussion of the arbitration agreements, see *supra* note 15 and accompanying text. Second, *Barrowclough* neither asserted claims that

basis for the court's decision would have been cases applying the Federal Arbitration Act, since that Act addresses the more analogous situation of enforcement of privately made arbitration agreements.⁸⁷ In *Dean Witter Reynolds, Inc. v. Byrd*,⁸⁸ a unanimous Supreme Court stated that the overriding concern of Congress in passing the Federal Arbitration Act was to insure that private arbitration agreements are enforced in the same manner as other contracts.⁸⁹ The *Byrd* Court construed the Federal Arbitration Act to require a district court asserting jurisdiction over an action under the Securities Exchange Act of 1934 to compel arbitration of pendent state law claims.⁹⁰ In so holding, the Court articulated a clear policy that private arbitration agreements should be "rigorously enforce[d]."⁹¹

jeopardized labor peace, nor had access to self-help remedies that would threaten labor peace. 752 F.2d at 939. Third, Barrowclough did not negotiate the arbitration agreements at arm's length. Rather, the agreements were imposed on him as a condition of employment. Brief for Appellant at 9-10, *Barrowclough v. Kidder, Peabody, Inc.*, 752 F.2d 927 (3d Cir. 1985). Finally, the Kidder, Peabody plan did not contain a waiver of the rights accorded by ERISA, and the arbitration agreements did not refer to the arbitration of disputes concerning the Plan. *Id.* at 10.

87. 9 U.S.C. §§ 1-14 (1982). Kidder, Peabody's motions to stay the district court proceedings and to compel arbitration were filed pursuant to the Federal Arbitration Act. See *supra* notes 24 & 25. For a discussion of the Federal Arbitration Act, see *infra* notes 88-92 and accompanying text.

88. 470 U.S. 213 (1985). In *Byrd*, a dissatisfied purchaser of securities filed suit against a securities broker in federal district court, alleging violations of the Securities Exchange Act of 1934 and of various state law provisions. *Id.* at 214. Federal jurisdiction over the state law claims was based on diversity of citizenship and pendent jurisdiction. *Id.* The broker filed a motion to sever the pendent state law claims and compel arbitration of these claims, pursuant to an agreement signed by the customer providing that any controversy arising from transactions between the broker and the customer would be settled by arbitration. *Id.* The district court denied the motion to sever the pendent claims and compel arbitration, and the Court of Appeals for the Ninth Circuit affirmed. *Id.* at 215-16. The Supreme Court reversed and remanded. *Id.* at 219. The Court held that the Federal Arbitration Act "requires district courts to compel arbitration of pendent arbitrable claims . . . even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. *Id.* at 217; see Recent Developments, *Federal and State Securities Claims: Litigation or Arbitration?*, 61 WASH. L. REV. 245 (1986).

89. 470 U.S. at 219.

90. *Id.* at 217. The Federal Arbitration Act provides: "A written provision in . . . a contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable . . ." 9 U.S.C. § 2 (1982). The Court stated that the Act does not allow federal district courts to use their discretion in determining whether a claim should go to arbitration. 470 U.S. at 219. Rather, the Court declared that where an arbitration agreement has been signed, "the district court *shall* direct the parties to proceed to arbitration." *Id.* at 218 (emphasis supplied by Court).

91. 470 U.S. at 221. One commentator has compared the impact of the court's decision in *Byrd* with the impact of the *Steelworkers Trilogy*, observing that "[t]he Court has put its imprimatur on a federalization of arbitration, compara-

In *Byrd*, the Court emphasized the national policy favoring enforcement of private agreements as a justification for compelling arbitration.⁹² In *Barrowclough*, however, the court justified its decision to compel arbitration by relying on cases involving rights under collectively bargained agreements.⁹³ The policies underlying the presumption of arbitrability as it evolved in the collective bargaining context were not implicated by *Barrowclough*'s ERISA claims. Therefore, the *Barrowclough* court should have focused instead exclusively on the Federal Arbitration Act and its policy favoring enforcement of private agreements to arbitrate.

Recognizing the strong federal policy favoring enforcement of private arbitration agreements enunciated in *Byrd*, it is nonetheless submitted that the *Barrowclough* court should have granted benefit plan participants access to federal court for all ERISA claims, including those that are contractually based. The Supreme Court stated in *Byrd* that "[t]he preeminent concern of Congress in passing the [Federal Arbitration Act] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . . at least absent a countervailing policy manifested in another federal statute."⁹⁴ It is submitted that Congress established such a "countervailing policy" in ERISA when it expressly provided that participants in employee benefit plans should have ready access to federal courts to enforce the terms of their plans.

Ample precedent exists that suggests a statutorily conferred right to select a judicial forum should override an agreement to arbitrate.⁹⁵ In

ble to its role in the dramatic evolution of labor arbitration in the early 1960's." Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1306 (1985); see also Recent Developments, *supra* note 88, at 245 (suggesting federal securities claims should be litigated in federal courts until Congress, courts, and securities industry act to insure adequate protection for investors in arbitration proceedings). For a discussion of the *Steelworker's Trilogy*, see *supra* note 45 and accompanying text.

92. 470 U.S. at 220. The court noted that Congress, in passing the statute, intended to insure that private agreements to arbitrate would be upheld. *Id.* The Court did not look to the *Steelworker's Trilogy* or its progeny in support of its conclusion that arbitration should be compelled.

93. For a discussion of the court's reasoning, see *supra* notes 43-46 and accompanying text.

94. 470 U.S. at 221 (emphasis added).

95. It is submitted that ERISA confers on benefit plan participants a "substantial right" to access to federal court. The Supreme Court recognized that the right to choose a judicial forum is a "substantial right". See *Boyd v. Grand Trunk Western Ry.*, 338 U.S. 263 (1949). In *Boyd*, a railroad employee injured on the job signed agreements with his employer limiting the venue of any action he might bring in the future. *Id.* at 263. The employee later brought suit under the Federal Employers Liability Act (FELA) in a jurisdiction prohibited by the agreement. *Id.* at 264. The Federal Employers Liability Act contains generous jurisdictional provisions, and includes an exculpatory provision that invalidates any contract limiting a common carrier's liability under the Act. See 45 U.S.C. § 56 (1982). After the Michigan Supreme Court had upheld the agreement, the

Wilko v. Swan,⁹⁶ the Supreme Court held that the Securities Act of 1933⁹⁷ conferred the right to select a judicial forum, and that the right could not be waived by an arbitration agreement. In *Wilko*, which involved an agreement to arbitrate disputes arising out of a securities transaction, the Court reasoned that a securities buyer who prospectively waives the right of access to federal court gives up more than a participant in other types of transactions, because the federal securities laws include generous jurisdiction and venue provisions.⁹⁸ This is

United States Supreme Court granted certiorari and reversed. *Id.* at 264, 266. The Court held that a stipulation restricting an employee's choice of venue in an action under the Federal Employers' Liability Act was invalid. *Id.* at 266. The Court reasoned that the right to select a forum was a substantial right, and that an agreement restricting that right would undermine the purpose of the statute. *Id.* It is submitted that the substantial right analysis employed by the *Boyd* Court applies in the ERISA context as well.

96. 346 U.S. 427 (1953). In *Wilko*, a customer sued a brokerage firm to recover damages for alleged misrepresentation in the sale of securities. *Id.* at 429. The defendant asserted that margin agreements between the customer and the brokerage firm, providing that all disputes concerning the securities would be settled by arbitration, required plaintiff to proceed with arbitration. *Id.* Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1982). Relying on § 14, the Court held that the arbitration agreement was void under the Securities Act of 1933. 346 U.S. at 438.

97. 15 U.S.C. §§ 77a-77bbb (1982).

98. 346 U.S. at 435. The Securities Act of 1933 provides that the district courts of the United States shall have jurisdiction of offenses and violations under the Act, the rules, and the regulations promulgated under the Act. 15 U.S.C. § 77v. The Act also provides that the district courts and state courts have concurrent jurisdiction of all suits brought to enforce any liability or duty created by the Act, and grants a wide choice of venue. *Id.* For the full text of § 77n, see *supra* note 96.

The *Wilko* Court observed that "[w]hile a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor." 346 U.S. at 435. So too, it is submitted, Congress enacted ERISA to provide benefit plan participants a vehicle to enforce their rights.

Because Dean Witter did not seek to compel arbitration of Byrd's federal securities claims, the Court did not reach the question of whether claims arising under the Securities Exchange Act of 1934 (1934 Act) are arbitrable. 470 U.S. at 216 n.2. However, in his concurring opinion Justice White suggested that the *Wilko* doctrine prohibiting arbitration of claims arising under the 1933 Act cannot be "mechanically transplanted" to claims arising under the 1934 Act. *Id.* at 224 (White, J., concurring). In the wake of *Byrd*, several courts have held that claims arising under the 1934 Act are subject to valid arbitration agreements. *See, e.g.*, Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (S.D.N.Y. 1985) (state law claims and federal claims arising under 1934 Act are arbitrable); Houlihan v. Schmacker, 620 F. Supp. 61 (E.D. Mo. 1985) (securities fraud claims arising under § 10 and rule 10b-5 of 1934 Act subject to arbitration); Prawer v. Dean Witter Reynolds, Inc., FED. SEC. L. REP. (CCH) ¶ 92,395 (D. Mass. 1985) (arbitration agreement between customer and broker enforceable with respect to claims under 1934 Act, not enforceable with respect to claims under 1933 Act). *But see* Glavin v. Prudential-Bache Securities, Inc., 623 F. Supp. 629 (D.

equally applicable to benefit plan participants, who enjoy similar advantages under ERISA.⁹⁹

In addition, the *Barrowclough* court could have looked to *Lewis v. Merrill Lynch, Pierce, Fenner & Smith*,¹⁰⁰ in which the United States District Court for the Eastern District of Pennsylvania found significant parallels between the Securities Act of 1933 and ERISA. The *Lewis* court concluded that the policy of ERISA favoring access to federal courts overrides the policy favoring enforcement of arbitration agreements.¹⁰¹ The court observed that both Acts were designed to protect a group of "buyers" who are at the mercy of a group of "sellers."¹⁰² The court noted that the sellers are better informed than the buyers and enjoy a superior bargaining position.¹⁰³ Taking the analogy between the Securities Act of 1933 and ERISA further, the court stated that a "pension plan participant is in reality an indirect securities investor, making his investments

S.C. 1985) (broker could not compel customer to arbitrate claims arising under 1934 Act). A recent decision by the District Court for the Southern District of New York cited *Byrd* in holding that there is no statutory justification for refusing to enforce an arbitration agreement covering claims arising under the 1934 Act. *Berner v. Becker Paribas, Inc.*, 18 SEC. REG. & L. REP. (BNA) 258 (S.D.N.Y. Dec. 31, 1985). The *Berner* court went on to hold that because the antifraud provisions of the 1933 and 1934 Acts are "virtually identical," 1933 Act claims should also be subject to arbitration. *Id.* at 259. However, the Third Circuit recently held that *Byrd* did not overrule its decision in *Ayers v. Merrill Lynch* that claims for damages under Section 10(b) of the 1934 Act are not subject to arbitration. *Jacobsen v. Merrill Lynch*, 797 F.2d 1197, 1201 (3d Cir. 1986).

99. For a discussion of the jurisdiction provisions of ERISA, see *supra* notes 32 & 51. ERISA provides that an action brought in a federal district court "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found," and that "process may be served in any other district where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2).

100. 431 F. Supp. 271 (E.D. Pa. 1977). In *Lewis*, the plaintiff was a vested participant in a pension plan who was informed by his former employer that his pension plan had been forfeited when he entered employment with a competitor. *Id.* at 273. The plaintiff sued his former employer, the pension plan, and plan administrators, alleging various violations of ERISA. *Id.* The employer sought a stay of the proceedings pending arbitration, relying on the arbitration agreements that the plaintiff had signed and filed with the New York Stock Exchange in order to become a registered representative. *Id.* The *Lewis* court denied the motion to stay the proceedings, holding that prospective agreements to arbitrate ERISA claims are invalid. *Id.* at 278.

101. *Id.* at 277-78. The court recognized the competing and "highly favored" policies of the Federal Arbitration Act, but concluded "ERISA was enacted to protect pension plan participants and beneficiaries. Exculpation from any of the rights conferred cannot be permitted if the Act is to remain faithful to its mandate." *Id.*

102. *Id.* at 275. In the court's analogy, the "buyers" are pension plan participants and securities investors. *Id.* The "sellers" are the sponsors and administrators of pension plans, and the sellers and brokers of securities. *Id.*

103. *Id.* The court noted that pension plan participants and securities purchasers are similarly situated, because both are "at the mercy of pension plan sponsors and administrators or securities sellers and brokers, each better informed and in a superior bargaining position." *Id.*

through an institutional intermediary, his pension plan.”¹⁰⁴ Based on this analogy, the court concluded that Congress had intended to protect pension plan participants from arbitration agreements that erode federally granted rights, in the same way as it had protected securities investors.¹⁰⁵ Thus, the court held that prospective agreements to arbitrate ERISA claims are invalid.¹⁰⁶

Congress has declared that one purpose of ERISA is to provide “ready access to the Federal courts.”¹⁰⁷ To this end, Congress specifically provided that a benefit plan participant is entitled to bring a civil action “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.”¹⁰⁸ Read together, these provisions are a clear expression of congressional intent to grant benefit plan participants a right to bring all their claims, both contractual and statutory, before the courts. The Third Circuit’s decision in *Barrow-clough* undermines that right. It renders meaningless the provisions that grant plan participants with contractually based claims access to federal courts, since employers can defeat this right by simply requiring arbitration agreements as a condition of participation in an employee benefit plan.¹⁰⁹ Therefore, it is submitted that the Third Circuit and other courts confronting the issue should heed the legislative history and language of ERISA and allow all claims to be brought before federal courts.

Finally, it is submitted that the efficient use of judicial resources and

104. *Id.* The *Lewis* court found the comparison appropriate because interest earned from a pension plan is designed to “sustain” the participant after he retires, just as if he had taken his personal income and directly purchased securities “in lieu of employer contributions to the pension plan.” *Id.* Furthermore, the court found the abuses that the Securities Act was designed to eliminate, “fraud and overreaching between securities sellers and purchasers,” can also occur between pension plan administrators and beneficiaries. *Id.*

105. *Id.* The court reasoned that ERISA can be considered a step toward Congress’ goal of “modifying the rule of caveat emptor as applied to securities transactions.” *Id.* at 276.

106. 431 F. Supp. at 277. The court observed that ERISA does not contain a broad antiwaiver provision like that found in § 14 of the Securities Act of 1933. *Id.* For a discussion of the antiwaiver provision of the Federal Securities Act, see *supra* note 96. ERISA contains a similar provision, but it invalidates only agreements that attempt to relieve a fiduciary of liability for breach of duties that arise under ERISA’s fiduciary responsibility provisions. See 29 U.S.C. § 1110(a). Nevertheless, the court concluded that even “[r]ecognizing the strong policies favoring prior agreements to arbitrate the Court . . . believes that the promises of ERISA to pension plan participants are best kept by holding prospective agreements to arbitrate ERISA claims invalid.” 431 F. Supp. at 278.

107. 29 U.S.C. § 1001(b) (1982). For a discussion of the policy of ERISA favoring access to the federal courts, see *supra* note 32 and accompanying text.

108. See 29 U.S.C. § 1132(a)(1)(B) (1982); 29 U.S.C. § 1132(a)(3) (1982). For the text of these provisions, see *supra* notes 32 & 51 and accompanying text.

109. This concern was recognized by the *Lewis* court. 431 F. Supp. at 277. For a discussion of the *Lewis* decision, see *supra* notes 100-06 and accompanying text.

overcrowded dockets were unspoken factors in the decision of the *Barrowclough* court, and will always be important considerations when courts weigh the merits of arbitration of a particular dispute. Chief Justice Warren Burger has recently decried the increasing congestion and backlogs in all the courts in the country.¹¹⁰ According to the Chief Justice, the solution lies not in creating more judgeships,¹¹¹ but in finding ways of resolving private disputes without resort to the courts.¹¹² Specifically, the Chief Justice has stated, “[i]f the courts are to retain public confidence, they cannot let disputes wait two, three and five years or more to be disposed of. The use of private arbitration is one solution, and lawyers should be at the forefront in moving in this direction.”¹¹³ Given the many advantages of arbitration,¹¹⁴ the pressure of crowded dockets, and precedent such as *Barrowclough*, it is likely that other courts will adopt a presumption of arbitrability for contractually-based ERISA claims.¹¹⁵ The legislative history of ERISA suggests that arbitration may indeed be an acceptable form of dispute resolution for these claims, when structured so as to adequately protect the rights of plan participants.¹¹⁶ However, Congress has not established an arbitration system for ERISA disputes, or promulgated standards for private arbitration. Although the absence of an administrative system or protective standards may not present a danger to participants in a plan governed by a collective bargaining agreement, it could seriously jeopardize the rights of non-union employees like *Barrowclough*.¹¹⁷

110. Remarks by Chief Justice Warren Burger before the American Arbitration Association and the Minnesota State Bar Association, *reprinted in* *ARB. J.*, Dec. 1985, at 3, 4.

111. *Id.* at 4. The Chief Justice pointed out that the cost to taxpayers to sustain one federal judge is more than \$250,000 annually. *Id.* at 5.

112. Chief Justice Burger stated that “in the public interest we must move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration, mediation and conciliation.” *Id.*

113. *Id.* at 6. According to the Chief Justice, “I cannot emphasize too strongly to those in business and industry—and especially to lawyers—that every private contract of real consequence to the parties ought to be treated as a ‘candidate’ for binding private arbitration.” *Id.*

114. The Chief Justice summarized the advantages of private arbitration in large commercial transactions as including the opportunity to select triers by joint agreement, the opportunity to select triers with special expertise in a particular subject matter, the ability to maintain privacy and confidentiality, and the avoidance of delay caused by crowded court calendars. *Id.* at 6.

115. For a discussion of the legislative history concerning the use of arbitration in benefit plan disputes, see *supra* notes 56-66 and accompanying text.

116. That Congress perceived threats to the rights of benefit plan participants arising from the use of unregulated arbitration procedures is evident from the legislative history of ERISA. See *supra* notes 56-66 and accompanying text.

117. See *Lewis v. Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271, 277 (E.D. Pa. 1977). For a discussion of *Lewis*, see *supra* notes 100-06 and accompanying text.

This casebrief does not suggest that *Barrowclough*'s rights were compromised in the arbitration of his dispute with Kidder, Peabody. For a discussion of

In conclusion, it is submitted that the Third Circuit's decision in *Barrowclough* that contractually based ERISA claims are subject to arbitration unnecessarily undermines a fundamental purpose of ERISA. The court disregarded clear statutory language that granted benefit plan participants access to federal court to enforce the terms of their plans. This decision cannot be justified in terms of the countervailing federal policy of enforcing collectively bargained agreements, since neither the Plan itself nor the arbitration agreements were collectively bargained. The effect of *Barrowclough* and other decisions compelling arbitration of contractual claims under ERISA will be to defeat the intent of Congress to provide a federal forum for these claims because employers can require arbitration agreements as a condition to participation in the plan. It is submitted that the clear language of the statute should not have been set aside in a case such as *Barrowclough*, which involved unilaterally imposed arbitration agreements, of questionable applicability to the dispute at hand.¹¹⁸

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the outcome of that arbitration, see *supra* note 30. The arbitration was conducted in accordance with the rules of the New York Stock Exchange. 752 F.2d at 928. These rules appear in N.Y.S.E. GUIDE (CCH) ¶ 2601 (1980). A look at the rules reveals several ways in which a claimant might be disadvantaged. For instance, the rules do not provide for a discovery process, which would be available in a civil action. Also, the rules expressly state that the arbitrators are not bound by the rules of evidence, and have sole discretion as to the admissibility, relevance, and materiality of evidence. Rule 621, N.Y.S.E. GUIDE (CCH) ¶ 2621 (1980). Finally, the arbitrators are chosen by the Director of Arbitration of the New York Stock Exchange. Rule 607, N.Y.S.E. GUIDE (CCH) ¶ 2607 (1980). It is submitted that this raises the possibility of an industry bias. This concern about bias was recently addressed by a commentator. See Recent Developments, *supra* note 88, at 245. The author noted that confidence in the arbitration process is vital, and might be undermined when claimants are required to submit disputes to arbitrators selected by the securities industry. *Id.* at 260; see also Krause, *Securities Litigation: The Unsolved Problem of Predispute Arbitration Agreements for Pending Claims*, 29 DE PAUL L. REV. 693, 720 (1980) (suggesting that in arbitration of securities claims all sectors should have equal representation in formulation of rules).

118. The court also relied on the presumption of arbitrability in reaching its conclusion that *Barrowclough's* dispute with Kidder, Peabody was covered by the arbitration agreement. 752 F.2d at 938. For a discussion of the court's reasoning, see *supra* notes 37-38. However, in an earlier decision the Third Circuit had held that an arbitration agreement similar to that signed by *Barrowclough* did not cover a dispute involving the forced sale of stock upon retirement. See *Ayres v. Merrill Lynch, Pierce, Fenner & Smith*, 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976). In *Ayres*, Merrill Lynch required a broker to sell his Merrill Lynch stock upon retirement. 538 F.2d at 534. The stock was not publicly traded at the time, and the employee was permitted to own the stock only because of his employee status. *Id.* at 533. The employee later charged that the company had withheld information of its decision to go public in violation of the Securities Exchange Act, and alleged that had he known of the decision he would have postponed his retirement and avoided the forced sale of his stock. *Id.* at 534. In response, Merrill Lynch invoked the employee's agreement to ar-

bitrate disputes arising from his employment or its termination. *Id.* The Third Circuit refused to order arbitration, observing that although the claims were connected to the termination of plaintiff's employment in a purely factual sense, they did not concern the respective duties of the employer and employee. *Id.* at 535.

Ayres and *Barrowclough* are similar in important respects. In *Ayres*, the company permitted the employee to purchase the stock only because of his employee status. *Id.* at 533. Likewise, Barrowclough's participation in the Kidder, Peabody Plan was also an option made possible because of his employee status. *See supra* note 16. Although Ayres purchased the stock and Barrowclough participated in the Plan because of their status as employees, neither dispute concerned their rights or duties as employees or related to the terms or conditions of their employment. Both Ayres and Barrowclough asserted rights under federal laws. As a stockholder and seller of securities, Ayres alleged violations of federal and state securities laws. 538 F.2d at 535. As a benefit plan participant, Barrowclough asserted rights under ERISA. Despite the similarity between these two cases, the *Barrowclough* court did not refer to the decision in *Ayres*, or attempt to distinguish that case.