NOTES

ARBITRABILITY OF CLAIMS ARISING UNDER THE SECURITIES EXCHANGE ACT OF 1934

In his concurring opinion in *Dean Witter Reynolds, Inc. v. Byrd,*[1] Justice White raised an issue that was not before the Supreme Court—whether an implied claim under the Securities Exchange Act of 1934 (the Exchange Act)[2] must be arbitrated pursuant to a predispute agreement to arbitrate. Federal courts of appeals had uniformly held Exchange Act claims to be nonarbitrable, based on the Court's holding in *Wilko v. Swan*[3] that claims arising under the Securities Act of 1933 (the Securities Act)[4] are nonarbitrable. Justice White's concurrence questioned whether Exchange Act claims should be protected against arbitration in a similar fashion.[5]

Relying on Justice White's concurrence, the United States Court of Appeals for the Eighth Circuit[6] and a number of federal district courts[7]

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1. 105 S. Ct. 1238 (1985).

2. 15 U.S.C. §§ 78a-78kk (1982).

3. 346 U.S. 427, 438 (1953).

4. 15 U.S.C. §§ 77a-77aa (1982).

5. *Byrd,* 105 S. Ct. at 1244 (White, J., concurring).

6. Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1399 (8th Cir. 1986).

7. Bob Ladd, Inc. v. Adcock, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,514, at 93,104 (E.D. Ark. 1986); Fisher v. Prudential-Bache Sec., Inc., 635 F. Supp. 234, 236-37 (D. Md. 1986); Schriner v. Bear Stearns & Co., 635 F. Supp. 373, 375-76 (N.D. Cal. 1986); Shotto v. Laub, 632 F. Supp. 516, 524-26 (D. Md. 1986); Gerhardstein v. Shearson/American Express, Inc., [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512, at 93,099 (N.D. Ohio 1986); Jope v. Bear Stearns & Co., 632 F. Supp. 140, 143-44 (N.D. Cal. 1985); Brener v. Becker Paribas, Inc., 628 F. Supp. 442, 447-49 (S.D.N.Y. 1985); Sacks v. Dean Witter Reynolds, Inc., 627 F. Supp. 377, 378-79 (C.D. Cal. 1985); Frye v. Paine Webber Jackson & Curtis, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. ¶ 92,516, at 93,109-10 (N.D. Tex. 1985); Prawer v. Dean Witter Reynolds, Inc., 627 F. Supp. 642, 646 (D. Mass. 1985); Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 623 F. Supp. 1005, 1008 (E.D. Mich. 1985); Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1509 (S.D.N.Y. 1985); Peele v. Kidder, Peabody & Co., 620 F. Supp. 61, 63 (W.D. Mo. 1985); McMahon v. Shearson/American Express, 618 F. Supp. 384, 387-89 (S.D.N.Y. 1985), *rev'd,* 788 F.2d 94 (2d Cir. 1986); West v. Drexel Burnham Lambert, Inc., [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,327, at 92,172 (W.D. Wash. 1985); Land v. Dean Witter Reynolds, Inc., 617 F. Supp. 52, 54-55 (E.D. Va. 1985); Jarvis v. Dean Witter Reynolds, Inc., 614 F. Supp. 1146, 1151-52 (D. Vt. 1985); Finn v. Davis, 610 F. Supp. 1079, 1082 (S.D. Fla. 1985); Niven v. Dean Witter Reynolds, Inc., [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,059, at 91,277 (M.D. Fla. 1985).

have held that agreements to arbitrate Exchange Act claims are enforceable. The United States Court of Appeals for the Second Circuit, the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Eleventh Circuit have reaffirmed[8] their pre-*Byrd* holdings[9] that Exchange Act claims are nonarbitrable. The United States Court of Appeals for the Ninth Circuit recently confronted this issue for the first time, and held that Exchange Act claims are nonarbitrable.[10] Because the issue of arbitrability arises in almost all Exchange Act claims brought against brokers and dealers, the resolution of this issue will have a significant impact on Exchange Act litigation.

This note argues that valid public policy considerations continue to support disallowing compelled arbitration of Securities Act claims.[11] The note demonstrates that the similarity between the Securities Act and the Exchange Act—similarity both in certain statutory provisions and in the general purpose of protecting investors—supports denying arbitrability to claims arising under the Exchange Act as well, notwithstanding Justice White's concurrence.[12]

I. ARBITRABILITY OF SECURITIES ACT CLAIMS: *WILKO V. SWAN*

A. *The* Wilko *Doctrine—Securities Act Claims Nonarbitrable.*

Before an investor establishes a securities or investment account with a broker or dealer, the broker or dealer generally will require the investor to enter into a written customer agreement.[13] These standard agreements usually require investors to submit to arbitration any disputes arising from the relationship with the broker or dealer.[14] The Federal Arbitration Act[15] provides that such a written agreement to arbitrate

8. Miller v. Drexel Burnham Lambert, Inc., 791 F.2d 850, 854 (11th Cir. 1986); King v. Drexel Burnham Lambert, Inc., 796 F.2d 59, 60 (5th Cir. 1986); McMahon v. Shearson/American Express, Inc., 788 F.2d 94, 98 (2d Cir. 1986).

9. Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1025-26 (11th Cir. 1982); Allegaert v. Perot, 548 F.2d 432, 436-38 (2d Cir.), *cert. denied,* 432 U.S. 910 (1977); Sibley v. Tandy Corp., 543 F.2d 540, 543 n.3 (5th Cir. 1976), *cert. denied,* 434 U.S. 824 (1977).

10. Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 524 (9th Cir. 1986).

11. *See infra* notes 33-49 and accompanying text.

12. *See infra* notes 122-45 and accompanying text.

13. *See* Exchange Act Release No. 15,984, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,122, at 81,976 (July 2, 1979).

14. *Id.* An arbitration clause in one such agreement read as follows:

> Any controversy arising out of or relating to the account of the undersigned, to transactions with you for the undersigned or to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc. or the Board of Governors of the New York Stock Exchange or the American Stock Exchange as the undersigned may elect.

Liskey v. Oppenheimer & Co., 717 F.2d 314, 315 n.2 (6th Cir. 1983).

15. 9 U.S.C. §§ 1-14 (1982).

future disputes "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[16]

Despite this general statutory mandate, the Supreme Court held in *Wilko v. Swan*[17] that arbitration of a claim arising under section 12(2) of the Securities Act could not be compelled. In *Wilko,* a securities buyer who had signed margin agreements providing for the arbitration of all future disputes brought an action in federal court against a securities brokerage firm to recover damages for misrepresentation under section 12(2) of the Securities Act.[18] The Supreme Court reinstated the district court's denial of the defendant's motion to compel arbitration.[19] The Court recognized that Congress intended the Arbitration Act to promote arbitration.[20] The Court reasoned, however, that because the right to recover under section 12(2) is a "special right"—in that the seller has the burden of proving lack of scienter and the purchaser has a wide choice of venue—differing from the common law right to recover for misrepresentation,[21] the Securities Act should prevail over the Arbitration Act.[22]

The Court declared itself compelled by the language of section 14 of the Securities Act to hold the arbitration agreement unenforceable with respect to the Securities Act claim.[23] Section 14 provides that any "stipulation" waiving compliance with any "provision" of the Securities Act is void.[24] The Court held that an agreement to arbitrate claims arising under the Securities Act was such a stipulation because it infringed upon the right of the purchaser to select the judicial forum.[25]

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16. *Id.* § 2.

17. 346 U.S. 427, 438 (1953).

18. *Id.* at 428-30.

19. *Id.* at 429-30, 438.

20. *Id.* at 431-32.

21. *Id.* at 431. Section 12(2) is enforceable in federal court or state court, and removal from state court is prohibited. 15 U.S.C. § 77v(a) (1982).

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

23. *Id.* at 434-35.

24. 15 U.S.C. § 77n (1982). The Exchange Act has a similar nonwaiver provision, § 29(a), 15 U.S.C. § 78cc(a) (1982). The other acts under the jurisdiction of the Securities and Exchange Commission contain nonwaiver provisions as well. *See* Trust Indenture Act of 1939 § 327, 15 U.S.C. § 77aaaa (1982); Public Utility Holding Company Act § 26(a), 15 U.S.C. § 80a-46(a) (1982); Investment Advisers Act § 215(a), 15 U.S.C. § 80b-15(a) (1982).

25. *Id.* The Court then discussed the policy reasons for protecting the purchaser's right to select the forum:

> While 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. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than [do] buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers. When the security

The assumption that arbitration would not provide as effective a remedy for the violation of investors' rights was an important element of the Court's decision in *Wilko*.[26] The Court noted that arbitration would be a less effective means to enforce the Securities Act for two reasons. First, the arbitrator would be forced to make subjective findings on the alleged violator's state of mind without judicial instruction on the law.[27] Second, appellate review of arbitrators' decisions is restricted.[28]

Although arbitration has become widely accepted in recent years as an alternative to litigation, *Wilko* remains good law. The Court continues to note the vitality of *Wilko*,[29] and although the *Byrd* Court was urged to overrule *Wilko*, it did not do so.[30] Some commentators have argued, however, that the rationale underlying *Wilko* is no longer

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buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions.

Id. at 435.

The Court's reference to the "disadvantages under which buyers labor" reflected a concern about buyers' lack of access to information about securities. It is also important to note that buyers labor under another disadvantage which justifies the protections extended them by Congress—they often must accept the terms of an adhesion contract when purchasing securities. Yet an arbitration agreement is seldom struck down on the ground that it is part of an adhesion contract. *See* McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384, 386-87 (S.D.N.Y. 1985) (noting that arbitration agreements are routinely upheld absent showing of fraud, duress, or inequality of bargaining power), *rev'd on other grounds*, 788 F.2d 94 (2d Cir. 1986); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 n.2 (8th Cir. 1984) (finding alleged adhesion contracts to arbitrate not "inherently unfair" and enforcing the agreements). *But cf.* Richards v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 64 Cal. App. 3d 899, 902-06, 135 Cal. Rptr. 26, 27-30 (1977) (voiding adhesion contract binding nonmember of New York Stock Exchange to arbitrate when arbitrators had been selected pursuant to procedural rules deemed fundamentally unfair to reluctant nonmembers). Furthermore, if a party alleges fraud in the inducement of the contract embodying the arbitration agreement, a federal court will not invalidate the contract unless there has been fraud in the inducement of the arbitration clause itself; the arbitrator will decide the issue of fraud in the inducement of the general contract. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

26. Had the Court perceived arbitration to be fully effective in protecting investors, its opinion would have rested solely on the nonwaiver provision of the Securities Act without any underlying policy rationale.

27. *Wilko*, 346 U.S. at 435-36.

28. *Id.* at 436.

In dissent, Justice Frankfurter stated: "There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system as practiced in the City of New York, and as enforceable under the supervisory authority of the District Court for the Southern District of New York, would not afford the plaintiff the rights to which he is entitled." *Id.* at 439 (Frankfurter, J., dissenting). The dissent argued that judicial review of the arbitrator's decision would safeguard against any misapplication or disregard of the law by an arbitrator. *Id.* at 440.

29. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3355 (1985); *Byrd*, 105 S. Ct. at 1240 n.1.

30. *See Byrd*, 105 S. Ct. at 1240 n.1.

valid.[31] According to these commentators, courts should not exempt federal securities claims from arbitration because arbitration has improved to such an extent that—with some minor adjustments in arbitration procedures—it could safeguard investors' rights effectively.[32]

Such arguments are not persuasive. Arbitration procedures have not changed sufficiently since *Wilko* was decided to eliminate the Court's fundamental objections to allowing adversaries to arbitrate Securities Act claims. Arbitration is not as effective as adjudication in federal court as a means of protecting investors' rights because the purposes underlying arbitration fundamentally conflict with the right to a federal forum granted under the Securities Act and the Exchange Act. The primary purpose of arbitration is the quick disposition of disputes.[33] Courts, in contrast, are willing to sacrifice speed and incur expense because they are concerned with reaching the "right" result.

Several differences between arbitration procedure and court procedure could significantly affect the resolution of federal securities claims. Not only are arbitrators free to dispense with formal rules of evidence,[34] but they are also not required to follow substantive principles of law.[35]

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31. *See* Katsoris, *The Arbitration of a Public Securities Dispute,* 53 FORDHAM L. REV. 279, 312-14 (1984); Krause, *Securities Litigation: The Unresolved Problem of Predispute Arbitration Agreements for Pendent Claims,* 29 DE PAUL L. REV. 693, 721 (1984).

32. As one commentator has stated:

> Arbitration represents the only remedy that provides a meaningful dimension of due process without the prohibitive costs, delay, and protractions of litigation. When weighed against the potential dilution and waiver of certain substantive legal rights, arbitration should be found to be an acceptable manner of resolving securities disputes. Accordingly, once clear, unambiguous and fair arbitration provisions are formulated, *Wilko v. Swan* must be overruled.

Krause, *supra* note 31, at 721. *See also* Katsoris, *supra* note 31, at 312-14 (arguing that *Wilko's* restraint should be abolished once securities arbitration procedures are streamlined and placed under jurisdiction of independent organization governed by members of public and securities industry). *But see* L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1193 (1983) (labeling *Wilko* decision "eminently sensible"); Note, *Federal and State Securities Claims: Litigation or Arbitration?,* 61 WASH. L. REV. 245, 260-61 (1986) (arguing that *Wilko* should not be overruled until securities arbitration has been "substantially improved").

33. Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972) ("[T]he very purpose of arbitration . . . is to provide a relatively quick, efficient and informal means of private dispute settlement."); *In re* Arbitration Between Mole and Queen Ins. Co. of Am., 14 A.D.2d 1, 2-3, 217 N.Y.S.2d 330, 332 (1961) ("The principal purpose of arbitration is to reach a speedy and final result and to avoid protracted litigation.").

34. *See* COMMERCIAL ARBITRATION RULES Rule 31 (American Arbitration Association 1986) ("[C]onformity to legal rules of evidence shall not be necessary."); CODE OF ARBITRATION PROCEDURE § 34 (National Association of Securities Dealers, Inc. 1984) ("The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence."); *see also* M. HILL & A. SINICROPI, EVIDENCE IN ARBITRATION 1 (1980) ("Since arbitration is essentially a fact-finding proceeding, the arbitrator is not bound by any formal rules of evidence.").

35. *See* M. DOMKE, COMMERCIAL ARBITRATION § 25:01 (rev. ed. 1984) ("[A]rbitrators need not follow otherwise applicable law when deciding issues before them unless they are commanded to

In addition, the discovery provisions of the Federal Rules of Civil Procedure do not apply to arbitration proceedings.[36] Arbitrators are required neither to state the reasons underlying their awards nor to make written findings of fact,[37] and judicial review of arbitration awards is quite limited.[38] Furthermore, arbitrators are not bound by the doctrine of stare

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do so by the terms of the arbitration agreement." (quoting University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1140 (Alaska 1974))); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense,* 2 CARDOZO L. REV. 481, 483 (1981) ("Arbitrators in this country are not bound by substantive private law."). *Cf.* Mentschikoff, *Commercial Arbitration,* 61 COLUM. L. REV. 846, 861 (1961) (survey of American Arbitration Association arbitrators indicated that 80% thought they ought to follow principles of substantive law but almost 90% believed they were free to ignore them if they desired).

36. *See* Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) ("While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege." (citation omitted)); Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9, 11 (E.D. Pa. 1960) ("[I]n a proceeding before arbitrators neither the statute nor the rules make available to any party thereto the discovery procedures provided in the Federal Rules of Civil Procedure."); *see also* Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11, 13-14 (S.D. Tex. 1967) (judicially controlled discovery not allowed in arbitration proceeding absent showing that "exceptional situation" exists). *See generally* Katsoris, *supra* note 31, at 287 n.52 (comparing court discovery procedures to arbitration discovery procedures).

Without the discovery rights provided by the Federal Rules of Civil Procedure, an investor may be placed at a substantial disadvantage in an arbitration proceeding against a broker or dealer, for "without discovery [the investor] may be unable to learn the volume of commissions generated by his account in relation to other accounts, the nature of recommendations made by the broker's research department, and possible conflicts of interest." Comment, *Arbitration of Investor-Broker Disputes,* 65 CALIF. L. REV. 120, 131 (1977). In contrast, the broker or dealer will have such information in its possession, magnifying the disadvantages to the customer. *Id.* at 131-32.

37. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) (arbitrators need not give reasons for an award); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956) (same); Case v. Alperson, 181 Cal. App. 2d 757, 761, 5 Cal. Rptr. 635, 638 (1960) (arbitrators need not make findings of fact); M. DOMKE, *supra* note 35, § 29:06, at 435-36 (arbitrators need not explain facts or make formal findings of fact).

The president of the American Arbitration Association has encouraged arbitrators not to write opinions setting forth the reasons for their awards. *See* R. COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 26 (1980) ("Written opinions can be dangerous because they identify targets for the losing party to attack."). Stenographic records of an arbitration hearing are not made unless requested and paid for by one of the parties. *See* COMMERCIAL ARBITRATION RULES Rule 23 (American Arbitration Association 1986); CODE OF ARBITRATION PROCEDURE § 37 (National Association of Securities Dealers, Inc. 1984).

If arbitrators were subject to judicial review and thus required to write opinions setting forth findings of fact and conclusions of law, arbitration "would no longer resemble arbitration as it has developed in this country, and no longer offer many of the advantages for which arbitration is known." Sterk, *supra* note 35, at 484-85.

38. Nearly all states have adopted the provision of the Uniform Arbitration Act governing judicial vacation of an arbitration award, and similar rules apply to federal courts under the Federal Arbitration Act, 9 U.S.C. § 10 (1982). G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION § 5.04, at 62 (1983). Under the Federal Arbitration Act, the Uniform Arbitration Act, and similar statutes, there are four grounds for vacating an arbitration award:

> (1) There was an undisclosed relationship between an arbitrator and a party or his counsel affecting the arbitrator's impartiality or appearance of impartiality.
>
> (2) An arbitrator was corrupt.

decisis to follow prior arbitration decisions.[39] Finally, the expertise of federal judges in adjudicating federal law may often exceed that of arbitrators because arbitrators are not required to be lawyers.[40]

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(3) The arbitrators did not schedule or conduct the hearing in a fair and judicious manner.

(4) The arbitrators granted relief that they were not authorized to grant under the contract pursuant to which the arbitration was held.

Id. § 5.04, at 63.

Generally, courts will *modify* an arbitration award only when a mistake, such as a mistake in calculation, is apparent on the face of the award. *Id.* § 5.05, at 63.

An arbitration award will not be overturned by a court for erroneous findings of fact or misinterpretations of the law by the arbitrator. *See* French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986). The arbitrator's decision must be confirmed by the court unless it is "completely irrational," *id.* (quoting Swift Indus. v. Botany Indus., 466 F.2d 1125, 1131 (3d Cir. 1972)), or unless it is in "manifest disregard of the law." *French,* 784 F.2d at 906 (quoting George Day Constr. Co. v. United Bhd. of Carpenters, 722 F.2d 1471, 1477 (9th Cir. 1984)). This lax standard of review results from the desire to make arbitration both informal and binding: "An occasional mistake by an arbitrator, left uncorrected by the courts, is the price that must be paid for a healthy system of binding arbitration." R. COULSON, *supra* note 37, at 26.

Challenging an arbitration award on the basis of errors of fact or law is made even more difficult by the common practice among arbitrators not to provide written opinions. *See id.* at 28 ("Because commercial arbitrators do not write opinions explaining the reasons for their decision, it may be difficult to determine whether an arbitrator has exceeded his or her powers. An undisclosed error of judgment is therefore virtually immune from attack."); M. DOMKE, *supra* note 35, § 25:05, at 396 ("Siuce the arbitrator does not have to state reasons for an award, whether and how he has applied the substantive rules of law is difficult to ascertain when the award is being challenged.").

The difficulty an investor encounters in securing judicial review is illustrated in Sobel v. Hertz, Warner & Co., 338 F. Supp. 287 (S.D.N.Y. 1971), *rev'd,* 469 F.2d 1211 (2d Cir. 1972). Sobel, a brokerage firm customer, elected to arbitrate a dispute involving claims of market manipulation and fraud perpetrated by representatives of the brokerage firm. *Id.* at 289-91. After the arbitration panel dismissed the claims *without explanation, id.* at 292, one of the firm's representatives was convicted on conspiracy charges in connection with the same activity. *Id.* at 290-91. Sobel moved to vacate the arbitration award on the ground that the arbitrators' determination ignored the federal securities laws. The district court remanded the matter to the arbitrators "for an indication, now wholly lacking from the record, of the basis on which the petitioner's claim was dismissed." *Id.* at 289. The United States Court of Appeals for the Second Circuit reversed, holding that the arbitrators had no obligation to clarify the reasons for the award if any ground for the decision could be inferred from the facts. Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1216 (2d Cir. 1972).

One commentator has cited *Sobel* as a vivid example "that for all practical purposes there is no right to appellate review of arbitration awards." E. BRODSKY, GUIDE TO SECURITIES LITIGATION 305 (1974). Another commentator states that the decision shows "that investors are likely to get short shrift on their securities fraud claims submitted to arbitration." Comment, *supra* note 36, at 130.

Finally, judicial review of arbitration awards is further limited in that an arbitration award may not be challenged on the ground of newly discovered evidence. *See* Levine v. Klein, 70 A.D.2d 532, 533, 416 N.Y.S.2d 28, 29 (1979); *In re* Arbitration Between Molc and Queen Ins. Co. of Am., 14 A.D.2d 1, 3, 217 N.Y.S.2d 330, 332 (1961); M. DOMKE, *supra* note 35, § 33:05, at 473-74.

39. *See* M. HILL & A. SINICROPI, *supra* note 34, at 40-41.

40. *See* M. DOMKE, *supra* note 35, § 21:01, at 317 ("There are no specific requirements with respect to the qualifications of arbitrators in any arbitration statute in the United States."). Moreover, the arbitration panels provided by the New York Stock Exchange and the American Stock Exchange may be biased, as they have a "high degree of securities industry representation." Comment, *supra* note 36, at 123 & n.20.

Moreover, *Wilko* should not be undermined because to do so would conflict with congressional intent.[41] Allowing investors and brokers to require arbitration would violate the antiwaiver provision of the Securities Act and could thereby reinforce "the disadvantages under which [securities] buyers labor."[42] If this policy is to change, Congress, not the courts, should change it.

The Securities and Exchange Commission (SEC) recently demonstrated its support for *Wilko* by adopting Rule 15c2-2, which makes it a "fraudulent, manipulative or deceptive act or practice" for brokers or dealers to purport to bind public customers to arbitrate future disputes under the federal securities laws.[43] The SEC phased in this rule during 1984 by allowing brokers and dealers to continue to use preexisting customer agreement forms but requiring them to disclose in writing that the customer need not arbitrate disputes arising under the federal securities laws.[44] In announcing the adoption of this rule, the SEC noted that courts had consistently held claims arising under the Securities Act and Exchange Act to be nonarbitrable.[45] The SEC decided to adopt Rule 15c2-2, however, because brokers and dealers continued to include *unrestricted* arbitration clauses in customer agreement forms.[46]

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41. The basic purpose of the Securities Act is to protect investors against fraud and misrepresentation by issuers and sellers of securities. S. REP. NO. 47, 73d Cong., 1st Sess. 1-2 (1933); H.R. REP. NO. 85, 73d Cong., 1st Sess. 2-3 (1933). *See also* Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) ("[T]he basic purpose of the [Securities] Act [is] to provide greater protection to purchasers of registered securities."); SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953) ("The design of the [Securities Act] is to protect investors . . . ."). Although there is no legislative history explaining the specific purpose of section 14, the nonwaiver provision of the Act, that provision clearly is consistent with the Act's general purpose of protecting investors against fraud and misrepresentation. Thus, to the extent that a predispute agreement to arbitrate requires an investor to forfeit the procedural protections of federal court, *see supra* note 34-40 and accompanying text, judicial enforcement of such an agreement conflicts with the congressional intent underlying the Securities Act.

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

43. 17 C.F.R. § 240.15c2-2(a) (1985).

44. *See* 17 C.F.R. § 240.15c2-2(b) (1985). This disclosure requirement was in effect from December 28, 1983, to December 31, 1984. *Id.* The broker or dealer who chose to use existing supplies of customer agreement forms bearing the standard arbitration clause was required to make the following written disclosure:

> Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

Id.

45. *See* Exchange Act Release No. 20,397, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,452, at 86,357 (Nov. 18, 1983).

46. *See id.* The SEC had noted in an earlier release that customers who sign broker-dealer agreements are frequently not well informed of their rights, and consequently, "a customer who receives from the broker-dealer a demand for arbitration pursuant to the customer agreemeut may

The SEC also indicated its support for extending *Wilko*'s protection against arbitrability to the Exchange Act.[47] By its terms, Rule 15c2-2 applies to "the Federal securities laws"[48] and thus appears to apply equally to the Securities Act and the Exchange Act. However, courts have interpreted the rule as implementing, not changing, the existing law on arbitrability.[49] Because the law on this issue is not entirely settled, Rule 15c2-2 will not by itself prevent the arbitration of Exchange Act claims.

B. *Limitations on the* Wilko *Doctrine.*

The *Wilko* doctrine is not absolute; Congress and the Supreme Court have imposed some direct limitations on it. In *Scherk v. Alberto-Culver Co.*,[50] the Court refused to hold that *Wilko* prevented the arbitration of Exchange Act claims pursuant to an arbitration clause contained in an international agreement entered into by parties of equal bargaining power. The Court emphasized the international character of the contract and noted that conflict-of-laws problems not present in *Wilko* were implicated.[51] The Court reasoned that a refusal to enforce the arbitration agreement would have jeopardized the interests of the party forced to litigate under the laws of a foreign jurisdiction and might have deterred businesses from entering into future international commercial

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not be aware that he or she may have the right to avoid arbitration if there is a claim arising under the federal securities laws." Exchange Act Release No. 15,984, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,122, at 81,977-78 (July 2, 1979). According to the SEC, some customers might have been induced by the representations of the broker-dealer to submit their claims to arbitration while others might have been induced to forgo pursuing their claims at all. *Id.* at 81,978. The representations could thereby "effectively deprive[ ]" investors of their right to choose an alternate forum. *Id.*

47. *See* Exchange Act Release No. 20,397, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,452, at 86,357 (Nov. 18, 1983). The SEC suggested that *Wilko*'s protection against arbitrability should extend to other federal securities laws as well:

> Several commentators noted that to date predispute arbitration clauses have been held unenforceable only with respect to causes of action arising under the Securities Act of 1933 and the Securities Exchange Act of 1934. . . . These commentators have cited no basis upon which the Commission can determine that the *Wilko* analysis does not hold equally true for other federal securities acts, which contain substantially identical anti-waiver provisions.

Id. at 86,357 n.6.

48. 17 C.F.R. § 240.15c2-2 (1985).

49. *See* Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1398 n.17 (8th Cir. 1986). The rule was drafted carefully so that it would not conflict with the exceptions to the *Wilko* doctrine allowing arbitration of existing disputes, arbitration of disputes between members of national exchanges, and arbitration of disputes arising from international transactions. Exchange Act Release No. 20,397, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,452, at 86,357-58 (Nov. 18, 1983). For a discussion of the exceptions to the *Wilko* doctrine, see *infra* notes 50-60 and accompanying text.

50. 417 U.S. 506, 519-21 (1974).

51. *Id.* at 515-18.

transactions.[52]

In addition, *Wilko* does not bar the arbitration of disputes between members of national securities exchanges or the National Association of Securities Dealers (NASD). Section 28(b) of the Exchange Act provides that the nonwaiver provision in section 29(a) does not prevent the enforcement of agreements by self-regulatory organizations to settle disputes between their members.[53] Courts therefore regularly require arbitration of disputes between members of self-regulatory organizations arising under the Exchange Act.[54] One commentator has stated that section 28(b) reflects the congressional belief that members of national securities exchanges are sophisticated and therefore do not need the protection of the nonwaiver provisions.[55] Although the Securities Act does not contain a provision equivalent to section 28(b) of the Exchange Act,[56] courts have upheld the arbitration of like disputes arising under the Securities Act.[57] Furthermore, most courts will enforce a predispute arbitration clause when both parties are generally knowledgeable about the securities industry and are negotiating at arms length from positions of equal bargaining power.[58]

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52. *Id.* at 517-18. *Cf.* AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 157-59 (2d Cir. 1984) (agreement between Dutch investor and Dutch investment partnership to resolve all disputes in the Netherlands under Dutch law held enforceable, notwithstanding section 29(a) of the Exchange Act); Tamari v. Bache & Co. (Lebanon) S.A.L., 565 F.2d 1194, 1200 (7th Cir. 1977) (Commodity Exchange Act does not bar arbitration of international commodity dispute), *cert. denied,* 435 U.S. 905 (1978); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977) (same).

53. 15 U.S.C. § 78bb(b) (1982). The NASD is the only securities association registered as a self-regulatory organization under section 15A of the Exchange Act, 15 U.S.C. § 78o-3 (1982). *See* T. HAZEN, THE LAW OF SECURITIES REGULATION § 10.2, at 259 (1984). Ten national securities exchanges, including the New York Stock Exchange and the American Stock Exchange, qualify and are registered as self-regulatory organizations under section 6 of the Exchange Act, 15 U.S.C. § 78f (1982). *See* T. HAZEN, *supra,* § 10.2, at 259. All broker-dealers are now required to be members of either a national exchange or a registered securities association that qualifies as a self-regulatory organization. *See* 15 U.S.C. § 78o(b)(8) (1982 & Supp. II 1984).

54. *See, e.g.,* Tullis v. Kohlmeyer & Co., 551 F.2d 632, 637-38 (5th Cir. 1977); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1213-14 (2d Cir.), *cert. denied,* 406 U.S. 949 (1972); N. Donald & Co. v. American United Energy Corp., 585 F. Supp. 533, 535-36 (D. Colo.), *aff'd,* 746 F.2d 666 (10th Cir. 1984).

55. *See* Peloso, *Agreements to Arbitrate,* 13 REV. SEC. REG. 943, 947 (1980).

56. *See* Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838, 843 (2d Cir. 1971); Peloso, *supra* note 55, at 947; *see also* Brown v. Gilligan, Will & Co., 287 F. Supp. 766, 772 (S.D.N.Y. 1968) ("Permitting broker-dealers to agree in advance to arbitrate controversies arising between them would not appear to offend the congressional intent underlying passage of the [Securities] Act.").

57. *See* Tullis v. Kohlmeyer & Co., 551 F.2d 632, 633 n.1, 637-38 (5th Cir. 1977); Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838, 843 (2d Cir. 1971); Brown v. Gilligan, Will & Co., 287 F. Supp. 766, 775 (S.D.N.Y. 1968).

58. *See* Katsoris, *supra* note 31, at 295 & n.115; Peloso, *supra* note 55, at 946-47; *see also* Alco Standard Corp. v. Benalal, 345 F. Supp. 14, 24 (E.D. Pa. 1972) (suggesting validity of arbitration clause negotiated at arm's length between sophisticated investors); GCA Corp. v. Coler, [1971-1972

Finally, *Wilko* does not bar enforcement of an agreement to submit an existing dispute—as opposed to a future dispute—to arbitration, even if the dispute involves claims arising under the Securities Act or the Exchange Act.[59] Courts will uphold such agreements, which waive the right to bring an action in court, provided the waiving party has sufficient knowledge to make an informed waiver.[60]

C. *Application of* Wilko *to the Exchange Act.*

Although *Wilko* bars the arbitration of Securities Act claims (subject to a few well-defined exceptions[61]), *Wilko*'s applicability to Exchange Act claims is less certain. The Supreme Court first addressed this issue in 1974 in *Scherk v. Alberto-Culver Co.*[62] In *Scherk,* the Court stated in dictum[63] that "a colorable argument could be made" that *Wilko* does not bar arbitration of an implied cause of action arising under section 10(b) of the Exchange Act.[64] The Court distinguished the " 'special right' of a

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Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,339, at 91,815 (S.D.N.Y. 1972) ("[T]he public policy offended by a brokerage house customer's relinquishment of his right to sue in the courts is not offended by a similar relinquishment made between parties who deal at arm's length from equal bargaining positions."). *But see* Miller v. Schweickart, 405 F. Supp. 366, 369 (S.D.N.Y. 1975) (refusing to undertake subjective determination of whether plaintiff was sophisticated); Newman v. Shearson, Hammill & Co., 383 F. Supp. 265, 268 (W.D. Tex. 1974) ("The federal securities laws do not distinguish between sophisticated and unsophisticated investors . . . ."); Krause, *supra* note 31, at 703 n.58 (noting that some courts have refused to apply the "sophisticated investor" exception).

59. *See* Gardner v. Shearson, Hammill & Co., 433 F.2d 367, 368 (5th Cir. 1970), *cert. denied,* 401 U.S. 978 (1971); Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968); Katsoris, *supra* note 31, at 295 & n.116; Peloso, *supra* note 55, at 948.

60. *See* Malena v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,492, at 98,449 (E.D.N.Y. 1984) ("The *Wilko* Court did not seek to prohibit voluntary arbitration; rather, it sought to prevent and protect an investor from unknowingly waiving a right granted by the federal securities law."); L. Loss, *supra* note 32, at 1191-92 (although non-waiver provisions void waivers by agreement, they do not preclude waiver by conduct or settlements of existing controversies). In order for the dispute to be an "existing controversy," the investor must be aware that a dispute exists and that it involves potential securities laws violations. *See* Malena v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,492, at 98,450 (E.D.N.Y. 1984).

Existing disputes under federal antitrust laws may likewise be submitted to arbitration even though predispute arbitration agreements will not be enforced. *See* Sterk, *supra* note 35, at 508. Public policy can explain this difference in treatment: the public has a strong stake in the proper enforcement of antitrust claims, and regularly submitting those claims to arbitration might fail to protect the public interest adequately. Once there is an existing antitrust claim, however, the parties may settle it by whatever means they choose, including by arbitration, because there is no public policy against the voluntary settlement of private antitrust claims. *Id.* at 508 & n.96.

61. *See supra* notes 50-60 and accompanying text.

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

63. The Court assumed for the purposes of its decision "that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934 . . . ." *Id.* at 515.

64. *Id.* at 513.

private remedy for civil liability" provided by section 12(2) of the Securities Act from the implied private cause of action under section 10(b) of the Exchange Act, noting that "the [Exchange] Act itself does not establish the 'special right' that the Court in *Wilko* found significant."[65] The Court further distinguished *Wilko* on the ground that the Exchange Act does not guarantee plaintiffs the wide choice of forum that section 22 of the Securities Act guarantees.[66]

Despite the Court's dictum in *Scherk,* all federal courts of appeals that addressed the issue during the decade following *Scherk* held *Wilko* applicable to Exchange Act claims.[67] These courts relied primarily on an Exchange Act provision barring the waiver of any of the Act's provisions.[68] This nonwaiver provision is practically identical to the nonwaiver provision in the Securities Act—the provision on which the *Wilko* Court based its decision.[69] The courts accordingly reasoned that because the general purposes underlying each Act are the same, the nonwaiver provision in each should preclude arbitration agreements from infringing upon the protection of federal jurisdiction.[70] These courts distinguished

65. *Id.* at 513-14.

66. *Id.* at 514. The Court compared the jurisdictional provision of the Securities Act with that of the Exchange Act and noted that section 22 of the Securities Act, 15 U.S.C. § 77v (1982), allows a plaintiff to bring an action in either federal or state court and prohibits removal from state court, whereas section 27 of the Exchange Act, 15 U.S.C. § 78aa (1982), provides for suit only in federal district courts with "exclusive jurisdiction." *Scherk,* 417 U.S. at 514. This provision of the Exchange Act, according to the Court, "significantly restrict[s] the plaintiff's choice of forum." *Id.*

67. *See* Raiford v. Buslease Inc., 745 F.2d 1419, 1421 (11th Cir. 1984); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1030 (6th Cir. 1979), *vacated,* Chicago Bd. Options Exch., Inc. v. Board of Trade, 459 U.S. 1026 (1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 827-29 (10th Cir. 1978); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 833-36 (7th Cir. 1977); Allegaert v. Perot, 548 F.2d 432, 437-38 (2d Cir.), *cert. denied,* 432 U.S. 910 (1977); Sibley v. Tandy Corp., 543 F.2d 540, 543 n.3 (5th Cir. 1976), *cert. denied,* 434 U.S. 824 (1977); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536-37 (3d Cir.), *cert. denied,* 429 U.S. 1010 (1976).

Three other circuits, in dictum, expressed support for the argument that *Wilko* extends to Exchange Act claims. *See* Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 (8th Cir. 1984); Ingbar v. Drexel Burnham Lambert, Inc., 683 F.2d 603, 605 (1st Cir. 1982); De Lancie v. Birr, Wilson & Co., 648 F.2d 1255, 1257-59 (9th Cir. 1981). The Fourth Circuit has not addressed the issue. *See* Blomquist v. Churchill, 633 F. Supp. 131, 133 n.4 (D.S.C. 1985).

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

69. *See supra* notes 24-25 and accompanying text. Section 14 of the Securities Act, 15 U.S.C. § 77n (1982), 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."

70. As one court stated:

> It is enough to say that the Supreme Court found prospective waivers of the right to judicial trial and review to be inconsistent with Congress' overriding concern for the protection of investors. . . . We are not . . . persuaded that either the differences between the rights

Scherk on the ground that the parties in *Scherk* had equal bargaining power and were involved in an international transaction.[71]

II. *BYRD* AND THE ARBITRABILITY OF EXCHANGE ACT CLAIMS

A. Dean Witter Reynolds, Inc. v. Byrd.

The federal courts at one time applied two different procedures for accommodating the joinder of arbitrable state claims with nonarbitrable federal claims. Some courts adopted a bifurcated approach, which involved severing the arbitrable claims and directing that such claims be arbitrated.[72] Other courts embraced the "intertwining doctrine"—when the arbitrable and nonarbitrable claims were legally and factually intertwined, the court would deny a motion to arbitrate the state claims and would exercise pendent jurisdiction to adjudicate those claims.[73]

The Supreme Court resolved this split in *Dean Witter Reynolds, Inc. v. Byrd*.[74] The plaintiff, A. Lamar Byrd, had invested $160,000 in securities through broker-dealer Dean Witter Reynolds, Inc.[75] Shortly after Byrd made the investment, the value of his account declined by more than $100,000.[76] Byrd sued Dean Witter in federal court, alleging violations of sections 10(b), 15(c), and 20 of the Exchange Act.[77] He joined several state claims with the federal claim; jurisdiction over the state claims was predicated on diversity of citizenship and pendent jurisdiction.[78]

Byrd's customer agreement provided that all disputes arising out of his relationship with Dean Witter would be settled by arbitration.[79]

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granted in the 1933 and 1934 Acts or any consideration of policy warrant such a distinction.

Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536 (3d Cir.) (citations omitted), *cert. denied*, 429 U.S. 1010 (1976). *See also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 829 (10th Cir. 1978) (stating that the remedy under Rule 10b-5 should not be relegated to inferior position, since it is "the most important remedy in both Acts").

71. *See* Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 835 (7th Cir. 1977).

72. The Sixth, Seventh, and Eighth Circuits opted for bifurcated proceedings. *See* Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 62 (8th Cir. 1984); Liskey v. Oppenheimer & Co., 717 F.2d 314, 317-21 (6th Cir. 1983); Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 644-46 (7th Cir. 1981).

73. The Fifth, Ninth, and Eleventh Circuits adopted the intertwining approach. *See* Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552, 554 (9th Cir. 1984), *rev'd*, 105 S. Ct. 1238 (1985); Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982); Sibley v. Tandy Corp., 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

74. 105 S. Ct. 1238 (1985).

75. *Id.* at 1239.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Dean Witter accordingly filed a motion to sever the state claims and order their arbitration, and to stay arbitration of those claims pending resolution of the federal action.[80] Dean Witter did not seek arbitration of the Exchange Act claim, in accordance with the holdings of lower courts extending *Wilko* to actions arising under the Exchange Act.[81] The district court denied the motion to sever the pendent state claims and compel their arbitration,[82] and the United States Court of Appeals for the Ninth Circuit, adopting the intertwining doctrine, affirmed.[83]

After the Supreme Court granted certiorari, the petitioner, Dean Witter, and the Securities Industry Association, as amicus curiae, urged the Court to overrule the post-*Scherk* courts and to hold that claims brought under section 10(b) of the Exchange Act are arbitrable.[84] In a footnote, the Court said that this issue was not before it and declined to overrule the lower courts.[85] The Court's decision instead focused on whether to adopt the intertwining or bifurcated approach.

In adopting the bifurcated approach, the Court held that the Federal Arbitration Act requires that district courts compel arbitration of all claims that are subject to arbitration, even if bifurcated and potentially inefficient proceedings result.[86] The Court looked to the plain language of the Federal Arbitration Act, which provides that written agreements to arbitrate disputes arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[87] Byrd had argued that the Federal Arbitration Act's primary purpose was to provide for quick and efficient resolution of disputes—a purpose that would be frustrated by inefficient bifurcated proceedings.[88] The Court dismissed this argument and stated that the primary purpose of the Act was to ensure the enforcement of private agreements to arbitrate.[89] The Court directed the parties to arbitrate the severed state claims without stay, rejecting Byrd's argument that arbitration of those claims would collaterally estop the litigation of federal claims.[90]

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80. *Id.*

81. *Id.* at 1239-40.

82. *Id.* The district court opinion is not reported.

83. Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552, 554 (9th Cir. 1984), *rev'd,* 105 S. Ct. 1238 (1985).

84. Brief for Petitioner at 4-6 n.3; Brief for the Securities Industry Association, Inc., et al. as Amicus Curiae at 5-15.

85. *Byrd,* 105 S. Ct. at 1240 n.1.

86. *Id.* at 1241.

87. 9 U.S.C. § 2 (1982).

88. *Byrd,* 105 S. Ct. at 1241-42.

89. *Id.* at 1242 & nn.6-7.

90. *Id.* at 1243-44.

B. *White's Concurrence and Arbitrability of Exchange Act Claims.*

Only Justice White, concurring, restated the *Scherk* dictum and suggested that *Wilko* should not be extended to claims arising under the Exchange Act. Justice White stated that "*Wilko*'s reasoning cannot be mechanically transplanted to claims arising under the Exchange Act."[91] White repeated the arguments advanced in *Scherk*: that jurisdiction under the Exchange Act is narrower than jurisdiction under the Securities Act; that the cause of action under section 10(b) is implied rather than express, so that section 14 of the Exchange Act, which bars waiver of "compliance with any *provision* of this chapter," literally does not apply; and that an implied right of action under section 10(b) does not rise to the level of the "special right" under section 12(2) of the Securities Act protected in *Wilko*.[92] Justice White did not elaborate upon these arguments, explain them, or supply any original reasoning.

C. *Judicial Response to White's Concurrence.*

Relying on Justice White's concurrence, many district courts have held that *Wilko* does not apply to Exchange Act claims and have ordered parties to arbitrate those claims pursuant to valid arbitration clauses in broker-dealer contracts.[93] Some of these courts[94] have also relied on a subsequent decision, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[95] which held that federal antitrust claims arising out of an interna-

91. *Id.* at 1244 (White, J., concurring).

92. *Id.* Ironically, Justice White had joined in Justice Douglas's dissent in *Scherk*, where Justice Douglas argued that *Wilko* should apply with equal force to section 10(b) actions. *Scherk*, 417 U.S. at 521 (Douglas, J., dissenting).

93. *See supra* note 7.

94. *See* Ross v. Mathis, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,343, at 92,248 (N.D. Ga. 1985); Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1510 (S.D.N.Y. 1985); Geller v. Nasser, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,409, at 92,512 (C.D. Cal. 1985).

95. 105 S. Ct. 3346, 3355-61 (1985). In *Mitsubishi*, the Court addressed the question whether claims arising under the federal antitrust laws could be arbitrated pursuant to an arbitration agreement between parties involved in an international transaction. *Id.* at 3353. In holding the arbitration agreement enforceable, the Court rejected the argument that federal statutory claims are entitled to a blanket presumption of nonarbitrability. *Id.* The Court emphasized the policy underlying the Federal Arbitration Act and held that arbitration agreements should be enforced absent countervailing congressional intent:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history . . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 3355.

After noting the absence of a provision in either the Sherman Act or the Federal Arbitration Act precluding the waiver of judicial remedies under the federal antitrust laws, *id.*, the Court concluded that the policies favoring arbitration of international disputes outweighed the policies oppos-

tional transaction are arbitrable. Other district courts have merely noted the strong federal policy favoring arbitration agreements.[96] A sizable minority of district courts, however, have held Exchange Act claims nonarbitrable,[97] generally on the basis of precedent within the circuits—precedent that *Byrd* or *Mitsubishi* did not directly overrule.[98]

Following the *Byrd* decision, the United States Court of Appeals for the Second Circuit was the first federal court of appeals to rule on the arbitrability of Exchange Act claims. In *McMahon v. Shearson/American Express, Inc.*,[99] the court held that claims arising under section 10(b) and Rule 10b-5 are nonarbitrable. The plaintiffs, customers of a brokerage firm, alleged that a representative of the defendant firm violated section 10(b) by churning the customers' accounts, making false statements, and omitting material facts from investment advice.[100] The plaintiffs had entered into a customer agreement that contained a standard arbitration clause.[101] The brokerage firm moved to compel arbitration of the customers' claims on the basis of the arbitration clause,[102] and the district court ordered arbitration of the section 10(b) and Rule 10b-5 claims.[103]

The Second Circuit reversed, holding the claims nonarbitrable.[104] The court first looked to the Second Circuit precedent holding Exchange Act claims nonarbitrable.[105] The court refused to overrule this precedent based only upon the defendant's "speculati[on] as to what the Supreme

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ing arbitration of federal antitrust claims, and accordingly held the claims to be arbitrable. *Id.* at 3355-61.

96. *See* Prawer v. Dean Witter Reynolds, Inc., [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,395, at 92,436-37 (D. Mass. 1985); Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 623 F. Supp. 1005, 1007-08 (E.D. Mich. 1985).

97. *See* Bustamante v. Rotan Mosle, Inc., 633 F. Supp. 303, 306-07 (S.D. Tex. 1986); Bale v. Dean Witter Reynolds, Inc., 627 F. Supp. 650, 654-55 (D. Minn. 1986); Shapiro v. Merrill Lynch & Co., [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,504, at 93,059-63 (S.D. Ohio 1986); Webb v. R. Rowland & Co., 613 F. Supp. 1123, 1123-24 (E.D. Mo. 1985); Levendag v. Churchill, 623 F. Supp. 620, 621-22 (D.S.C. 1985); Robert A. Stone & Assocs. v. Drexel Burnham Lambert, Inc., No. 85 C 6927 (N.D. Ill. Nov. 15, 1985) (LEXIS, Genfed library, Dist file); Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,328, at 92,175 (W.D. Okla. 1985); Leone v. Advest, Inc., 624 F. Supp. 297, 302-03 (S.D.N.Y. 1985).

98. *See* Lamb v. Legg Mason Wood Walker, Inc., No. 85-1316 (E.D. Pa. Sept. 16, 1985) (LEXIS, Genfed library, Dist file); Leone v. Advest, Inc., 624 F. Supp. 297, 302 (S.D.N.Y. 1985); Baker v. Powell, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,407, at 92,504-05 (D.N.J. 1985).

99. 788 F.2d 94, 96-98 (2d Cir. 1986).

100. *Id.* at 96.

101. *Id.*

102. *Id.*

103. McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384, 389 (S.D.N.Y. 1985).

104. *McMahon*, 788 F.2d at 96-98.

105. *Id.* at 96-97.

Court may do with our settled law."[106] In effect, the court stated that a more authoritative pronouncement by the Supreme Court in favor of arbitrability of Exchange Act claims would be required before it would overrule clear precedent within the Second Circuit.[107]

The court also looked to the public policy considerations implicated by the arbitration of section 10(b) and Rule 10b-5 claims, noting that "[t]he securities laws generally, and the implied causes of action which the courts have recognized, are designed to protect the public, and particularly the less sophisticated investor."[108] Noting the similarity between the nonwaiver provisions of the Acts and the similarity between the public policy concerns that underlie the Acts, the court concluded that there is a "compelling need for a judicial forum in the resolution of securities law disputes."[109]

The United States Court of Appeals for the Eleventh Circuit, in *Miller v. Drexel Burnham Lambert, Inc.*,[110] and the United States Court of Appeals for the Fifth Circuit, in *King v. Drexel Burnham Lambert, Inc.*,[111] also held that section 10(b) and Rule 10b-5 claims are not arbitrable. In brief opinions, the courts held themselves bound by prior precedent and accordingly refused to order the arbitration of Exchange Act claims.[112]

Despite the position taken by the Second, Fifth, and Eleventh Circuits, the United States Court of Appeals for the Eighth Circuit held in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[113] that Exchange Act claims can be arbitrated pursuant to a predispute agreement to arbitrate. Unlike the Second, Fifth, and Eleventh Circuits, the Eighth Circuit had no precedent extending *Wilko*'s prohibition against arbitration to claims arising under the Exchange Act.[114] The court relied on Justice White's concurring opinion in *Byrd*[115] and the "strong federal policy favoring enforcement of arbitration agreements."[116] The court did not

106. *Id.* at 97.
107. *Id.* at 98.
108. *Id.*
109. *Id.*
110. 791 F.2d 850, 854 (11th Cir. 1986) (per curiam).
111. 796 F.2d 59, 60 (5th Cir. 1986).
112. *Miller*, 791 F.2d at 853-54 (reaffirming Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982)); *King*, 796 F.2d at 60 (reaffirming Sibley v. Tandy Corp., 543 F.2d 540, 543 n.3 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977)).
113. 795 F.2d 1393, 1399 (8th Cir. 1986).
114. In an Eighth Circuit case decided before *Byrd*, Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 (8th Cir. 1984), the court noted that lower federal courts had consistently held that *Wilko* applied to the Exchange Act. This statement, however, was dictum. *See Phillips*, 795 F.2d at 1399.
115. *Phillips*, 795 F.2d at 1397-98.
116. *Id.* at 1398.

develop or explain Justice White's arguments, and merely concluded that "[t]he non-waiver provision of the 1934 Act, section 29(a), simply does not override the Arbitration Act in the same manner as section 14 of the 1933 Act when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act."[117]

Judge Ross dissented. He emphasized public policy considerations and the similarity between the nonwaiver provisions of the Securities Act and the Exchange Act. He also noted that the decisions of eight other courts of appeals supported extending *Wilko* to the Exchange Act.[118]

Finally, the United States Court of Appeals for the Ninth Circuit has also taken a position on the issue. In *Conover v. Dean Witter Reynolds, Inc.*,[119] the court held that section 10(b) and Rule 10b-5 claims are nonarbitrable. The court was not bound by precedent[120] but based its decision upon the nonwaiver provision of the Exchange Act and the policies underlying the federal securities laws.[121]

III. APPLICABILITY OF *WILKO* TO EXCHANGE ACT CLAIMS

As noted above, since *Byrd* most district courts faced with the issue of arbitrability of Exchange Act claims have held that such claims are arbitrable. This is surprising. Granted, these decisions are supported by Justice White's concurrence in *Byrd*. But Justice White's statement on this issue is mere dictum, as was the *Scherk* Court's statement on this issue eleven years earlier.[122] Given that every federal court of appeals that addressed the issue prior to *Byrd* disregarded the dictum in *Scherk* and held that Exchange Act claims are nonarbitrable,[123] district courts should consider themselves bound by precedent as did the Second Circuit in *McMahon,* the Fifth Circuit in *King,* and the Eleventh Circuit in *Miller* unless they consider the rationale underlying Justice White's concurrence in *Byrd* to be exceptionally persuasive.

Even in the absence of binding precedent, the position adopted by the Second, Fifth, Ninth, and Eleventh Circuits is correct. Justice White's arguments in favor of allowing the arbitration of Exchange Act claims are flawed in several respects. Justice White first focused on the jurisdictional differences between the Securities Act and the Exchange

117. *Id.*

118. *Id.* at 1400 (Ross, J., dissenting).

119. 794 F.2d 520, 527 (9th Cir. 1986).

120. *Id.* at 522.

121. *Id.* at 522-27.

122. *See supra* notes 62-66 and accompanying text. Justice White's concurrence in *Byrd* was not joined by any other Justice, whereas the opinion of the Court in *Scherk* was supported by five Justices. *See Scherk,* 417 U.S. at 507.

123. *See supra* note 67.

Act and noted that claims arising under the Securities Act can be asserted in either federal court or state court, whereas claims arising under the Exchange Act can be asserted *only* in federal court.[124] This same point was made in *Scherk*. Neither Justice White's concurrence in *Byrd* nor the Court's opinion in *Scherk* explained why this jurisdictional difference should be relevant to the arbitrability of Exchange Act claims. The relevance of the point appears to be grounded in the statement in *Wilko* that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act."[125] In other words, Justice White appears to be arguing that because the Exchange Act does not give the plaintiff a choice of forum, the plaintiff has not waived any provision of the Act by agreeing to arbitrate.

This argument does not withstand close analysis. First, the fact that the Exchange Act does not give the plaintiff a choice of forum does not imply that the plaintiff must forfeit his right to bring an action in federal court. The jurisdictional provision of the Exchange Act, section 27,[126] expressly extends the protection of the federal courts to investors. A prospective agreement to arbitrate any future Exchange Act claim would be a waiver of compliance with this provision, in violation of section 29(a) of the Act.

The United States Court of Appeals for the Ninth Circuit has interpreted section 27 of the Exchange Act as "an even more forceful indication of Congress' intent" than section 22 of the Securities Act that federal courts rather than arbitrators exercise jurisdiction over the claims.[127] This corresponds with the arguments traditionally asserted in support of exclusive federal jurisdiction under the Exchange Act—"(1) promotion of uniform interpretation, (2) greater expertise of federal judges, (3) avoidance of state courts' hostility to 'unfamiliar federal claims arising in familiar state law contract actions' and (4) the 'disparate impact' of state and federal discovery provisions"[128]—which all tend to support protecting Exchange Act claims against arbitration.[129]

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124. *Byrd*, 105 S. Ct. at 1244 (White, J., concurring).

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

126. 15 U.S.C. § 78aa (1982).

127. Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 527 (9th Cir. 1986).

128. Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C.L. REV. 707, 720 (1982).

129. Uniform interpretation of the Exchange Act will be promoted to a greater extent in the federal courts beeause arbitrators are not bound to follow prior arbitration decisions. *See* M. HILL & A. SINICROPI, *supra* note 34, at 40-41 (arbitrators may choose to follow the precedent of prior arbitration awards but are not required to do so). The expertise of federal judges in adjudicating federal law will often exceed that of arbitrators because arbitrators are not necessarily lawyers. *See supra* note 40 and accompanying text. Arbitrators unfamiliar with the federal securities laws will not only lack the expertise of federal judges but also might have the "hostility" to federal claims

But both the Ninth Circuit and Justice White are making too much of the difference between the jurisdictional provisions of the two Acts because, as the American Law Institute has noted, this distinction exists by "pure happenstance."[130] Because the difference between the jurisdictional provisions occurred by chance, Justice White is incorrect in interpreting section 27 of the Exchange Act as expressing congressional intent that Exchange Act claims are more appropriately subject to arbitration than are Securities Act claims.

Justice White also asserted that because a private cause of action under section 10(b) of the Exchange Act is implied rather than express, the Act's provision prohibiting waiver of "compliance with any provision of this chapter, rule or regulation thereunder" literally does not apply.[131] This argument exalts form over substance by drawing an unjustifiable technical distinction. If it were true that the nonwaiver provisions did not apply to implied causes of action, then nothing would prevent investors from prospectively waiving *all* implied rights to recover. Yet courts have not allowed investors to waive implied rights prospectively, because courts have recognized that permitting such waivers could emasculate the protections that these implied rights of action afford.[132] In effect,

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similar to that which state judges are thought to possess. The "disparate impact" of discovery procedures may be greater between federal courts and arbitration than between federal courts and state courts. Broad discovery is not generally available in arbitration. *See supra* note 36.

130. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 183 (1969). One commentator traced the jurisdictional provision of the Exchange Act through the entire legislative process and found no articulated reason for the choice of exclusive federal jurisdiction rather than concurrent state and federal jurisdiction under the Exchange Act. Note, *The Securities Exchange Act and the Rule of Exclusive Federal Jurisdiction,* 89 YALE L.J. 95, 109 n.58 (1979).

131. *Byrd,* 105 S. Ct. at 1244 (White, J., concurring). The logical extension of this argument is that the enforceability of arbitration agreements should depend on whether the cause of action is express or implied, rather than whether the claim arises under the Securities Act or the Exchange Act. *Cf.* Brener v. Becker Paribas, Inc., 628 F. Supp. 442, 449 (S.D.N.Y. 1985) (holding that claim brought under section 17(a) of Securities Act is arbitrable because private cause of action under that section is implied). Several private rights of action under the Exchange Act are express, *see* Piper v. Chris-Craft Indus., 430 U.S. 1, 24-25 (1977), and some rights of action under the Securities Act are implied. *See* Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978), *cert. denied,* 444 U.S. 995 (1979).

132. *See* Goodman v. Epstein, 582 F.2d 388, 402 (7th Cir. 1978) ("Section 29(a) of the Securities Exchange Act of 1934, as interpreted by the courts, mandates that a purported release of claims under [Rule 10b-5] is valid *only* as to mature, ripened claims of which the releasing party had knowledge before signing the release." (footnotes omitted)), *cert. denied,* 440 U.S. 939 (1979); Korn v. Franchard Corp., 388 F. Supp. 1326, 1329 (S.D.N.Y. 1975) (section 29(a) disallows anticipatory waiver of right to litigate Rule 10b-5 claims; it does not disallow settlement of matured claims); *see also* 5C A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10b-5 § 237.02, at 10-73 to -74 (1986) ("Judges have not permitted a plaintiff to waive a 10b-5 right before the right matures or before he knows it exists." (footnotes omitted)); Note, *Section 29(a) of the Securities Exchange Act: A "Legislative Chaperon" for Rule 10b-5,* 63 NW. U.L. REV. 499, 502 (1968) ("[T]here is little doubt that section 29(a) also applies to the *judicially created* private right of action under Rule 10b-5.").

then, an implied cause of action is treated as if it were literally a provision of one of the Acts.

The final argument Justice White advanced was that "*Wilko*'s solicitude for the federal cause of action—the 'special right' established by Congress—is not necessarily appropriate where the cause of action is judicially implied and not so different from the common law action."[133] Justice White thus intimated that the implied rights under the Acts are less worthy of protection than the rights expressly provided in the Acts.

This suggestion is novel and has far-reaching implications. The assumption underlying this argument appears to be that courts have gratuitously bestowed the implied rights under the Securities Act and the Exchange Act upon investors. This suggestion conflicts with a fundamental principle underlying the implied rights—that implying private causes of action is necessary to effectuate the purposes of the Acts.[134] As the Court has clearly explained, private remedies are implied "where congressional purposes are likely to be undermined absent private enforcement."[135]

Moreover, there is no justification for the notion that once a court has recognized an implied right of action under the securities laws, that right should be entitled to less protection than an express cause of action. In no other context has the Court provided less procedural protection to an implied private cause of action than an express cause of action. Granted, the Court has been circumspect in implying causes of action[136] and has imposed strict requirements on section 10(b) actions with regard

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See generally A. JACOBS, *supra,* § 237.02 (discussing the enforceability of waivers and settlements in Rule 10b-5 litigation).

133. *Byrd,* 105 S. Ct. at 1244 (White, J., concurring) (citation and footnote omitted).

134. *See* Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 524-25 (9th Cir. 1986); *see also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 62 (1975) ("Of course, we have not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and *necessary* for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission." (emphasis added)); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) ("Private enforcement of the proxy rules [enacted pursuant to section 14(a) of the Exchange Act] provides a *necessary* supplement to Commission action." (emphasis added)). *Cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 317 (1979) (private right of action not "necessary" to carry out congressional purpose under the Trade Secrets Act, 18 U.S.C. § 1905); Piper v. Chris-Craft Indus., 430 U.S. 1, 41 (1977) ("[J]udicially creating a damages action in favor of Chris-Craft [under section 14(e) of the Securities Act] is *unnecessary* to ensure the fulfillment of Congress' purposes in adopting the Williams Act." (emphasis added)); Cort v. Ash, 422 U.S. 66, 84-85 (1975) (private cause of action would "not aid the primary congressional goal" of 18 U.S.C. § 610).

135. Piper v. Chris-Craft Indus., 430 U.S. 1, 25 (1977).

136. *See, e.g.,* Touche Ross & Co. v. Redington, 442 U.S. 560, 567 (1979) (denying implied cause of action under section 17(a) of Exchange Act); Piper v. Chris-Craft Indus., 430 U.S. 1, 42 (1977) (defeated tender offeror has no implied cause of action under section 14(e) of Exchange Act).

to standing to sue[137] and scienter.[138] Such limitations, however, only establish the elements of the cause of action; they do not indicate that the section 10(b) action is less worthy of procedural protection.[139]

Justice White did not explain why a right of action "not so different from the common law action" should not be protected against waiver. Granted, the cause of action under section 10(b) is not the same as the "special right" under section 12(2) of the Securities Act, but this is a distinction without a difference insofar as section 29(a) of the Exchange Act is concerned. Section 29(a) prohibits waiver of "any provision" of the Act; it is not limited to "special rights."

The Court recently reaffirmed the principle that the implied cause of action under section 10(b) is entitled to the same degree of protection as that afforded an express cause of action under the Securities Act. In *Herman & MacLean v. Huddleston,*[140] the Court held that an implied cause of action under section 10(b) could be maintained for conduct that also subjects the defendant to liability under section 11 of the Securities Act. In holding the two causes of action to be cumulative, the Court reemphasized the validity of the implied right to sue under section 10(b).[141] Were the right of action under section 10(b) less worthy of protection than the express right, the Court presumably would not have allowed the section 10(b) action to stand. At the very least, it would

137. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975).

138. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976).

139. In fact, the procedural protections afforded the private plaintiff who brings a section 10(b) action are in some ways more extensive than those afforded the private plaintiff claiming under provisions of the Securities Act that expressly provide private rights of action. The Exchange Act provides a wider choice of venue than does the Securities Act. *Compare* 15 U.S.C. § 78aa (1982) *with* 15 U.S.C. § 77v(a) (1982). Section 11(e) of the Securities Act authorizes a court to require a plaintiff to post bond for costs including attorney fees and to assess costs against the plaintiff under certain circumstances. 15 U.S.C. § 77k(e) (1982). A court may not impose such requirements on a plaintiff in a section 10(b) action. *See* Erust & Ernst v. Hochfelder, 425 U.S. 185, 209-11 (1976). Section 13 of the Securities Act imposes a statute of limitations of one year from the time the violation was or should have been discovered with an absolute limit of three years from the offer or sale of the security. 15 U.S.C. § 77m (1982). The statute of limitations for section 10(b) actions is provided by the law of the forum state, which usually will provide a longer period than that provided by section 13. *See Ernst & Ernst,* 425 U.S. at 210 n.29. For a list of the applicable limitation periods by state, see 5C A. JACOBS, *supra* note 132, § 235.02, at 10-21 to -30.

A plaintiff in a Rule 10b-5 action is entitled to a jury trial if damages are requested. *See* Rachal v. Hill, 435 F.2d 59, 63 (5th Cir. 1970) (dictum), *cert. denied,* 403 U.S. 904 (1971); 5C A. JACOBS, *supra* note 132, § 297. Arbitration, of course, requires the plaintiff to forfeit his right to a jury trial. Note, *supra* note 32, at 255 & n.85.

140. 459 U.S. 375, 382-83 (1983).

141. *Id.* at 380. *Cf.* Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 525 (9th Cir. 1986) ("The express lesson drawn by the Supreme Court is that the 1933 and 1934 Acts are interrelated components of the federal securities regulation scheme.").

have discussed why it would allow the implied right to stand in addition to the express right.

In addition to relying on Justice White's concurrence, courts finding claims arising under the Exchange Act to be arbitrable have cited the strong federal policy supporting arbitration.[142] Certainly, the federal policy favoring arbitration should not be overlooked or disparaged. As *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[143] specifies, federal courts are to uphold the mandates of the Federal Arbitration Act and order arbitration in the absence of countervailing federal policies. When the Securities Act or the Exchange Act is implicated, however, there is a countervailing federal policy opposing arbitration—the policy of protecting investors by allowing them to vindicate their rights in federal court.[144] The Exchange Act's underlying policy of protecting investors is significant. Section 29(a), the nonwaiver provision, effectuates this purpose. Given the fact that arbitration may often prove a less effective forum than federal court for the vindication of investors' rights,[145] investors should have the opportunity to bring their claims in federal court.[146]

142. *See, e.g.*, Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1395, 1398 (8th Cir. 1986); Brener v. Becker Paribas, Inc., 628 F. Supp. 442, 448 (S.D.N.Y. 1985).

143. 105 S. Ct. 3346, 3354-55 (1985).

144. Just as a central purpose of the Securities Act is protection of investors, *see supra* notes 41-42 and accompanying text, so is investor protection a primary purpose of the Exchange Act. *See* H.R. REP. NO. 1383, 73d Cong., 2d Sess. 5, 10-11 (1934) ("To insure to the multitude of investors the maintenance of fair and honest markets, manipulative practices of all kinds on national exchanges are banned."); S. REP. NO. 792, 73d Cong., 2d Sess. 1-3 (1934) ("[T]he bill [is] to provide for the regulation of securities exchanges and of over-the-counter markets—to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes . . . ."). *See also* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (protection of investors is "one of [the] central purposes" of the Exchange Act); SEC v. Texas Gulf Sulphur, 401 F.2d 833, 858 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (dominant purposes of Exchange Act are to protect investors and to promote free and open public securities markets); 5 A. JACOBS, *supra* note 132, § 6.06, at 1-187 (The [Securities] and [Exchange] Acts are intended to protect investors."). Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1982), grants authority to the SEC to prescribe rules and regulations "necessary or appropriate in the public interest or for the protection of investors."

One might argue on policy grounds that section 10(b) actions should be arbitrated because litigation is not well-suited to resolving 10(b) actions efficiently. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739-43 (1975) (litigation under Rule 10b-5 presents undue danger of vexatiousness because meritless complaints that are not dismissed by summary judgment often have high settlement value). Yet this is a decision for Congress to make; courts should abstain from making such a legislative decision. At the very least, courts should be more explicit in setting forth the policy bases for their decisions.

145. *See supra* notes 33-40 and accompanying text.

146. Despite the potential that arbitration may not protect investors' rights effectively, some investors may prefer to arbitrate their claims because arbitration is a quick, efficient, and inexpensive means of dispute resolution. *See* Note, *supra* note 32, at 255. If *Wilko* were applied with equal force to the Exchange Act, an investor who desired to submit Exchange Act claims to arbitration could do so under the exception to the *Wilko* doctrine permitting the arbitration of existing disputes. *See supra* notes 59-60 and accompanying text.

IV. CONCLUSION

Certiorari has been granted in a recent case holding Exchange Act claims nonarbitrable.[147] The Supreme Court has thus been called on to resolve the circuit split that has developed as a result of Justice White's concurrence in *Dean Witter Reynolds, Inc. v. Byrd*. Justice White's arguments in favor of compulsory arbitration of implied Exchange Act claims are unpersuasive. Close analysis of the text of the Securities Act and the Exchange Act, and the policies underlying the Acts, indicates that the Court should hold claims arising under the Exchange Act to be nonarbitrable.

David L. Heinemann

147. McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (Oct. 6, 1986) (No. 86-44).