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I. INTRODUCTION

As a matter of standard practice, arbitration clauses are included in commercial contracts, particularly those between brokerage firms and their customers. These arbitration clauses are typically very broad and provide for arbitration of all disputes that arise out of the contractual relationship of the parties. As such, broker-dealer arbitration clauses have given rise to a seminal issue: whether federal courts must enforce agreements to arbitrate section 10(b) and Rule 10b-5 claims arising out of the Securities Exchange Act of 1934[1] (the "1934 Act") and claims arising out of the Racketeer Influenced and Corrupt Organizations Act[2] ("RICO").

Although the Federal Arbitration Act of 1925[3] (the "Arbitration Act") provides that courts of competent jurisdiction must enforce valid arbitration agreements,[4] the American judiciary traditionally has been reluctant to fully enforce such agreements. Historically, authorities have accorded arbitration clauses a lesser status than other contract terms, and have concluded that the judiciary may, in its discretion, refuse to enforce arbitration clauses[5] in order to preserve exclusive federal jurisdiction over certain claims, or to better implement the policies of other federal statutes.[6]

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1. Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 78a to 78kk (1982)); 15 U.S.C. § 78j(b) (1982).

2. 18 U.S.C. § 1964(c) (1982).

3. Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1982)).

4. 9 U.S.C. § 4 (1982).

5. *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).

6. *See, e.g.*, Applied Digital Technology v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978).

In 1985, the Supreme Court endeavored to reverse this trend, placing arbitration agreements "upon the same footing as other contracts, where [they] belong."[7] In *Dean Witter Reynolds, Inc. v. Byrd*[8] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[9] the Court directed the lower federal courts to strictly construe and enforce arbitration clauses. The Court held that arbitration agreements should be enforced unless Congress has evinced a contrary intention.[10] *Byrd*, however, expressly left open the issue of whether parties can provide contractually for arbitration of Section 10(b), Rule 10b-5, and RICO claims.

Finally, in *Shearson/American Express, Inc. v. McMahon*,[11] the Supreme Court granted certiorari to determine the enforceability of agreements to arbitrate the 1934 Act and RICO claims. Noting that the Arbitration Act mandates arbitration according to the terms of the parties' agreement,[12] and in response to the increasing congestion in the federal judicial system, the Court has definitively declared that 1934 Act and RICO claims are subject to arbitration when the parties have previously agreed to resolve their disputes before an arbitration tribunal. The *McMahon* decision represents a long-awaited and deserved recognition of the arbitration forum as a competent, fair, and efficient method for resolution of claims arising out of broker/customer disputes. This article will discuss the history of the American judiciary's reluctance to submit 1934 Act and RICO claims to arbitration, assess the impact of the *Byrd* and *Mitsubishi* holdings, and summarize the far-reaching implications of the *McMahon* decision.

II. The History of the Dispute over Arbitration

A. Arbitration: A Question of Appropriateness

With the passage of the Arbitration Act,[13] Congress established a strong federal policy favoring arbitration.[14] This legislation represented the first break from the English tradition of refusing to enforce arbitration agreements because they impinged upon the

7. *Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)).
8. 470 U.S. 213 (1985).
9. 473 U.S. 614 (1985).
10. *Id.* at 618.
11. 107 S. Ct. 2332 (1987).
12. 9 U.S.C. § 1 (1982).
13. 9 U.S.C. §§ 1-14 (1982).
14. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 24-25 (1983).

courts' jurisdiction.[15] Prior to the passage of the Arbitration Act, American courts criticized this judicial attitude as illogical and unjust. Nevertheless, the precept was considered too deeply rooted to be overruled without legislative enactment.[16]

The Arbitration Act provides that a written provision in any contract to arbitrate any dispute arising out of the agreement shall be deemed valid, irrevocable, and enforceable to the same extent as any other contract.[17] The statute further provides that any party aggrieved by the improper refusal of another party to commence arbitration may petition a federal court of competent jurisdiction for an order compelling arbitration.[18] If the formation of an arbitration agreement is not at issue, "the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[19] The Arbitration Act was necessitated by the traditional reluctance of courts to enforce arbitration clauses,[20] and simply codifies the common law duty of courts to enforce the terms of valid contracts.[21]

Despite the simple and direct language of the Arbitration Act, there has been considerable disagreement in the federal judiciary over the Act's procedural[22] and substantive interpretation and ap-

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15. *Byrd*, 470 U.S. 213.

16. *Id.*

17. 9 U.S.C. § 2 (1982).

18. 9 U.S.C. § 4 (1982).

19. *Id.* (emphasis added). The Arbitration Act provides also that if a claim is brought before any federal court upon any issue referable to arbitration under a written agreement, the court shall, on the application of a party, stay the trial until arbitration has been had in accordance with the agreement. 9 U.S.C. § 3 (1982).

20. *See Byrd*, 470 U.S. at 219-20.

21. *Id.* at 220 n.7 (the Act "creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts. . . .") (quoting 65 CONG. REC. 1931 (1924)).

22. Procedural issues arose from the judicial severance of arbitrable and non-arbitrable claims, with the resultant arbitration of the former and judicial review of the latter. Belke v. Merrill, Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1027 (11th Cir. 1982); Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979). If both arbitrable and non-arbitrable claims arose out of the same transaction, however, courts have questioned the wisdom and practicality of severing the arbitrable claims. *Belke*, 693 F.2d at 1029; Miley v. Oppenheimer & Co., 637 F.2d 318, 334-37 (5th Cir. 1981); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 585 (E.D. Cal. 1982). Judicial authorities have questioned the efficiency of bifurcated proceedings related to single transactions, and have expressed concern for the possible preclusive effect of factual issues resolved by arbitration. *Belke*, 693 F.2d at 1029; *Miley*, 637 F.2d 318; *Cunningham*, 550 F. Supp. 578, 585. As a result of this procedural dilemma, until recently, several federal circuits followed the "intertwining doctrine." The "intertwining doctrine" provided that federal district courts, in their discretion, could refuse to compel arbitration of arbitrable claims under a written agreement when such claims were so intertwined with non-arbitrable claims that their severance could result in substantial inefficiency or collateral estoppel problems.

plication. This disagreement has resulted in the common judicial refusal to enforce arbitration clauses in disputes arising under federal remedial legislation. The judiciary has often found arbitration to be an unsuitable method of dispute resolution,[23] and has generally precluded the arbitration of securities,[24] antitrust,[25] bankruptcy,[26] and RICO disputes.[27]

The federal judiciary has advanced several rationales for rejecting arbitration in these areas. The most acceptable of these rationales is that Congress (for example, in the Securities Act of 1933) has legislatively mandated that parties may not waive their rights to judicial proceedings through private agreements.[28] Less persuasive justifications for the rejection of arbitration include: (a) the judicial conclusion that particular statutes embody policies that cannot be satisfactorily furthered through arbitration,[29] (b) the judicial concern that arbitration may not bind non-signatory third

23. *See, e.g.* Merrill Lynch, Pierce, Fenner & Smith v. Moore, 590 F.2d 823 (10th Cir. 1978); Applied Digital Technology v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Allegaeart v. Perot, 548 F.2d 432 (2d Cir. 1977), *cert. denied*, 432 U.S. 910 (1977); S.A. Mineracao da Trinidade-Samitri v. Utah International, Inc., 576 F. Supp. 566 (S.D.N.Y. 1983) (holding arbitration clauses uneforceable in the areas of antitrust, bankcruptcy, 10b-5, and RICO claims respectively).

24. *See* Wilko v. Swan, 346 U.S. 427 (1953) (holding claims brought under 1933 Securities Act non-arbitrable). *See also*, Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59 (8th Cir. 1984); Merrill Lynch, Pierce, Fenner & Smith v. Moore, 590 F.2d 823 (10th Cir. 1978) (both holding claims brought under section 10(b) of Securities Exchange Act of 1934 and 10b-5 claims non-arbitrable, following *Wilko*); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, 538 F.2d 532 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1010 (1976); Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

25. Mitsubishi Motors. v. Soler Chrysler-Plymouth, 473 U.S. 619 (1985); Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1974); Helfenbein v. International Industries, Inc., 438 F. 2d 1068 (8th Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); A. & E. Plastic Pak v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968); Hunt v. Mobil Oil Corp., 410 F. Supp. 10 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977).

26. *In re* Braniff Airways, 33 Bankr. 33 (Bankr. N.D. Tex. 1983); Coar v. Brown, 29 Bankr. 806 (N.D. Ill. 1983); *In re* Good Hope Indus., 16 Bankr. 719 (Bankr. D. Mass. 1982); *In re* Cross Elec. Co., 9 Bankr. 408 (Bankr. W.D. Va. 1981); Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984), *aff'g In re* Ludwig Honold Mfg. Co., 22 Bankr. 436 (Bankr. E.D. Pa. 1982).

27. Witt v. Merrill Lynch, Pierce, Fenner & Smith, 602 F. Supp. 867 (W.D. Pa. 1985); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, 605 F. Supp. 510 (W.D. Pa. 1984); Universal Marine Ins. Co., v. Beacon Ins. Co., 588 F. Supp. 735 (W.D. N.C. 1984); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984).

28. Wilko v. Swan, 346 U.S. 427 (1953).

29. *See, e.g., American Safety Equip.*, 391 F.2d at 821 (antitrust); *S.A. Mineracao*, 576 F. Supp. at 566 (RICO).

parties,[30] and (c) the judicial determination that certain types of disputes are too factually or legally complex for arbitration.[31]

In *Dean Witter Reynolds, Inc. v. Byrd*,[32] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[33] and *Shearson/American Exp., Inc. v. McMahon*,[34] the United States Supreme Court significantly broadened the scope of enforceability of arbitration agreements. In *Byrd*, the Supreme Court rejected the intertwining doctrine, thus requiring arbitration of arbitrable claims without regard to their relationship to non-arbitrable claims. In *Mitsubishi*, the Court deemed antitrust claims arising out of international transactions to be arbitrable, notwithstanding the pervasive judicial hostility to the arbitration of antitrust disputes arising out of domestic transactions. Most recently, in *McMahon*, the Supreme Court expanded the substantive scope of arbitrable claims by enforcing arbitration agreements to arbitrate claims arising under both the 1934 Act and RICO.

B. The Recent Trend Favoring the Use of Arbitration

Federal policy, embodied in the provisions of the Arbitration Act and the recent decisions of the Supreme Court, strongly favors arbitration as a means of resolving disputes.[35] As the Supreme Court recently observed in *Mitsubishi*, "[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[36] Thus, the Supreme Court has recognized that the Arbitration Act dictated that any doubts about the arbitration of issues should be resolved

30. *See, e.g.*, *Coar*, 29 Bankr. at 806 (bankruptcy).

31. *See, e.g.*, *American Safety Equip.*, 391 F.2d at 821.

32. 470 U.S. 213 (1985).

33. 473 U.S. 614 (1985).

34. 107 S. Ct. 2332 (1987).

35. *Id.*

36. 105 S. Ct. at 3354. *Accord*, Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, at 24 (Section 2 of the Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration. . . .[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."); Southland Corp. v. Keating, 465 U.S. 1 (1984) (in passing the Arbitration Act, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); *see also* Wilko v. Swann, 346 U.S. at 439 (Frankfurter, J., dissenting) ("[t]here is nothing in the record . . . to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled."). The recent opinions of *Mitsubishi*, *Moses Cone*, and *Southland* lend support to Justice Frankfurter's dissenting language in *Wilko*.

in favor of arbitration.[37]

The majority of district courts analyzing the arbitrability of Section 10(b) and Rule 10b-5 claims after *Mitsubishi* and *Byrd* ultimately ordered arbitration.[38] One district court went as far as to remark that "after *Byrd*, it is clear that 1934 Act claims are indeed arbitrable."[39] Some courts, however, refused to follow the modern trend espoused in *Byrd* and continued to hold that Section 10(b) and Rule 10b-5 claims were not subject to arbitration. Instead, they continued to follow the pre-*Byrd* holdings of federal circuit courts precluding arbitration.[40] These authorities declined to follow the trend begun by the *Byrd* and *Mitsubishi* decisions because the Supreme Court had not held this practice to be required under the Arbitration Act.[41] These authorities were, however, in the dis-

37. *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25; *See also Southland Corp.*, 465 U.S. at 10-16.

38. *See* Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith, 623 F. Supp. 1005, 1008 (E.D. Mich. 1985) (stating that "[t]he overwhelming majority of lower federal courts have accepted the court's invitation in *Byrd* and have ordered arbitration of claims under the 1934 Act and Rule 10b-5."); Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1509 (S.D.N.Y. 1985) (the "court joins the growing ranks of district courts that have held that arbitration agreements are not void as to claims under the 1934 Act"). *See also* Peele v. Kidder, Peabody & Co., 620 F. Supp. 61 (W.D. Mo. 1985); Dees v. Distenfield, 618 F. Supp. 123 (C.D. Cal. 1985); West v. Drexel Burnham Lambert, Inc., 623 F. Supp. 269 (W.D. Wash. 1985); McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384 (S.D.N.Y. 1985); Houlihan v. Schmaker, 621 F. Supp. 48 (E.D. Mo. 1985); Niven v. Dean Witter Reynolds, Inc., Fed. Sec. L. Rep. (CCH) ¶ 92,059 (M.D. Fla. 1985); Finn v. Davis, 610 F. Supp. 1079 (S.D. Fla. 1985); Ross v. Mathis, 624 F. Supp. 110 (N.D. Ga. 1985); Land v. Dean Witter Reynolds, Inc., 617 F. Supp. 52 (E.D. Va. 1985); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-1674, slip op. (M.D. Fla. March 9, 1985); Greenstein v. First Bescayne Corp., No. 82-0584, slip op. (S.D. Fla. May 16, 1985); Mann v. Foster & Marshall, No. C84-925D (W.D. Wash. May 16, 1985); Wells v. Oppenheimer & Co., 106 F.R.D. 258 (S.D.N.Y. 1985); Fisher v. Prudential-Bache Sec., Inc., 635 F. Supp. 234 (D. Md. 1986); Jarvis v. Dean Witter Reynolds, Inc., 614 F. Supp. 1146 (D. Vt. 1985); Driscoll v. Smith Barney, Harris Upham & Co., 625 F. Supp. 25 (S.D. Fla. 1985);Westwind Trans. v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-734-Civ.-T-10, slip. op. (M.D. Fla. Apr. 9, 1985).

39. West v. Drexel Burham Lamber, Inc., 623 F. Supp. 26, 28 (W.D. Wash. 1985).

40. *See, e.g.*, Rojas Concanon v. Smith Barney, Harris Upham & Co., 612 F. Supp. 996 (S.D. Fla. 1985). *See also* Miller v. Drexel Burham Lambert, Inc., 791 F.2d 850 (11th Cir. 1986); McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 107 S. Ct. 60 (1986); Roberts v. Lehman Bros. Kuhn Loeb, Inc., No. 84-1421-Civ.-King, slip. op. (S.D. Fla. Jul. 15, 1985); Divco Constr. and Realty Corp. v. Merrill Lynch, Pierce, Fenner & Smith, No. 83-13939-Civ. King, slip. op. (S.D. Fla. Apr. 26, 1985).

41. *See, e.g.*, Scharp v. Cralin & Co., 617 F. Supp. 476, 479 (S.D. Fla. 1985) (following the rule that claims under the 1934 Act are not arbitrable "until overruled by the United States Supreme Court or the United States Court of Appeals for the Eleventh Circuit sitting *en banc*"). *See generally infra* note 103 and accompanying text (cases declining to order arbitration of claims under 1934 Act until the Supreme Court so requires).

tinct minority, and failed to acknowledge that the recent trend in Supreme Court rulings favored arbitrability in an increasing number of cases.[42] Since the *Wilko v. Swan*[43] decision in 1953, every relevant Supreme Court decision has favored arbitration.[44]

As the *Byrd* decision noted, the Arbitration Act does not provide for the exercise of discretion by the district courts, but instead mandates that district courts "shall" direct the parties to proceed with arbitration on issues subject to an arbitration agreement.[45] The Supreme Court's message was clear: the only legitimate ground upon which to decline to enforce an arbitration clause is a manifest Congressional intention to preclude arbitration.[46]

C. The Capacity of Arbitration Tribunals

Coinciding with the Supreme Court's increasingly favorable disposition toward arbitration, arbitration forums and procedures have become increasingly sophisticated and commonplace. For example, the rules and procedures governing arbitration have been designed and refined to ensure fair results.[47] In addition, arbitration forums are more readily available to litigants.[48] This has lead to the widespread recognition of the advantages of arbitration as a

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42. *See* Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith & Co., 623 F. Supp. 1005, 1008 (E.D. Mich. 1985).

43. 346 U.S. 427 (1953).

44. *Mitsubishi*, 473 U.S. 614 (*See infra* notes 123-26, 132-34, 138-51 and accompanying text); *Byrd*, 470 U.S. 213 (*See infra* notes 102-117 and accompanying text); Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding preempted state laws invalidating arbitration clauses otherwise valid under Arbitration Act); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (holding a federal district court's stay of federal suit seeking arbitration under Section 4 of Arbitration Act improper); Scherk v. Alberto-Culver, 417 U.S. 506 (1974) (holding claims brought under Securities Exchange Act of 1934 arising out of international contracts arbitrable); Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967) (holding that, when one party to a contract containing an arbitration clause claims fraud in the inducement of the contract generally, the claim must be settled in arbitration according to the terms of the arbitration clause).

45. *Byrd*, 470 U.S. at 218.

46. *Mitsubishi*, 473 U.S. at 627.

47. The SEC has approved the operation and implementation of the arbitral systems for securities cases provided by the National Association of Securities Dealers (the "NASD"), the New York Stock Exchange (the "NYSE") and the American Stock Exchange. *See* SEC SECURITIES EXCHANGE ACT RELEASE NO. 16390 (Nov. 30, 1979), 18 SEC DOCKET 1197. The SEC retains general jurisdiction to monitor the fairness of the rules of the NASD and the Exchanges, including the rules governing their arbitration proceedings. *See* 15 U.S.C. ¶ 78s (c).

48. The American Arbitration Association has offices in over thirty cities, and arbitration may be held in any location to which the parites agree. Similarly, the NYSE has standing panels in thirty-five cities and the NASD in fifty cities, and each will conduct hearings elsewhere upon agreement of the parties.

speedy, economic, efficient, confidential, and fair means of dispute resolution.[49]

Moreover, arbitrators are available today who are experienced and fully competent to interpret and apply the securities laws. Unlike the situation in 1953, the year of the *Wilko* decision, there is currently a fully developed body of case law interpreting the securities laws to which arbitrators can turn for guidance. Many arbitrators are lawyers who specialize in securities counseling or litigation. Others arbitrators are business or accounting executives, financial consultants, and college deans or professors. As the *Mitsubishi* Court noted, "adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed and arbitral rules typically provide for the participation of experts."[50]

Furthermore, arbitration fully satisfies the federal policies underlying the securities laws. In securities disputes, arbitrators are obligated to apply the federal securities laws,[51] and their awards can be vacated on a number of statutory grounds, including situations in which the arbitrators exceeded or imperfectly executed their powers.[52] Enforcement of an arbitration award may require judicial confirmation. Thus, the courts will be able to ensure at the enforcement stage that the legitimate interest of the securities laws has been addressed.[53] The prospect, and the reality, of judicial review assures that the policies embodied in the securities laws will be applied. Thus, the *Wilko* Court's suspicion that arbitration would somehow undermine those policies[54] is simply unfounded.

The extensive arbitration in the more than thirty-four years since *Wilko* further demonstrates the efficacy of arbitration. In 1950, shortly before the *Wilko* decision, the American Arbitration Association had a total of approximately 1750 arbitrations, fewer than five hundred of which were commercial. Conversely, in 1985, the total number of arbitrations increased more than twenty-five

49. In *Mitsubishi,* the Court noted, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forego access to judicial remedies." 473 U.S. at 633.

50. *Id.*

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

52. 9 U.S.C. ¶ 10 (d).

53. *Mitsubishi,* 473 U.S. at 628.

54. *Id.* at 628.

times to 45,000, over 8,000 of which were commercial.[55] This extensive, nationwide experience with arbitration has shown that it is a fair, efficient, and effective means of resolving commercial disputes. Thus, in recent years, the virtues and efficacy of arbitration have been widely recognized by courts and commentators.[56]

Experience has shown also that arbitration is a fair method of resolving securities disputes in particular. Contrary to the *Wilko* majority's assumptions, arbitration of securities disputes has not proven to be disadvantageous to customers. For example, a survey conducted by the American Arbitration Association revealed that of forty cases brought by customers against securities firms recently arbitrated to decision under the auspices of the Association, twenty-seven (68%) resulted in awards for the customer, with an average award in excess of $26,000, including four awards of punitive damages (ranging from $50,000 to $150,000).[57]

The fairness and effectiveness of securities arbitrations is confirmed also by its use in other countries. Arbitration clauses regarding securities claims are generally enforceable in several countries, including the following: Austria, Belgium, Canada, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, Netherlands, Singapore, Spain and Switzerland.[58] Further, as a result of *Mitsubishi* and *Scherk v. Alberto-Culver*,[59] if domestic securities and antitrust claims were held to be non-arbitrable, the anomalous result would be that foreign arbitrators would be trusted to apply these federal laws, and U.S. arbitrators would not.

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55. *See* Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, n.7 (1985); Furnish, *Commercial Arbitration Agreements and The Uniform Commercial Code*, 67 CALIF. L. REV. 317, 317-18 & n.1 (1979).

56. *See, e.g.* Burger, *Isn't There A Better Way?* 68 A.B.A. J. 274 (March 1982); Furnish, *Commercial Arbitration Agreements, supra* note 55; Meyerowitz, *The Arbitration Alternative*, 1 A.B.A. J. 78 (Feb. 1985).

57. Materials in files of AAA's Office of Case Administration. Similarly, NASD statistics show that in 1985, 55% of the public customer cases that were arbitrated to decision awarded damages to the customer. *See* Securities Industry Conference on Arbitration, Report No. 5, at 6 (April, 1986).

58. *See* International Council for Commercial Arbitration, Supp. 1 (May 1984) at 5-6 (Austria); 4-5 (Belgium); 5 (Canada); 8-9 (Great Britain); *Id.* Supp. 3 (Jan. 1985) at 15-18 (Italy); 8-9 (Switzerland); *Id.* Supp. 4 (Nov. 1985) at 7-8 (Greece); *Id.* Supp. 5 (May 1986) at 6-7 (Denmark); Doing Business in Europe, Common Mkt. L.R. (CCH) ¶ 27033 (1986) (Netherlands); *Id.* at ¶ 28553 (Spain); International Council for Commercial Arbitration, *Year Book: Commercial Arbitration* Vol. XI (1986) at 29-33 (Singapore); P. Gide, J. Loyrette and P. Nouel, *Le Droit Francais de L'Arbitrage* at 57-75 (1983) (France); O. Glossner, *Commercial Arbitration in the Federal Republic of Germany* (1984) at 2-4, 55 (Germany); Z. Kitagawa, *Doing Business in Japan*, Vol. 7 at ¶ 4.03 (1986) (Japan).

59. 417 U.S. 506 (1974). See *infra* notes 93-99 and accompanying text.

With the increasing internationalization of the securities markets, such a distinction would be irrational.

As these developments demonstrate, arbitration has proven to be a fair, efficient, and effective means of resolving commercial disputes, including securities disputes.[60] In contrast, the *Wilko* Court's assumptions contradict both experience and the Congressional intent as embodied in the Arbitration Act. In recent years, the Supreme Court increasingly has rejected the traditional judicial suspicion of arbitration, and has enforced a strict reading of the Arbitration Act favoring the use of arbitration in dispute resolution. Nevertheless, until the *McMahon* decision, substantial uncertainty existed about the application of the Arbitration Act to securities disputes. This uncertainty was reflected by the conflict among district courts regarding the arbitrability of securities claims.[61] The recent line of Supreme Court pronouncements, culminating in *McMahon*, has finally laid to rest the unwarranted suspicion of the appropriateness and capacity of arbitration tribunals to effectively deal with securities issues.

III. The Arbitrability of Securities and RICO Claims Prior to *McMahon*

A. The Arbitrability of Securities Issues

1. Pre-*Byrd* Procedural Issues

Prior to the decision in *Byrd*, the federal circuits split over the proper administration of arbitrable claims that were factually and

60. There are various other indicia of the increasing acceptance of arbitration. Whereas in 1950 only twenty states had statutes requiring the enforcement of arbitration clauses, today all but five states (Alabama, Mississippi, Nebraska, North Dakota, and West Virginia) do. Materials in files of AAA's Office of General Counsel. Moreover, case law, including the decisions of the Supreme Court discussed above, is increasingly receptive to arbitration. *See generally* DiBenedetto, *An Outline for Arbitration Under the Civil Practice Law and Rules*, 48 ALB. L. REV. 763 (1984) ("Over the years there has been a dramatic increase in both the number of controversies submitted to arbitration and the judiciary's acceptance and encouragement of this alternative means of dispute resolution."). *Id.* State and federal courts have increasingly adopted arbitration programs to help resolve disputes also. Thus some 16 states already have court-annexed arbitration programs in place, and eight more states and the District of Columbia are contemplating implementation; two federal district courts have such programs in place, and such programs are being adopted in eight more districts. Federal Judicial Center, *Settlement Strategies for Federal District Judges* 43-46 (1986). Moreover, the AAA's role as an impartial administrator of arbitration has been specifically recognized in two federal statutes, three federal regulations, and over 40 state statutes in 21 states and the Virgin Islands. *See* 5 *Lawyers' Arbitration Letter* No. 2 (June 1981 & Supp. 1983).

61. *See* Appendix B of this article for a complete list of district court cases deciding both for and against use of arbitration for securities claims prior to *McMahon*.

legally intertwined with non-arbitrable claims.[62] This issue arose primarily in federal and state securities cases, and was premised on the assumption that federal courts have exclusive jurisdiction over all federal securities claims.[63] The Fifth, Ninth, and Eleventh Circuits acknowledged the strong federal policy favoring arbitration as embodied in the Arbitration Act,[64] yet followed the intertwining doctrine developed by the Fifth Circuit.[65] These courts considered the pro-arbitration policy to be well settled by a line of Supreme Court and lower federal court decisions.[66] Nevertheless, these courts concluded that, when it is not feasible to separate the non-arbitrable federal securities claims from the arbitrable claims, a court should deny arbitration in order to preserve exclusive jurisdiction over the federal securities claims.[67]

The Fifth Circuit presented two rationales in support of the intertwining doctrine. First, it reasoned that arbitration "presents a threat of binding the federal forum through collateral estoppel"[68] when an arbitrator reviewing state claims must render determinations on the issues central to the resolution of federal claims. The second reason cited by the Fifth Circuit was judicial efficiency. By ruling against arbitration, courts avoided bifurcated proceedings and wasteful, duplicative litigation.[69]

The intertwining doctrine contravened the plain language of the Arbitration Act, which states that "the court shall make an Order directing the parties to proceed to arbitration in accordance with the terms of the Agreement."[70] In an effort to circumvent the plain meaning of the statute, the Fifth, Ninth, and Eleventh Circuits reasoned that Congress did not specifically consider the prospect of

62. *See* Belke v. Merrill Lynch Pierce Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318, 335 (5th Cir. 1981).

63. *See Miley*, 637 F.2d at 335.

64. *Byrd*, 726 F.2d at 553; *Belke*, 693 F.2d at 1025; *Miley*, 637 F.2d at 335; Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976).

65. *Belke*, 693 F.2d at 1023; *Sibley*, 543 F.2d at 540.

66. *Mitsubishi*, 473 U.S. at 614; *Byrd*, 470 U.S. at 226; Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding preempted state law invalidating arbitration clauses otherwise valid under Arbitration Act); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (holding a federal district court's stay of federal suit seeking arbitration under § 4 of Arbitration Act improper as not having met requisite circumstances for surrender jurisdiction); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (holding claims brought under Securities Exchange Act of 1934 arising out of international contracts arbitrable); Prima Paint Corp. v. Flood & Conklin Manufacturing, 388 U.S. 395 (1967).

67. *Sibley*, 543 F.2d at 543.

68. *See, e.g., Miley*, 637 F.2d at 335-36.

69. *Id.* at 337.

70. 9 U.S.C. § 4.

bifurcated proceedings, and that the plain language of the statute might therefore be misleading.[71] These courts concluded that the Arbitration Act's purpose was to facilitate speedy and efficient decision-making, and ruled that bifurcated proceedings would thwart the legislative intent and that, as a result, the judiciary must consolidate claims for judicial resolution.[72]

In contrast, the Sixth, Seventh, and Eighth Circuits held that the Arbitration Act divests district courts of their discretion to arbitrate arbitrable claims[73]. In *Dickenson v. Heinold Securities, Inc.*,[74] the Seventh Circuit analyzed the cases espousing the intertwining doctrine and rejected their reasoning. The court noted that the Arbitration Act does not identify ineffeciency as a bar to arbitration and remarked further that the decisions of the Fifth Circuit applying the intertwining doctrine failed to give appropriate weight to the policies underlying the Arbitration Act.[75] The court concluded that the Arbitration Act requires the courts to enforce the parties' contract regarding dispute resolution, and not substitute judicial preferences of economy and efficiency.[76]

2. Pre-*Byrd* Substantive Issues

Courts that have continued to hold that Section 10(b) and Rule 10b-5 claims are not subject to arbitration rely on the Supreme Court's holding in *Wilko v. Swan*[77] for this proposition. This reliance, however, is clearly unwarranted. In *Wilko*, the Court determined that express provisions of the Securities Act of 1933[78] (the "1933 Act") barred enforcement of an agreement to arbitrate the statute's express judicial remedy. According to the *Wilko* Court, Section 12(2)[79] creates "a special right" to recover for misrepresentation that differs substantially from the common law action.[80] The *Wilko* Court held that the right to select a judicial forum was a "provision" of the 1933 Act, and thus subject to Section 14 of the

71. *See, e.g., Byrd*, 726 F.2d at 554.
72. *Id.*
73. Surman v. Merrill Lynch Pierce Fenner & Smith, 733 F.2d 59 (8th Cir. 1984); Lyski v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983); Dickenson v. Heinold Sec., Inc., 661 F.2d 638 (7th Cir. 1981).
74. Dickenson v. Heinhold Sec., Inc., 661 F.2d 638.
75. *Id.* at 646.
76. *Id.*
77. 346 U.S. 427 (1953).
78. 15 U.S.C. § 771(2) (1982).
79. *Id.*
80. *Wilko*, 346 U.S. at 431.

1933 Act.[81] Section 14 prohibits any "stipulation" binding any person acquiring security to waive compliance with any "provision" of that Act.[82] Taking these provisions together, the Court concluded that an arbitration clause would constitute a "stipulation" waiving the "provision" of the 1933 Act which grants a special right to sue in any court of competent jurisdiction.[83] Thus, the Court held such arbitration clauses to be unenforceable.[84]

The reasoning of *Wilko* was thus limited to the specific language of the 1933 Act; and, in particular, to the express statutory remedy in section 12(2).[85] As the Supreme Court has recently reconfirmed, the 1933 Act and the 1934 Act should not necessarily be construed *in pari materia*, but should be analyzed separately according to the language and purpose of each statute.[86]

Until *Byrd*, lower federal courts consistently extended the reasoning of *Wilko* to claims arising under section 10(b) and Rule 10b-5[87] of the Securities Exchange Act of 1934,[88] holding such claims to be non-arbitrable.[89] In many instances, courts simply assumed that the holding in *Wilko* applied to the 1934 Act as well. For example, in *Starkman v. Seroussi*, the United States District Court for the Southern District of New York found *Wilko's* holding "equally applicable" to the 1934 Act, and summarized the rule as follows: an "agreement to arbitrate future controversies is void . . . where it is brought to enforce any liability or duty created by the Securities Act of 1933 or the Exchange Act of 1934."[90] Other

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 438.
85. Assuming that the 1933 Act implies a Congressional prohibition against waiving the right to sue in federal court, the Supreme Court's holding in *Wilko* was clearly correct. It is well settled that contracts are deemed to incorporate all relevant provisions of existing statutory law. Burns v. Regional Transp. Auth., 112 Ill. App. 3d 464, 445 N.E.2d 348, *rev'd on other grounds*, 101 Ill. 2d 284, 461 N.E.2d 969 (1982). Thus, in a technical sense, there is no conflict between the Arbitration Act and the non-waiver provision of the 1933 Securities Act; contracts providing for arbitration of securities disputes are deemed to incorporate an exception for claims arising under the 1933 Act. *Id.*
86. Randall v. Loftsgaarden, No. 85-519, slip op. (United States July 2, 1986).
87. 17 C.F.R. § 240.10b-5 (1987).
88. 17 U.S.C. § 78j(b) (1982).
89. Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 (8th Cir. 1984) ("Lower courts have ... held with consistency that *Wilko* applies equally to claims arising under the Securities Exchange Act of 1934 or regulations promulated thereunder."). *See also* Merrill Lynch, Pierce, Fenner & Smith v. Moore, 590 F.2d 823 (10th Cir. 1978); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, 538 F.2d 532 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1010 (1986); Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1987).
90. Starkman v. Seroussi, 377 F. Supp. 518, 522 (S.D.N.Y. 1974).

federal courts, citing *Wilko* for support, have summarily asserted that arbitration clauses are void under the 1934 Act.[91] Therefore, courts addressing this issue generally have concluded that the similarities between the Securities Act of 1933 and the Securities Exchange Act of 1934 "far outweigh any differences."[92]

Important differences exist, however, between the two statutes. In *Scherk v. Albert-Culver Co.*,[93] the Supreme Court held that the 1934 Act claims arising out of international transactions are arbitrable, notwithstanding the uniform rule that domestic claims are non-arbitrable.[94] The Supreme Court reasoned that considerations of international comity and commercial predictability outweighed the solicitude for the individual investor underlying the *Wilko* doctrine.[95] The *Scherk* Court stated in dictum that, although the 1934 Act contains a non-waiver provision comparable to that found in the 1933 Act, it does not create the "special right" that the *Wilko* Court found significant in Section 12(2) of the 1933 Act.[96] The Court observed that the Section 10(b) and Rule 10b-5 claims were implied, rather than express, causes of action. The Court further noted that the 1934 Act does not provide the broad grant of State and federal jurisdiction afforded potential plaintiffs by Section 22 of the 1933 Act.[97] In sum, the Court determined that the 1934 Act did not contain the "provisions" that prior decisions held were non-waivable under Section 14 of the 1933 Act. The Court concluded that "a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control" claims brought under the 1934 Act.[98]

After *Scherk*, many subsequent federal decisions addressed the analysis expressed in this dictum.[99] Nevertheless, courts almost universally continued to hold claims arising under the 1934 Act to be non-arbitrable.[100] These courts were not persuaded that the differences between the 1933 and 1934 Acts or any policy considerations necessitated any relevant distinction between the two

91. *Sibley*, 543 F.2d at 543 n.3.
92. *Id.*
93. 417 U.S. 506 (1974).
94. *Id.* at 519-20.
95. *Id.* at 515-17.
96. *Id.* at 513-14.
97. *Id.*
98. *Id.* at 513.
99. Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536 (3d Dist. 1976); *Moore*, 590 F.2d at 827; *Weissbuch*, 558 F.2d at 834.
100. *See Surman*, 733 F.2d at 61.

statutes.[101]

3. The *Byrd* Case

In *Byrd*, the Supreme Court cast considerable doubt upon the practice of extending *Wilko* to Section 10(b) and Rule 10b-5 claims. Although confronted with the issue, the Court expressly declined to decide whether arbitration was appropriate to resolve such securities claims.[102] In *Byrd*, a dispute arose between A. Lamar Byrd, a private speculator, and Dean Witter Reynolds. Byrd opened a trading account with Dean Witter Reynolds in which he placed $160,000 for investment. The parties signed a written agreement to arbitrate any claims arising out of the account. The value of the account quickly declined by more than $100,000, and Byrd ultimately filed suit in federal district court, alleging violations of the Securities Exchange Act of 1934 and various state securities statutes.

Dean Witter sought to compel arbitration of the state claims under Section 4 of the Arbitration Act, conceding that the claims under the Securities Exchange Act of 1934 were nonarbitrable. In accordance with the intertwining doctrine, the district court denied the motion to compel arbitration,[103] and the Ninth Circuit affirmed.[104] The Supreme Court granted certiorari to determine whether the federal district court properly refused to compel arbitration of the state law claims under the arbitration agreement.[105] The Court held that a federal district court may not deny a motion to compel arbitration of state claims under an arbitration agreement on the ground that the claims are intertwined with non-arbitrable federal securities claims.[106]

The Supreme Court based its decision on the legislative history of the Arbitration Act. The Court concluded that, contrary to the interpretation of the Ninth Circuit, the primary purpose of the Arbitration Act was to ensure the enforcement of arbitration agreements, not to promote judicial efficiency.[107] The legislature was aware of the potential salutary effect of the statute on judicial speed and efficiency. Its primary concern, however, "was to enforce private agreements into which parties had entered, and that concern

101. *Ayres*, 538 F.2d at 536.
102. *Byrd*, 470 U.S. at 216 n.1.
103. *See Byrd*, 470 U.S. at 215-16.
104. *Byrd*, 726 F.2d at 552.
105. *Byrd*, 470 U.S. at 214.
106. *Id.* at 217.
107. *Id.* at 220-21.

requires that [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."[108]

As for the judicial concern over the preclusive effect of an arbitrator's fact-finding, the Court observed that the application of collateral estoppel to arbitration is unsettled, and that it is unclear that an arbitration proceeding would have any preclusive effect on the trial of federal, non-arbitrable claims.[109] Even the lower courts that previously rejected the interwining doctrine assumed that arbitration of pendent state issues would often have to be stayed pending the completion of the trial of non-arbitrable federal statutory claims in order to protect the federal court's exclusive jurisdiction over those matters.[110] The *Byrd* Court held that neither a denial of arbitration nor a stay of arbitration was necessary to protect federal interests.[111] Without deciding what preclusive effect, if any, results from arbitration proceedings, the Court stated that lower courts could take into account the federal issues warranting protection in framing preclusion rules in this context.[112]

Justice White, in his concurring opinion in *Byrd*, discussed the reasoning of *Wilko* and its inapplicability to claims under Section 10(b) of the Exchange Act. He observed that the validity of the conclusion that Section 10(b) claims are not arbitrable "is a matter of substantial doubt."[113] He stated that "*Wilko's* reasoning cannot be mechanically transplanted to the 1934 Act." He concluded that a private agreement to arbitrate an implied cause of action cannot constitute a waiver of a "provision" of the Exchange Act when the Act makes no provision for a private right of action.[114] Given that a private right of action under Section 10(b) has been judicially implied, rather than Congressionally mandated, the non-waiver provision of Exchange Act Section 29(a)[115] is, in the words of Justice White, "literally inapplicable."[116] Thus, the clear impact of *Byrd* was that Section 10(b) claims are arbitrable.[117]

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108. *Id.* at 221.
109. *Id.* at 222.
110. *See, e.g.,* Dickenson v. Heinold Sec., Inc., 661 F.2d 638 (7th Cir. 1981).
111. *Byrd*, 470 U.S. at 222.
112. *Id.* at 223.
113. *Id.*
114. *Id.*
115. 15 U.S.C. § 78cc(a).
116. *Byrd*, 470 U.S. at 225.
117. *Id.* Moreover, the virtual identity of Section 10(b) claims and claims arising from common law fraud, which are clearly arbitrable, argues against any special exception to the Arbitration Act for Section 10(b) claims. *Id.*

4. Post-*Byrd*

In light of the Supreme Court decisions in *Byrd* and *Scherk*, the majority of district courts have ordered arbitration when deciding the arbitrability of Section 10(b) and Rule 10b-5 claims.[118] These courts have found that the reasoning of *Wilko* cannot be extended to include securities claims arising under the 1934 Act. Some courts, however, while citing *Byrd* for its procedural holding,[119] have simultaneously declared Section 10(b) and Rule 10b-5 claims to be non-arbitrable without reference to *Byrd*.[120] Other courts have continued to follow *Wilko* and its progeny, deciding against arbitration. These courts have evinced an intention to continue applying *Wilko*, unless and until the Supreme Court holds the practice to be violative of the Arbitration Act.[121]

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118. *See* Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith, 623 F. Supp. 1005, 1008 (E.D. Mich. 1985) (stating that "[t]he overwhelming majority of lower federal courts have accepted the court's invitation in Byrd and have ordered arbitration of claims under the 1934 Act and Rule 10b-5"); Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1509 (S.D.N.Y. 1985) (the court joins "the growing ranks of district courts that have held that arbitration agreements are not void as to claims under the 1934 Act"). *See also* Peele v. Kidder, Peabody & Co., 620 F. Supp. 61 (W.D. Mo. 1985); Dees v. Distenfield, 618 F. Supp. 123 (C.D. Cal. 1985); West v. Drexel, Lambert, Inc., 623 F. Supp. 26 (W. D. Wash. 1985); McMahon v. Shearson/American Express, Inc., 84 Civ. 3331 (LFM), slip op. (S.D.N.Y Sept. 25, 1985), *rev'd*, 788 F.2d 94 (2nd Cir. 1986); Houlihan v. Schmacker, 621 F. Supp. 48 (E.D. Mo. 1985); Niven v. Dean Witter Reynolds, Inc., Fed. Sec. L. Rep. (CCH) § 92,059 (M.D. Fla. March 28, 1985); Finn v. Davis, 610 F. Supp. 1079 (S.D. Fla. 1985); Ross v. Mathis 624 F. Supp. 998 (N.D. Ga. 1985); Land v. Dean Witter Reynolds, Inc., 617 F. Supp. 52 (E.D. Va. 1985); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-1647, slip op. (M.D. Fla. March 9, 1985); Greenstein v. First Biscayne Corp., No. 82-0584, slip op. (S.D. Fla. May 16, 1985); Mann v. Foster & Marshall, No. C84-925D (W.D. Wash. May 16, 1985); Wells v. Oppenheimer & Co., 106 F.R.D 258 (S.D.N.Y. 1985); Fisher v. Prudential-Bache Sec., 635 F. Supp. 234 (D. Md. 1986); Jarvis v. Dean Witter Reynolds, Inc., 614 F. Supp. 1146 (D. Vt. 1985); Driscoll v. Smith, Barney, Harris, Upham & Co., 625 F. Supp. 25 (S.D. Fla. 1985); Westwind Trans. v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-734-Civ.-T-10, slip op. (M.D. Fla. Apr. 9, 1985).

119. In accordance with the *Byrd* mandate, lower courts have uniformly compelled arbitration of arbitrable state claims, although they may be intertwined with nonarbitrable federal claims. *See, e.g.*, Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986); Changan v. Butcher & Singer, Inc., No. 85-5550, slip, op. (E.D. Pa. Apr. 30, 1986); Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691 (9th Cir. 1986); AFP Imaging Corp. v. Ross, 780 F.2d 202 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3295 (1986); Shihade v. Dean Witter Reynolds, Inc., 766 F.2d 461 (11th Cir. 1985); NPS Communications, Inc. v. Continental Group Inc., 760 F.2d 463 (2d Cir. 1985); Austin Municipal Sec., Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985); Rush v. Oppenheimer & Co., 799 F.2d 885 (2d Cir. 1985). Thus, the procedural issue associated with the Arbitration Act has been resolved.

120. Clark v. Kidder, Peabody & Co., 636 F. Supp. 195 (S.D.N.Y. 1986); Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985).

121. *See, e.g.*, Scharp v. Cralin & Co., 617 F. Supp. 476, 479 (S.D. Fla. 1985) (following the rule that claims under the 1934 Act are not arbitrable "until overruled by the

As noted previously, however, the trend of recent rulings has been toward arbitrability.[122] Until *McMahon*, the Supreme Court's most recent arbitration decision was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*.[123] In *Mitsubishi*, the Court held that, as with any other contract, the parties' intentions control as to the scope of arbitration agreements, but their intentions should be generously construed to favor arbitrability.[124] In *Byrd*, the Court held that arbitration agreements must be enforced in the absence of a countervailing policy reflected in another federal statute.[125] The *Mitsubishi* Court more specifically held that arbitration must be compelled, unless Congress has clearly set forth a contrary intent.[126] Despite the strong wording of the dicta in *Byrd* and *Mitsubishi*, some lower courts refused the guidance that these decisions provided on substantive matters.

After the *Byrd* and *Mitsubishi* rulings, the lower courts were burdened with motions to compel arbitration of Section 10(b) and civil RICO claims. Circuit court precedent compelled many of these courts to prohibit enforcement of arbitration agreements and to hear the resulting lawsuits. Others, relying upon recent decisions of the Supreme Court, considered the issues to be open and concluded that Section 10(b) and RICO claims were arbitrable. After *Byrd*, over one hundred cases nationwide decided the issue of the enforceability of the agreements to arbitrate Section 10(b) claims.[127] Opposite conclusions were reached by the Second Circuit and the Eighth Circuit on this issue. Accordingly, the Supreme Court had little choice in granting certiorari to review the merits of each argument.

United States Supreme Court or the United States Court of Appeals for the Eleventh Circuit sitting en banc").

122. Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith & Co., 623 F. Supp. 1005, 1008 (E.D. Mich. 1985).

123. 473 U.S. 614 (1985).

124. *Mitsubishi*, 473 U.S. at 626.

125. *Byrd*, 470 U.S. at 221.

126. *Mitsubishi*, 473 U.S. at 627. The Supreme Court stated, "It is the Congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." The Court elaborated:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to judicial forum, that intent will be decucible from 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.

127. *See* Appendix A for a complete list of the district court decisions on this issue.

In *McMahon*,[128] the Second Circuit refused to enforce agreements to arbitrate claims under Section 10(b) of the Exchange Act. This decision directly conflicted with the Eighth Circuit's decision in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[129] which enforced an agreement to arbitrate Section 10(b) claims. As the Eighth Circuit recognized, the conflict was clear and direct:

> Finally, we observe that the federal appellate courts, in the absence of precedent in their own circuit, tend to rely on precedent in other circuits. Ordinarily, then, in deciding a case of this kind, we should defer to the opinion of another circuit, such as rendered by the Second Circuit in *McMahon*, and avoid creating a conflict within the circuits. We believe, however, that the Supreme Court's opinions in *Scherk* and *Byrd* have invited a reexamination of the applicability of *Wilko* to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. Because we are not bound by the precedents of other circuits, we are free to make a new assessment of this issue. We have made that assessment, and now create a conflict within the circuits. We assume the Supreme Court will eventually decide this question.[130]

After careful analysis, the Eighth Circuit concluded:

> Based on these differences between the 1933 and 1934 Acts, and on the strong federal policy favoring enforcement of arbitration agreements, we conclude that *Wilko's* holding and rationale does not extend to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. The nonwaiver 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. . . . We hold, then, that Congress has not evinced an intention to preclude the waiver of judicial remedies for the section 10(b) and Rule 10b-5 rights at issue here.[131]

The Second Circuit's mistrust of arbitration, as exemplified in *McMahon*, directly conflicted with the Congressional policy codified in the Arbitration Act and recent Supreme Court decisions. Congress intended the Arbitration Act to reverse the courts' general hostility towards arbitration agreements and to expressly state the strong public policy in favor of enforcing such agreements.[132]

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128. *McMahon*, 788 F.2d 94 (1986).
129. 795 F.2d 1373 (8th Cir. 1986).
130. *Phillips*, slip op. at 14.
131. *Phillips*, slip op. at 10 (footnotes omitted).
132. *Mitsubishi*, 473 U.S. at 626-27 n.14; *Byrd*, 470 U.S. at 217-20; Southland Corp. v. Keating, 465 U.S. 1, 10-16; Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *Scherk*, 417 U.S. at 510-11.

Similarly, the Supreme Court recognized that Section 2 of the Act created a federal law of arbitrability, and established that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.[133]

Mitsubishi taught that statutory claims, express or implied, are arbitrable absent explicit Congressional intent to the contrary.[134] The Second Circuit's decision in *McMahon* completely thwarted the *Mitsubishi* analysis. By refusing to enforce an agreement to arbitrate an implied right of action, the Second Circuit preferred its own view which stressed the importance of a judicial forum for an implied cause of action, over the explicit Congressional mandate codified in the Arbitration Act that arbitration agreements should be enforced.

B. The Arbitrability of RICO Claims

RICO imposes treble damages upon any person who conducts an enterprise by means of a "pattern of racketeering activity."[135] Congress enacted RICO primarily to combat the infiltration of legitimate business by organized crime.[136] In the years since its passage, however, the private cause of action under RICO has developed into a broad commercial tort quite different from Congress' original conception.[137] "Racketeering" is now a basic claim in commercial disputes, and RICO claims are added as a matter of course in virtually all cases challenging securities transactions.

Until *Mitsubishi*, the enforceability of agreements to arbitrate RICO claims was an open question, although the language of the RICO statute neither expressly nor implicitly prohibited the arbitration of private RICO claims. In the wake of *Byrd* and *Mitsubishi*, many courts held private RICO claims to be arbitrable, based upon the absence of a non-waiver provision in the RICO statute [138]

133. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25; *see also Southland Corp.*, 465 U.S. at 10-16.

134. *Mitsubishi*, 473 U.S. 614.

135. 18 U.S.C. § 1964(C) (1982).

136. United States v. Turkette, 452 U.S. 576, 591 (1981). Section 1964(c) of RICO grants a private right of action for treble damages, reasonable attorneys' fees, and the cost of the suit to "[a]ny person injured in his business or property by reason of a violation of [RICO's] Section 1962." 18 U.S.C. § 1964(c) (1982). Section 1962(c) makes it unlawful to conduct the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activity. 18 U.S.C. § 1962 (1982).

137. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

138. *See* Bale v. Dean Witter Reynolds, Inc., 627 F. Supp. 650 (D. Minn. 1986); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1985-86 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92, 276 (W.D. Pa. Apr. 19, 1985).

and a legislative history suggesting a Congressional intent to bar arbitration of RICO claims.[139]

The Court's decision in *Mitsubishi* clearly affected the RICO jurisprudence of the Fifth Circuit. In *Smokey Greenhaw Colton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[140] the court initially ruled that civil RICO claims are not arbitrable. Upon reconsideration of the *Mitsubishi* ruling, however, the Fifth Circuit withdrew that portion of its decision, on the ground that the *Mitsubishi* doctrine was apt to be equally applicable to domestic and international disputes.[141]

In *Mayaja Inc. v. Bodkin*,[142] the Fifth Circuit maintained that all RICO claims are arbitrable regardless of the arbitrability of the predicate offenses involved. Following the Supreme Court's emphasis on text and legislative history in *Mitsubishi*, the Fifth Circuit determined that the text of RICO gives no indication of Congressional intent on the arbitration question. Then, turning to the legislative history of RICO's private treble-damages provision in section 1964(c), the court discovered a compensatory purpose similar to that which the *Mitsubishi* Court found in the antitrust laws. The Fifth Circuit concluded that such a compensatory motive indicated that plaintiffs may effectively vindicate their right of action, and serve the legislative intent, in the arbitral forum.[143]

In *McMahon*, the Second Circuit held that the policies underlying RICO are too important to be left to arbitrators, and distinguished the Supreme Court's decision in *Mitsubishi*.[144] The Second Circuit asserted that generalized notions of public policy preclude arbitration of RICO claims.[145] The First Circuit has subsequently

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139. Bob Ladd, Inc. v. Adock, 663 F. Supp. 241 (E.D. Ark. 1986); Bale v. Dean Witter Reynolds, Inc., 627 F. Supp. 650 (D. Minn. 1986).

140. 785 F.2d 1274 (5th Cir. 1986).

141. *Id.* The Fifth Circuit noted:

> Although Mitsubishi arose in an international antitrust dispute and its holding purports to be limited to that context, we believe that its broad language may carry significance for domestic disputes as well. The parties in this case should have the opportunity to argue the applicability of *Mitsubishi* to domestic RICO claims before the District Court. We therefore amend our opinion to refuse to decide the arbitrability *vel non* of the plaintiffs' RICO claim and, on remand, leave to the District Court the task of deciding that issue . . .

Id.

142. 803 F.2d 157 (5th Cir. 1986).

143. *Id.* at 165.

144. *McMahon*, 788 F.2d at 94.

145. *Id.*

endorsed this view.[146] This position, however, is in direct contravention with the circuit and district court decisions since *Mitsubishi* which direct arbitration of all civil RICO claims.[147]

Conversely, the Third and Eleventh Circuits have held that RICO claims are subject to arbitration only if the underlying predicate offenses of the RICO claim are arbitrable.[148] These circuits have assumed that *Mitsubishi* governs domestic disputes and have applied the case in different ways by treating RICO and RICO's predicate offenses separately.

The Second Circuit's decision in *McMahon* directly contravenes the *Mitsubishi* mandate. The decision contains no analysis of RICO's language or the statute's legislative history. Instead, the court decided to create a judicial exception to the Arbitration Act, concluding that undefined "public policy" considerations bar arbitration of RICO claims.[149]

Several of the pre-*McMahon* district court decisions holding that RICO claims are not arbitrable were decided before *Mitsubishi*, and were based upon the assumption that antitrust claims could never be arbitrated. Analogizing RICO claims to antitrust claims, those courts concluded that RICO claims could not be arbitrated.[150] The clear majority of district court cases that decided this issue after *Mitsubishi*, however, have reversed this trend and enforced agreements to arbitrate civil RICO claims.[151]

IV. THE *MCMAHON* DECISION

From February, 1980 through July 1982, Eugene and Julia McMahon, either individually, jointly, or on behalf of various trusts, signed a series of customer agreements with Shearson Lehman Brothers, Inc. ("Shearson"), a registered broker-dealer. Each of these agreements provided for arbitration of any controversy relating to the various accounts the McMahons maintained at Shearson: "Unless unenforcable due to federal or state law, any controversy arising out of or relating to my accounts, to transac-

146. Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (1st Cir. 1986).

147. *See* Appendix B which lists district court decisions that have addressed the enforceability of agreements to arbitrate civil RICO claims.

148. Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197 (3d Cir. 1986); Tashea v. Bache, Halsey, Stuart, Shield, Inc., 802 F.2d 1337 (11th Cir. 1986).

149. *McMahon*, 788 F.2d at 98-99.

150. *See* Roes v. Paine, Webber, Jackson & Curtis, Inc., No. C84-2311A (N.D. Ga. Mar. 29, 1985); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984).

151. *See* Appendix B.

tions with you for me or to this agreement or the breach thereof, shall be settled by arbitration."[152]

On October 26, 1984, the McMahons filed an action against Shearson, and its registered representative, Mary Ann McNulty ("McNulty"), in the Southern District of New York.[153] The McMahons alleged that there had been excessive trading in their accounts, that false statements were made and material facts were omitted from the advice given to them, and that certain securities they purchased were not appropriate for their particular investment objectives.[154] The McMahons asserted that this conduct constituted: (a) a violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, (b) a violation of Section 1962 of RICO, (c) common law fraud and, (d) a breach of fiduciary duty.[155]

A. The District Court Proceeding

Shearson and McNulty moved for an order to enforce the arbitration provisions in the customer agreements. The district court stated that arbitration should be compelled if the proponent of arbitration establishes: (1) the existence of a valid agreement to arbitrate, (2) arbitrable claims, and (3) no waiver of the right to arbitrate.[156] The district court dismissed the McMahons' argument that the arbitration agreement was an adhesion contract.[157] The court also rejected the argument that the claims were based on fraud and that fraud was a non-arbitrable issue.[158] With respect to the waiver issue, the McMahons contended that Shearson had waived its right to arbitrate the federal action when it commenced a state court action against the McMahons. The court found that because Shearson's state court proceeding involved issues only tangentially related to those at bar, the state proceeding had no bearing on the action and certainly was not a waiver of the arbitration provision.[159]

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152. 618 F. Supp. 384, 385 (S.D.N.Y. 1985).

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

154. *Id.* at 386.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* According to the court, even if it assumed that the customer's agreement was fraudulently induced, the breadth of the arbitration provision would mandate that the issue of fraud in inducement also be referred to arbitration. *Id.* at 387.

159. *Id.* Before the McMahons filed their federal suit, McNulty filed suit against Eugene McMahon in state court. McNulty's suit claims that McMahon "mounted a

The district court next addressed the question of which of the McMahons' claims were subject to arbitration. The court found that the Supreme Court's *Byrd* decision compelled the arbitration of the state law fraud claims.[160] The court summarily held the RICO claim not arbitrable because of important federal policies and the federal courts' enforcement of RICO.[161] The court then turned to the more difficult issue: the arbitrability of Section 10(b) claims.

The court first observed that the propriety of applying *Wilko* to claims under the 1934 Act had been questioned by the Supreme Court in *Sherk* and *Byrd*.[162] The court focused on the "salient distinctions" between Section 12(2) of the 1933 Act and Section 10(b) of the Exchange Act as expressed by Justice White in his concurrence in *Byrd*. Based on Justice White's concurrence in *Byrd*,[163] the reservations expressed by the Supreme Court in *Sherk*, and the strong national policy favoring the enforcement of arbitration agreements, the district court "accepted *Byrd*'s invitation" to compel the McMahons to comply with their express contractual obligations concerning arbitration.[164]

B. The Second Circuit Proceeding

The McMahons appealed the district court's order enforcing the agreement to arbitrate the Section 10(b) claims and Shearson cross-appealed the denial of its motion to arbitrate the RICO claims.[165] The Second Circuit reversed the district court's decision that Section 10(b) claims were arbitrable ruling that it was an unwarranted departure from established precedent.[166] In view of *Wilko* and the similarity of the non-waiver provision of the 1933 and 1934 Acts, the Second Circuit consistently had held that Section 10(b) claims

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vendetta" aimed at destroying her business by denigrating her as a stockbroker. McNulty charges that McMahon told her "I will get you, I will destroy you, and your husband, and your children." N.Y. Times, March 29, 1987.

160. *McMahon*, 618 F. Supp. at 387.

161. *Id.*

162. *Id.* at 388.

163. *Id.*

164. *Id.* The court also found that the McMahon's case did not present claims involving fraud, nor industry-wide practices which may tend to ensnare an unsuspecting public. According to the court, the McMahon's claim was simply that a single securities representative "churned" their accounts and made certain misrepresentations concerning the status of those accounts. Such a dispute over the management of an account neither raises broad issues of policy nor involves widespread industry practices and therefore touches none of the concerns which mandate a judicial forum. *Id.*

165. *McMahon*, 788 F.2d 94.

166. *Id.* at 97.

were not arbitrable. The Second Circuit also noted that the broad policy questions involved in securities law claims required a judicial forum for resolution of disputes.[167]

Finally, the Second Circuit found the public interest in judicial enforcement to be a compelling factor.[168] The Second Circuit concluded that it would be "improvident" to disregard the clear judicial precedent in the Second Circuit based upon mere speculation.[169] Addressing the arbitrability of RICO claims, the Second Circuit found that the *American Safety* doctrine and the implication of strong public policy considerations dictated that RICO claims be heard in a judicial forum.[170] Shearson appealed the Second Circuit decision.

C. The Supreme Court Holding[171]

On June 8, 1987, the United States Supreme Court held that

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167. *Id.*

168. *Id.* at 98.

169. *Id.*

170. *Id.* at 98-99. The Second Circuit also held that, in light of *Byrd*, the McMahons' state law claims were subject to arbitration. *Id.*

171. Shearson's Supreme Court brief argued that Rule 10b-5 claims are arbitrable. Brief for Petitioner at 26-28, Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987). Shearson observed that the Supreme Court itself had recognized that *Wilko* did not necessarily apply to section 10(b) of the 1934 Act. Shearson also argued that the Second Circuit erred in applying "misplaced and outdated concerns" regarding the adequacy of arbitrable forums to resolve federal secuities laws violations, Brief for Petitioner at 33-39, and asserted that arbitration provided a fair way to resolve securities law disputes. According to Shearson, securities arbitrators often are better equipped than a jury to resolve factual issues of improper executions of a customers' orders, or inappropriate investments, given their knowledge of the brokerage industry and the types of problems that commonly arise between customers and their stockbrokers. Brief for Petitioner at 346. Shearson argued also that the arbitration provision compelled the arbitration of the McMahons' RICO claims. Brief for Petitioner at 10-14. Shearson emphasized that the Arbitration Act compels arbitration of all claims absent congressional intent to the contrary. According to Shearson, the RICO statute does not contain *any* language indicating that Congress intended to preclude arbitration. Brief for Petitioner at 14-18. The McMahons responded. First, the McMahons asserted that the countervailing federal policies inherent in the 1934 Act and the underlying congressional intent compel an exception to the Arbitration Act. Brief of Respondent at 7-21. The McMahons argued that the *Wilko* rationale applied equally to claims under the 1934 Act, Brief of Respondent at 11, because the 1934 Act contains the same anti-waiver provision in the 1933 Act. The McMahons also maintained that the public policy rationale enunciated by the Second Circuit and the remedial purpose of protecting investors were still valid. Brief for Respondent at 13. According to the McMahons, the congressional inquiry into the insider trading schemes and other market abuses demonstrated the inadequacy of self-regulation. Finally, the McMahons asserted that the convenience of arbitration was outweighed by the "risks" of arbitration: the loss of the constitutional guarantee of due process, trial by jury, findings of fact and conclusions of law, federal pleading, discovery and evidentiary rules; the risk that the law will be improperly

Section 10(b) and RICO claims are arbitrable, reversing and remanding the Second Circuit's decision.[172] Justice O'Connor, writing for the majority,[173] observed that the Arbitration Act was the starting point for an analysis of the issues. The Arbitration Act, she wrote, mandates arbitration of Section 10(b)and RICO claims unless the Act's directive is overridden by a contrary congressional demand.[174] The opponent of arbitration has the burden of showing that Congress intended to preclude a waiver of the judicial forum.[175]

The Court rejected the McMahons' argument that Section 29(a) of the 1934 Act forbids a waiver of the Section 27(a) grant of jurisdiction to the federal courts.[176] According to the Court, Section 29(a)'s anti-waiver provision forbids the waiver of "compliance" with "substantive" provisions of the Exchange Act.[177] Section 27(a) merely addresses jurisdiction and does not impose any duty or substantive obligation with which the person trading in securities must "comply."[178] The Court asserted that *Wilko* did not compel a different result. The Court limited *Wilko* by holding that a waiver of the right to a judicial forum was unenforceable only when arbitration was judged inadequate to enforce the 1933 Act's statutory rights. The Court acknowledged that the continuing vitality of *Wilko* was questionable but declined to overrule the case.[179]

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applied; the possible risk of collateral estoppel and inconsistent verdicts and the unlikelihood, if not unavailability, under various rules of the industry's self-regulatory organizations, of the right to appeal. Brief for Respondent at 13. The McMahons argued that Congress intended to except civil RICO claims from the purviews of the Arbitration Act in RICO's juridictional provision. Brief for Respondent at 21-23. The McMahons analogized the RICO statute to the federal antitrust laws and contended that Congress created a private attorney general provision based on the antitrust model, designed to fill prosecutorial gaps. Brief for Respondent at 23. The McMahons noted that numerous courts, finding the antitrust analogy persuasive, held arbitration of RICO disputes to be unsuitable because of public policy concerns. Brief for Respondent at 25.

172. Shearson/American Express v. McMahon, 107 S. Ct. 2332 (1987).

173. Justices Renquist, White, Powell, and Scalia joined in Justice O'Connor's opinion. Justices Brennan, Blackmun, Marshall and Stevens joined in the Court's decision with respect to the arbitrability of RICO claims, but not with respect to the arbitrability of section 10(b) claims. Justice Blackmun filed an opinion concurring in part and dissenting in part, which was joined by Justices Brennan and Marshall. Justice Stevens also filed an opinion concurring in part and dissenting in part.

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

175. *Id.*

176. *Id.* at 2338.

177. *Id.*

178. *Id.*

179. The Court found that many of the concerns regarding arbitration expressed in *Wilko* were no longer valid because of improvements in the arbitration process. *Id.* The

The dissent charged the majority with abandoning investors at a time when the industry's abuses directed at public customers were more manifest than ever.[180] The dissent argued that *Wilko*'s holding should be extended to 1934 Act cases. According to the dissent, Section 29(a) of the 1934 Act was primarily designed to protect investors and demonstrates a Congressional intent to except securities claims from the Arbitration Act.[181] The dissent rejected the argument that the arbitration process had improved sufficiently and protected investors. Indeed, the dissent noted that the preparation of a record is not invariably required and that judicial review of the record is extremely limited.[182] Finally, the dissent asserted that the arbitration process is controlled by the securities industry.[183] Indeed, the dissent observed that the uniform opposition of investors to the arbitration process, and the securities industry's uniform support for the process, suggested that the securities industry does have an advantage in an arbitration forum.[184]

The Court was not divided over the arbitrability of RICO claims and unanimously held that RICO claims are subject to arbitration. The Court observed that neither the language of the RICO statute nor its legislative history evinced congressional intent to exclude

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Court also dismissed the McMahons' argument that Congress' amendment to section 28(b) of the 1934 Act indicated that Congress intended to preclude a waiver of the right to a judicial forum. As originally enacted, section 28(b) stated:

> Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange.

15 U.S.C § 78bb (1934). Section 28(b), as amended, provides:

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

15 U.S.C. § 78bb (1934). The Court, however, did not find an intent to preclude a waiver of access to the courts because Section 28(b) addresses only the "self-regulatory" functions of an exchange. *McMahon*, 107 S. Ct. at 2338.

180. *McMahon*, 107 S. Ct. at 2346.
181. *Id.* at 2348.
182. *Id.* at 2354-55.
183. *Id.* at 2355.
184. *Id.*

RICO from the dictates of the Arbitration Act.[185] Accordingly, the Court declined to find that there was an irreconcilable conflict between arbitration and RICO's public policy purposes. Further, the Court noted that it already addressed many of the "public policy" arguments in *Mitsubishi*,[186] and rejected the contention that the complexity of the dispute was a sufficient basis to reject arbitration.[187] Likewise, the "overlap" between a statute's civil and criminal penalties does not render the statutory claims nonarbitrable.[188] Finally, the Court observed that although RICO's drafters sought to fight organized crime, RICO actions are seldom brought against "the archetypical, intimidating mobster."[189]

V. CONCLUSION

With the watershed *McMahon* ruling, the Supreme Court has swept away any doubt about the enforceability of valid arbitration clauses. In essence, the Supreme Court has finally placed arbitration agreements on an equal footing with other contracts, and has signaled its intention to enforce the arbitrability of virtually all actions. At the same time, the Supreme Court has all but overruled *Wilko v. Swan*; at the very least, its precedential value has been severely circumscribed.

It is customary for securities dealers and brokerage houses to include arbitration clauses in their account agreements. Thus, virtually all future customer claims will be subject to arbitration under the auspices of the securities exchanges or self-regulatory organizations. With the dramatic increase in their arbitration dockets, these organizations may choose to circumscribe their own jurisdiction in order to reduce their backlog of arbitration proceedings. Nevertheless, the transfer of securities and RICO claims from the judicial system to the arbitration system is no longer a trend, but a reality. Therefore, it behooves the layman and the practitioner alike, to reevaluate the standard account agreements and form contracts in order to take advantage of the arbitration alternative, or avoid the undesirable implications of the *McMahon* doctrine. Whatever the practical ramifications, the *McMahon* doctrine will dramatically alter the course of business strategy and dispute resolution for the foreseeable future.

185. *Id.* at 2343-46.
186. *Id.* at 2344-45.
187. *Id.* at 2344.
188. *Id.*
189. *Id.* at 2345 (citing Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

APPENDIX A

DISTRICT COURT CASES ADDRESSING THE ENFORCEABILITY OF AGREEMENTS TO ARBITRATE § 10(b) CLAIMS

Cases Holding § 10(b) Claims Arbitrable

First Circuit

Agent v. Shearson/American Express, Inc., 633 F. Supp. 770 (D. Mass. 1985); Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., No. 83-2851-C (D. Mass. July 16, 1985), *vacated*, 795 F.2d 1111 (1st Cir. 1986); Prawer v. Dean Witter Reynolds, Inc., 626 F. Supp. 642 (D. Mass. 1985); Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-3240-N (D. Mass. July 19, 1985), *aff'd*, 807 F.2d 16 (1st Cir. 1986).

Second Circuit

Brener v. Becker Paribas Inc., 628 F. Supp. 442 (S.D.N.Y. 1985); Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (S.D.N.Y. 1985); Ilan v. Shearson/American Express, Inc., 632 F. Supp. 886 (S.D.N.Y. 1985); Intre Sport Ltd. v. Kidder Peabody & Co., 625 F. Supp. 1303 (S.D.N.Y. 1985), *modified*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 23, 1986) (decided after *McMahon* but following *AFP Imaging Corp.*), *aff'd*, 795 F.2d 1004 (2d Cir. 1986); Jarvis v. Dean Witter Reynolds, Inc., 614 F. Supp. 1146 (D. Vt. 1985); Johnson v. Kidder Peabody & Co., No. 85 Civ. 178 (N.D.N.Y. July 30, 1985); Shamir v. Kidder, Peabody & Co., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,511 (S.D.N.Y. Mar. 12, 1986); Terra Resources I v. Burgin, 664 F. Supp. 82 (S.D.N.Y. 1987).

Third Circuit

Baker v. Paine, Webber, Jackson & Curtis, Inc., 637 F. Supp. 419 (D. N.J. 1986); Erlbaum v. Prudential-Bache Securities, Inc., No. 85-5541 (E.D. Pa. Aug. 9, 1985), *vacated and remanded*, 797 F.2d 1197 (3d Cir. 1987); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 605 F. Supp. 510 (W.D. Pa. 1984), *vacated*, 797 F.2d 1197 (3d Cir. 1987) (decided after *McMahon*).

Fourth Circuit

Fisher v. Prudential-Bache Securities, Inc., 635 F. Supp. 234 (D. Md. 1986) (appeal pending); Land v. Dean Witter Reynolds, Inc.,

617 F. Supp. 52 (E.D. Va. 1985); Shotto v. Laub, 632 F. Supp. 516 (D. Md. 1986).

Fifth Circuit

Coonly v. Rotan Mosle, Inc., 630 F. Supp. 404 (W.D. Tex. 1985); Frye v. Paine Weber Jackson & Curtis, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,516 (N.D. Tex. Dec. 26, 1985); Hymel v. Delta Petroleum & Energy Corp., No. SA-83-CA-362 (W.D. Tex. June 19, 1985); Russell v. Shearson Lehman Bros., Inc., No. CA3-85-2335-R (N.D. Tex. Mar. 10, 1986), *aff'd in part,* 806 F.2d 259 (5th Cir. 1986), *cert. denied,* 107 S. Ct. 3210 (1987).

Sixth Circuit

Drazdik v. Kidder, Peabody & Co., No. C-85-2442 (N. D. Ohio Mar. 31, 1986), *aff'd in part and remanded,* 823 F.2d 553 (6th Cir. 1987); Gerhardstein v. Shearson/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,512 (N.D. Ohio Mar. 3, 1986); Moncrieff v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 623 F. Supp. 1005 (E.D. Mich. 1985); Yee v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., No. 84-4017 (E.D. Mich. Mar. 31, 1986).

Seventh Circuit

Austad v. Drexel Burnham Lambert, Inc., 828 F.2d 22 (7th Cir. 1987); Steinberg v. The Illinois Co., 635 F. Supp. 615 (N.D.Ill. 1986); Willis v. Prudential-Bache Securities, Inc., No. L 85-0059 (N.D. Ill. July 10, 1985).

Eighth Circuit

Bob Ladd, Inc. v. Adcock, 633 F. Supp. 241 (E.D. Ark. 1986); Houlihan v. Schmacker and Meyer v. Schmacker, Nos. 83-159 C(5) and 83-1356 C(5) (E.D. Mo. May 3, 1985); Peele v. Kidder, Peabody & Co., Inc., 620 F. Supp. 61 (W.D. Mo. 1985) (appeal pending); Sulit v. Dean Witter Reynolds, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,755 (W.D. Mo. Mar. 27, 1986).

Ninth Circuit

Anderson v. Paine Webber Jackson & Curtis, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,446 (C.D. Cal. Sept. 23, 1985); Blakley v. Prudential Bache Securities, Inc. No. R-85-442 (D. Nev. Dec. 9, 1985); Byrd v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,225 (S.D.

Cal. July 8, 1985 (on remand from Supreme Court); Dees v. Distenfield, 618 F. Supp. 123 (C.D. Cal. 1985); Geller v. Nasser, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,409 (C.D. Cal. Nov. 18, 1985); Jope v. Bear Stearns & Co., 632 F. Supp. 140 (N.D. Cal. 1985); Mann v. Foster & Marshall/American Express, Inc., No. C84-925D (W.D. Wash. June 3, 1985); Marx v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,311 (C.D. Cal. Aug. 23, 1985); Sacks v. Dean Witter Reynolds, Inc. 627 F. Supp. 377 (C.D. Cal. 1985); Sapa v. Kelly, No. CV 85 1292 (S.D. Cal. Aug. 20, 1985); West v. Drexel Burnham Lambert, Inc., 623 F. Supp. 26 (W.D. Wash. 1985).

Tenth Circuit

Butz v. Dean Witter Reynolds, Inc., No. 83-7-2043 (D. Colo. Apr. 16, 1985).

Eleventh Circuit

Ackerman v. Drexel Burnham Lambert, Inc., No. 84-6739 (S.D. Fla. May 14, 1985); Adrian v. Smith Barney, Harris Upham & Co., No. 84-1652 Civ-T-13 (M.D. Fla. Sept. 17, 1985); Batteh v. Prudential-Bache Securities, Inc., No. 84-452-Civ-J-14 (M.D. Fla. July 29, 1985); Boyd v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 614 F. Supp. 940 (S.D. Fla. 1985); Butler v. Dean Witter Reynolds, Inc., No. CV 84-L-5680-NE (N.D. Ala. Sept. 5, 1985); Byrne v. Oppenheimer & Co., No. 84-264-Civ.-T-17 (M.D. Fla. Aug. 2, 1985); Chandler v. Drexel Burnham Lambert, Inc., No. C-85-1585-A (N.D. Ga. Oct. 29, 1985) *aff'd,* 824 F.2d 973 (11th Cir. 1983); Colangelo v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 23, 1985); Crabb v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-1145-Civ-J-12 (M.D. Fla. Oct. 7, 1985); Driscoll v. Smith Barney, Harris Upham & Co., 625 F. Supp. 25 (S.D. Fla. 1985), *aff'd in part & rev'd in part,* 815 F.2d 655 (11th Cir. 1987); Finn v. Davis, 610 F. Supp. 1079 (S.D. Fla. 1985); Greenstein v. First Biscayne Corp., No. 82-0584-Civ. (S.D. Fla. May 16, 1985); Gregory v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-1647 Civ. T-10 (M.D. Fla. Mar. 9, 1985); Greist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 83-6828-Civ (S.D. Fla. Aug. 26, 1985); Hashemi v. Merrill Lynch, Pierce, Fenner & Smith, 642 F. Supp. 376 (N.D. Ga. 1985); Leffler v. Prudential-Bache Securities, Inc., No. 84-1292-Civ-J-12 (M.D. Fla. Sept. 5, 1985); Miller v. Drexel Burnham Lambert, Inc., No. 83-6871 (S.D. Fla., July 31, 1985),

rev'd 791 F.2d 850 (11th Cir. June 17, 1986) (per curiam); Niven v. Dean Witter Reynolds, Inc., [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,059 (M.D. Fla. Mar. 28, 1985); Oliver v. Harris, 767 F.2d 937 (S.D. Ga. 1985); Pruzan v. Paine, Webber, Jackson & Curtis, No. C84-2016A (N.D. Ga. Aug. 30, 1985); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,269 (N.D. Ga. May 16, 1985); Rockoff v. Shearson Lehman/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986); Ross v. Mathis, 624 F. Supp. 110 (N.D. Ga. 1985); Rowel v. Dean Witter Reynolds, Inc., No. 84-1393-Civ-J-14 (M.D. Fla. Aug. 5, 1985); Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048 (N.D. Ga. 1986), *aff'd in part & rev'd in part sub nom.* Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987); Schultz v. Robinson-Humphrey/American Express Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986); Sigvartsen v. Smith Barney Harris Upham & Co., No. 84-540-Civ-T-15 (M.D. Fla. June 4, 1985); Walch v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,060 (M.D. Fla. Apr. 25, 1985); Westwind Transp., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-734 (M.D. Fla. Apr. 9, 1985).

Cases Holding § 10(b) Claims Not Arbitrable

District of Columbia Circuit

Kalali v. Prudential-Bache Securities, Inc., 637 F. Supp. 1131 (D. D.C. 1986).

Second Circuit

Becker v. Silverman, 638 F. Supp. 193 (S.D.N.Y. 1986) (decided after *McMahon*); Couvaris v. Paine Webber Jackson & Curtis Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,554 (S.D.N.Y. Feb. 24, 1986); Brill v. Prudential-Bache Securities, Inc., No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986) (dictum) (decided after *McMahon*); Clark v. Kidder, Peabody & Co., Inc., 636 F. Supp. 195 (S.D.N.Y. 1986) (decided after *McMahon*); Farino v. Advest Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986) (decided after *McMahon*); Gilmore v. Shearson/American Express, Inc., 811 F.2d 108 (S.D.N.Y. 1986) (decided after *McMahon*); Intre Sport, Ltd. v. Kidder, Peabody & Co., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986) (decided after *McMahon* but following *AFP Imaging*),

aff'd, 795 F.2d 1004 (2d Cir. 1986), *vacated*, 107 S. Ct. 3203 (1987); IRPA Corp. v. Shearson/American Express, Inc., 806 F.2d 37 (2nd Cir. 1986) (decided after *McMahon*); Leone v. Advest, Inc., 624 F. Supp. 297 (S.D.N.Y. 1985); Rush v. Oppenheimer & Co., No. 84 Civ. 3219 (S.D.N.Y. June 27, 1986) (dictum), 779 F.2d 885 (2nd Cir. 1985) (decided after *McMahon*); Schlussel v. Shearson Lehman/American Express, Inc., No. 85-0835 (S.D.N.Y. Apr. 22, 1986) (decided after *McMahon*); Suthirachartkul v. Shearson Lehman Bros., Inc., No. 85-6469 (S.D.N.Y. May 21, 1986), *remanded*, 815 F.2d 840 (2nd Cir. 1987); Weizman v. Adornato, 625 F. Supp. 1101 (E.D.N.Y. 1985).

Third Circuit

Blumenthal v. Dean Witter Reynolds, Inc., No. 84-4799F (D. N.J. July 3, 1985), reprinted in 2 RICO L. Rptr. 275 (1985), *remanded*, 824 F.2d 287 (3rd Cir.); Erlbaum v. Prudential-Bache Securities, Inc., No. 85-5541 (E.D. Pa. Aug. 9, 1985), *vacated and remanded*, 797 F.2d 1197 (3d Cir. 1986); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 605 F. Supp. 510 (W.D. Pa. 1985) (appeal pending).

Fourth Circuit

Blomquist v. Churchill, 633 F. Supp. 131 (D.S.C. 1985); Galvin v. Prudential-Bache Securities, Inc., 623 F. Supp. 629 (D. S.C. 1985); Levendag v. Churchill, 623 F. Supp. 620 (D.S.C. 1985).

Fifth Circuit

Bustamante v. Rotan Mosle, Inc., 633 F. Supp. 303 (S.D. Tex. 1986), *aff'd*, 802 F.2d 815 (5th Cir. 1980); King v. Drexel Burnham Lambert, Inc., No. 3-Civ-85-000-932-P (N.D. Tex. Oct. 29, 1985), *rev'd* 825 F.2d 68 (5th Cir. Aug. 25, 1987).

Seventh Circuit

Barr v. The Illinois Co., No. 84-C-2076 (N.D. Ill. Oct. 29, 1985); Gibson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No 84-C-7542 (N.D. Ill. June 18, 1985); Goldberg v. Drexel Burnham Lambert, Inc., No. 83-C-8586 (N.D. Ill. Jan. 15, 1986), *motion for reconsideration granted in part*, No. 83-C-8586 (Dec. 16, 1987); Hughes v. Paine, Webber, Jackson & Curtis, Inc. No. 81-C-5075 (N.D. Ill. Nov. 15, 1985); Robert A. Stone & Assocs. v. Drexel Burnham Lambert, Inc., No. 85-C-6927 (N.D. Ill. Nov. 15, 1985)

(appeal pending); Winkler v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 642 F. Supp. 122 (N.D. Ill. Apr. 25, 1986).

Eighth Circuit

Bale v. Dean Witter Reynolds, Inc. and Haertel v. Dean Witter Reynolds, Inc., 627 F. Supp. 650 (D. Minn. 1986); Nesslage v. York Securities, Inc., 107 F.R.D. 389 (E.D. Mo. 1985), *aff'd in part & rev'd in part,* 823 F.2d 231 (8th Cir. 1987); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, 623 F. Supp. 493 (D. Minn. 1985), *rev'd*, 795 F.2d 1393 (8th Cir. 1986); Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985), *aff'd,* 800 F.2d 803 (8th Cir. 1986).

Ninth Circuit

Conover v. Dean Witter Reynolds Inc., 794 F.2d 520 (9th Cir. 1986), *rev'd*, No. 85-6082 (9th Cir. Jan. 21, 1988); Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92 (D. Ore. 1985); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984).

Tenth Circuit

Adams v. Merrill Lynch, Pierce, Fenner & Smith, Corp., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,328 (W.D. Okla. Sept. 20, 1985), *on reconsideration,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,405 (W.D. Okla. 1987).

Eleventh Circuit

Gorman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F.2d 1032 (11th Cir. 1985) (*en banc* rehearing pending); Krieck v. Dean Witter Reynolds, Inc., No. GCA 84-0085 (N.D. Fla. Apr. 24, 1985); Rojas Cancanon v. Smith Barney, Harris Upham & Co., 612 F. Supp. 996 (S.D. Fla. 1985); Sharp v. Cralin & Co., 617 F. Supp. 476 (S.D. Fla. 1985); Wolfe v. E.F. Hutton & Co., No. 84-151-Civ-Orl-18 (M.D. Fla. Mar. 30, 1985) (consolidated with *Gorman*) *rev'd & remanded*, 827 F.2d 695 (11th Cir. 1987).

Cases Stayed Pending Eighth Circuit's Decision in Phillips

Minnesota Odd Fellows Home Foundation v. Engler & Budd Co., 630 F. Supp. 797 (D. Minn. 1986).

APPENDIX B

DISTRICT COURT CASES ADDRESSING THE ENFORCEABILITY OF AGREEMENTS TO ARBITRATE CIVIL RICO CLAIMS

Cases Holding Civil RICO Claims Arbitrable

Second Circuit

Brener v. Becker Paribas Inc., 628 F. Supp. 442 (S.D.N.Y. 1985); Dev. Bank v. Chemtex Fibers Inc., 617 F. Supp. 55 (S.D.N.Y. 1985) (international agreements to arbitrate RICO claims are enforceable); Wall Street Assocs., v. Becker Paribas, Inc., No.85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985).

Third Circuit

Baker v. Paine, Webber, Jackson & Curtis, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D.N.J. Apr. 10, 1986); ABright v. SAK & N Assocs., No. 85-6966 (E.D. Pa. June 18, 1986) (appeal pending); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 (W.D. Pa. Apr. 19, 1985) (modifying on the basis of *Byrd* the court's prior decision in the same case, reported at 605 F. Supp. 510 (W.D. Pa. 1984), that RICO claims are not arbitrable) (decided before *Mitsubishi*), *aff'd in part & rev'd in part,* 797 F.2d 1197 (3d Cir. 1986), *vacated,* 824 F. 2d 287 (3rd Cir. 1987).

Fourth Circuit

Land v. Dean Witter Reynolds, Inc., 617 F. Supp. 52 (E.D. Va. 1985); Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. M-84-3118 (D. Md. Jan. 10, 1986).

Fifth Circuit

Russell v. Shearson Lehman Bros., Inc., No. CA3-85-2335-R (N.D. Tex. Mar. 10, 1986) *aff'd in part*, 806 F.2d 259 (5th Cir. 1986).

Sixth Circuit

Drazdik v. Kidder Peabody & Co., No. C-85-2442 (N.D. Ohio Mar. 31, 1986) *aff'd in part & remanded*, 823 F.2d 553 (6th Cir. 1987); Gerhardstein v. Shearson/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 3, 1986); Lerchen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 83-CV-1479-DT (E.D. Mich. Nov. 29, 1985); Yee v.

Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-4017 (E.D. Mich. Mar. 31, 1986).

Seventh Circuit

Robert A. Stone & Assocs. v. Drexel Burnham Lambert, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,927 (N.D. Ill. Nov. 15, 1985) (appeal pending); Steinberg v. The Illinois Co., No. 85 C 7131 (N.D. Ill. May 15, 1986).

Eighth Circuit

Bale v. Dean Witter Reynolds, Inc. and Haertel v. Dean Witter Reynolds, Inc., 627 F. Supp. 650 (D. Minn. 1986); Bob Ladd, Inc. v. Adcock, 633 F. Supp. 241 (E.D.Ark. 1986).

Ninth Circuit

Blakley v. Prudential Bache Securities, Inc., No. R-85-442 (D. Nev. Dec. 9, 1985); Sacks v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985).

Eleventh Circuit

Adrian v. Smith Barney, Harris Upham & Co., No. 84-1652-Civ-T-13 (M.D. Fla. Sept. 17, 1985); (Colangelo v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 23, 1985); Crabb v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 84-1145-Civ-J-12 (M.D. Fla. Aug. 26, 1985); Finn v. Davis, 610 F. Supp. 1079 (S.D. Fla. 1985) (decided before *Mitsubishi*); Greist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No.83-6826-Civ (S.D. Fla. Aug. 26, 1985); Rockoff v. Shearson Lehman/American Express, Inc., [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986); Ross v. Mathis, 624 F. Supp. 110 (N.D. Ga. 1985).

Cases Holding Civil RICO Claims Not Arbitrable

District of Columbia Circuit

Kalali v. Prudential-Bache Securities, Inc., 637 F. Supp. 1131 (D. D.C. 1986).

First Circuit

Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-3240-N (D. Mass. July 19, 1985), *aff'd,* 807 F.2d 16 (1st Cir. 1986).

Second Circuit

Brill v. Prudential-Bache Securities, Inc., No.84 Civ. 0846 (S.D.N.Y. June 13, 1986) (dicta) (decided after *McMahon*); Farino v. Advest, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986) (decided after *McMahon*); S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566 (S.D.N.Y. 1983), order certified for interlocutory appeal, 579 F. Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed*, 745 F.2d 190 (2d Cir. 1984) (decided before *Mitsubishi*); Suthirachartkul v. Shearson Lehman Bros., Inc., No. 85-6469 (S.D.N.Y. May 21, 1986) (decided after *McMahon*); Weizman v. Adornato, 625 F. Supp. 1101 (E.D.N.Y. 1985).

Third Circuit

Blumenthal v. Dean Witter Reynolds, Inc., No.84-4799F (D.N.J. July 3, 1985), *reprinted in* 2 RICO L. Rptr. 275 (1985); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 605 F. Supp. 510 (W.D. Pa. 1984) (decided before *Mitsubishi*), modified after *Byrd*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,276 (W.D. Pa. April 19, 1985) (appeal pending); Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 602 F. Supp. 867 (W.D. Pa. 1985) (decided before *Mitsubishi*).

Fourth Circuit

Fisher v. Prudential-Bache Securities, Inc., 635 F. Supp. 234 (D. Md. 1986), *aff'd in part & rev'd in part,* 831 F.2d 290 (4th Cir. 1987); Universal Marine Ins. Co. v. Beacon Ins. Co., 588 F. Supp. 735 (W.D.N.C. 1984) (decided before *Mitsubishi*).

Seventh Circuit

American Concept v. Irsay, No. 84 C 0026 (N.D. Ill. Oct. 4, 1985) (appeal pending); Myers v. Rosenberg, No. 83-C-1342 (N.D. Ill. Mar. 6, 1986).

Eighth Circuit

Webb v. R. Rowland & Co., 613 F. Supp. 1123 (E.D. Mo. 1985), *aff'd,* 800 F.2d 803 (8th Cir. 1986).

Ninth Circuit

Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984) (decided before *Mitsubishi*).

Eleventh Circuit

Pruzan v. Paine, Webber, Jackson & Curtis, Inc., No. C84-2016A (N.D. Ga. Aug. 30, 1985); Roes v. Paine, Webber, Jackson & Curtis, Inc., No. C84-2311A (N.D. Ga. Mar. 29, 1985) (decided before *Mitsubishi*).