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Bird v. Shearson Lehman/American Express, Inc.: Upholding Compulsory Arbitration of ERISA Claims Properly Treats All Investors Equally

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Comments

Bird v. Shearson Lehman/American Express, Inc.: Upholding Compulsory Arbitration of ERISA Claims Properly Treats All Investors Equally

Pension plan trustee Frank Bird invested plan assets totalling $62,206 with the brokerage firm Shearson Lehman/American Express (Shearson) after signing Shearson's standard customer agreement[1] containing a compulsory arbitration clause.[2] After Shearson made fifty-five transactions in twenty-two months, the plan's assets dwindled to $13,428.[3] Bird sued Shearson for excessive trading under the Securities Exchange Act (Exchange Act)[4] and for breach of fiduciary duties under the Employee Retirement Income Security Act (ERISA).[5] Finding the arbitration agreement valid, the federal district court held that the Exchange Act claim required arbitration, but refused to enforce arbitration for the ERISA claim.[6]

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1. Bird v. Shearson Lehman/Am. Express, Inc., 871 F.2d 292, 293-94 (2d Cir.), *vacated*, 110 S. Ct. 225 (1989) (remanding for further consideration in light of Rodriguez de Quijas v. Shearson/Am. Express, Inc., 109 S. Ct. 1917 (1989)).

2. The clause read, in pertinent part:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules . . . of the National Association of Securities Dealers, Inc. or the Board of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect. . . . Judgement upon any award rendered by the arbritrators [sic] may be entered in any court having jurisdiction thereof. This agreement to arbitrate does not apply to any controversy with a public customer for which a remedy may exist pursuant to an expressed or implied right of action under certain of the federal securities laws.

Id. at 294 n.2.

3. *Id.* at 294. Shearson generated a commission on each transaction and allegedly made many high risk investments. *Id.*

4. The complaint specifically charged "churning," or excess trading of an account, in violation of § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j (1988), and Rule 10b-5, 17 C.F.R. § 240-10b-5 (1988). *Bird*, 871 F.2d at 294.

5. 29 U.S.C. § 1104 (1988).

6. *Bird*, 871 F.2d at 294.

The Second Circuit in *Bird v. Shearson Lehman/American Express, Inc.*[7] affirmed the district court, holding that statutory ERISA claims are not subject to compulsory arbitration notwithstanding a valid arbitration agreement.[8] The Supreme Court granted certiorari,[9] vacated the judgment, and remanded the case for further consideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*[10]

Overcrowded court dockets and skyrocketing litigation costs have made arbitration an increasingly popular alternative for dispute resolution.[11] The Supreme Court in recent years has shown increasing support for the parallel national policies favoring the enforcement of promises to arbitrate in both commercial and labor agreements.[12] The Court has also consistently recognized ERISA's underlying policy of protecting private employee benefit plan participants.[13] ERISA's civil enforcement provisions create a dilemma, however, when ERISA disputes involve arbitration agreements because courts must reconcile the dual congressional goals of enforcement of private promises to arbitrate and judicial enforcement of ERISA statutory rights.[14] The *Bird* case presented this dilemma

7. 871 F.2d 292 (2d Cir. 1989).

8. *Id.* at 294.

9. Bird v. Shearson Lehman/Am. Express, Inc., 110 S. Ct. 225 (1989).

10. 109 S. Ct. 1917 (1989). The Supreme Court issued the *Rodriguez* opinion two months after the Second Circuit decided the *Bird* case. *Rodriguez* overruled past precedent by holding statutory claims under the Securities Act of 1933 subject to compulsory arbitration under a valid arbitration agreement. *Id.* at 1918.

11. Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 394 (1987). As an example, the number of commercial and labor cases arbitrated under the auspices of the American Arbitration Association (AAA) doubled between 1975 and 1985. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J., Feb. 1985, at 78, 79.

12. *See infra* notes 16-83 and accompanying text. *See also* Bendixsen, *Enforcing the Duty to Arbitrate Claims Arising Under a Collective Bargaining Agreement Rejected in Bankruptcy: Preserving the Parties' Bargain and National Labor Policy*, 8 INDUS. REL. L.J. 401, 441-42 (1986) (national labor policy favoring arbitral dispute resolution "one of twin pillars which include a national policy to enforce commercial arbitration promises").

13. *See, e.g.*, Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 569-70 (1985); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361-62 (1980).

14. Many collective bargaining agreements contain mandatory arbitration provisions. Donaldson, *The Use of Arbitration to Avoid Litigation Under ERISA*, 17 WM. & MARY L. REV. 215, 216 (1975). Due to judicial interpretation of the Labor Management Relations Act of 1947 (LMRA), these agreements also often simultaneously include ERISA pension plans. The LMRA requires employers and unions to bargain in "good faith with respect to wages, hours, and other terms and conditions of employment." LMRA § 8(a)(5), (b)(3), (d), 29

by asking whether Congress intended *non-waivable* federal court access for parties asserting statutory ERISA violations, despite the federal policy favoring enforcement of arbitration agreements.[15]

This Comment examines the Second Circuit's attempt to reconcile the policies underlying ERISA with the federal policy favoring enforcement of commercial arbitration agreements. Part I explores judicial treatment of agreements to arbitrate in both the commercial and the labor realms. Part I also examines ERISA's underlying policies as well as judicial treatment of its overall scheme. Part II details the Second Circuit's *Bird* decision. Part III argues that the Second Circuit erred in effectively ignoring recent commercial arbitration precedents, instead relying improperly on older labor arbitration decisions of questionable applicability. This Comment concludes that equal protection for all securities investors coupled with modern commercial arbitration jurisprudence mandates the enforcement of valid commercial arbitration agreements for statutory ERISA claims.

I. TENSION BETWEEN ERISA PROCEDURAL GUARANTEES AND THE FEDERAL POLICY SUPPORTING THE ENFORCEMENT OF ARBITRATION AGREEMENTS

A. COMMERCIAL ARBITRATION

The Supreme Court has taken a very deferential approach to commercial arbitration in recent years.[16] This newfound

U.S.C. § 158(a)(5), (b)(3), (d) (1988). In *Inland Steel Co. v. NLRB*, the court held pension plans to be "wages" and "conditions of employment" and hence mandatory subjects of collective bargaining. 170 F.2d 247, 250-51 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

ERISA pension plan administrators also invest a large share of pension plan assets in securities. Pension funds "hold more than a quarter of all the stocks listed on the New York Stock Exchange, and account for an even greater share of daily stock transactions." Wall St. J., Sept. 25, 1989, at 1, col. 5. The brokerage firms handling these funds commonly require customers to sign brokerage agreements containing predispute arbitration provisions. *See* Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 292 (1984). Thus, this practice has created another instance in which ERISA plans and arbitration agreements commonly coexist.

15. Bird v. Shearson Lehman/Am. Express, Inc., 871 F.2d at 295.

16. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 109 S. Ct. 1917, 1918 (1989) (approving use of commercial arbitration to resolve claims under Securities Act of 1933); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (enforcing predispute arbitration agreement for claims under Securities Exchange Act of 1934 and under Racketeer Influenced and

support for arbitration is diametrically opposed to the American judiciary's historical attitude of open hostility toward arbitration agreements.[17] Following precedent from the English common law, American courts historically refused to enforce arbitration agreements on the theory that such agreements ousted the courts from their jurisdiction.[18]

1. The Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA)[19] in 1925 to put arbitration agreements on an equal footing with other contracts,[20] forcing the reversal of longstanding judicial animosity.[21] The FAA provides that written arbitration agreements shall be valid, unless sufficient grounds exist to find any contract invalid.[22] It requires courts to stay their proceedings on any issue determined to be within the scope of a valid arbitration agreement,[23] and it empowers federal district courts to compel arbitration of arbitrable issues when a party improperly

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Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (holding antitrust claims in international context arbitrable pursuant to predispute arbitration agreement); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) (requiring federal district court to compel arbitration of arbitrable claims pendent to non-arbitrable claim upon motion of party); Scherk v. Alberto-Culver Co., 417 U.S. 506, 513 (1974) (enforcing predispute agreement to arbitrate Exchange Act claims by parties to international contract).

17. *See* Bedell, Harrison & Grant, *Arbitrability: Current Developments in the Interpretation and Enforceability of Arbitration Agreements*, 13 J. CONTEMP. L. 1, 1 (1987).

18. H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924) (House Report accompanying the Federal Arbitration Act of 1925). *See, e.g.*, Cocalis v. Nazlides, 308 Ill. 152, 158-60, 139 N.E. 95, 98-99 (1923) (holding predispute arbitration agreement contrary to public policy and thus invalid because it attempted to divest the courts of their jurisdiction); Hurst v. Litchfield, 39 N.Y. 377, 379 (1868) (same).

19. 9 U.S.C. §§ 1-14 (1988).

20. *Scherk*, 417 U.S. at 511 (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)).

21. *Id.* at 510.

22. Section 2 of the Act provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1988).

23. *Id.* § 3.

refuses to abide by an arbitration agreement.[24] The FAA also limits judicial review of arbitration awards to situations involving fraud in procuring the award, partiality or corruption on the part of the arbitrator, gross misconduct by the arbitrator prejudicing the rights of any party, or the arbitrator's failure to render a final decision.[25] To these four statutory grounds for judicial review, the Supreme Court has added a fifth common law ground — the arbitrator's "manifest disregard" of the applicable law.[26]

2. Commercial arbitration in the securities industry

As a consequence of the efficiency and expertise associated with arbitration, predispute arbitration clauses commonly appear in commercial contracts today.[27] Arbitration boasts particularly widespread use in the resolution of securities disputes,[28] due to a common practice in the industry wherein brokers require new customers to sign brokerage agreements containing mandatory arbitration clauses.[29] These arbitration clauses require brokers and investors to submit to arbitration all future disputes arising between them.[30]

Two statutes, the Securities Act of 1933[31] and the Securities Exchange Act of 1934,[32] presently govern most securities transactions in the United States.[33] Both acts created private causes of action, enabling investors in certain circumstances to sue for damages.[34] In the absence of an arbitration agreement,

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24. *Id.* § 4.
25. *Id.* § 10(a)-(d).
26. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 259 (1987).
27. Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222, 1224 (2d Cir. 1980).
28. Fletcher, *supra* note 11, at 394.
29. *See* Comment, *Securities Arbitration — The Supreme Court Resolves the Issue of Enforceability of Mandatory Arbitration Clauses in Broker-Investor Contracts:* Shearson/American Express, Inc. v. McMahon, 73 IOWA L. REV. 449, 449 & nn.1-2 (1988).
30. *Id.*
31. Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (1988)).
32. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. § 78a-78ll (1988)).
33. Comment, *supra* note 29, at 450. Congress passed these acts after the Great Depression in part to protect investors. *See* Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 404 & n.47; H.R. REP. NO. 85, 73d Cong., 1st Sess. 2 (1933); S. REP. NO. 47, 73d Cong., 1st Sess. 1 (1933).
34. *See* Wilko v. Swan, 346 U.S. 427, 431 (1953) (noting existence of private cause of action under Securities Act of 1933); Herman & MacLean v. Huddle-

investors have the unquestioned right to bring securities claims in federal district court.[35]

The general scope of the FAA includes arbitration agreements covering securities transactions on national exchanges.[36] Since passage of the federal securities acts, however, confusion has persisted over the effect of the FAA on private actions brought pursuant to these acts when a brokerage agreement contains an arbitration clause.[37] Three recent Supreme Court decisions have put these questions to rest by upholding the enforceability of arbitration agreements for claims under the securities acts, thereby precluding such investors from bringing an action in federal district court.[38]

3. Judicial treatment of commercial arbitration agreements under the Federal Arbitration Act

The Supreme Court set out its current position on commercial arbitration in *Shearson/American Express, Inc. v. McMahon*,[39] a landmark decision for the securities industry. Calling for stringent judicial enforcement of arbitration agreements[40] in compliance with the federal policy embodied in the FAA favoring commercial arbitration,[41] the Court noted that this duty of enforcement does not diminish for statutory claims.[42]

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ston, 459 U.S. 375, 387 (1983) (upholding an implied private right of action under § 10(b) of Exchange Act); Scherk v. Alberto-Culver Co., 417 U.S. 506, 513-14 (1974) (noting existence of implied private cause of action under Exchange Act).

35. *See* 15 U.S.C. § 77v(a) (1988); 15 U.S.C. § 78aa (1988).

36. Katsoris, *supra* note 14, at 292 n.88 (stating that the FAA applies to all transactions involving interstate commerce, and most securities transactions involve interstate commerce).

37. Comment, *supra* note 29, at 451.

38. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 109 S. Ct. 1917, 1922 (1989) (overruling prior Supreme Court decision by approving use of commercial arbitration to resolve claims under Securities Act of 1933); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987) (enforcing predispute arbitration agreement for claims under Securities Exchange Act of 1934); Scherk v. Alberto-Culver Co., 417 U.S. 506, 513 (1974) (enforcing predispute agreement to arbitrate Exchange Act claims by parties to international contract).

39. 482 U.S. 220 (1987).

40. *Id.* at 226 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

41. The FAA establishes a "federal policy favoring arbitration agreements." *Id.* (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

42. Absent the type of fraud or unequal bargaining power that would establish grounds for the revocation of any contract, the Court concluded that

The federal judiciary did not adopt this deferential posture overnight. After enactment of the FAA, the courts carved out several major exceptions to the federal policy favoring arbitration, most notably in the areas of securities,[43] antitrust,[44] bankruptcy,[45] and the Racketeering Influenced and Corrupt Organizations Act (RICO).[46] The courts have begun to pare down these exceptions only within the last fifteen years.[47]

In 1953, the Supreme Court in *Wilko v. Swan*[48] held that the Securities Act confers the right to select a judicial forum, and a party to an arbitration agreement retains this right.[49] Subsequently, many federal courts extended the *Wilko* reasoning to claims under section 10(b) of the Exchange Act.[50] Courts

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the FAA treats agreements to arbitrate statutory claims on par with any other arbitration agreement. *Id.*

The Court did recognize, however, that a sufficient showing of contrary congressional intent for a specific statutory right could override the FAA's mandate. *Id.* at 227. The Court first announced the test for construing a statute's arbitrability in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The test consists of scrutinizing the statute's text, its legislative history, and its underlying policies and purposes for evidence of a congressional intent to preclude enforcement of arbitration agreements for the resolution of statutory disputes. *Id.* Any uncertainty over the FAA's scope, however, "should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25.

43. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 438 (1953) (holding claims arising under 1933 Securities Act not subject to arbitration); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61-62 (8th Cir. 1984) (following *Wilko* to hold claims arising under § 10(b) of 1934 Securities Exchange Act nonarbitrable); Merrill Lynch, Pierce, Fenner & Smith v. Moore, 590 F.2d 823, 828-29 (10th Cir. 1978) (same).

44. *See, e.g.*, Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117-19 (7th Cir. 1978) (holding antitrust claims nonarbitrable); Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974) (same); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968) (same).

45. *See, e.g.*, Braniff Airways, Inc. v. United Air Lines, Inc., 33 Bankr. 33, 34 (Bankr. N.D. Tex. 1983) (holding bankruptcy issues nonarbitrable); Coar v. Brown, 29 Bankr. 806, 807 (N.D. Ill. 1983) (same).

46. *See, e.g.*, Universal Marine Ins. Co. v. Beacon Ins. Co., 588 F. Supp. 735, 738 (W.D.N.C. 1984) (holding RICO claims nonarbitrable); S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566, 575 (S.D.N.Y. 1983) (same); *see also* Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 602 F. Supp. 867, 870 (W.D. Pa. 1985) (recognizing the nonarbitrability of RICO claims).

47. *See infra* notes 52-67 and accompanying text.

48. 346 U.S. 427 (1953).

49. *Id.* at 438. The *Wilko* Court based its holding in part on its suspicion that arbitration could shortchange statutory rights. *Id.* at 435-36.

50. *See* Fletcher, *supra* note 11, at 413 n.142. The nonwaiver and jurisdictional provisions in the Exchange Act are comparable to the Securities Act provisions on which the Supreme Court relied to preclude arbitration in *Wilko*; furthermore, the two statutes share the purpose of investor protection.

also applied this rationale to numerous other statutory claims in commercial cases.[51]

In 1974, the Supreme Court's present aggressive posture in support of the FAA finally began to emerge. In *Scherk v. Alberto-Culver Co.*,[52] the Court held that claims under section 10(b) of the Exchange Act involving international business transactions were subject to arbitration.[53] The Court's decision rested primarily on concerns of international comity and on the necessity of prospective arbitration agreements for international trade.[54] The Court's next move came in *Dean Witter*

Based on these similarities, many lower courts extended the *Wilko* rationale to § 10(b) claims. Shell, *supra* note 33, at 404 & nn.45-47.

51. Using *Wilko*-type rationale, courts held the particular statutory claims at issue nonarbitrable for "public policy" reasons. Shell, *supra* note 33, at 404 & nn.48-51. *See also, e.g., supra* notes 43-46 (citing major exceptions to the federal policy favoring arbitration). The Second Circuit Court of Appeals, for example, used "public policy" as its rationale to articulate a basis for the antitrust arbitration exception. *See* American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-28 (2d Cir. 1968). The decision rested on four grounds. First, private parties play an important supplementary role in the enforcement of the antitrust laws through private actions for treble damages. "Second, 'the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract.' " Third, antitrust issues are typically complicated:

> "requir[ing] sophisticated legal and economic analysis," and thus are "ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community . . . ."

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985) (outlining the reasoning underlying the *American Safety* decision) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 162 (1st Cir. 1983)). *See American Safety*, 391 F.2d at 826-28.

Lower courts uniformly followed the *American Safety* decision. *See, e.g.*, Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117 (7th Cir. 1978) (following *American Safety* in finding antitrust claims not subject to compulsory arbitration); Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974) (same); Helfenbein v. International Indus., Inc., 438 F.2d 1068, 1070 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971) (same); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715-16 (9th Cir. 1968) (same); Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 25 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (same). The antitrust exception became known as the *American Safety* doctrine. Bedell, *supra* note 17, at 16.

52. 417 U.S. 506 (1974).

53. *Id.* at 513.

54. *Id.* at 515-20. Dictum in Justice Stewart's opinion foreshadowed even further erosion of the *Wilko* exception by raising a "colorable argument" for rejection of the *Wilko* rationale as applied to domestic § 10(b) claims as well. *Id.* at 513-14.

Reynolds, Inc. v. Byrd.[55] In *Byrd*, the Court held that the FAA requires courts to compel arbitration of arbitrable state law claims even when such claims arise from the same transaction and are "intertwined" with nonarbitrable federal claims.[56] Following *Scherk* and *Byrd*, the lower courts split over the arbitrability of section 10(b) Exchange Act claims and RICO claims,[57] but uniformly maintained the nonarbitrability of domestic antitrust claims.[58]

The next major commercial arbitration precedent, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[59] cast some doubt on the lower courts' stance on domestic antitrust arbitration. The Court held that, at least for international disputes, antitrust claims were arbitrable.[60] Setting forth an "arbitrability test" for statutes, the *Mitsubishi* Court clarified that the FAA did not disfavor agreements to arbitrate statutory claims.[61]

The Supreme Court's 1987 decision in *Shearson/American Express, Inc. v. McMahon*[62] finally settled the question of the arbitrability of both RICO claims and section 10(b) Exchange Act claims in favor of arbitration.[63] The Court interpreted the *Wilko* decision as grounded primarily on the Court's earlier suspicion that commercial arbitration was "inadequate to enforce the statutory rights created by § 12(2)" of the Securities Act, and not on a congressional intention to preclude waiver of access to the judicial forum by securities investors.[64] The Court found this suspicion inapplicable to present day securities arbitration.[65]

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55. 470 U.S. 213 (1985).

56. *Id.* at 217. The Court held that the Act compelled arbitration even if the result was the "possibly inefficient maintenance of separate proceedings in different forums." *Id.* In a concurring opinion, Justice White questioned the mechanical application of *Wilko* to Exchange Act disputes. *Id.* at 224-25 (White, J., concurring). *See also supra* note 54 (highlighting dictum in *Scherk*).

57. Shell, *supra* note 33, at 406 n.68 (citing cases).

58. *Id.* at 406 n.69 (citing cases).

59. 473 U.S. 614 (1985).

60. *Id.* at 640. Weighing the *American Safety* doctrine against a strong belief in the efficacy of arbitration for international commercial dispute resolution, the Court refuted each of *American Safety*'s four grounds in turn. *Id.* at 632-36.

61. *Id.* at 627. *See supra* note 42.

62. 482 U.S. 220 (1987). *See supra* notes 39-42 and accompanying text.

63. *McMahon*, 482 U.S. at 238, 242.

64. *Id.* at 228-29.

65. *Id.* at 231-34.

The most recent chapter in the Supreme Court's campaign for commercial arbitration came in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[66] The *Rodriguez* Court used the groundwork laid in *Scherk* and *McMahon* to explicitly overrule *Wilko v. Swan* by holding section 12(2) Securities Act claims subject to compulsory arbitration under a valid arbitration agreement. The Court declared that *Wilko* was "incorrectly decided" and "inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."[67]

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66. 109 S. Ct. 1917 (1989).

67. *Id.* at 1922. In *Rodriguez*, securities customers signed a standard customer agreement containing a compulsory arbitration clause. *Id.* at 1918-19. Despite this agreement, the customers sued the broker in federal district court when the investments went sour. *Id.* at 1919. The district court ordered all claims except for the § 12(2) Securities Act claims to be submitted to arbitration, and, based on *Wilko v. Swan*, held that the Securities Act claims must remain in the judicial forum. *Id.* The Fifth Circuit reversed, concluding that the Supreme Court's "subsequent decisions have reduced *Wilko* to 'obsolescence.'" *Id.* (quoting Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1299 (5th Cir. 1988)).

The Supreme Court affirmed the Fifth Circuit's reversal. Relying on *Scherk*, *Byrd*, *Mitsubishi*, and *McMahon*, the Court first emphasized that " 'the old judicial hostility to arbitration' " has steadily eroded over time, particularly in the Court's recent decisions enforcing arbitration agreements for claims under the Exchange Act, RICO, and the antitrust laws. *Id.* at 1920 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)). To the extent that *Wilko* rested on suspicion that arbitration failed to adequately protect substantive rights, the decision was not in step with the Court's current strong endorsement of the FAA. *Id.*

The Court also found that the Securities Act's liberal provisions for service of process, venue, and amount in controversy, while admittedly facilitating suits by securities buyers, were present in other federal statutes not interpreted to preclude compulsory arbitration, specifically the Exchange Act, RICO, and the antitrust laws. *Id.* On the other hand, the Securities Act's grant of concurrent jurisdiction, compared with the Exchange Act's exclusive federal jurisdiction considered in *McMahon*, actually supports the arbitrability of claims because, in effect, it affords the buyer broader freedom in selecting a forum. *Id.* at 1921.

In rejecting *Wilko*'s aversion to arbitration for securities dispute resolution, the Court summarily relied on *McMahon*'s lengthy description of the recent expansion of the SEC's authority to oversee and regulate arbitration procedures in the securities industry. *Id.* Finally, the Court stressed the strong language in the FAA favoring strict enforcement of agreements to arbitrate, and declared that plaintiffs had not carried their burden of showing that Congress intended to preclude waiver of the judicial forum for Securities Act claims. *Id.*

The Supreme Court issued the *Rodriguez* opinion two months after the Second Circuit's *Bird* decision. When the Supreme Court considered *Bird* on certiorari, the Court vacated the Second Circuit judgment and, without further comment, remanded the case for further consideration in light of *Rodriguez*.

B. Arbitration Under Collective Bargaining Agreements and the Federal Labor Laws

The FAA expressly excludes from its scope labor-management contractual collective bargaining disputes.[68] The judiciary nonetheless espouses a strong policy of deferral to arbitration under collective bargaining agreements that parallels its position on arbitration in the commercial realm.

1. The *Steelworkers Trilogy*

The Supreme Court firmly established this policy in three landmark decisions known as the *Steelworkers Trilogy*.[69] Through these decisions, the Court instructed the judiciary to defer to arbitration in disputes concerning the meaning, interpretation, and application of collective bargaining agreements, and to resolve any doubts as to arbitrability in favor of coverage.[70] The Supreme Court reasoned that if courts were allowed to review and overturn arbitration decisions, "[t]he federal policy of settling labor disputes by arbitration would be undermined."[71] In the years following the *Steelworkers Trilogy*, all disputes arising from collectively bargained pension plans were subject to binding arbitration unless found to be expressly exempted from contractual arbitration coverage.[72]

Id. at 1917. *See also infra* notes 131-32 and accompanying text (additional discussion of Supreme Court ruling in *Bird*).

68. *See* 9 U.S.C. § 1 (1988) (stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

69. The three decisions of the *Steelworkers Trilogy* are United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (holding that courts should decline to review merits of arbitration award under collective bargaining agreement); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (holding that judicial inquiry must be limited to question of whether parties agreed to arbitrate grievance, and doubts concerning interpretation of scope of arbitration clause must be resolved in favor of coverage); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) (holding courts confined to issue of whether grievance is covered by arbitration agreement; court may not weigh merits of grievance).

70. Comment, *ERISA Arbitration — Participant in Unfunded Deferred Compensation Plan Required to Submit Claim to Enforce Terms of Plan to Arbitration*, 31 Vill. L. Rev. 1166, 1176 n.45 (1986); *see* also *supra* note 69.

71. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. at 596. "[T]he finality essential to making arbitration a workable grievance resolution process would be eliminated." Schneider, *Surviving ERISA Preemption: Pension Arbitration in the 1980's*, 16 Colum. J.L. & Soc. Probs. 269, 276 (1980) (discussing the Court's reasoning in *Enterprise Wheel*).

72. Schneider, *supra* note 71, at 276-77 & n.46.

2. The *Alexander* Trilogy — a departure from the deferral policy

Notwithstanding its longstanding policy of deferral to collective bargaining arbitration and its emerging and equally strong policy in the last two decades favoring commercial arbitration, the Supreme Court has handed down three decisions since 1974 in conflict with these policies,[73] all in the collective bargaining context. In *Alexander v. Gardner-Denver Co.*,[74] the Court held that, despite an adverse arbitration decision, an individual can bring a wrongful termination claim under Title VII of the Civil Rights Act of 1964 (Title VII).[75] Seven years later, the Court held in *Barrentine v. Arkansas-Best Freight Systems*[76] that claims pursuant to minimum wage provisions of the Fair Labor Standards Act (FLSA) are not compulsorily arbitrable.[77] Finally, in *McDonald v. City of West Branch*,[78] the Court held that federal courts may not accord preclusive effect to unappealed arbitration awards in subsequent suits brought under 42 U.S.C. section 1983.[79]

The Court based the three decisions on similar reasoning, focusing initially on the need to distinguish between collectively bargained contractual rights and individual statutory rights.[80] The Court also stressed the specialized character of

73. *See* McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 745 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).

74. 415 U.S. 36 (1974).

75. The Supreme Court held that an employee's right to a trial *de novo* on a Title VII claim is not foreclosed by prior submission to binding arbitration of a grievance under a collective bargaining agreement's nondiscrimination clause based on the same facts. *Id.* at 59-60.

76. 450 U.S. 728 (1981).

77. Reversing the lower court decision, the Court held that the employees' prior voluntary submission of their contractual claim to binding arbitration did not bar their subsequent FLSA claim in federal court. *Id.* at 745.

78. 466 U.S. 284 (1984).

79. The Court stated that in a § 1983 action, "a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement." *Id.* at 292.

80. All three cases involved grievances supported by both contractual and statutory provisions. *See supra* notes 75, 77 & 79. In each case, the Court recognized the petitioner's individual statutory right as independent of the collective bargaining process and, therefore, not precluded by collective bargaining arbitration. *See Alexander*, 415 U.S. at 52; *Barrentine*, 450 U.S. at 745; *McDonald*, 466 U.S. at 290. In contrast, the three cases in the *Steelworkers Trilogy*, through which the Supreme Court originally established its policy of deference to labor arbitration, involved questions of contractual interpretation only.

each statutory right, citing its constitutional dimensions,[81] the high priority placed upon it by Congress,[82] or the individual minimum substantive guarantee it provided.[83] Finally, a review of arbitration's weaknesses and limitations lent additional support to the Court's decisions.[84] Confusion over the scope of these three decisions has caused discord among the lower courts as to the enforceability of commercial arbitration agreements for claims under not only ERISA, but other statutes as well.[85]

Castle & Lansing, *Arbitration of Labor Grievances Brought Under Contractual and Statutory Provisions: The Supreme Court Grows Less Deferential to the Arbitration Process*, 21 AM. BUS. L.J. 49, 66-67 (1983).

81. Relying on *Alexander* and *Barrentine*, the Court determined in *McDonald* that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." *McDonald*, 466 U.S. at 290.

The *Alexander* Court noted in dictum that "the resolution of statutory or constitutional issues is a primary responsibility of courts, . . . especially . . . with respect to Title VII," since its interpretation requires "reference to public law concepts." *Alexander*, 415 U.S. at 57.

82. The *Alexander* Court emphasized that in the Civil Rights Act of 1964, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" 415 U.S. at 47 (quoting Newman v. Piggie Park Enter. Inc., 390 U.S. 400, 402 (1968)). To effectuate this policy, Title VII provides several independent and non-preclusive forums for employment discrimination claims: the Equal Employment Opportunity Commission (EEOC), state and local agencies, and federal courts. *Id.* at 47-48. The Court concluded that Title VII's purpose and procedures strongly suggest that final arbitration of a grievance does not preclude a subsequent statutory claim. *Id.* at 49.

83. The *Barrentine* Court noted that while Congress designed the Labor Management Relations Act (LMRA) to encourage employees to protect their interests *collectively*, it intended the FLSA "to give specific minimum protections to *individual* workers" by ensuring that *each* employee receive a fair wage. *Barrentine*, 450 U.S. at 739. The Court concluded that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Id.* at 737. Additionally, the Court recognized that in the context of collective bargaining, sometimes the union must sacrifice an individual's rights for the collective benefit. *See Alexander*, 415 U.S. at 58 n.19; *Barrentine*, 450 U.S. at 742; *McDonald*, 466 U.S. at 291.

84. The *Alexander* decision emphasized several shortfalls of arbitration in protecting Title VII rights, including the specialized competence of arbitrators primarily relating to "the law of the shop," not to the interpretation of federal statutes. *Alexander*, 415 U.S. at 57. The Court's list of arbitration's weaknesses also included procedural informality; relaxed application of evidentiary rules; often severely limited or nonexistent discovery, compulsory process, cross examination, and testimony under oath; and no obligation on the arbitrator to give reasons for an award. *Id.* at 57-58; *see also Barrentine*, 450 U.S. at 743-45 (relying on the same arbitral inadequacies); *McDonald*, 466 U.S. at 290-91 (relying on *Alexander*'s analysis of arbitration's weaknesses).

85. Some courts have relied on the *Alexander* decisions to hold claims under the Age Discrimination in Employment Act of 1967 (ADEA) not com-

C. ERISA

Prompted by the extent of the national work force's reliance on employee benefit plans,[86] the magnitude of plan assets,[87] and the pervasiveness of fund abuse and mismanagement,[88] Congress enacted ERISA in 1974.[89] To assure the equi-

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pulsorily arbitrable in the commercial arbitration context, while other courts have disagreed. *See* Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 222 (3d Cir. 1989) (holding ADEA claims nonarbitrable in a non-collective bargaining setting); Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543, 547 (D.N.J. 1987) (same). *But see* Pihl v. Thomson McKinnon Sec., Inc., 48 Fair Empl. Prac. Cas. (BNA) 922, 924-26 (E.D. Pa. 1988) (holding ADEA claims arbitrable in non-collective bargaining setting under Federal Arbitration Act and *Mitsubishi*).

Similar conflicts exist over Title VII and FLSA claims outside of the collective bargaining setting, as well as Minnesota Human Rights Act claims and New York Human Rights Law claims outside collective bargaining. *See* Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1305-09 (8th Cir. 1988) (reasoning that *Alexander*, *Barrentine* and *McDonald* render Title VII and Minnesota Human Rights Act claims outside of the collective bargaining setting nonarbitrable). *But see* Steele v. L.F. Rothschild & Co., 701 F. Supp. 407, 408 (S.D.N.Y.) (holding claims under the FLSA arbitrable under *Mitsubishi*, *McMahon*, and FAA by rejecting *Barrentine*'s applicability in non-collective bargaining setting), *appeal dismissed*, 864 F.2d 1 (2d Cir. 1988); DeSapio v. Josephthal & Co., 143 Misc. 2d 611, 617-18, 540 N.Y.S.2d 932, 937 (Sup. Ct. 1989) (holding claims under § 296 of the New York Human Rights Law arbitrable in non-collective bargaining setting).

86. Congress found that "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans." 29 U.S.C. § 1001(a) (1988). In fact, the majority of American workers and their dependents rely on employee benefit plans for their welfare and retirement security. Powers, *The Crime of the Eighties: Employee Benefits Fund Abuse*, 15 J. PENSION PLAN. & COMPLIANCE 115, 116 (1989). *See also* SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 99TH CONG., 2D SESS., THE DEPARTMENT OF LABOR'S ENFORCEMENT OF EMPLOYEE RETIREMENT INCOME SECURITY ACT 43, 71 (Comm. Print 1986) (listing statistic on ERISA participation); Lilly, *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603, 604 (1984) (discussing initial ERISA participation).

87. ERISA's text begins by highlighting Congress's recognition of the "rapid and substantial" growth in "size, scope, and numbers of employee benefit plans in recent years." 29 U.S.C. § 1001(a); *see* Lilly, *supra* note 86, at 604; EMPLOYEE BENEFITS RESEARCH INSTITUTE, EBRI QUARTERLY PENSION INVESTMENT REPORT, Second Quarter 1987, Vol. 2, No. 2, Oct. 1987. Private pension plan assets hold over 25% of all stocks on the New York Stock Exchange (NYSE). Wall St. J., Sept. 25, 1989, at 1, col. 5; *see also* Note, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743, 743 (1984-85) (citing private pension plan assets as largest source of NYSE funds).

88. B. Coleman, *Primer on ERISA* xv (3d ed. 1989). Congressional investigations uncovered widespread instances of incompetence, poor management, inequitable administration, gross conflicts of interest, fraud, kickbacks, and bribery. Malone, *Criminal Abuses in the Administration of Private Welfare and Pension Plans: A Proposal for a National Enforcement Program*, S. ILL.

table administration and financial soundness of employee benefit plans, ERISA provides minimum standards for reporting and disclosure,[90] participation and vesting,[91] funding,[92] and fiduciary responsibility.[93]

Under ERISA's procedural provisions, willful violators of the Act may face criminal penalties.[94] ERISA's civil action pro-

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U.L.J. 400, 414 (1976). Embezzlement, self-dealing by administrators, and lack of reasonable care and prudence in investing funds further added to substantial depletions in plan assets. Ford, *The Aftermath of* Daniel: *Private Pension Plans, ERISA, and the Federal Antifraud Provisions*, 46 MO. L. REV. 51, 53 & n.9 (1981).

89. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988) and scattered sections of the Internal Revenue Code at 26 U.S.C. (1988)).

Congress designed ERISA's comprehensive regulatory scheme to protect the benefit rights and retirement security of plan participants and beneficiaries. Schneider, *supra* note 71, at 272. Section 2(b) of the Act defines ERISA's goal:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefits plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b) (1988).

90. ERISA requires plan administrators to provide plan participants and the federal government with understandable and accurate descriptions of the terms and financial status of plans. ERISA §§ 101-111, 209, 29 U.S.C. §§ 1021-1031, 1059.

91. *Id.* §§ 201-211, 29 U.S.C. §§ 1051-1061.

92. *Id.* §§ 301-306, 29 U.S.C. §§ 1081-1086.

93. *Id.* §§ 401-414, 29 U.S.C. §§ 1101-1114. In discharging his duties under ERISA, a fiduciary must act

> with the care, skill, prudence and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

Id. § 404(a)(1), 29 U.S.C. § 1104(a)(1). While this standard might not demand a higher degree of care than that required by the state statutory or common law preempted by ERISA, the Act contains additional specific fiduciary requirements and prohibitions, mandating fiduciary compliance with ERISA's complex and frequently ambiguous substantive provisions. Schneider, *supra* note 71, at 273 n.29; *see also* ERISA §§ 404-414, 29 U.S.C. §§ 1104-1114 (discussing the specific fiduciary responsibilities under ERISA).

94. ERISA § 501, 29 U.S.C. § 1131. A person convicted of violating ERISA's Title I reporting and disclosure provisions can be fined up to $5,000, or imprisoned not more than one year, or both. A corporate violator can receive a fine of up to $100,000. *Id.*

visions, however, are the primary means of enforcement.[95] ERISA provides for benefit claims[96] as well as statutory claims for violation of ERISA's substantive standards, including breach of fiduciary responsibility.[97] The federal district courts have exclusive jurisdiction over suits involving the latter claims.[98]

ERISA includes a broad preemption provision, displacing all state and local regulation and establishing the field of employee benefit plans as an exclusively federal concern.[99] Recog-

95. *Id.* §§ 502-515, 29 U.S.C. §§ 1132-1145. *See also* H.R. REP. No. 533, 93d Cong., 1st Sess. 2 (1973) (House Committee on Education and Labor report stating that "the principal focus of the enforcement effort [is] on anticipated civil litigation . . . by the Secretary of Labor as well as participants and beneficiaries").

Congress relaxed venue requirements and procedural barriers for ERISA civil actions and included liberal provisions for the award of attorney's fees and costs. ERISA §§ 502(e)(2),(f), (g)(1),(g)(2)(D), 29 U.S.C. §§ 1132(e)(2),(f),(g)(1),(g)(2)(D).

> The intent of [Congress] is to . . . remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants. For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court.

S. REP. No. 127, 93d Cong., 1st Sess. 35 (1973); *see also* H.R. REP. No. 533, 93d Cong., 1st Sess. 17 (1973) (same language).

96. ERISA benefit claims are contractually-based. A plan participant or beneficiary may bring a civil action to recover benefits, enforce rights, or clarify rights to future benefits under the terms of an employee benefit plan: ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). ERISA also requires every employee benefit plan to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." *Id.* § 503(2), 29 U.S.C. § 1133(2). The Department of Labor has issued a regulation endorsing the use of grievance and arbitration procedures created by a collective bargaining agreement as a permissible means of complying with this internal claims review requirement. *See* 29 C.F.R. § 2560.503-(b)(2)(i) (1985). State and federal district courts have concurrent jurisdiction in these benefit claims suits. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

97. A plan participant, a beneficiary, a fiduciary, or the Secretary of Labor may bring a civil action for violation of ERISA's substantive standards. ERISA § 502(a)(2)-(5), 29 U.S.C. § 1132(a)(2)-(5). The Secretary of Labor also has the discretionary right to intervene in any fiduciary breach action, and both the Secretary of Labor and the Secretary of the Treasury may intervene in suits claiming violation of any other substantive provision. *Id.* § 502(h), 29 U.S.C. § 1132(h).

98. *Id.* § 502(e)(1), 29 U.S.C. § 1132(e)(1).

99. ERISA § 514(a) provides: "[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).

Congress determined that "the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of pri-

nizing that ERISA's statutory provisions were insufficient to establish the comprehensive regulatory scheme desired, Congress empowered the federal courts to develop a body of federal common law to supplement the statutory scheme, to develop the general standards set forth, and to fill the gaps created by preemption.[100]

D. JUDICIAL ATTEMPTS TO RECONCILE ERISA POLICIES WITH DEFERENCE TO ARBITRATION

ERISA pension plans must include claims procedures providing participants an opportunity for internal review of benefit claim denials by plan administrators.[101] Courts have uniformly held that a participant's failure to exhaust internal review pro-

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vate employee benefit programs." 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits, a principal sponsor of ERISA). *See also* H.R. REP. NO. 533, 93d Cong., 1st Sess. 12 (1973):

> [W]ithout . . . access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets. Furthermore, a fiduciary standard embodied in Federal legislation . . . will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. . . .
>
> Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

Remarks made in floor debates on the final conference report further evidence Congress's recognition of the necessity of uniformity. *See, e.g.*, 120 CONG. REC. 29,197 (1974) (Congressman Dent's statement that "[w]ith the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation").

100. *See* Ray & Halpern, *The Common Law of ERISA*, TRIAL June, 1985, at 20, 21 (citing Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1498-1500 (9th Cir. 1984)). The late Senator Javits, a principal sponsor of ERISA, stated that "it is . . . intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 CONG. REC. 29,942 (1974); *see also* Authier v. Ginsberg, 757 F.2d 796, 799 n.5 (6th Cir.) (stating that Congress intended ERISA's preemption provision to create a body of federal substantive law regulating pension plans), *cert. denied*, 474 U.S. 888 (1985).

101. ERISA § 503, 29 U.S.C. § 1133 (1988). According to regulations promulgated by the Secretary of Labor covering minimal acceptable procedures for internal claims review, grievance and arbitration procedures established in a collective bargaining agreement and incorporated into the pension plan appeals process constitute compliance with the minimum standards. 29 C.F.R. § 2560.503-1(b)(2)(i)(A),(B) (1989). Unlike internal claims procedures, however, arbitration provides for final review. Note, *Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral or Intrafund Remedies?*, 71 CORNELL L. REV. 952, 953 n.7 (1986).

cedures for benefit claims bars a subsequent civil action,[102] but disagree as to the necessity of this exhaustion requirement for substantive ERISA claims.[103]

Similarly, courts disagree over whether a plaintiff alleging an ERISA statutory violation may file suit in federal court despite a prior agreement to submit disputes to arbitration.[104] In 1985, the Third Circuit in *Barrowclough v. Kidder, Peabody & Co.*[105] held that statutory ERISA claims, unlike contractually-based benefit claims under an ERISA plan, are not subject to compulsory arbitration notwithstanding an agreement to arbitrate.[106] In 1988, however, the Eighth Circuit in *Arnulfo P. Su-*

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102. Note, *supra* note 101, at 958. *See, e.g.,* Amato v. Bernard, 618 F.2d 559, 566-67 (9th Cir. 1980); Worsowicz v. Nashua Corp., 612 F. Supp. 310, 315 (D.N.H. 1985); Ridens v. Voluntary Separation Program, 610 F. Supp. 770, 778 (D. Minn. 1985).

103. Note, *supra* note 101, at 958-59. *See, e.g.,* Mason v. Continental Group, Inc., 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied,* 474 U.S. 1087 (1986) (holding employees' statutory ERISA suit barred by employees' failure to exhaust arbitral procedures provided in pension plan agreement); Kross v. Western Elec. Co., 701 F.2d 1238, 1243-45 (7th Cir. 1983) (holding plaintiff's failure to exhaust internal review procedures in ERISA pension plan barred § 510 civil suit). *But see* Amaro v. Continental Can Co., 724 F.2d 747, 751-52 (9th Cir. 1984) (holding *Kross* flawed and refusing to follow its exhaustion requirement for statutory ERISA claims); McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1504 (D.N.J. 1985) (declining to require exhaustion for statutory ERISA claim).

104. Note, *supra* note 101, at 959-60; *see also* Bird v. Shearson Lehman/Am. Express, Inc., 871 F.2d 292, 294 (2d Cir.), *vacated,* 110 S. Ct. 225 (1989) (holding statutory ERISA claims not compulsorily arbitrable despite valid commercial arbitration agreement); Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 941 (3d Cir. 1985) (holding that despite contractual agreement to arbitrate disputes arising out of employment, plaintiff need not arbitrate substantive ERISA violation); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 278 (E.D. Pa. 1977) (holding former employee may bring civil suit for substantive ERISA violations because prospective agreements to arbitrate ERISA claims are invalid). *But see* Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, 479 (8th Cir. 1988) (holding investor must arbitrate ERISA fiduciary breach claim given valid predispute arbitration agreement).

105. 752 F.2d 923 (3d Cir. 1985).

106. *Id.* at 941. The Third Circuit determined that ERISA's enactment required accommodation of its policy of federal court access and federal law remedies for pension plan participants with the FAA's policy favoring enforcement of arbitral agreements. *Id.* at 939. The court concluded that:

> [T]he most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under [an ERISA plan] that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, . . . while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate.

Id. (citations omitted).

The court based its decision primarily on three grounds. First, the court

lit, Inc. v. Dean Witter Reynolds, Inc.[107] held that a valid arbitration agreement compelled arbitration of plaintiff's ERISA claim, regardless of its statutory nature.[108]

On the related issue of deference to administrative results following exhaustion of intrafund procedures or arbitration, courts typically uphold benefit claims denials.[109] But again, courts disagree on the appropriate degree of deference to accord administrative results when statutory ERISA claims are involved.[110]

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pointed out that the deliberate parallel Congress drew between ERISA contractual claims and contractually-based claims for breach of a collective bargaining agreement under the LMRA revealed that Congress intended contractually-based pension claims to be similarly subject to arbitration. *Id.* Next, relying on the Supreme Court's *Barrentine* and *Alexander* decisions, the court likened ERISA's substantive protections and minimum standards for workers to substantive rights in the FLSA and Title VII, claims which the Supreme Court held were not subject to compulsory arbitration. *Id.* at 940-41. Finally, the court determined that arbitration of statutory claims would frustrate Congress's goal to provide a consistent source of law to aid plan fiduciaries and participants in predicting the legality of proposed actions. *Id.* at 941.

107. 847 F.2d 475 (8th Cir. 1988).

108. *Id.* at 477. The plaintiff in *Sulit* argued that his ERISA claims were not amenable to arbitration because "they are 'purely statutory,' require interpretation of a complex statutory scheme, and are generally beyond an arbitrator's competence." *Id.* Rejecting these arguments, the Third Circuit relied heavily on the Supreme Court's decision in Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). The *Sulit* court reasoned that the FAA dictated enforcement of plaintiff's arbitration agreement unless he satisfied "the burden placed on him as the party opposing arbitration to show 'Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.'" 847 F.2d at 478 (quoting *McMahon*, 482 U.S. at 227 (1987)).

The court applied the "arbitrability test" announced in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) and followed in *McMahon*, *see supra* note 42, and concluded that the plaintiff failed to satisfy its burden. The court found nothing in the legislative history of ERISA indicating a congressional intent to single out ERISA claims for exemption from the federal policy embodied in the FAA. *Sulit*, 847 F.2d at 478-79. Furthermore, the *McMahon* decision had considered and rejected as insufficient similar arguments concerning arbitrator competence and limited judicial review. *Id.* at 479 (citing *McMahon*, 482 U.S. at 232). The court finally concluded that, given recent Supreme Court decisions enforcing arbitration agreements for antitrust, Exchange Act, and RICO claims, it could find no compelling basis to treat ERISA claims differently. *Id.*

109. Note, *supra* note 101, at 961-62. Courts reach this result by either applying the deferential "arbitrary and capricious" standard of review when reviewing benefit denials following exhaustion of intrafund procedural review or by refusing to review the merits of the claim following an arbitral decision. *Id.* at 962.

110. *Id.; see also* King v. James River-Pepperell, Inc., 592 F. Supp. 54, 56 (D. Mass. 1984) (deferring to prior administrative results in a subsequent ERISA civil suit alleging a statutory claim). *But see* Amaro v. Continental Can

II. THE SECOND CIRCUIT'S DECISION IN *BIRD*: AN ATTEMPT TO KEEP ERISA BEYOND ARBITRATION'S REACH

The Second Circuit in *Bird*, relying in part on the reasoning of the Third Circuit in *Barrowclough v. Kidder, Peabody & Co.*[111] and expressly rejecting the more recent Eighth Circuit opinion in *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*,[112] held that statutory ERISA claims are not compulsorily arbitrable, notwithstanding a valid commercial arbitration agreement.[113] Based on the Supreme Court's test for the arbitrability of statutory claims[114] and on existing Supreme Court precedent in the labor arbitration setting,[115] the Second Circuit concluded that those asserting substantive ERISA violations cannot be denied access to a federal judicial forum.[116] In so holding, the court specifically distinguished statutory ERISA claims from benefit claims based on a particular ERISA plan, characterizing the latter as purely contractual[117] and subject to compulsory arbitration.[118]

The court began its analysis by recognizing the mandate of

Co., 724 F.2d 747, 753 (9th Cir. 1984) (holding binding arbitral decision not res judicata in a subsequent ERISA § 510 suit).

111. *Bird*, 871 F.2d at 297 (citing *Barrowclough*, 752 F.2d at 941, for its finding that a federal judicial forum is essential to ensuring minimum standards guaranteed by ERISA); *see also id.* at 297-98 (citing *Barrowclough*'s analogy between ERISA and LMRA); *supra* note 106 (discussing the *Barrowclough* decision).

112. The Second Circuit declared that "to the extent the *Sulit* court could 'find no hint in the legislative history' of Congress' intent that substantive ERISA claims not be subject to compulsory arbitration, we disagree." *Bird*, 871 F.2d at 298 n.8 (quoting *Sulit*, 847 F.2d at 478-79); *see also supra* note 108 (discussing the *Sulit* decision).

113. *Bird*, 871 F.2d at 294.

114. *See supra* note 42.

115. *See infra* notes 125-28.

116. The court concluded that "a federal judicial forum cannot be cut off to those asserting claims created as part of a comprehensive federal scheme protecting the rights of individual participants or beneficiaries of a pension plan and which fall within the exclusive jurisdiction of the federal courts." *Bird*, 871 F.2d at 298.

117. The court noted that ERISA's jurisdictional provisions "distinguish between suits brought to redress violations of substantive provisions of ERISA and actions to declare the rights of those covered and benefits due under a particular pension plan." *Id.* at 297 (citing 29 U.S.C. § 1132(e)).

118. The court declared it was not suggesting "that arbitration of purely contractual claims asserted pursuant to ERISA cannot be compelled. Suits to establish or enforce rights to benefits that are independent of claims predicated on substantive violations of ERISA are appropriately resolved through arbitration." *Id.* at 298.

the F.A.A.[119] The Second Circuit proceeded to determine, however, that under the *Mitsubishi* "arbitrability test"[120] substantive ERISA claims are not subject to mandatory arbitration;[121] ERISA's text,[122] its legislative history,[123] and its overall pol-

119. *Id.* at 295 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

120. *See id.* (outlining the Supreme Court's test announced in *Mitsubishi* for determining the arbitrability of a statute); *see also supra* note 42 (describing the elements of the *Mitsubishi* test).

121. *Bird*, 871 F.2d at 296-98.

122. The court found that ERISA's plain language "mandat[ing] 'ready access to the federal courts' " clearly evidenced Congress's intent that the federal courts be a "key ingredient" in the protection of plan participants and the central forum for ERISA's enforcement. *Id.* at 297 (quoting 29 U.S.C. § 1001(a)). The court also highlighted ERISA's liberal provisions for service of process, venue, attorney fees, and statutes of limitations as well as the right of the Secretary of Labor to maintain an action on behalf of a plan participant or beneficiary as further evidence of congressional intent to prevent waiver of access to the courts. *Id.*

123. The court relied on the House Conference Report's statement that LMRA § 301 be a model for the operation of ERISA § 1132(e), the jurisdictional provision for ERISA claims. *Id.* at 297-98 (citing H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5107). Section 301 permits suit in state or federal court for breach of a collective bargaining agreement. Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 939 (3d Cir. 1985). Nevertheless, courts have held such claims subject to mandatory arbitration. *Id.* Relying on the *Barrowclough* court's reasoning, the Second Circuit concluded that the reference in ERISA's legislative history to LMRA § 301 demonstrated Congress's intent that ERISA benefit claims, analogous to contractually-based claims for breach of a collective bargaining agreement, likewise be subject to arbitration. *Bird*, 871 F.2d at 298. The court also noted that, regardless of the forum, federal common law governs § 301 claims because the importance of federal labor policy and the need for uniformity in labor dispute resolution have required the development of a body of federal legal principles. *Id.* The Second Circuit concluded that, based on the reference to § 301 and on Congress's declaration that employee pension plan law is "affected with a national public interest," Congress likewise envisioned the development of federal common law to govern ERISA claims. *Id.* (quoting the ERISA prologue, 29 U.S.C. § 1001(a)).

Barrowclough, on which *Bird* generally relies, took the issue of ERISA-based federal common law further. The Third Circuit pointed out that ERISA § 514(a), *see supra* note 99, preempts any state law relating to ERISA pension plans, and concluded that "[i]n enacting ERISA, Congress authorized the evolution of a federal common law of pension plans." *Barrowclough*, 752 F.2d at 936 (quoting Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3d Cir. 1980)). The court further found that arbitration of statutory issues would be:

> inconsistent with Congress' goal, evident in the jurisdictional and preemption provisions of ERISA, to provide a consistent source of law to 'help administrators, fiduciaries and participants to predict the legality of proposed actions.' . . . This intent would be frustrated if arbitrators, who are not bound to consider law or precedent in their decisions, and who decide issues primarily on contractual grounds, had a conclusive role in deciding such claims.

icy[124] all reflect a congressional intent to preclude waiver of judicial remedies.

In addition to the "arbitrability test," the Second Circuit relied on three Supreme Court labor arbitration decisions which had held three different statutory claims not compulsorily arbitrable.[125] The Second Circuit noted that Congress has prohibited waiver of the judicial forum most often in "statutes designed to provide minimum substantive guarantees."[126] The court also stated that the *Alexander* and *Barrentine* decisions rested in part on the arbitrator's unique role in effectuating the parties' intent under their contract, a function that undermined the statutory goals at issue; this concern applied equally to ERISA.[127] Finally, according to the Second Circuit, *McDonald* illustrated the concerns underlying Congress's desire to maintain access to judicial forums for certain federal substantive rights, concerns also applicable to ERISA.[128]

Id. at 941 (quoting S. REP. NO. 127, 93d Cong., 1st Sess. 29, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4865).

124. The court believed that a conflict existed between arbitration and the policies underlying ERISA. By characterizing ERISA as a remedial statute designed to protect participants from benefit plan abuse, and citing several decisions construing access to a federal judicial forum as "essential to assuring the minimum standards" guaranteed by ERISA, the court reasoned that arbitration frustrated ERISA's remedial intent. *Bird*, 871 F.2d at 296-97 (citing *Barrowclough*, 752 F.2d at 941; Amaro v. Continental Can Co., 724 F.2d 747, 752 (9th Cir. 1984); Senco of Fla., Inc. v. Clark, 473 F. Supp. 902, 908 (M.D. Fla. 1979); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 276 (E.D. Pa. 1977)).

125. *Id.* at 295-96; *see also supra* notes 73-84 and accompanying text (discussing the *Alexander* trilogy: *McDonald*, *Barrentine*, and *Alexander*).

126. *Id.* at 295 (citing *Barrentine*, 450 U.S. at 737 (holding FLSA minimum wage claims not compulsorily arbitrable, based in part on statutory purpose to provide minimum substantive guarantees to individual workers)). Similarly, the Second Circuit found that ERISA was a remedial statute designed to curb employee pension plan abuses by establishing *minimum federal standards* to secure pension plan payments to participants. *Id.* at 296-97.

127. *Id.* at 295-96. The Supreme Court determined that the arbitrator's "task is to effectuate the intent of the parties rather than the requirements of enacted legislation." *Id.* at 296 (quoting *Alexander*, 415 U.S. at 56-57). Given the remedial character of ERISA, the Second Circuit concluded that "[t]he remedial intent of Congress tempers the right to privately order one's affairs." *Id.* In other words, an arbitrator might frustrate ERISA's underlying remedial purpose by subordinating it to contrary terms of the parties' agreement.

128. *Id.* The *McDonald* decision listed considerations supporting the Court's conclusion that binding arbitration did not bar § 1983 claims from federal court. The list included the arbitrator's possible lack of requisite expertise to resolve complex legal questions, and the Court's belief that "arbitral factfinding is generally not equivalent to judicial factfinding." *Id.* (citing *McDonald*, 466 U.S. at 290-91).

The *Bird* dissent faulted the majority for failing to follow the Supreme Court's recent decisions upholding the "federal policy favoring arbitration agreements," regardless of a claim's statutory basis.[129] The dissent further declared that the only cognizable basis for the majority's decision was its belief that arbitrators "are not up to the task," an untenable assumption given recent Supreme Court rulings.[130]

Shearson sought Supreme Court review of the Second Circuit's decision. Granting certiorari, the Court in a 5-3 decision disposed of *Bird* simply by vacating the judgment and remanding the case to the Second Circuit "for further consideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*"[131] The three dissenters also provided no commentary.[132] The Second Circuit in turn remanded the case to the district court, directing the court to proceed according to the Supreme Court's mandate.

III. *BIRD*'S MISGUIDED REASONING

The Second Circuit erred in holding statutory ERISA claims exempt from compulsory arbitration. The Supreme Court's summary remand in light of *Rodriguez* strongly suggests that ERISA claims are subject to compulsory arbitration. The *Rodriguez* decision alone does not compel this conclusion because it did not address legitimate policy concerns the Second Circuit raised particular to ERISA, nor did it provide novel affirmative grounds to support the arbitrability of statutory ERISA claims. Modern commercial arbitration jurisprudence taken as a whole, however, does so mandate.

In fact, had the Second Circuit thoroughly considered the Supreme Court's recent commercial arbitration decisions, although prior to release of the *Rodriguez* decision, it could have and should have determined that statutory ERISA claims

129. *Bird*, 871 F.2d at 298 (Cardamone, J., dissenting) (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The dissent further argued that since neither the ERISA text nor its legislative history even mentions arbitration, the majority's findings on these points were unsupported. *Id.* at 299.

130. *Id.* at 300 (citing Shearson/Am. Express v. McMahon, 482 U.S. 220, 231-32 (1987); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985); *Moses H. Cone*, 460 U.S. at 24). The dissent concluded that, having signed a valid agreement, Bird should be held to his bargain since Congress gave "no hint that [it] planned to deprive him of that option." *Id.*

131. Shearson Lehman/Am. Express, Inc. v. Bird, 110 S. Ct. 225 (1989).

132. Justices Brennan, Marshall and Stevens dissented. *Id.*

are no less subject to arbitration than statutory securities claims. Instead, the court erroneously relied primarily on the older *Alexander* trilogy cases from the labor arbitration context, arguably inapposite to the issue. By vacating and remanding *Bird* in light of its most recent commercial arbitration decision, the Supreme Court implicitly signalled that the Second Circuit erred in failing to focus on the more recent developments in commercial arbitration jurisprudence. Furthermore, careful examination of the Second Circuit's particularized ERISA policy concerns *vis-a-vis* arbitration reveals their illusory nature as well.

A. INADEQUACY OF *RODRIGUEZ* ALONE TO COMPEL *BIRD*'S REVERSAL

The FAA established a presumption that statutory claims are subject to commercial arbitration.[133] Courts must apply the *Mitsubishi* "arbitrability test," however, to ascertain whether the requisite congressional intent exists to override this presumption for a given statute.[134] Mere reference to the arbitrable status of a different statute is generally insufficient to determine the issue of arbitrability because each statute has its own unique text, legislative history, and underlying purposes. Therefore, *Rodriguez* alone was insufficient to overturn *Bird* because *Rodriguez* dealt specifically with the Securities Act of 1933, not with ERISA, and effectively addressed only a few of the Second Circuit's arguments and concerns.

Rodriguez, however, did refute that portion of the *Bird* decision resting on ERISA's liberal provisions for service of process, venue, and amount in controversy.[135] In *Rodriguez*, the Supreme Court held that the Securities Act's procedural provisions,[136] while admittedly facilitating suits by securities buyers,[137] were present in other federal statutes that the Court had

133. *See supra* note 41.

134. *See supra* note 42.

135. *See supra* note 122. *See also supra* note 67 and accompanying text (discussing the *Rodriguez* decision).

136. Wilko v. Swan, 346 U.S. 427 (1953), the decision overruled by Rodriquez de Quijas v. Shearson/Am. Express, Inc., 109 S. Ct. 1917 (1989), highlighted as critical to the protection of securities buyers under the Securities Act several specific procedural improvements: "broad venue provisions in the federal courts; the existence of nationwide service of process in the federal courts; the extinction of the amount-in-controversy requirement . . . ; and the grant of concurrent jurisdiction in the state and federal courts without possibility of removal." *Rodriguez*, 109 S. Ct. at 1920 (citing *Wilko*, 346 U.S. at 431).

137. *Id.*

interpreted as not prohibiting the enforcement of arbitration agreements.[138] The Second Circuit's use of similar procedural provisions to support ERISA's nonarbitrability is therefore untenable.[139]

The *Bird* court's reliance on ERISA's grant of exclusive federal jurisdiction for statutory claims, as opposed to the concurrent jurisdiction allowed for benefit claims,[140] also suffered a blow from the *Rodriguez* decision. The Supreme Court noted in *Rodriguez* that the Exchange Act's exclusive federal jurisdiction provision did not preclude a finding of arbitrability in *McMahon*.[141] Beyond countering the foregoing specific and very limited arguments in *Bird*, *Rodriguez* provided little novel guidance in deciding the issue presented in *Bird*.

B. The Second Circuit's Disregard of Commercial Arbitration Precedents

The Supreme Court has declared that an individual does not lose his substantive rights under a statute by agreeing to submit a statutory claim to arbitration.[142] Exemplifying this assertion, the Court found first in *Scherk*,[143] again in *McMahon*,[144] and most recently in *Rodriguez*[145] that arbitration was an adequate means to enforce the provisions of both the Securities Act and the Exchange Act and to protect the substantive rights under each act. By analogizing statutory ERISA claims to claims under the securities acts, a strong affirmative ground

138. *Id.* at 1920-21 (citing *McMahon*, 482 U.S. 220 (construing the Securities Exchange Act of 1934, 15 U.S.C. § 78 aa); *id.* (construing the RICO statutes, 18 U.S.C. § 1965); and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (construing the antitrust laws, 15 U.S.C. § 15)); *see also supra* note 67 (discussing the *Rodriguez* decision).

139. By analogy, ERISA's liberal statute of limitations provision must likewise fall to the *Rodriguez* reasoning as it too is merely another procedural provision designed to facilitate suits by aggrieved parties under ERISA.

140. *See supra* notes 96, 98, & 123.

141. *Rodriguez*, 109 S. Ct. at 1921. *See also supra* note 67 (discussing the *Rodriguez* decision).

The Court's reasoning in *Rodriguez* does not refute *Bird*'s legislative history argument, however, regarding Congress's reference to LMRA § 301 as a model only for ERISA benefits claims. *See supra* note 123.

142. *Mitsubishi*, 473 U.S. at 628. The Court asserted that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

143. *See supra* notes 52-54 and accompanying text.

144. *See supra* notes 62-65 and accompanying text.

145. *See supra* notes 66-67 and accompanying text.

emerges upon which to base the arbitrability of statutory ERISA claims.

Significant parallels exist between ERISA and the securities acts. Congress enacted ERISA to protect pension plan participants and beneficiaries from abuses perceived in the private pension plan system,[146] just as it enacted the securities laws to protect investors from abuses perceived in the securities industry.[147] One lower court observed that a pension plan participant is in effect a securities investor, making his investments indirectly through his pension plan.[148] This is a fair analogy that remains sound today. Given this parallel, arbitration procedures that adequately protect the securities investor's claims under the securities laws likewise should adequately protect a pension plan participant's claims under ERISA, particularly if those claims flow from alleged misconduct in the securities industry.

The Supreme Court in *McMahon* reviewed at length the adequacy of current arbitration procedures for securities claims.[149] In exercising its regulatory authority,[150] the SEC has

146. *See supra* note 88.

147. *See supra* note 33.

148. Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 275 (E.D. Pa. 1977). The court observed that the pension plan participant intends that his interest in his pension will support him after retirement "just as though he had purchased securities directly for the same purpose with money given him as salary or wages in lieu of employer contributions to the pension plan." *Id.*

The district court in *Lewis* was actually drawing this analogy to show that statutory ERISA claims should *not* be arbitrable, the opposite result that the Supreme Court apparently desires to reach in *Bird*. At the time of the *Lewis* decision in 1977, the court could successfully use the analogy to support its holding because the Supreme Court had not yet overruled *Wilko*, nor had it decided *McMahon*. Therefore, securities investors at the time did occupy a special shield of protection against compulsory arbitration. Given the precedent that exists today, however, the analogy can now support the opposite position for the same reasons that it worked in *Lewis*.

149. *See McMahon*, 482 U.S. at 233-34.

150. In 1975 Congress amended the Exchange Act, giving the Securities and Exchange Commission (SEC) extensive authority over the arbitration procedures of self-regulatory organizations ("SROs") — the national securities exchanges and registered securities associations — to ensure the adequacy of these procedures. *Id.* Before enactment of these amendments, the SEC had only limited authority over the rules governing the SROs and no authority at all over their arbitration procedures. *Id.* at 233. The amendments to § 19 of the Exchange Act give the Commission broad authority to oversee and regulate rules that the SROs adopt concerning customer disputes, "including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Id.* at 234.

specifically approved the arbitration procedures of the organizations involved in *McMahon*, procedures that are identical to those in the *Bird* brokerage agreement.[151] The *McMahon* Court concluded that if the prescribed arbitration procedures are subject to the SEC's regulatory authority, an arbitration agreement does not result in a waiver of the protections of the Exchange Act.[152] Because rules for the arbitration of claims under the Securities Act fall under the same broad authority of the SEC, the Court applied the *McMahon* reasoning by reference in *Rodriguez* to hold that the arbitration procedures also adequately protect statutory rights under the Securities Act.[153]

Based on the Supreme Court's determination that current securities industry arbitration procedures adequately protect the rights of aggrieved investors under the securities laws, these procedures likewise must be sufficient to protect the rights of aggrieved parties under ERISA who are claiming that securities industry personnel have breached ERISA's fiduciary standards. Consistent with this reasoning, the Eighth Circuit, upholding the arbitrability of ERISA claims, recently found that arbitrators are quite capable of handling ERISA's complexities.[154]

The Supreme Court's remand of *Bird* in light of its most recent commercial arbitration decision, notably in the securities area, further supports the conclusion that commercial arbitration in the securities industry adequately and equally protects all securities investors, whether they are investing individually or through an ERISA pension plan. This analogy provides a sound affirmative basis for holding that statutory ERISA claims for breach of fiduciary duty are arbitrable. When the Second Circuit decided *Bird*, sufficient Supreme Court precedent in the commercial arbitration realm already existed to firmly support such reasoning,[155] yet the Second Circuit improperly disregarded it. The *Rodriguez* decision relied heavily on these ex-

151. The organizations are the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers. *Id. See also supra* note 2 (setting forth the arbitration provision in the customer agreement at issue in *Bird*).

152. *McMahon*, 482 U.S. at 234.

153. *See supra* note 67 (discussing the *Rodriguez* decision).

154. Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, 479 (8th Cir. 1988); *see supra* note 108 (discussing the *Sulit* decision).

155. *See McMahon*, 482 U.S. at 242; Scherk v. Alberto-Culver Co., 417 U.S. 506, 513 (1974).

isting decisions,[156] and its arrival merely reinforced an already sound basis for a *Bird* decision in favor of ERISA arbitration.

C. Unfounded Concern Over Frustration of ERISA Policy

Because *Rodriguez* dealt with the Securities Act of 1933, neither it nor the Supreme Court's other commercial arbitration cases, on which *Rodriguez* specifically relied, addressed three of the Second Circuit's arguments particular to ERISA. The Second Circuit was concerned that a contrary holding would frustrate the congressional goal of a uniform body of federal common law governing ERISA,[157] the Secretary of Labor's right to bring statutory ERISA claims on behalf of a participant or beneficiary,[158] and congressional intent that remedial statutes providing individual minimum substantive guarantees be accorded nonwaivable consideration in a judicial forum.[159]

1. Uniformity Under ERISA

Both the Second Circuit in *Bird* and the Third Circuit in *Barrowclough* pointed out Congress's recognition of the need for development of a uniform federal common law under ERISA.[160] The *Barrowclough* decision emphasized the inconsistency between this goal and the arbitration of statutory ERISA claims.[161]

Congress did recognize the importance of providing uniform guidance to participants, beneficiaries, administrators, and fiduciaries of ERISA plans.[162] Some commentators, akin to the *Barrowclough* court, have submitted that allowing the arbitration of substantive ERISA claims will frustrate this congressional intent.[163] A finding of arbitrability in *Bird*, however,

156. *Rodriguez*, 109 S. Ct. at 1920-21; *see supra* notes 67 & 136-38 and accompanying text (discussing the *Rodriguez* decision).

157. *See supra* note 123 and accompanying text.

158. *See supra* note 122.

159. *See supra* notes 124-28. The *Barrowclough* court also raised this concern in its decision to preclude arbitration of an ERISA statutory claim.

160. *See supra* note 123. Several excerpts from ERISA's legislative history not cited by the Second Circuit further support this contention. *See supra* notes 99-100 and accompanying text.

161. *See supra* note 123. The Second Circuit in *Bird* relied substantially on the *Barrowclough* court's reasoning, although not always reiterating it in detail.

162. *See supra* notes 99-100 and accompanying text.

163. *See* Schneider, *supra* note 71, at 285 (goal of ERISA's federal preemption to help predict legality of proposed actions would be negated if traditional

would not necessarily frustrate this congressional goal because it would in no way hold that such claims must be resolved exclusively by arbitration. Only in those cases where parties had entered into a valid commercial arbitration agreement that included ERISA claims in its scope would arbitration of statutory ERISA claims be mandated. Many statutory ERISA claims would still make their way into the federal courts,[164] and the resulting judicial decisions would develop the desired gap-filling common law.

Arbitrators faced with statutory ERISA claims, as with other arbitrable statutory claims,[165] are "readily capable of

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arbitration were permitted because arbitrators not bound to consider either law or precedent); *see also* Note, *supra* note 101, at 974 (because judges are bound by precedent and must state reasons for decisions, they are "more likely to formulate clear, articulate, *uniform* standards of conduct").

164. ERISA's civil enforcement provisions grant several parties the right to sue for substantive violations of the Act. ERISA § 502(a), 29 U.S.C. § 1132(a) (1988). The *Bird* case, while casting a broad net due to securities industry practice, leaves many potential claims for substantive ERISA violations untouched. As long as the parties to the dispute do not have an arbitration agreement, the federal district courts retain exclusive jurisdiction.

Also, until the Supreme Court provides further guidance, a reversal of *Bird*'s holding should not preclude access to federal court for such claims arising in the labor realm. The *Bird* case deals with a predispute arbitration clause in a commercial contract, as does *Rodriguez*, and its holding should be confined to ERISA disputes in the commercial arbitration context. Labor arbitration differs from commercial arbitration in significant respects. Most notably, an aggrieved party under a collective bargaining clause must surrender his claim to the union's exclusive control. Emphasizing this distinction, the *Alexander*, *Barrentine*, and *McDonald* decisions all found that in labor arbitration the union may properly subordinate the interests of the individual employee to the collective interests of the employees as a whole. *See supra* note 83. Thus, an aggrieved party might lose his statutory right if not in the union's best interest to pursue his claim vigorously. *Id.*

In contrast, an ERISA claimant who is a party to a commercial arbitration agreement retains complete control of her claim in the arbitration proceeding, representing her own interests exclusively and independently. Based on this critical distinction and existing Supreme Court precedent, courts should refrain from extending a reversed *Bird* decision into the labor area without express Supreme Court approval. By thus limiting *Bird*'s reach, another source of claims to aid in developing ERISA federal common law emerges: statutory claims related to ERISA pension plans under collective bargaining agreements.

165. The Supreme Court has enforced agreements between private parties to arbitrate antitrust, Securites Act, Exchange Act, and RICO claims. *See supra* notes 43-67 and accompanying text.

In holding antitrust claims arbitrable, the Court declared potential complexity insufficient to ward off arbitration. Specifically, the Court determined that "adaptability and access to expertise are hallmarks of arbitration. The . . . subject matter . . . may be taken into account when arbitrators are appointed, and arbitral rules typically provide for the participation of experts either em-

handling the factual and legal complexities" of the claims.[166] Presumably, commercial arbitrators follow the law in reaching their decisions on statutory claims.[167] Furthermore, although judicial review of arbitration decisions is necessarily limited, the FAA does not provide complete immunity from review.[168] Therefore, far from eroding ERISA federal common law, arbitral decisions on statutory ERISA claims will aid in maintaining respect for this developing area of law.

2. Secretary of Labor's right to bring ERISA claims

Another Second Circuit concern that neither *Rodriguez* nor the other Supreme Court commercial arbitration cases addressed is Congress's grant to the Secretary of Labor of the right to intervene on behalf of a plan participant or beneficiary in an action based on a statutory ERISA claim.[169] Dispute resolution in the arbitral forum effectively destroys the Secretary's ability to exercise the right to intervene, and hence appears to remove an added protection that Congress intended. This protection, however, is analogous to ERISA's numerous liberal procedural protections which, as used in other statutes, have not prevented the Court from allowing waiver of the judicial

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ployed by the parties or appointed by the tribunal." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985).

In *McMahon*, the Court relied in part on *Mitsubishi* to hold both Exchange Act and RICO claims arbitrable, recognizing that "arbitral tribunals are readily capable of handling the factual and legal complexities . . ., notwithstanding the absence of judicial instruction and supervision." *McMahon*, 482 U.S. at 232.

Applying these Supreme Court precedents to statutory ERISA claims, the Eighth Circuit in *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.* held the claims arbitrable. The court determined that "[l]ike other essentially fact-based claims for fiduciary mismanagement, we believe arbitrators 'are readily capable of handling the factual and legal complexities' of ERISA claims, and that those claims are not by their nature beyond the ken of arbitrators." *Sulit*, 847 F.2d at 479 (quoting *McMahon*, 482 U.S. at 232).

166. *McMahon*, 482 U.S. at 232.

167. The Supreme Court has indicated that "there is no reason to assume at the outset that arbitrators will not follow the law" in deciding statutory claims. *Id.*

168. *See supra* notes 25-26 and accompanying text. The *McMahon* Court found the limited judicial review necessarily afforded arbitral decisions to be sufficient in ensuring that arbitrators comply with the requirements of the statute. *McMahon*, 482 U.S. at 232.

169. *See supra* note 122. The Securities Act underlying *Rodriguez* does not contain an analogous intervention provision, nor do any of the other statutes under which the Supreme Court has found arbitrable statutory claims, i.e., Exchange Act, Sherman Act, and RICO.

forum.[170] Like the procedural protections, the Secretary's intervention authority is not such an essential feature that ERISA bars its waiver.[171]

Furthermore, because the Secretary of Labor was not a party to the arbitration agreement, the Secretary retains the right to bring a separate civil action against the alleged ERISA violator in federal court notwithstanding a concurrent arbitration proceeding involving the same claim.[172] The Secretary can only exercise this right, however, if the Secretary receives notice that an "ERISA plaintiff" is bringing a statutory ERISA claim in a compulsory arbitration proceeding. ERISA requires that the plaintiff in any action under ERISA serve a copy of the complaint on the Secretary,[173] thereby effectuating the Secretary's right to intervene at her discretion.[174]

If this notice provision is not applicable in the arbitration context, the Secretary's right to bring suit may effectively be denied, thereby removing an element Congress included as part of ERISA's comprehensive regulatory scheme. Arguably, because this notice provision is directed to the ERISA plaintiff, nothing prevents the plaintiff from voluntarily complying with the provision notwithstanding his involvement in mandatory arbitration. Because the Secretary's right to intervene is essentially for the protection of the plaintiff, the arbitration plaintiff that fails to notify the Secretary in effect voluntarily waives the potential aid of the Labor Department.[175]

3. Congressional intent

The Second Circuit's third major concern was preservation of Congress's intent that remedial statutes providing individual minimum substantive guarantees, including ERISA, be ac-

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170. *See supra* notes 135-39 and accompanying text.

171. *See Rodriguez*, 109 S. Ct. at 1920 (stating that the Securities Act's liberal procedural provisions are not so essential to the Act that they may not be waived).

172. *See supra* note 97.

173. ERISA § 502(h), 29 U.S.C. § 1132(h) (1988).

174. *Id.*

175. Practically speaking, this potential aid may be largely illusory anyway. The Secretary's right to intervene is discretionary and given the number of ERISA complaints filed every year, the Secretary can become actively involved in only a small percentage. *See, e.g.*, Brennan, *Private Pensions May Be in Trouble*, Star Tribune (Minneapolis), Nov. 14, 1989, at 1D, col. 3 (discussing an Associated Press investigation revealing the Labor Department's inability to cope with the growth of the private pension system).

corded nonwaivable access to a judicial forum.[176] The court's characterization of ERISA as remedial, however, does not in itself establish such congressional intent,[177] and the *Bird* remand strongly suggests that the Second Circuit's primary reliance on the Supreme Court's decisions in *Alexander*, *Barrentine*, and *McDonald* was improper.[178]

The propriety of relying on the *Alexander* trilogy arises because, although these decisions admittedly involved labor arbitration under collective bargaining agreements, their holdings were based only in part on reasoning exclusively applicable to labor arbitration. The risk of subordination of individual interests to collective interests and the fact that the union exclusively controls the suit differentiate statutory claims under labor arbitration from those arising in commercial arbitration.[179] The Supreme Court also based these decisions on reasoning independent of the collective bargaining context, relating to the specialized character of each statute at issue.[180] The Second Circuit relied on these independent reasons, analogizing ERISA's purpose and policies to those of Title VII, the FLSA, and section 1983.[181]

The Supreme Court decided the *Alexander* trilogy cases during a ten-year period ending in 1984, *prior to* issuing its recent line of commercial arbitration decisions.[182] The Third Cir-

176. *See supra* notes 83 & 126. The *Barrowclough* court shared this concern and similarly relied on the *Alexander* trilogy for support. *See supra* note 106.

177. The Supreme Court in *McMahon* characterized both the Exchange Act and RICO as remedial statutes, but nonetheless held them both compulsorily arbitrable. *McMahon*, 482 U.S. at 240-41; *see also* SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953) (noting the "broadly remedial purposes of federal securities legislation").

178. *See supra* notes 73-85 and accompanying text.

179. *See supra* note 164.

180. The Court cited either the statute's constitutional dimensions, the high priority Congress placed on it, or the individual minimum substantive guarantees it provided. *See supra* notes 81-83 and accompanying text.

181. *See supra* notes 125-28 and accompanying text. The *Bird* court emphasized that "[t]he federal courts have consistently interpreted ERISA as a remedial statute designed to 'curb the funding and disclosure abuses of employee pension and welfare benefit plans by *establishing minimum federal standards*.'" *Bird*, 871 F.2d at 297 (quoting Taggert Corp. v. Efros, 475 F. Supp. 124 (D. Tex. 1978)) (emphasis added). Furthermore, in Pompano v. Michael Shiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir. 1982), the court had previously stated that "[a] reading of the statute's legislative history compels the conclusion that ERISA's purpose is to secure guaranteed pension payments to participants by insuring the honest administration of financially sound plans." *Id.*

182. The *Scherk* decision arrived in 1974, the same year as the *Alexander*

cuit's *Barrowclough* decision arrived in early 1985, also before the commercial arbitration decisions, making reasonable that court's reliance on the *Alexander* trilogy to hold ERISA statutory claims not compulsorily arbitrable.[183] Faced with the same issue in 1988 in *Sulit*, the Eighth Circuit properly looked to the commercial arbitration decisions for guidance, and held ERISA claims arbitrable.[184] The Second Circuit in *Bird*, on the contrary, inexplicably glossed over modern commercial arbitration jurisprudence in favor of the *Alexander* trilogy, even though *Bird* involved a commercial arbitration agreement.[185]

The Supreme Court's vacation of judgment and remand of the *Bird* case in light of *Rodriguez* clearly signals that the Second Circuit improperly disregarded the commercial arbitration decisions. Furthermore, the Supreme Court's current unflagging support for the FAA evinced in recent commercial arbitration decisions casts substantial doubt on the general applicability of the *Alexander* cases. Three possible theories may explain the flaw in the Second Circuit's primary reliance on the trilogy. The *Alexander* decisions may apply only to the specific statutes they address, the Supreme Court may recognize their precedential value only in the labor arbitration realm, or perhaps statutory ERISA claims simply fail to reach the threshold necessary to activate the decisions. Although *Bird* gave the Supreme Court an opportunity to clarify the distinctions between its labor arbitration and commercial arbitration decisions, the Supreme Court's summary remand unfortunately has deferred this issue to the future, reducing the foregoing theories to mere speculation.

Given the current uncertainty over the general applicability of the *Alexander* trilogy,[186] the Second Circuit's primary reliance on them was unreasonable. The court erred in failing to give the Supreme Court's more recent *commercial* arbitration decisions, particularly those involving statutory securities claims, greater if not exclusive consideration.[187] The trend in

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decision, but *Scherk* dealt with commercial arbitration in the international context, arguably distinguishing it from the later domestic commercial arbitration cases all decided after the last *Alexander* trilogy case. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc., 473 U.S. 614 (1985); and Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

183. *See supra* note 106.

184. *See supra* note 108.

185. *See supra* notes 114-28 and accompanying text.

186. *See supra* notes 85 & 179-84 and accompanying text.

187. *See supra* notes 142-56 and accompanying text.

modern commercial arbitration jurisprudence coupled with the illusory nature of the Second Circuit's other ERISA policy concerns outweigh any arguable analogy between ERISA and the statutes at issue in the *Alexander* trilogy, given *Bird*'s commercial context.

CONCLUSION

Given the massive amounts of money invested in private pension plans and the vast number of citizens relying on these plans,[188] *Bird* poses an issue of major significance. The Second Circuit erred in holding statutory ERISA claims exempt from compulsory arbitration. The Supreme Court's summary remand of *Bird* in light of *Rodriguez* indicates that the Second Circuit improperly disregarded recent commercial arbitration precedent. The *Rodriguez* decision alone does not compel reversal, but modern commercial arbitration jurisprudence and the federal policy favoring arbitration which it espouses, coupled with the desire to protect all securities investors both adequately and equally, mandates the enforcement of valid commercial arbitration agreements for statutory ERISA claims. The *Bird* remand also signals that the Second Circuit's primary reliance on the *Alexander* trilogy was misguided; until the Supreme Court clarifies the distinction between its commercial arbitration and labor arbitration precedents, however, this aspect of the remand shall remain a mystery.

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188. *See supra* notes 86-87.