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AVOIDING THE PROTECTIONS OF THE FEDERAL SECURITIES LAWS: THE ANTI-WAIVER PROVISIONS

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**INTRODUCTION**

Under section 14 of the Securities Act of 1933 (Securities Act)\(^1\) and section 29(a) of the Securities Exchange Act of 1934 (Exchange Act),\(^2\) any "condition, stipulation, or provision" waiving compliance with any provision\(^3\) of either Act is void. The purpose of these sections is to protect investors.\(^4\) At the same time, however, the sections have limited application to members of exchanges and broker-dealer associations.\(^5\) Most of the cases that have dealt with these sections have involved the validity of arbitration agreements involving investor claims asserted under the provisions of the federal securities laws and disputes by self-regulated registered broker-dealers.

The policy of encouraging the settlement of controversies by arbitration is judicially favored as an expeditious means of

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\(^1\) Section 14 of the Securities Act provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." Securities Act of 1933, § 14, 15 U.S.C. § 77n (1976).

\(^2\) Section 29(a) of the Exchange Act provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." Securities Exchange Act of 1934, § 29(a), 15 U.S.C. 78cc (1976).

\(^3\) Pursuant to section 6 of the Exchange Act, an Exchange may be registered as a National Securities Exchange, and, pursuant to sections 6 and 19 of the Exchange Act, such an Exchange may propose, adopt, change, add, or delete its own rules. Similarly, section 15 of the Exchange Act provides for the registration of an Association of brokers and dealers as a National Securities Association (e.g., The National Association of Securities Dealers, commonly referred to as the "NASD"), and sections 15 and 19 of the Exchange Act permit such an Association to propose, adopt, change, add, or delete its own rules. Securities Exchange Act of 1934, §§ 6, 15, 19, 15 U.S.C. §§ 78f, 78o, 78s (1976).

\(^4\) See generally A.C. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38, 40 (1941); 1 Loss, SECURITIES REGULATION 130-31 (1961); 3 Loss, SECURITIES REGULATION 1813-14 (1961).

settling disputes. However, since the United States Arbitration Act was adopted prior to either of the Securities Acts, and the earlier Act is not mentioned in either of the federal securities laws, it is doubtful that Congress intended to turn over the adjudicatory authority over federal securities claims to private arbitrators.

The issue was first raised in Wilko v. Swan, where the United States Supreme Court held an agreement to submit to arbitration any future controversy that might arise between a brokerage firm and its customer void under section 14, notwithstanding the provisions of the Arbitration Act. More recently, the Court, in Scherk v. Alberto-Culver Co., held that an international business agreement containing an arbitration clause was enforceable against a claim alleging violations of Rule 10b-5 of the Exchange Act. In so holding, the Court declined to apply the Wilko rationale under the particular circumstances. Relying on the distinctions between Wilko and Scherk, as well as other factors, the lower courts have generally limited the application of sections 14 and 29(a). However, as will be discussed later in this article, the rationale for the limitations has only facial appeal and is not firmly grounded in the remedial scheme established by the federal securities laws. In every case where claims subject to arbitration agreements or otherwise involving some sort of deviation from judicial resolution of the merits are intermixed with claims under the federal securities laws, a tension will surface: Is the claimant entitled to a judicial forum, or is the claim subject to contractual waiver provisions that cut off judicial rights?

This article first focuses on the Wilko and Scherk decisions in an effort to ascertain the scope of each decision, as well as to examine the continued viability of Wilko after Scherk. Second, the applications of, and limitations placed on, sections

6. Chief Justice Burger recently reiterated the strong preference given arbitration by the judiciary. See Remarks of Chief Justice Burger, American Bar Association Midyear Meeting (Feb. 12, 1978). See generally Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), cert. denied, 434 U.S. 824 (1977) where the court held that a plaintiff's securities claims had to be stayed pending arbitration of the contract claims as "claims under the Federal Securities Acts . . . are generally not subject to arbitration under a pre-existing arbitration clause." Id. at 543; see also notes 71-83 and accompanying text infra.


8. See notes 49-50 infra.


11. See notes 84-90 and accompanying text infra.
14 and 29(a) by the lower courts are examined. Finally, the self-
regulatory organization exception to the application of the
anti-waiver provisions is discussed to ascertain the scope of the
exception.

**Wilko AND Scherk: COMPLEMENTARY OR CONTRADICTORY?**

The United States Arbitration Act\(^1\) provides that written
contractual provisions to settle controversies by arbitration
shall be “valid, irrevocable and enforceable.”\(^2\) Congress has
stated that any suit or proceeding brought in a federal court
“upon any issue referable to arbitration under an agreement in
writing for such arbitration” must be stayed until such arbitra-
tion is completed.\(^3\) Upon application of an aggrieved party to
a court, if the making of the agreement or the failure to comply
therewith is not in issue, the court shall direct that arbitration
proceed in accordance with the agreement.\(^4\) However, a court
will deny enforcement on “such grounds as exist at law or in
equity for revocation of any contract.”\(^5\)

The adoption of the Arbitration Act evidenced a congres-
sional preference for arbitration over litigation.\(^6\) The benefits
sought to be achieved thereby were the avoidance of the com-
plexity, delay and expense of litigation.\(^7\) On the other hand,
the Securities Act was intended to protect the multitude of
investors who must necessarily rely on issuers and dealers in
securities to make full and fair disclosure concerning the char-

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13. Id. § 2.
14. Id. § 3.
15. Id. § 4.
16. Id. § 2.
No. 536, 68th Cong., 1st Sess. 3 (1924); see Marine Transit Corp. v. Dreyfus, 284 U.S.
263 (1932). The Arbitration Act reversed “centuries of judicial hostility to arbitration
agreements, [and] was designed . . . to place arbitration agreements ‘upon the same
1-2 (1924); see also S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924).
18. “The reports of both Houses on the Arbitration Act stress the need for avoid-
ing the delay and expense of litigation, and practice under its terms raises hopes for
its usefulness both in controversies based on statutes or on standards otherwise cre-

Other effects of submitting claims to arbitration are a reduction in the congestion
of the judicial system, and alleviation of the burdens placed on corporate executives
by the litigation process. These factors were among the policy considerations which led
the Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) to conclude
that standing in private damage actions under section 10(b) of the Exchange Act and
Rule 10b-5 thereunder was limited to persons who actually purchased or sold securities.
acter of the securities being sold. Issuers and dealers in securities typically have better access than buyers to information concerning the business and opportunities of a company. This advantage is sought to be balanced by requiring full disclosure to buyers. Liability is provided for misstatements in the offer and sale of securities, and fraud is prohibited.

20. 346 U.S. at 435.
21. Section 5 of the Securities Act prohibits the offer or sale of securities by the use of any means or instruments of transportation or communication in inter-state commerce or of the mails unless a registration statement is on file with the SEC and has become effective. Securities Act of 1933, § 5, 15 U.S.C. § 77c (1976). Section 8 of the Act governs when a registration statement may become “effective” and provides the Commission with the authority to issue a “stop order”, upon notice and hearing, when it appears that the registration statement contains material misstatements or omissions. Securities Act of 1933, § 8, 15 U.S.C. § 77h (1976). However, section 3 of the Act exempts various securities, and section 4 exempts certain transactions, from the prohibitions of section 5. Securities Act of 1933, §§ 3-5, 15 U.S.C. §§ 77c-77e (1976).
22. Section 11(a) of the Securities Act creates civil liability for untrue statements of, or omissions to state, material facts in a registration statement which has become effective. Under this section, any person acquiring a security offered pursuant to such a registration statement, unless it is proved that at the time of acquisition such person knew of the untruth or omission, may sue to recover, at law or in equity, in any court of competent jurisdiction. Section 11(b) of the Act provides for absolute liability of the issuer, except to the extent that the issuer can affirmatively show that the damage to the investor was not caused by the misstatement or omission in the registration statement, section 11(e), and what has come to be known as a “due diligence” defense for any other person against whom suit may be brought under section 11(a). Section 11(e) governs the amount recoverable, and section 11(g) places a ceiling on such amount. Securities Act of 1933, § 11, 15 U.S.C. § 77k (1976). The landmark cases dealing with liability under section 11(a) and (b) and the due diligence defense are Escott v. Bar-Chris Construction Corp., 283 F.Supp. 643 (S.D.N.Y. 1968), and Feit v. Leasco Data Proc. Equip. Corp., 332 F.Supp. 544 (E.D.N.Y. 1971).

Section 12(1) of the Securities Act imposes civil liability for the offer or sale of a security in violation of section 5, and section 12(2) imposes liability for misstatements or omissions in a prospectus or oral communication. Under section 12, a purchaser may sue any person who violates section 12(1) or (2), at law or in equity, in any court of competent jurisdiction. Securities Act of 1933, § 12, 15 U.S.C. § 77i (1976).

Section 13 of the Act sets a limitation on the time within which suit to enforce any liability under sections 11 or 12 may be brought. Section 15 imposes civil liability upon every person who controls any person liable under sections 11 or 12 if the controlling person has the requisite state of mind. Section 16 of the Act provides that the rights and remedies provided by the Act are in addition to all rights that may exist at law or in equity. Section 17(a) prohibits fraud in the offer or sale of any security. Securities Act of 1933, §§ 13, 15-17(a), 15 U.S.C. §§ 77m, 77c-77q (1976). While the Supreme Court has expressly left open the question whether an implied private cause of action for damages exists under section 17(a), International Bhd. of Teamsters v. Daniel, 99 S. Ct. 790, 795 n.9 (1979); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 733 n.6, such an action has been held to exist by the lower courts. Schaefer v. First Nat'l Bank of Lincolnwood, 509 F.2d 1289, 1293 (7th Cir. 1975); Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1283-84 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970).
Wilko v. Swan was the first major case to deal with the tension created by an arbitration agreement that is “valid” under the Arbitration Act, but which covers a claim that is actionable under the remedial provisions of the Securities Act. The suit was between a brokerage firm and its customer with respect to a claim asserted by the customer under section 12(2) of the Securities Act. The customer alleged that the brokerage firm had, by means of false representations and omissions, induced him to purchase certain securities which he later sold at a loss.

The defendants sought to stay trial under section 3 of the United States Arbitration Act, until arbitration could be had pursuant to the terms contained in margin agreements entered into by the customer with the brokerage firm. When the case


23. Section 12 of the Securities Act imposes civil liability on any person who offers or sells a security in violation of section 5 of the Act or by means of a prospectus or oral communication which includes an untrue statement of, or omits to state, a material fact. A purchaser who knows of the untruth or omission in the prospectus or oral communication at the time he purchases is expressly precluded from the remedy permitted by section 12(2). Further, the offeror or seller upon whom liability is sought to be imposed has the burden of proving “that he did not know, and in the exercise of reasonable care could not have known of such untruth or omission.” Securities Act of 1933, § 12, 15 U.S.C. § 77l (1976). The effect of this provision is that the seller has the burden of proving lack of scienter. Wilko v. Swan, 346 U.S. at 431. Finally, section 12 expressly limits the amount recoverable by an aggrieved purchaser. Securities Act of 1933, § 12, 15 U.S.C. § 77l (1976).

24. Section 3 of the Arbitration Act provides:

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


25. 346 U.S. at 429. The district court denied the motion to stay, holding that the arbitration agreement deprived the customer of the advantageous court remedy provided by the Securities Act. Wilko v. Swan, 107 F. Supp. 75 (S.D.N.Y. 1952). A
reached the Supreme Court, the issue at hand was "whether an agreement to arbitrate a future controversy is a 'condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision' of the Securities Act which §14 declares 'void.'" The Court's holding that such an agreement was void by force of section 14 was based upon its analysis of the conflicting policies underlying the Arbitration and Securities Acts, and the finding that section 12(2) of the Securities Act affords a special right to injured investors that cannot be waived by a prior agreement to submit a claim which is actionable under section 12(2) to arbitration. Also, the Court placed considerable emphasis on the fact that the agreement involved concerned an agreement to arbitrate a future controversy.

In dealing with the conflicting policies under these separate Acts, the Wilko Court relied heavily on the congressional intent underlying the Securities Act; i.e., investor protection. The majority recognized that buyers of securities are typically at a disadvantage, and it was "with an eye" to the disadvantages that the Securities Act was drafted. The Court agreed with the argument that section 14 was intended to preclude sellers from maneuvering buyers into a position that weakens their ability to recover under the Securities Act.

Considerable emphasis was placed on the special right afforded investors by section 12(2) of the Securities Act. In this regard, the Court noted that this special right differs substantially from a common law action based on the same facts, in that under section 12(2): the seller must prove lack of scienter; the right is enforceable in state or federal court; removal from state to federal court is prohibited; and, if suit is brought in federal court, there is a wide choice of venue, nationwide service of process, and no jurisdictional amount in controversy requirement.

divided court of appeals reversed, holding that the Securities Act did not prohibit an agreement to arbitrate future controversies. Wilko v. Swan, 201 F.2d 439 (2d Cir. 1953).

26. 346 U.S. at 430.
28. 346 U.S. at 430, 432, 438.
29. Id. at 435.
30. Id. at 432, 435.
31. Id. at 431, 435, 438.
32. Id. at 431. The provisions of the Securities Acts dealing with jurisdiction and
The Court concluded that the agreement to arbitrate was a "stipulation" within the meaning of section 14, and the right to select the judicial forum was the kind of "provision" that could not be waived under the section. However, the Court was careful to point out that its analysis and holding were limited to agreements entered into prior to the occurrence of any violation or controversy arising from an alleged violation. The rationale behind this limitation is that once a violation has been committed, a subsequent agreement to resolve the claim arising therefrom by arbitration does not entail a waiver of compliance with the securities laws. The parties to the agreement are each bound to comply with all of the provisions of the securities laws prior to the occurrence of the violation, and the subsequent agreement to arbitrate the resultant claim has no affect on that obligation. It is only when the agreement is entered into in advance of a violation that a party is effectively required to waive a right that the law provides.


33. 346 U.S. at 434-35. The court in Wilko pointed out that even if the claim were to be determined in arbitration, the arbitration agreement would not have relieved the seller from liability or the burden of proof imposed by the Securities Act. In other words, the provisions of the Securities Act would have applied in arbitration. Id. at 433 & n.18, 434-36, 440 (Frankfurter, J., dissenting).

34. Id. at 435, 438.

35. Agreements to settle or arbitrate claims arising from violations which have already occurred are not void under sections 14 and 29(a). See Murtagh v. University Computing Co., 490 F.2d 810, 816 (5th Cir. 1974); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1213 (2d Cir. 1972), cert. denied, 406 U.S. 949 (1972); Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970); Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968); see generally Note, 62 YALE L.J. 985, 994-96 (1953).

36. 417 U.S. at 508-09, 521. Interestingly, the Court in Scherk did not concern itself with the express remedy created by section 29(b) of the Exchange Act. 15 U.S.C. § 78cc (1976). That section provides that any contract made in violation of, or the performance of which would violate any provision, rule or regulation of the Exchange Act shall be void as regards the violator or his successor who takes with knowledge. The courts have interpreted the section as providing the aggrieved party with the option of invoking the right to rescission. See Mills v. Electric Auto-Lite Co., 396 U.S.
was based upon allegedly fraudulent representations concerning the unencumbered status of the trademarks it had purchased.  

The purchase agreement contained a clause providing that "any controversy or claim [arising] . . . out of this agreement or the breach thereof . . . shall be settled by arbitration." In response to Alberto-Culver's claim, Scherk filed a motion to stay the suit pending arbitration pursuant to the terms of the agreement. Relying on Wilko as the controlling authority, the district court denied the motion, and the court of appeals affirmed. When the case reached the Supreme Court, the Court once again was faced with having to resolve the conflicting policies underlying the Arbitration Act and the anti-waiver provisions of the Securities Acts. On this occasion, however, the issue was put in the context of an international commercial transaction involving the purchase of securities, and a claim asserted under the Exchange Act.

In holding that section 29(a) of the Exchange Act did not operate to void the arbitration clause contained in the agreement in Scherk, the Court relied primarily on the character of the transaction involved—an international business transaction. The Court reasoned that considerable uncertainty, confusion and lack of predictability in international business transactions would follow from application of United States laws to such transactions where the parties had, beforehand, mutually agreed upon the forum and laws to be applied in the event of a controversy. As Justice Stewart stated in his majority opinion:

375, 387 (1970); Occidental Life Ins. Co. of N.C. v. Pat Ryan and Assoc., Inc., 496 F.2d 1265 (4th Cir. 1974), cert. denied, 419 U.S. 1023 (1974). At least one court has held that the aggrieved party has the absolute right to rescission under section 29(b), even after performance has been rendered. Eastside Church of Christ v. National Plan, Inc., 391 F.2d 357, 362-63 (5th Cir. 1968). However, such a construction of the section has been criticized as "draconian" and "devastating" and has not been followed by other courts. See, Occidental Life Ins. Co. of N.C. v. Pat Ryan and Assoc., Inc., 496 F.2d at 1265; Pearlstein v. Scudder & German, 429 F.2d 1136, 1149 (2d Cir. 1970) (Friendly, J., dissenting), cert. denied, 401 U.S. 1013 (1971).
37. 417 U.S. at 509.
38. Id. at 508 n.1.
39. Id. at 510.
40. Id. at 515-19. Relying on The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Court in Scherk stated that invalidation of the arbitration agreement would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'" 417 U.S. at 519, quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. at 9.
A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

The dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.41

Thus, on a policy level, the Supreme Court in Scherk held that the principles and stability of international business override a strict application of section 29(a) of the Exchange Act. Presumably, the conclusion would be no different if the application of section 14 of the Securities Act were at issue, since its terms are almost identical to the terms of section 29(a).42

However, the Court in Scherk does not appear to have limited its rationale to "truly international transactions." On the contrary, it implied rather strongly that its holding applied to transactions having fewer foreign contacts than the transaction in Scherk. It must be noted that the transaction in Scherk had only the slightest contact with the United States. The negotiations to purchase the trademarks and stock, with very limited exceptions, and the actual operations of the businesses acquired, were all conducted and located in Europe. Justice Douglas (in a dissenting opinion) expressed a concern that, under the majority's holding, parties to transactions which have significant contacts with the United States, unlike Scherk, and only slight contacts with foreign countries, could invoke the "talisman" of "international contact,"43 and thus avoid the application of Wilko. The majority responded to this concern by stating: "Concededly, situations may arise where

41. 417 U.S. at 516-17.

42. "The Act of 1934, accordingly, as indicated, is supplementary to that of 1933, except in its judicial remedy, and accordingly, the same logic is applicable to the Act of 1934, as is applicable to that of 1933, and, therefore, to both non-waiver sections." Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d at 245. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96, 723 (10th Cir. 1978).

43. 417 U.S. at 528-29 (Douglas, J., dissenting).
the contacts with foreign countries are so insignificant or attenuated that the holding in Wilko would meaningfully apply."

The implication from this response is that transactions which have only slight contacts with foreign countries will not be subject to the holding of Wilko. Rather, only when the contacts are "so insignificant or attenuated" will Wilko apply. Under such an interpretation, the breadth of Wilko is severely limited.

In addition to the policy rationale, the Court in Scherk distinguished Wilko on the ground that Scherk did not involve the "special right" of a private remedy as Wilko did. In this regard, the Court reasoned that the "provision" relied upon in Wilko—allowing a plaintiff to bring suit in state or federal court—had no counterpart in the Exchange Act. This seems to suggest that certain types of agreements that might be void under section 14 might not be void under section 29(a), and that Wilko should not apply to cases involving section 29(a) of the Exchange Act. However, it is important to point out that the Court in Scherk preceded this analysis by characterizing it as only a "colorable argument." This characterization may have been a result of the Court's apparent disbelief that section 10(b) applied to the facts of the case at all.

44. Id. at 517 n.11 (emphasis added); but see Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 834 (7th Cir. 1977).
45. 417 U.S. at 517.
46. Id. at 513.
47. Id. Lower courts have considered these two provisions to be counterparts and have construed them to forbid the same kinds of contractual provisions. Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d at 245; Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 183 n.5 (2d Cir. 1966); Special Trans. Servs., Inc. v. Balto, 325 F. Supp. 1185, 1187 (D. Minn. 1971).
48. In this regard, the Court raised several issues suggesting that section 10(b) did not apply to the facts of the case. First, the Court questioned whether Alberto-Culver's "acquisition of Scherk's business was a security transaction within the meaning of § 10(b) . . . and Rule 10b-5." Id. at 514 n.8. Second, the Court acknowledged the existence of the issue of whether the federal securities laws apply at all to an international transaction of the kind involved. Id. at 516 n.9, 518 n.12. Third, the Court appears to have been of the view that Congress' passage of chapter 2 of the United States Arbitration Act, 9 U.S.C. §§ 201-208 (1976), to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Economic and Social Council, June 10, 1958, 3 U.S.T. 2517, T.I.A.S. No. 6997 (1970), superceded the application of the federal securities laws to international arbitration agreements. 417 U.S. at 520 n.15. In this regard, the Court said:

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention and...
would not be unreasonable to argue that the *exclusive jurisdiction* granted to the federal courts by section 27 of the Exchange Act amounts to the creation of a "special right" which is at least as important as the special right referred to in *Wilko*. Indeed, Congress' vesting exclusive jurisdiction over Exchange Act claims in the federal courts would seem to make the right created thereby more "special" than the right created by the concurrent state and federal court jurisdiction provided for in the Securities Act.

Finally, the fact that the Arbitration Act was passed by Congress in 1924\(^4\)—prior to the passage of the Securities Acts in 1933 and 1934—is strong reason for strictly applying the provisions of the Securities Acts when they conflict with the provisions of the Arbitration Act. Despite the existence of the Arbitration Act at the time that the Securities Acts were debated and passed, Congress chose to omit any reference to arbitration in sections 14 and 29(a), or for that matter, in the jurisdictional provisions of the Securities Acts.\(^5\) Arguably, this should prohibit any court from remanding a claim arising under the Securities Acts to an arbitral forum when to do so would contravene the express provisions of sections 14 and 29(a). If Congress had intended to permit the remanding of such claims to arbitration, it could have done so expressly.

**APPLICATION OF AND LIMITATIONS ON THE ANTI-WAIVER PROVISIONS**

Relatively few lower court decisions have dealt with sections 14 and 29(a) and their application under *Wilko* and *Scherk*. Those courts that have dealt with these issues have

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\(^{4}\) The Arbitration Act provides that agreements to arbitrate "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 (1976). Clearly, the express terms of section 14 and 29(a) are "grounds as exist at law . . . for the revocation" of a contract to arbitrate claims arising under the provisions of the federal securities laws. *Id.* §§ 14, 29(a).


*See* Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979) (*Wilko* inapplicable to pendant state law actions that may be referred to arbitration unless the federal actions "contain substantially the same elements as the state law claims." *Id.* at 1030.).
generally been unwilling to interpret the voiding provisions as broadly as they are written, and have tended to restrict the application of Wilko to cases where the parties do not have equal bargaining power. This trend, and the Burger Court’s apparent inclination to restrict the scope of the federal securities laws,\(^{41}\) suggests that sections 14 and 29(a), and Wilko, will be of limited utility to investors in the future. This result is unfortunate since it goes far toward vitiating a protection that Congress intended to provide. As the Court said in Wilko:

> As the protective provisions of the Securities Act [and, presumably, the Exchange Act] require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended §14 [and §29(a)] . . . to apply to waiver of judicial trial and review.\(^{52}\)

The vestiges of hope that remain for the viability of sections 14 and 29(a) appear to be in the argument that they were intended to protect the small investor, and preclude prior agreements to submit claims arising under the federal securities laws to decisional forums outside of those expressly provided for in the Securities Acts.\(^{53}\)

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51. See, e.g., International Bhd. of Teamsters v. Daniel, 99 S.Ct. 790 (1979) (involuntary non-contributory pension plan is not a “security”); SEC v. Sloan, 436 U.S. 103 (1978) (limitation on SEC’s right to suspend trading in registered securities for more than ten days); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (breach of fiduciary duty, absent fraud or deception, is not actionable under section 10(b) and Rule 10b-5); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (defeated tender offeror does not have standing to bring an implied private right of action under section 14(e)); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (scienter required in private damage actions under section 10(b) and Rule 10b-5); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (only actual purchasers and sellers have standing to bring an implied private right of action under section 10(b) and Rule 10b-5).

52. 346 U.S. at 437; Scherk v. Alberto-Culver Co., 417 U.S. at 525 (Douglas, J., dissenting); cf. Note, 41 GEO. L.J. 565 (1953); Note, 62 YALE L.J. 985 (1953); The same logic is applicable to sections 14 and 29(a). Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d at 245.

53. The intent of the arbitration process is to bring finality to a dispute. However, the issue of whether a given controversy is covered by an arbitration clause is a matter of interpretation and construction, governed by federal law. Further, it is “federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration.” Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 385 (2d Cir. 1961).

Once a claim has been arbitrated, there is little that can be done to open it up for judicial review. There are, however, circumstances under which arbitral finality may be challenged. See, e.g., Commonwealth Coatings Corp. v. Continental Gas Co., 393 U.S. 145 (1968); Torrington v. Metal Workers Local 1645, 362 F.2d 677 (2d Cir. 1966);
In Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the Court of Appeals for the Seventh Circuit dealt with an action brought by a customer under section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, against a large broker-dealer firm. In upholding the district court's denial of the broker-dealer firm's motion to stay the customer's action pending arbitration pursuant to the terms of a Standard Option Agreement signed by the customer, the court of appeals held Wilko to be controlling on policy grounds. First, it distinguished Scherk on the ground that its application was limited to international agreements. Second, the court placed considerable emphasis on the "bargaining posture" of the parties. In this regard, much reliance was placed on Justice (then Judge) Stevens' analysis in his court of appeals dissent in Scherk that the "holding in Wilko was directed at protecting . . . the relatively uninformed individual investor." Weissbuch found the disparity in bargaining power of the parties to be a significant factor in arriving at its conclusion. It reasoned that unlike Scherk, where both parties possessed formidable financial


Counts II and III of the complaint alleged common law fraud and deceit, and breach of contract. These claims were arbitrable pursuant to the arbitration clause contained in the Standard Option Agreement signed by the customer, but were stayed by the district court pending its determination of the Rule 10b-5 claim in Count I. Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.


54. 558 F.2d 831 (7th Cir. 1977).
55. Counts II and III of the complaint alleged common law fraud and deceit, and breach of contract. These claims were arbitrable pursuant to the arbitration clause contained in the Standard Option Agreement signed by the customer, but were stayed by the district court pending its determination of the Rule 10b-5 claim in Count I. Rule 10b-5 provides:

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56. 558 F.2d at 834.
58. 558 F.2d at 835.
strength, *Wilko* and *Weissbuch* each involved an individual investor pitted against a large brokerage firm.\(^9\)

While the logic of this reasoning is appealing, it is fallacious. It ignores the dictate of the Supreme Court that “[t]o decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous.”\(^{10}\) As Justice Douglas, directly confronting this point, said in his *Scherk* dissent:

> The [Exchange] Act does not speak in terms of “sophisticated” as opposed to “unsophisticated” people dealing in securities. The rules when the giants play are the same as when the pygmies enter the market . . . . Congress has specified a precise way whereby big and small investors and the rules under which [large and sophisticated companies] of this Nation shall operate. They or their lawyers cannot waive those statutory conditions, for our corporate giants are not principalities of power . . . .”\(^{11}\)

Finally, *Weissbuch* rejected the argument that a judicially implied private right of action under Rule 10b-5 is different than the “special right” emphasized in *Wilko* and that, therefore, *Wilko* should not apply to an action arising under Rule 10b-5. In this regard, the court of appeals relied on the Third Circuit’s decision in *Ayres v. Merrill Lynch, Pierce Fenner & Smith, Inc.*,\(^{12}\) which concluded that the differences in rights created by the Securities Act and the Exchange Act do not warrant such a distinction.\(^{13}\)

*Ayres* also made two other important points. First, it implicitly reasoned that the “purpose” of an arbitration clause should be discerned so as to evaluate its applicability to a claim arising under the provisions of the federal securities laws.\(^{14}\) If the clause in question was intended to govern a different area than the federal securities laws claim alleged, then it should not be applicable in that case.\(^{15}\) This rationale finds some ana-

\(^{59}\)Id.


\(^{61}\)417 U.S. at 527-28. See also Stier v. Smith, 473 F.2d 1205 (5th Cir. 1973).

\(^{62}\)538 F.2d 532 (3d Cir. 1976), cert. denied, 429 U.S. 1010 (1976).

\(^{63}\)538 F.2d at 536; accord, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, [1979 Transfer Binder] Fed. Sec. L Rep. (CCH) ¶ 96, 723 (10th Cir. 1978); but see notes 44-48 and accompanying text supra.


\(^{65}\)Ayres involved a registered representative (RR) employed by Merrill Lynch who had acquired 8,000 shares of Merrill Lynch common stock. At the time, Merrill
logical support in the holding in *Scherk*. Recall that the Court there, in upholding the arbitration clause, placed overwhelming emphasis on the international character of the transaction involved and the need to preserve orderliness and predictability in international commercial transactions.\textsuperscript{66} The arbitration clause was viewed as a means of achieving that end. It could be argued that just as the overriding "purpose" of the clause in *Scherk* governed its applicability in that case, so must an absence of such purpose behind a given clause preclude its applicability.

The second important point made in the *Ayres* decision is in its emphasis on *Wilko*'s conclusion that "prospective waivers of the right to judicial trial and review [are] inconsistent with Congress' overriding concern for the protection of investors."\textsuperscript{67} In view of the importance placed on congressional intent in recent Supreme Court decisions interpreting the federal securities laws,\textsuperscript{68} this point takes on added importance. Further, in response to the argument that *Wilko* does not apply to judi-

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Lynch was a privately held corporation. Pursuant to an option agreement entered into between the RR and Merrill Lynch, Merrill Lynch exercised its right to repurchase the 8,000 shares when the RR retired. Unbeknownst to the RR, Merrill Lynch was in the midst of planning a public offering of its stock at a price substantially higher than the option price at which it purchased the 8,000 shares. The RR sued Merrill Lynch under section 10(b), Rule 10b-5, and state law, alleging that had he known of Merrill Lynch's plans to make the public offering, he would have postponed his retirement and thereby avoided the triggering of the option repurchase right. Merrill Lynch moved for a stay of the RR's claim pending arbitration, arguing that New York Stock Exchange Rule 347(b), by which it and the RR were bound, subjected any claims arising out of employment or termination of employment to compulsory arbitration.

The court of appeals examined the purpose of Rule 347(b), and found that it related to the "exchange's housekeeping affairs" and dealt primarily with "the area of wage claims."\textsuperscript{69} 538 F.2d at 536. It then said:

Our conclusion that Exchange Rule 347(b) is inapplicable here is buttressed by the fact that even if Exchange Rule 347(b) was intended to govern controversies such as this, we believe it would, in any event, be unenforceable and invalid as applied to this case [by the force of *Wilko*].\textsuperscript{70}

*Id.* (emphasis added). See generally Laupheimer v. McDonnell & Co., 500 F.2d 21, 24-27 (2d Cir. 1974). However, the issue of whether a given controversy is covered by an arbitration clause is a matter of interpretation and construction, and is therefore governed by federal law. Further, it is "federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration." Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d at 385.

66. See notes 39-44 and accompanying text supra.
cially implied causes of action under the Exchange Act, Ayres noted "that Congress appears to have accepted the view that Wilko v. Swan applies in the 10b-5 context."70

In dealing with cases involving multiple cause of action, where some counts are alleged under the federal securities laws, the courts have been inclined to carefully distinguish between the securities and non-securities claims, and then apply the anti-waiver provisions only to the securities claims. For example, in Sibley v. Tandy Corp.,71 plaintiff, who was the representative of the shareholders of the acquired and disappearing company to a merger, brought suit against the acquiring and surviving company alleging violations of section 10(b) and Rule 10b-5 in connection with the merger agreement, and also alleging claims grounded in contract with respect to the merger agreement.72 The district court declined to sever the contract counts and to submit them to arbitration, reasoning that they were too intertwined with the securities law claims.73 The court of appeals, however, reversed and held that the counts should have been severed, and that the non-securities counts should have been submitted to and decided in arbitration prior to resolution of the securities claims.74

The court of appeals first carefully distinguished between the securities and contract claims.75 The court next analyzed the logical order in which proof of each of the claims would have to proceed. In this regard, it reasoned that the contract counts would have to be resolved first since they involved an interpretation of the agreement between the parties, and the securities fraud claims would have to follow since their viability was dependent upon the court's construction of the terms of the contract under the contract claims.76

After examining the transaction in light of these factors, the court in Sibley concluded that the contract and securities claims were not so intertwined as to prohibit severance. In severing the counts, the court ordered that the contract claims

69. See notes 45-49 and accompanying text supra.
71. 543 F.2d 540 (5th Cir. 1976).
72. Id. at 542.
73. Id. at 543.
74. Id. at 544.
75. Id. at 544-44.
76. Id.
be submitted to arbitration pursuant to the agreement of the parties and that resolution of the securities claims be stayed pending the outcome of the arbitration proceedings. Subsequently, if the contract were construed in the manner contended by plaintiff, there would be no basis for the securities fraud claims since these claims were based on an alternative ground that construed the merger agreement in accordance with the defendant's contentions.

The rationale applied in Sibley is sensible and should be followed. As stated earlier, arbitration is a favored means of resolving disputes. It should not be circumvented or avoided absent compelling reasons. To do so would be inconsistent with the express provisions of the Arbitration Act. However, the courts should be careful in severing claims and submitting them to arbitration. Not all cases permit arbitration as the complexity of the factual setting may result in too great of an overlap between claims. Under circumstances where the non-securities claims are so intertwined with the securities claims that a factual resolution of the non-securities claims would, in effect, result in a factual resolution of the securities claims, severance and submission to arbitration would, in effect, amount to a violation of sections 14 and 29(a) and their interpretation under Wilko. Indeed, the court in Sibley recognized this position and clearly stated that claims should not be severed in such cases.

The court in Sibley also pointed out that in cases where counts are severable, resolution of the non-securities claims will not always come before resolution of the securities claims. Instead, the nature of the claims, their interrelationship with one another and their interdependency will be controlling in determining which is decided first. If resolution of the non-
securities claims would, in effect, require a factual determination of the securities claims, then the former should be stayed pending resolution of the latter.\textsuperscript{83}

In addition to dealing with the issue of the applicability of sections 14 and 29(a) to an alleged waiver in a given case, the viability of the waiver should also be examined under other applicable legal principles. In this regard, the voluntariness and knowledge with which a waiver was made will have a bearing on its viability. As the Fifth Circuit said:

[J]udicial hostility toward waivers of statutory rights requires that the right to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment.\textsuperscript{84}

Thus, if a waiver were made unintentionally or involuntarily, it might be void in the first instance, and there would be no need to test its viability under the anti-waiver provisions of the Securities Acts. Similarly, under general principles of contract law, agreements entered into involuntarily or by fraud may be avoided.\textsuperscript{85}

[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.\textsuperscript{86}

There is nothing in the Securities Acts which compels injured parties “to seek their remedies only through litigation.”\textsuperscript{87} However, when the right to do so is effectively waived by a prior agreement, there exist other bases in state and federal law under which the “agreement” can be overcome without considering sections 14 or 29(a).\textsuperscript{88} Finally, even if a waiver is know-

\textsuperscript{83} See, e.g., Greater Continental Corp. v. Schechter, 422 F.2d at 1103-04.
\textsuperscript{85} See, e.g., note 40 supra.
\textsuperscript{86} Prima Paint Corp. v. Flood and Conklin, 388 U.S. at 403-04.
\textsuperscript{87} Murtagh v. Univ. Computing Co., 490 F.2d at 816; see Wilko v. Swan, 346 U.S. at 438; Moran v. Paine, Webber, Jackson & Curtia, 389 F.2d at 245-46.
ingly and intentionally made, a court may refuse to recognize it on the basis that it does not achieve a desirable end that is compatible with the broad purposes of the federal securities laws. The rationale underlying this position is that a party should not be permitted by a prior agreement to defeat the protections that Congress intended to provide by its enactment of the Securities Acts.

It does seem illogical and unnecessary, however, to unqualifiedly prohibit parties from knowingly agreeing in advance to submit future claims to arbitration. The prohibition makes sense when viewed from the perspective of an unwary investor who signs a standard margin or other account agreement full of fine print restrictions and limitations. The majority of the cases dealing with the anti-waiver provisions have involved individual investors who apparently had little, if any, appreciation for the potential consequences of their agreements. The investor typically is not aware of all the ramifications of what he is doing, and as a practical matter, has little say in the matter. When a subsequent controversy develops, the investor will either proceed blindly in accordance with what he believes to be a binding and enforceable agreement, or complain and seek judicial relief from what he, at that point, perceives to be an unjust predicament. Under these circumstances, it is quite sensible to hold that a prior agreement to arbitrate a future controversy is void.

89. Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970).

90. Indeed, in a recent release the SEC urged broker-dealers to set forth in standard customer agreements that agreements to arbitrate future controversies may be void. Securities Exchange Act Release No. 15984 (July 2, 1979), [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,122. In the release, the Commission concluded:

The Commission is especially concerned that arbitration clauses continue to be part of form agreements widely used by broker-dealers, despite the number of cases in which these clauses have been held to be unenforceable in whole or in part. Requiring the signing of an arbitration agreement without adequate disclosure as to its meaning and effect violates standards of fair dealing with customers and constitutes conduct that is inconsistent with just and equitable principles of trade. In addition, it may raise serious questions of compliance with the anti-fraud provisions of the securities laws.

Commissioner Karmel dissented from the Commission's statement, arguing that the use of arbitration agreements does not raise questions under the anti-fraud provisions. Further, to the extent that arbitration clauses in standard customer agreements do not comport with just and equitable principles of trade by broker-dealers, Commissioner Karmel contended that the changes should have been directed to the Securities Industry Conference on Arbitration or the appropriate self-regulatory organization for consideration.
However, when the parties to a contract know and fully appreciate the potential consequences of their agreement to arbitrate or otherwise resolve future controversies, it seems highly inappropriate to prohibit them from doing so. An informed decision to waive certain avenues of relief in the event of a future disagreement should be binding as part of a bargained-for package of rights and duties. Such an agreement does not relieve either of the parties from complying with the law. Instead, it limits their avenues of relief when a disagreement arises. When the limitation is knowingly imposed as part of an agreed-upon exchange, the courts should not intervene and adjust the agreement.

An additional consideration pertinent to the application of sections 14 and 29(a) is the timeliness with which a claim is brought, or the concept of laches. In Rule 10b-5 cases seeking rescission, the timely filing of a claim is a prerequisite to recovery.\(^1\) This principle has also been applied to Securities Act section 12 and section 17 cases.\(^2\) While neither section 14 nor section 29(a) speak of any limitations period, the principle applicable in Rule 10b-5 rescission cases has been applied to the anti-waiver provisions.\(^3\) However, it seems rather incongruous to say that an agreement is "void," presumably *ab initio*, if a party seeks to enforce its provisions on a timely

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91. See Myzel v. Fields, 386 F.2d 718, 740 n.15 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968), wherein the Court of Appeals said:
   
   The logic of this rule is particularly compelling when the property in dispute consists of stocks or fungibles of fluctuating value. A party could otherwise sit back without notification to the wrongdoer, and, within the allowable period to sue, watch the market go up or down, thereby speculating on the success or value at the total risk of the wrongdoer . . . .
   
   Although the law does not favor a wrongdoer, neither does it promote speculative damages at his expense.


basis, and to say that it is not so void when a party delays in asserting its terms. The agreement is either void or valid. If a party delays unnecessarily in asserting the voidness of the agreement, the court should adjust the rights of the parties by applying principles of equity, but it should not make a void agreement valid.

Before leaving this area, one final point is worth noting; it concerns contractual acknowledgement of nonreliance by either or both parties to a transaction. The acknowledgement may appear in a contract and, for example, state that party A is not relying on the representations or obligations of party B in entering into the contract or transaction. Semantically, this would not be a "waiver," and, therefore, the voiding provisions of sections 14 and 29(a) would be inapplicable. However, at least one court has held that such a provision is, in effect, the equivalent of a waiver, and therefore subject to the voiding provisions of sections 14 and 29(a). The Court in Wilko came to the same conclusion in dictum. Such regard for substance over form is sound. A party should not be permitted to do indirectly that which he may not do directly.

**Exceptions for Self-Regulatory Organizations**

An exception to the voiding provisions of sections 14 and 29(a) has been created by section 28(b) of the Exchange Act. The purpose of section 28(b) is to promote the self-regulatory functions of the securities exchanges. This purpose has been

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95. 346 U.S. at 434.
96. Section 28(b) provides in pertinent part:

> Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, . . . or (3) of any section described in paragraph (1) . . . on any person who has agreed to be bound thereby.


This section was amended by section 21(l) of the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97. (codified at 15 U.S.C. § 78bb(b) (1976)). The principal effect of the amendment was to expand the reach of section 28(b) to apply to all self-regulatory organizations and municipal securities brokers and dealers (reference to which is contained in subpart (2) of section 28(b) and is omitted from the quoted portion of the section above). Prior to the 1975 amendment, the only reference in section 28(b) to securities organizations was to "exchanges." The terms "member" and "participant" are defined in sections 3(a)(3) and 3(a)(24) of the Exchange Act.

exhibited in three areas: prescribing mandatory arbitration rules, developing constitutions and viewing both of the federal securities acts as one overall scheme of regulation.

The section 28(b) exception has been developed as follows. First, the phrase, "action taken by the authorities . . . to settle disputes between members or participants," has been construed to include Exchange "action" in prescribing mandatory arbitration rules applicable to Exchange members. Therefore, an Exchange rule compelling a member or participant to arbitrate is "action taken by the authorities." Second, members and participants of self-regulatory organizations typically must, as a pre-condition for admission, agree to be governed by the constitution and rules of the organization that usually include compulsory arbitration. Consequently, members and participants of self-regulatory organizations are bound to arbitrate pursuant to the constitution and rules of such organizations, and section 28(b) precludes anything in the Exchange Act from modifying this.

On the rationale that the Exchange Act establishes a "statutory scheme of supervised self-regulation," section 28(b) has been held to preserve Exchange arbitration rules and requirements notwithstanding section 29(a) and Wilko. Section 28(b) involves control of exchange markets by requiring or permitting national securities exchanges to adopt rules governing their practices and procedures and the business conduct of their members, and in each case imposes the responsibility for enforcement of these rules on the exchanges themselves.

And, as one court has stated:

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99. See New York Stock Exchange Constitution, art. VIII, § 1; American Stock Exchange Constitution, art. VIII, § 1; New York Stock Exchange Rule 347(b).


[The arbitration clause contained in the New York Stock Exchange Constitution is precisely the kind of self-regulatory provision called for by the 1934 Act. Instead of violating the policy behind the Act, . . . arbitration in this case furthers that policy.]

This rationale seems sound as the legislative policy of protecting investors, a matter that had significant bearing on the outcome in Wilko, will not be adversely affected by compelling members and participants of self-regulatory organizations to arbitrate.

It might be pointed out that the National Association of Securities Dealers (NASD), which was established to create a self-policing body among brokers and dealers, in 1968, adopted a Code of Arbitration that provides for arbitration between a member and a customer if the customer so demands. This arbitration, if demanded, takes priority over section 29(a). Based on the success of this procedure, the SEC has proposed establishment of a uniform system for resolution of disputes between investors and their broker-dealers.

While the Securities Act has no counterpart to section 28(b) of the Exchange Act, it has been held that the exception created by section 28(b) is applicable to claims arising under the Securities Act and to which section 14 of that Act applies. The rationale behind this conclusion is that the Securities Acts must be read together as invoking an overall scheme of regulation, and that the ends sought to be achieved by section 28(b) of the Exchange Act should not be defeated simply because a given set of facts is alleged to have violated a provision of the Securities Act rather than the Exchange Act. In this regard,

104. See notes 21-28 and accompanying text supra.
the Third Circuit noted that "the same logic is applicable to the Act of 1934, as is applicable to that of 1933, and, therefore, to both non-waiver sections.""112

As appealing as this rationale may seem, it is not appropriate. While the Securities Acts may be viewed together as one overall scheme of regulation, they are separate legislative Acts and were intended to cure, to some degree, different sorts of evils. The Securities Act was intended to provide full and fair disclosure in the offer and sale of securities; the Exchange Act was intended to deal with deceptive and unfair securities trading practices, incomplete and misleading information to purchasers, sellers and owners of securities, and the regulation of credit in the securities markets. An intent to provide a system of self-regulation is nowhere found in the Securities Act, except in the argument that is should be read together with the Exchange Act. From an overall regulatory perspective, such a reading may be desirable. However, to carry it to the next step and incorporate a provision of the Exchange Act into the Securities Act seems to go too far. Congress was perfectly capable of doing so, and where it obviously did not, the courts should not.

CONCLUSION

Sections 14 and 29(a) provide important protections for investors. They should be broadly construed to the extent necessary to fulfill their purpose. The sections are intended to prohibit agreements and stipulations that permit parties to avoid compliance with the provisions, rules and regulations of the federal securities laws. The courts have construed this purpose to preclude prior agreements to resolve future disputes that would be actionable under the securities laws in a manner other than as expressly provided in the Securities Acts.113 In addition, the courts have shown a preference for broadly construing these sections in cases where individual investors have been pitted against large corporate concerns.

The principles enunciated in this article offer an approach that is consistent with the remedial purposes of the Securities Acts while, at the same time adhering to congress' intent as expressly set forth in the Acts. Although the waiver of the

obligation to comply with the securities laws should be prohibited in all cases, knowing and reasoned waivers of certain rights under the Securities Acts should be permitted. When parties of relatively equal bargaining power, large or small, knowingly agree to waive certain rights with a reasoned appreciation for what they are giving up, the courts should honor the agreement of the parties to do so. Such agreements do not relieve the parties from their obligation to comply with the law, but instead limit the rights that the parties may exercise under the law. When such agreements are entered into voluntarily and knowingly, they should be upheld as they are not at odds with the purpose of the anti-waiver provisions.