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Doctrine of Intertwining: A Dead-End After - Dean Witter Reynolds, Inc. v. Byrd, The

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NOTE

THE DOCTRINE OF INTERTWINING: A DEAD-END AFTER *Dean Witter Reynolds, Inc. v. Byrd*[1]

INTRODUCTION

The arbitrability of pendent state claims in federal securities cases has become a problematic issue. This issue arises out of federal courts' efforts to recognize the conflicting policies of two federal statutes in the context of investor-broker disputes.[2] Since 1953 federal courts have chosen sides in this controversy[3] between the pro-investor Securities Acts[4] (hereinafter Securities Act, 1933 Act, or 1934 Act) and the pro-broker Federal Arbitration Act[5] (hereinafter Arbitration Act). Ineffectual attempts to reconcile the two competing policies were exemplified in a recent dispute between a retired dentist and his investment company, where the issue was settled by the United States Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*.[6] The Court held that district courts have no discretion to direct parties to arbitrate an issue encompassed in an arbitration agreement because the Arbitration Act mandates that district courts *shall* direct the parties to proceed to arbitration in those controversies involving both arbitrable and nonarbitrable claims.[7] In so holding, the Court stamped the resulting bifurcated proceedings with the federal seal of approval and placed judicial economy in the back seat.[8]

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1. 470 U.S. 213 (1985)

2. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights.

Wilko v. Swan, 346 U.S. 427, 438 (1953)

3. The Fifth, Ninth and Eleventh Circuits have all adopted the intertwining doctrine (*see infra* note 25 and accompanying text) while the Sixth, Seventh and Eighth Circuits have all rejected the doctrine. (*see infra* note 26 and accompanying text). The D.C. Circuit has rejected the doctrine when arbitrable state claims were joined with nonarbitrable federal antitrust claims. Lee v. Ply*Gem, Inc., 593 F.2d 1266, 1274 (D.C. Cir. 1979), *cert. denied*, 441 U.S. 967 (1979).

4. This note will only deal with these federal securities statutes: Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970 & Supp. III. 1984) and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1970 & Supp. V. 1975).

5. 9 U.S.C. §§ 1-14 (1949)

6. 470 U.S. 213 (1985).

7. 9 U.S.C. §§ 3-4 (1947).

8. 53 U.S.L.W. at 4223.

THE CONFLICT

The Federal Arbitration Act declares that arbitration provisions in existing contracts "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] In 1953, an exception to the Arbitration Act was made in the case of claims asserted under federal securities laws. This exception arose in *Wilko v. Swan*[10] because of a conflict between the Arbitration Act and the Securities Act of 1933, which was enacted to protect the rights of investors and forbade a waiver of those rights.[11] The agreement to arbitrate claims arising under the Securities Act was held to be void[12] as a "stipulation waiving the right to seek a judicial remedy".[13] Courts have since barred agreements that would compel arbitration of federal securities law claims.

The problem occurs when a nonarbitrable federal securities law claim is joined through pendent jurisdiction with an arbitrable state law claim. The dispute typically arises when a dissatisfied investor files suit against his broker, drafting the complaint primarily in terms of federal securities law violations and adding state common law claims of fraud,[14] negligent misrepresentation,[15] breach of fiduciary duty[16] or damages for emotional distress.[17] In doing so, the investor can seek punitive damages under the state law claims while simultaneously avoiding the arbitration of those claims provided for in the Customer Agreement.

The solution is simple when the claims are legally and factually separable.[18] The policy of neither statute, is endangered by severing the action and compelling arbitration of arbitrable claims while litigating the nonar-

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9. 9 U.S.C. § 2 (1947).

10. 346 U.S. 427 (1953).

11. The language used in both the 1933 and 1934 Acts is equivalent: "Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter of of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a) (197).

12. 346 U.S. at 435. "[W]e think the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." *Id.*

13. *Id.* at 438.

14. *E.g.*, Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1021 (6th Cir. 1979); Greitzer v. United States Nat'l Bank, 326 F. Supp. 762, 762 (S.D. Cal. 1971).

15. *E.g.*, Cunningham v. Dean Witter Reynolds, 550 F. Supp. 578 (E.D. Cal. 1982).

16. *See, e.g.*, Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1021 (6th Cir. 1979); Macchiavelli v. Shearson, Hammill & Co., 384 F. Supp. 21 (E.D. Cal. 1974).

17. *E.g.*, Greitzer v. United States Nat'l Bank, 326 F. Supp. 762 (S.D. Cal. 1971).

18. *See, e.g.*, Macchiavelli v. Shearson, Hammill & Co., 384 F. Supp. 21 (E.D. Cal. 1974). However, a close inspection of the case reveals that the same facts were necessary to prove both the contract claim and the rule 10b-5 claim, although the necessary legal elements differed.

bitrable claims. When the claims are so factually tied to one another that it was impractical to separate them, the federal circuits are split as to the resolution of the problem.

A. *Proponents of the Doctrine of Intertwining*

One view embraced the "doctrine of intertwining" which permits federal courts to refuse to refer to arbitration arbitrable state claims when these claims are factually inextricable from nonarbitrable federal securities law claims.[19] These advocates would endow the district courts with discretion as to the severability of the claims, requiring courts to judge how inextricable the claims must be to merit severance.[20]

Advocates of the intertwining doctrine assert two arguments in support of their position. First, they assert that referring the claims to arbitration would thwart the Arbitration Act's primary goal of speedy and efficient decisionmaking.[21] Splitting the cause of action would waste time because the resolution of the same facts would have to be determined in two different proceedings—a waste of time, factfinding and money. Proponents of the intertwining doctrine assert that the Court's decision in *Wilko v. Swan* was an unanticipated determination that the protective intent of the federal securities laws was to take priority over the economic advantages of arbitration. They point out that the Arbitration Act did not anticipate the pleading of arbitrable and nonarbitrable claims arising out of closely intertwined factual questions.[22] Therefore, it is reasoned, since a contrary federal interest was found to be sufficiently compelling to outweigh the mandate of the Arbitration Act in the past, the interest of speedy and efficient resolution of claims should likewise be sufficient.[23]

A typical case in support of this point is *Cunningham v. Dean Witter Reynolds, Inc.*[24] arising under the familiar scenario of a suit by an investor against a brokerage firm for violation of federal securities laws and pendent state laws. The court found that all claims arose from the same series of

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19. *See* Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981); Cunningham v. Dean Witter, Reynolds, 550 F. Supp. 578 (E.D. Cal. 1982).

20. *See* Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318, 336 (5th Cir. 1981).

21. *See* Raiford v. Buslease, Inc., 745 F.2d 1419, 1422 (11th Cir. 1984) (citing the reversed 9th Circuit decision Byrd v. Dean Witter Reynolds, for support, "We believe that severance is impractical if not impossible in this case."); Witt v. Merrill Lynch, Pierce, Fenner & Smith, 602 F. Supp. 867, 870 (1985).

22. Cunningham v. Dean Witter Reynolds, 550 F. Supp. 578, 583 (E.D. Cal. 1982).

23. *Id.* at 585; *see also* Miley v. Oppenheimer & Co., 637 F.2d 318, 336 (5th Cir. 1981).

24. 550 F. Supp. 578 (E.D. Cal. 1982).

occurrences[25] and, in order to avoid duplicative proceedings, refused to order arbitration of the common law claims.[26] In so holding, the court stated that "the Congressional goal of avoiding litigation where arbitration would be cheaper and faster would be disserved if the court were to bifurcate the proceedings and compel arbitration of the pendent claims."[27]

The second reason asserted to support the denial of a motion to compel arbitration in the context of mixed claims is the protection of the courts' exclusive jurisdiction over federal securities claims.[28] It is feared that the factfinding accomplished in an arbitration proceeding may bind, through collateral estoppel, the federal court in a subsequent litigation of the federal securities claim.[29] In the alternative, if the court orders arbitration after the federal proceedings, any application of expertise by the arbitrator is effectively preempted because the technical issues would most likely be decided at trial.[30] Either way it is argued that bifurcated proceedings foreclose the major decisionmaking in one forum and are thus an unsatisfactory solution to the problem.

This argument was emphasized in *Miley v. Oppenheimer & Co., Inc.*[31] In Miley, an investor sued her broker for violation of federal securities laws and the fiduciary duty owed under common law. The Fifth Circuit relied on the "doctrine of intertwining",[32] and in denying an order to arbitrate, the court stated:

> A federal forum is charged with the sole responsibility and is correlatively granted the sole right to decide the ultimate issues essential to a federal securities claim, based on its own appraisal of the evidence. Allowing an arbitrator to make the primary appraisal of the evidence and to reach the primary conclusions on the issues central to the resolution of the case presents a threat of binding the federal forum through collateral estoppel . . . and, at the very least, forces the federal court to reach its findings in the light of prior conclusions by the arbitrators on the very same issues.[33]

Although admitting that the exclusive federal jurisdiction would be preserved by allowing the federal trial to proceed while arbitration of the state claim was stayed, the court was unwilling to permit the pendent state claims to be arbitrated in the case where the jury finds a violation of federal securities laws.[34]

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25. *Id.* at 582.
26. *Id.* at 585.
27. *Id.*
28. *See, e.g.*, Belke v. Merrill, Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982).
29. *See, e.g.*, Miley, 637 F.2d at 335-36; Sibley v. Tandy Corp., 543 F.2d 540, 542 (5th Cir. 1975), *cert. denied*, 434 U.S. 824 (1977).
30. 550 F. Supp. at 585.
31. 637 F.2d 318 (5th Cir. 1981).
32. *Id.* at 335.
33. *Id.* at 336.
34. *Id.*

B. *Proponents of Bifurcation*

The opposing view supports the enforcement of an arbitration agreement even though arbitration would result in bifurcated proceedings. This view does not consider the efficiency of trying all related claims together sufficient grounds for finding an otherwise valid contractual arbitration provision unenforceable.[35] Proponents of bifurcation argue that the plain meaning of the Arbitration Act as well as the strong federal policy favoring enforcement of arbitration agreements requires that arbitrable claims be arbitrated pursuant to the agreements between the parties.[36] This faction asserts that the legislative history of the Arbitration Act shows the intent of the drafters was not to ensure speedy and efficient decisionmaking. Rather, it was to ensure judicial enforcement of privately made agreements to arbitrate.[37] The resulting bifurcation occurs because the Federal Securities Act *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.[38]

The proposition that bifurcated proceedings may allow an arbitration to bind the federal court through collateral estoppel is defended on the ground that, although there may be a preclusive effect, the federal court has discretion to stay either proceeding pending resolution of the other to achieve a just result.[39] Where the securities claims predominate over arbitrable claims, a stay of arbitration proceedings would prevent a collateral estoppel effect.[40] Where arbitrable claims predominate the securities claims, a stay on the securities litigation would allow the arbitrator proper leeway to resolve the dispute according to the expertise required in solving the dominate technical issues.[41]

This reasoning was followed in *Dickinson v. Heinold Securities, Inc.*[42] The broker in Dickinson appealed from a District Court order which denied its motion for a stay of proceedings pending arbitration of state law claims

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35. Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59 (8th Cir. 1984) (citing C. Itoh & Co. v. Jordan International Co., 552 F.2d 1228, 1231-32 (7th Cir. 1977)).

36. *See* Dickinson v. Heinold Securities, 661 F.2d 638 (7th Cir. 1981); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59 (8th Cir. 1984); Liskey v. Oppenheimer & Co., Inc., 717 F.2d 314 (6th Cir. 1983).

37. Dickinson v. Heinold Securities, 661 F.2d 638, 645 (7th Cir. 1981).

38. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

39. Dickinson v. Heinold Securities, 661 F.2d 638, 644 (7th Cir. 1981) ([T]his threat to the jurisdiction of the federal courts does not justify denying arbitration of otherwise arbitrable intertwined state law claims."0; *see also* C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228, 1231 (7th Cir. 1977).

40. Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, 558 F.2d 831 (7th Cir. 19770; Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2nd Cir. 1970); Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D.N.Y. 1965).

41. Sibley v. Tandy Corp., 543 F.2d 540, 544 (5th Cir. 1976); Collins Radio Co. v. Ex-Cell-O-Corp., 467 F.2d 995, 1000 (8th Cir. 1972): Fox v. Merrill Lynch, Pierce, Fenner & Smith, 453 F. Supp. 561, 567 (S.D.N.Y. 1978).

42. Dickinson v. Heinold Securities, 661 F.2d 638 (7th Cir. 1981).

brought by its former client.[43] In reversing the order, the Seventh Circuit court explained that "by controlling the order of the two adjudications . . . the district court can preserve its full authority to decide the non-arbitrable federal issues without any collateral estoppel consequences from a prior arbitration."[44]

Other cases have followed the *Dickinson* rationale. The court in *Liskey v. Oppenheimer & Co., Inc.*[45] compared extensively the reasoning in *Dickinson* with that in *Cunningham* and concluded that "the *Dickinson* rule strikes the proper balance between the competing policies in the Arbitration Act and the Securities Exchange Act of 1934."[46] The court in *Surman v. Merrill Lynch, Pierce, Fenner & Smith*[47] held that "state fraud claims were subject to arbitration even though based on the same transaction as the federal securities law claims."[48]

Dickinson and its progeny[49] indicate a step forward in the national policy favoring enforcement of arbitration agreements, but the question as to what preclusive effect an arbitration proceeding might have is left unresolved,[50] *Dean Witter Reynolds Inc. v. Byrd* notwithstanding.[51]

The basis of the problem is the rule of jurisdiction bringing these claims together. A state law claim may be joined to a federal securities law claim in federal court by pendent jurisdiction if both claims derive from " 'a common nucleus of operative fact' and are such that the plaintiff 'would ordinarily be expected to try them all in one judicial proceeding.' "[52] In order to be within the district judge's jurisdiction, therefore, the state law claim

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43. *Id.* at 641.
44. *Id.* at 644.
45. Liskey v. Oppenheimber & Co., 717 F.2d 314 (6th Cir. 1983).
46. *Id.* at 320.
47. 733 F.2d 59 (8th Cir. 1984).
48. *Id.* at 63.
49. *See also*, Speck v. Oppenheimer & Co., 583 F. Supp. 325, 330 (W.D. Mo. 1984).
50. Severance seems to be the rule rather than the exception. *See, e.g.*, Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D.N.Y. 1965). In *Stockwell*, common law claims, including breach of fiduciary duty, were joined with federal securities law claims. The court noted:

> [R]elief sought in each of these counts is based on the same transactions which are the subject of the Securities Exchange Act counts, which must be determined by the court under the *Wilko* doctrine. There would appear to be little purpose in having both the court proceeding and the arbitration going on at the same time, and doubtless the ultimate determination by the court of the [securities law claims] would have a definite bearing on the outcome of the arbitration proceeding

Id. at 220. Nevertheless, the court did not refuse to allow the common law issues to go to arbitration, but stayed arbitration pending the courts resolution of the securities claims. *Id.*
51. 470 U.S. at 222.
52. C. WRIGHT, LAW OF FEDERAL COURTS, 105 (4th Ed. 1983).

would necessarily be closely tied to the federal securities law claim, at least factually.[53] For this reason, opponents of the doctrine of intertwining call it "the exception that swallowed the rule,"[54] allowing the presence of a non-arbitrable claim to force a trial on the otherwise arbitrable claim.

THE CASE

A. Lamar Byrd sold his dental practice in 1981 and invested the $160,000 proceeds through Gale, a Dean Witter Reynolds, Inc. (Dean Witter) employee.[55] In less than eight months the value of the account declined by more than $100,000.[56] Byrd filed a complaint against Dean Witter in district court, alleging violations of federal securities law and various state law provisions, which were joined through the principle of pendent jurisdiction.[57]

Byrd signed a Customer Agreement containing an agreement to arbitrate disputes arising out of the management of the account.[58] Accordingly, Dean Witter filed a motion for an order severing the pendent state claims, compelling their arbitration and staying arbitration of those claims pending resolution of the federal court action.[59] The district court denied the motion to sever and compel arbitration of the pendent state claims.[60] On an interlocutory appeal, the Court of Appeals for the Ninth Circuit affirmed.[61] Although the Court of Appeals noted that district courts in the Ninth Circuit were split on this issue,[62] it found the district court had discretion to determine the similarity of factual issues.[63] The court reasoned that a separation of claims would frustrate the purposes of the Arbitration Act and the protective intent of the federal securities laws.[64] The Supreme Court reversed the Ninth Circuit[65] and settled this issue. Other questions, however, were left unanswered.

THE DECISION

The Supreme Court's decision continued the trend of giving a liberal interpretation to the Arbitration Act and favoring the enforcement of arbi-

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53. *See generally* United Mine Workers v. Gibbs, 383 U.S. 715 (1966).
54. Dickinson v. Heinold Securities, 661 F.2d 638, 645 (7th Cir. 1981).
55. Byrd v. Dean Witter Reynolds, 726 F.2d 552, 553 (9th Cir. 1984), *rev'd*, 470 U.S. 213 (1985).
56. *Id.*
57. 470 U.S. at 214.
58. *Id.* at 215.
59. *Id.*
60. *Id.* at 215-16.
61. 726 F.2d 552 (9th Cir. 1984), *rev'd*, 470 U.S. 213 (1985).
62. *Id.* at 554.
63. *Id.*
64. *Id.*
65. 470 U.S. 213 (1985).

tration agreements. The Court's 1983 holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[66] resulted in bifurcated proceedings through enforcement of an arbitration agreement.[67] In *Moses* the Court affirmed the Fourth Circuit Court of Appeals' order which reversed a District Court order to stay resolution of a district court proceeding pending resolution of a state court suit.[68] Both suits involved the issue of the arbitrability of a construction comany's claims for delay and impact costs because of the Hospital's delay or inaction. The majority found substantial reason for doubt that the construction company would be able to obtain from the state court an order compelling the Hospital to arbitrate[69] and since there were no exceptional circumstances,[70] the District Court's stay order was held unjustified.[71] The Court restated the rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[72]

The Court attacked the "doctrine of intertwining" on basically the same premises as did the proponents of bifurcation and the *Dickinson* line of cases. The Court rejected the contention that speedy and efficient resolution of disputes was the primary purpose of the Arbitration Act.[73] It found instead that the "preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,[74] and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation".[75] The Court found support for this proposition in the House Report accompanying the Arbitration Act,[76] which states that the purpose of the Act was to place arbitration agreements "upon the same footing as other contracts, where it belongs."[77]

The Court vaguely defended the proposition that arbitration would have no collateral estoppel effect on subsequent litigation.[78] The Court first reasoned that there will not necessarily be a preclusive effect on subsequent

66. 460 U.S. 1 (1983).
67. *Id.* at 22.
68. *Id.* at 29.
69. *Id.* at 26-27.
70. *Id.* at 19. The "exceptional circumstances" test was formulated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818-19 (1976). This test incorporated a balancing approach to decide when a federal district court may decline to exercise its jurisdiction because of parallel state court litigation. That balancing test involved weighing four factors: which court first assume jurisdiction over the property involved in the litigation, inconvenience of the federal forum, avoidance of piecemeal litigation and the order in which the concurrent forums obtained jurisdiction.
71. 460 U.S. 28.
72. 470 U.S. at 221 (quoting *Moses*, 460 U.S. at 24-25).
73. *Id.* at 219.
74. *Id.*
75. *Id.* at 221.
76. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924).
77. *Id.*
78. 470 U.S. at 222.

litigation.[79] The recent *McDonald v. City of West Branch*[80] decision was offered in support of that contention. The Court held in *McDonald* that the full faith and credit provision of 28 U.S.C. § 1738 does not permit a federal court to accord a preclusive effect to an unappealed arbitration award because arbitration is not a judicial proceeding and therefore the statute did not apply.[81] Since the Court found arbitration an inadequate substitute for a judicial proceeding in protecting federal statutory and constitutional rights, it refused to fashion a federal common law rule of preclusion.[82]

The Court explained that courts may effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding.[83] Neither a stay of arbitration nor a refusal to compel arbitration of state claims is required to prevent a preclusive effect as to subsequent federal litigation.[84] The trial courts have broad discretion, as circumstances dictate, to determine the weight to be accorded the prior arbitral decision.

If the Court later declares that arbitration proceedings will have preclusive effect on subsequent litigation, federal court procedure would be damaged. The rules of evidence are more relaxed in arbitration, and procedures which are common in civil trials may be unavailable or limited. For these reasons, there is a possibility that evidence would be admitted by the arbitrator which might otherwise be barred in federal court.

On the other hand, if the court gives no preclusive effect to arbitration proceedings, the use of arbitration as an effective method of dispute resolution may suffer. If parties realize that findings of fact may not be given effect in a subsequent proceeding, whether in an appeal in federal court or litigation of a pendent federal securities law claim, the finality of an arbitration will always be in question. Rather than risk the time, money, and effort, parties involved in establishing their case may abandon arbitration as a method of settling disputes. In addition, the possibility of inconsistent results in both proceedings may be seen as both unfair and a further weakening of arbitration as an alternative method of dispute resolution.

The Supreme Court addressed this issue in *Alexander v. Gardner-Denver Company*.[85] An employee brought suit against his employer under Title VII of the 1964 Civil Rights Act,[86] which requires equal employment opportunities. The employee's claim under a nondiscrimination clause in a collective-bargaining agreement was rejected in an arbitration proceeding.[87] The district

79. *Id.*
80. 466 U.S. 284 (1984).
81. *Id.* at 291-92.
82. *Id.* at 290.
83. 470 U.S. at 223.
84. *Id.*
85. 415 U.S. 36 (1974).
86. 42 U.S.C. §§ 2000 et. seq (1964).
87. 415 U.S. at 42.

court dismissed the action,[88] claiming that the employee was bound by the arbitral decision which precluded him from suing his employer under Title VII.[89] The Court of Appeals for the Tenth Circuit affirmed,[90] and the Supreme Court reversed.[91]

Justice Powell, writing for the majority, explained that, because Title VII vested federal courts with plenary powers to enforce statutory requirements and provided for a private right of action to obtain judicial enforcement of Title VII, an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under a collective bargaining agreement.[92] The Court supported its holding with the following reasoning:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.[93]

The Court stressed that an arbitration decision binds both the employer and the employee, and judicial review is limited to both.[94] However, in instituting an action under Title VII, the employee does not seek judicial review of the arbitral decision but, instead, asserts a statutory right independent of the arbitration process.[95]

The Court also rejected the argument that permitting a later resort to a judicial forum would undermine the employer's incentive to arbitrate.[96] The union's reciprocal promise not to strike, it was reasoned, is the primary incentive for an employer to enter into an arbitration agreement, and that incentive outweighs any costs resulting from according employees an arbitral remedy in addition to their judicial remedy.[97]

Alexander differs from *Byrd* in some important aspects. The claim in *Alexander* was the same in both the federal court and arbitration proceedings, while *Byrd* only urged that inextricably tied pendent state claims be adjudicated in an arbitration proceeding apart from the federal claims in federal court. The statutes at issue in both cases also afford grounds for distinction. Title VII, unlike the 1933 Act, does not limit enforcement of its provisions

88. 346 F. Supp. 1012 (1971).
89. *Id.* at 1019.
90. 466 F.2d 1209 (1972).
91. 415 U.S. 36 (1974).
92. *Id.* at 49.
93. *Id.* at 49-50.
94. *Id.* at 54.
95. *Id.*
96. *Id.*
97. *Id.* at 55.

to the federal courts.[98] Moreover, the question in *Alexander* was whether a statutory right is foreclosed by prior submission of the claim to arbitration. In *Byrd*, the question is not that direct. Proceeding on the assumption that the claims are severed, the statutory claim in *Byrd* is itself in no danger of being preempted, but some or all of the underlying facts necessary for resolution of the state claims may be determined in arbitration. The federal court is thus restricted in its ability to freely rule on the evidence and on the issues pursuant to the procedural parameters necessary to its proper functioning.

Despite the differences, *Alexander* does offer some insight into the Court's position regarding the preclusion issue in cases such as *Byrd*. The case reveals the Court's attitude as one of deference to the federal courts when a statutorily protected right is in danger of foreclosure by a binding arbitration decision. *Alexander*, in a sense, foreshadows the future, in that it expressly recognizes arbitration as a "comparatively inappropriate forum"[99] for the final resolution of statutorily protected rights, especially those whose enforcement is limited to the federal courts. To that end, the Court explained the relative differences between the forums and their processes, permitting trial in both forums. The arbitral decision was allowed to be admitted as evidence, giving the court discretion as to the weight to accord it.[100]

At the present time, the question of what preclusive effect arbitration proceedings might have has been left unanswered. The determination as to what analysis would encompass this situation will have to wait for a future case.

Another question left unresolved was whether the *Wilko* analysis should apply in the context of a claim arising under the Securities Exchange Act of 1934. The Court explained in a footnote[101] that Dean Witter did not seek to compel arbitration of the federal securities claims in district court, and refused to address the issue. Numerous lower courts have held that the *Wilko* analysis applies to the 1934 Act.[102] In his concurring opinion, however, Justice White emphasized that this issue was still an open question, and that these

98. *Id.* at 56.
99. *Id.*
100. *Id.* at 60.
101. 470 U.S. at 216 n.1.
102. *See, e.g.*, Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, 558 F.f 2d 831, 833-35 (7th Cir. 1977); Sibley v. Tandy Corp., 543 F.2d 540, 543 n.3 (5th Cir.. 1976), *cert. denied*, 434 U.S. 824 (1977); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532 (3rd Cir. 1975), *cert. denied*, 429 U.S. 1010 (1976). Apparently, Dean Witter relied on decisions such as these in assuming the 10(b)-5 claims was nonarbitrable. In light of the Court's dicta in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) and the concurring opinion in *Byrd* clarifying the Court's stance on the issue, it appears that this reliance may have flawed Dean Witter's litigation scheme.

holdings should be viewed with suspicion, since the reasoning used in the 1933 Act is inapplicable to the 1934 Act.[103]

CONCLUSION

The Court's decision to enforce arbitration agreements regardless of resultant bifurcated proceedings is somewhat problematic. Bifurcation in the majority of these cases will result in delay, duplication, and inconvenience—the price to be paid for protection of parties' contractual rights to arbitration. The preclusive effect of arbitration proceedings on subsequent litigation will only be resolved when such a case squarely confronts the Court. Cases such as *Alexander*, however, do give some indication of the Court's sympathies, and a solution such as that found in *Alexander* may well be the direction the Court takes. In the future, the Court may rule the *Wilko* exception limited to the 1933 Act, which could alleviate the problem.

As it stands now, however, the problem will never be fully alleviated without additional action by the Court further defining an integrated federal policy concerning arbitration and securities rights, and reconciling the apparently incompatible legal theories of bifurcation and pendent jurisdiction.

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103. In arriving at its conclusion in *Wilko*, the Supreme Court relied on three interconnected provisions in the 1933 Act. While section 14 of the 1933 Act is equivalent to section 29 of the 1934 Act, the counterparts do not exist in the 1934 Act. In the 1934 Act, jurisdiction is restricted to the federal coaurts and the cause of action is only implied, therefore the phrase "waive compliance with any provision of this chapter" is inapplicable. *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).