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Retroactive Application of Rule Changes: Arbitration Agreements May Be Circumvented - Nielsen v. Greenwood

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Retroactive Application of Rule Changes: Arbitration Agreements May Be Circumvented

Nielsen v. Greenwood[1]

I. INTRODUCTION

From early historical jurisprudence, courts have recognized the "timeless and universal human appeal"[2] of the presumption against the retroactive application of newly enacted statutes and rules. This principle, as a result, has perpetually been "a solid foundation of American law."[3]

In *Nielsen*, however, the court challenged this principle and retroactively applied a National Association of Security Dealer's ("NASD") rule change barring any agreements to arbitrate putative class actions.[4] Effectively distinguishing this case from precedent which arrived at a different result, the *Nielsen* decision remains consistent with relevant precedent and, significantly, does not violate fundamental notions of justice.

II. FACTS AND HOLDING

On October 11, 1991, Melvin C. Nielsen and Peter C. Kostantacos ("Nielsen"), on behalf of a putative class of wronged investors, filed a securities fraud class action against several defendants, including Piper, Jaffray & Hopwood,

1. 873 F. Supp. 138 (N.D. Ill. 1995), *affirmed by*, Nielsen v. Piper, Jaffray & Hopwood, 66 F.3d 145 (7th Cir. 1995).

2. Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990).

3. *Id.*

4. *Nielsen*, 873 F. Supp. at 146.

Inc. ("PJH").[5] Pursuant to an arbitration agreement between Nielsen and PJH,[6] PJH filed and the district court granted a motion to compel arbitration.[7]

On October 28, 1992, and prior to the district court's order, however, the NASD adopted and the Securities and Exchange Commission ("SEC") approved[8] a rule change which precluded the compelling of arbitration of claims encompassed by a class action.[9] Therefore, through the filing of a second motion, Nielsen asked the court to vacate its previous order compelling arbitration.[10]

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5. *Id.* at 139. PJH is one of two underwriters of the securities offering at issue. *Id.*

6. *Id.* Nielsen purchased certain debentures pursuant to a "Fiduciary Cash Account Agreement" which was signed by Nielsen and provided in part:

> We specifically agree and recognize that all controversies which may arise between Piper, Jaffray and Hopwood Incorporated . . . and me, concerning any transaction, account or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, ***shall be determined by arbitration*** to the fullest extent provided by law. Such arbitration shall be in accordance with the rules then in effect, of the Arbitration Committee of the New York Stock Exchange or the National Association of Securities Dealers, Inc. as I may elect . . . . I understand that I am not obligated to arbitrate disputes under the federal securities laws to the extent such claims are held not to be arbitrable as a matter of law.

Id. at 140 (emphasis added).

7. *Id.* at 146. In a report and recommendation issued by United States Magistrate Judge Rebecca Pallmeyer, the Northern District of Illinois of the United States District Court overruled Nielsen's objections to arbitration and granted PJH's motion to compel arbitration. *Id.* The court concluded that the arbitration agreement provided sufficiently broad language to include the relevant claims, that the arbitration clause's exclusionary language did not exclude securities claims, and that the "strong federal policy favoring arbitration" outweighs any desire for class treatment by the courts. *Id.*

On August 27, 1993, following the magistrate's recommendation, the United States District Court, Northern District of Illinois, denied Nielsen's objection to this recommendation. *Id.* The court applied reasoning similar to the reasoning announced in the aforementioned magistrate's report and recommendation. *Id.*

8. *Nielsen*, 873 F. Supp. at 140. The SEC approved the rule change through an issuance of a Release on October 28, 1992. *Id.* The Release stated in part:

> This rule change is effective upon the date of Commission approval for all open arbitrations and for arbitration filings made on or after that date . . . . Accordingly, neither member firms nor their associated persons may use an existing arbitration agreement to compel a customer to arbitrate a claim that is encompassed by a class action.

Id. at 140-41 (citing Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, Securities and Exchange Commission Release No. 34-31371, 57 Fed.Reg. 42659 (October 28, 1992)). Importantly, the Release also stated that: "[The] proposed rule change will ensure that class actions and claims of individual class members are not eligible for arbitration at the NASD, regardless of any previously existing agreement to arbitrate . . . ."
Id. at 141 (emphasis added by court).

9. *Id.* at 140. Specifically, the amended rule provides: "No member or associated person shall seek to enforce any agreement to arbitrate against a customer who has initiated in court a ***putative class action*** or is a member of a putative or certified class with respect to any claims encompassed by the class action . . . ." *Id.* (emphasis added). Furthermore, the rule became effective "upon the date of Commission approval for all open arbitrations and for arbitration filings made on or after that date . . . ." *Id.*

10. *Id.* at 141.

Nielsen asserted that the amended NASD rule was adopted and became effective "before the motion to compel arbitration was decided" and, thus, should have been retroactively applied.[11] In contrast, PJH urged that the retroactive application of the rule change did not preclude arbitration in this case; therefore, the court should deny Nielsen's motion to vacate.[12]

The United States District Court, Northern District of Illinois, requested a report and recommendation ("report") of the United States Magistrate to determine whether to grant Nielsen's motion to vacate the court's previous order compelling arbitration.[13] The magistrate judge's[14] report recommended that the court "enforce" the applicable NASD rule changes, and, accordingly, the court's previous motion compelling arbitration should be vacated.[15]

In accordance with this recommendation, the court granted Nielsen's motion to vacate the prior order compelling arbitration.[16] The court held that NASD rules control the parties' rights and obligations[17] and that retroactive application of the rule change "is appropriate" in this case.[18]

III. LEGAL BACKGROUND

To address the issue of retroactive application of NASD rule changes to arbitration agreements, a two-step analysis will be followed. First, the history of retroactivity in the context of statutes will be reviewed. Second, the extension of this principle of retroactivity to NASD rules will be analyzed.

A. Retroactive Application of Statutes

The United States Supreme Court has endorsed two conflicting presumptions relative to retroactivity of newly-enacted statutes.[19] One line of cases[20] endorses

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11. *Id.* The court addressed three issues: 1)whether NASD rules are binding; 2)whether plaintiff has standing; and 3)whether NASD rule changes should be applied retroactively. *Id.* at 142-46. For purposes of this casenote, only the last issue will be discussed.

12. *Id.* at 141.

13. *Id.* at 139.

14. Magistrate Judge Rebecca R. Pallmeyer provided the report and recommendation. *Id.*

15. *Id.* at 146.

16. *Id.*

17. *Id.* at 142-44.

18. *Id.* at 146.

19. Mojica v. Gannett Co., 7 F.3d 552, 556 (7th Cir. 1993).

20. *Kaiser*, 494 U.S. at 854 (citing United States v. Security Indus. Bank, 459 U.S. 70 (1982); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)). *See also Id.* at 844 (the majority in *Kaiser* refers to the rule against retroactive application as "more than 150 years of doctrinal certainty") (citing Watson v. Mercer, 8 Pet. 88 (1834); Graham & Foster v. Goodcell, 282 U.S. 409 (1931)).

the traditional presumption "favoring prospective application of newly-enacted statutes" unless there is a specific indication to the contrary, thereby rejecting retroactivity.[21] Conversely, another line of cases decided more recently by the Court endorsed "a presumption in favor of retroactive application unless the statute included a clear legislative statement to the contrary."[22] As a result of confusion created by this conflicting United States Supreme Court precedent, lower courts have individually resolved this conflict by stating their own general rule.[23]

The United States Supreme Court began the "current confusion"[24] by initially setting forth the presumption of retroactivity in *Thorpe v. Housing Authority of the City of Durham*.[25] In *Thorpe*, the Housing Authority of the City of Durham, North Carolina ("Authority") evicted the petitioner from her apartment without notification of the reasons for eviction and without an opportunity to reply to those reasons.[26] The Supreme Court rejected the Authority's contention that the circular[27] issued by the Department of Housing and Urban Development "does not apply to eviction proceedings commenced prior to its issuance"[28] and held that the Authority must apply the HUD circular "before evicting any tenant still residing in such projects on the date of this decision," irrespective of when an eviction proceeding began.[29] In doing so, the Court also rejected the North Carolina Supreme Court's analogy with North Carolina's rule that "statutes are presumed to act prospectively only."[30] As a result, the Court applied a broader rule that "an appellate court must apply the law in effect at the time it renders its decision" instead of the rule applying a change in the law only where the legislature clearly states its intent for retroactive application.[31]

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21. *Mojica*, 7 F.3d at 556 (citing *Kaiser*, 494 U.S. at 855).

22. *Id.* (citing Bradley v. School Bd., 416 U.S. 696, 711-12 (1974); Thorpe v. Housing Auth. of City of Durham, 393 U.S. 268 (1968)).

23. *Id.*

24. *Kaiser*, 494 U.S. at 844.

25. 393 U.S. 268 (1969).

26. *Thorpe*, 393 U.S. at 269-71. The Court, in *Thorpe*, stated the issue as:

> whether a tenant of a federally assisted housing project can be evicted prior to notification of the reasons for the eviction and without an opportunity to reply to those reasons, when such a procedure is provided for in a Department of Housing and Urban Development [] circular issued after eviction proceedings have been initiated.

Id. at 269-70.

27. The Department of Housing and Urban Development issued the circular subsequent to the beginning of the eviction proceeding, but while the petitioner's case was still pending in the United States Supreme Court. *Id.* at 272. The circular directed local housing authorities operating all federally assisted projects to "inform the tenant 'in a private conference or other appropriate manner' of the reasons for the eviction and give him 'an opportunity to make such reply or explanation as he may wish'" before instituting an eviction proceeding. *Id.*

28. *Id.* at 281.

29. *Id.* at 274.

30. *Id.*

31. *Id.* at 281.

The issue of retroactivity again surfaced in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*.[32] Although the majority in *Kaiser* refused to reconcile the "apparent tension" between the two lines of cases regarding retroactivity because of the clear congressional intent present in that case,[33] Justice Scalia declared in his concurring opinion that the two lines of cases were an "irreconcilable contradiction."[34] Admitting that the rule expressed in *Thorpe* was wrong, he reaffirmed the rule of construction that "absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."[35]

Justice Scalia relied on two reasons in his opinion: 1)the presumption of retroactivity is contrary to "an immense volume of precedent"[36] and 2)this presumption is also contrary to "fundamental notions of justice."[37] For his first reason, Justice Scalia noted the historical existence prior to 1969 of courts unequivocally applying the presumption that statutes are not retroactive,[38] but that the presumption of retroactivity has been applied only as a special rule in "enactment-after-adjudication" rule change cases.[39] Recognizing an inherent difficulty with this limited application, he concluded that it is "quite impossible" to apply a special rule to "enactment-after-adjudication" cases while applying the traditional presumption of nonretroactivity to "enactment-before-adjudication" cases.[40]

For his second reason, Justice Scalia simply noted the "timeless and universal human appeal" of the principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."[41] To support this principle further, he offered numerous historical examples of jurisprudence which rejected the presumption of retroactive application.[42] These

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32. 494 U.S. 827 (1990).

33. *Kaiser*, 494 U.S. at 837.

34. *Id.* at 841 (citing *Bradley*, 416 U.S. at 696; *Thorpe*, 393 U.S. at 282; *Bowen*, 488 U.S. at 208; United States v. American Sugar Refining Co., 202 U.S. 563, 577 (1906); *comparing, e.g.*, Davis v. Omitowoju, 883 F.2d 1155, 1170-71 (3rd Cir. 1989); Anderson v. USAIR, Inc., 818 F.2d 49 (D.C. Cir. 1987); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1505-06 (6th Cir. 1989)).

35. *Kaiser*, 494 U.S. at 841.

36. *Id.* at 855.

37. *Id.*

38. *Id.* at 853.

39. *Id.* at 854. Scalia distinguishes between enactment of rule changes prior to adjudication and enactment of rule changes after initial adjudication but prior to appellate review. *Id.* In the former, he ensured the stability in this area by stating that the courts have applied the presumption against retroactivity "as though it was uncontroverted." *Id.* at 851.

40. *Id.* at 854. The opinion provided the following example of the irrational results which would be produced by applying different presumptions: "[t]his would mean nonsuiting the plaintiff who has won a tort judgment that is on appeal when the statute abolishing the tort is enacted, while rendering judgment in favor of plaintiffs who sue later for pre-enactment torts." *Id.*

41. *Id.* at 855.

42. *Id.*

examples include, *inter alia*, recognition of this principle by the Romans, the Greeks and the English common law and Justice Story's commentary that "retrospective laws are . . . generally unjust" and are not consistent "with sound legislation."[43]

The United States Court of Appeals, Seventh Circuit, in *Mojica*, likewise accepted the presumption against retroactive application of newly-enacted statutes by following the rule pronounced in *Mozee v. American Commercial Marine Service Co.*[44] that "statutory provisions" will not be retroactively applied.[45] The court reasoned that a better rule would hold "parties accountable for only those acts that were in violation of the law" when the acts were performed.[46]

B. Retroactive Application of NASD Rules

Despite the plethora of decisions pertaining to retroactivity of statutes, the district court in *Nielsen* surmises that *Kresock v. Bankers Trust Co.*[47] is the only case in the Seventh Circuit addressing the retroactivity of NASD rule changes.[48]

In *Kresock*, the plaintiff, a securities dealer, filed a complaint against Bankers Trust, a foreign banking corporation, alleging gender and pregnancy discrimination in violation of Title VII.[49] The court determined the relevant issue to be whether NASD's rules require the plaintiff to arbitrate her discrimination suit.[50]

Without distinguishing between NASD rules and newly-enacted statutes, the *Kresock* court followed the rule advocated in *Mojica* and *Mozee* that retroactivity will not be presumed where the rules were not in effect when the relevant conduct

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43. *Id.* Other examples presented by Justice Scalia which proscribe retroactive laws are the United States Constitution and several states' constitutions and/or statutes. *Id.* at 856.

44. 963 F.2d 929, 932 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992).

45. *Mojica*, 7 F.3d at 556.

46. *Id.*

47. 21 F.3d 176 (7th Cir. 1994).

48. *Nielsen*, 873 F. Supp. at 145. In its decision, the court did not discuss other circuits' application of the retroactivity of NASD rules. *Id.*

49. *Kresock*, 21 F.3d at 177.

50. *Id.* The dispute in this case arises from the following series of events. Prior to her employment, Kresock signed a standard industry form U-4 which contained an arbitration clause. *Id.* at 177. This clause provided that Kresock agreed to "arbitrate any dispute, claim or controversy . . . that is required to be arbitrated under the rules" of NASD. *Id.*

The court noted that the NASD Code, as it read prior to any rule changes, "did not require arbitration of employment discrimination suits." *Id.* at 178 (citing Farrand v. Lutheran Bhd., 993 F.2d 1253, 1255 (7th Cir. 1993)). Prior to Kresock's filing her complaint, but subsequent to the events giving rise to the complaint, NASD proposed to amend the code to require arbitration of any dispute "arising out of the employment or termination of employment of associated person(s)." *Id.* (citing 58 FED. REG. 39,070 (1993)). Moreover, this proposed rule change did not become effective until well after the filing of Kresock's complaint but prior to the court's decision. *Id.* Therefore, the sequence of events is very similar to those in the case at hand.

occurred.[51] This court, however, also espoused the exception allowing rule changes to apply retroactively if the rule "explicitly indicate[s] that they apply retroactively."[52] Accordingly, the court held that the NASD rule changes pertaining to the plaintiff's suit do not apply retroactively because the relevant conduct occurred prior to the effective date of the NASD rule changes.[53]

IV. INSTANT DECISION

In *Nielsen*, the court began its analysis by acknowledging and briefly discussing numerous decisions[54] including the *Kresock* decision.[55] The court, however, concluded that the *Kresock* decision represented the only reported decision decided by the Seventh Circuit on retroactivity of NASD rule changes.[56] Further, the court noted that the *Kresock* decision, in denying the defendant's motion to compel arbitration, stated that the plaintiff had never agreed to retroactivity of NASD amendments and that the amendments themselves did not purport to apply retroactively.[57] Therefore, the court determined that the actual language of the *Kresock* opinion suggested a different result for this case.[58]

The *Nielsen* court relied on two distinctions in ascertaining a different result than *Kresock*.[59] First, despite the rule change's lack of explicit mention of retroactivity in this case, the court found it significant that retroactive intent had been expressed patently in a SEC Release.[60] The court concluded, through the

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51. *Id.* at 179. The court noted the unfairness inherent in holding private parties accountable in these situations. *Id.*

52. *Id.* (citing Diaz v. Shallbetter, 984 F.2d 850, 852 (7th Cir. 1993)).

53. *Id.*

54. *Nielsen*, 873 F. Supp. at 145. The majority of these cases pertain to NASD rule changes requiring arbitration of employment discrimination clauses. *Id.* Several cases either reversed a prior order compelling arbitration or did not require arbitration at all when deciding this issue. *Id.* (citing Turner v. IDS Fin. Servs., Inc., No. 94-1263, 1994 WL 580186 (7th Cir. Oct. 21, 1994); F.N. Wolf & Co. v. Brothers, 613 N.Y.S.2d 319 (N.Y. Sup. Ct. 1994); Farrand v. Lutheran Bhd., 993 F.2d 1253 (7th Cir. 1993)). In contrast, several cases held that arbitration should be compelled in this context. *Id.* (citing Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516 (11th Cir. 1994); Scher v. Equitable Life Assurance Soc'y, 866 F. Supp. 776 (S.D.N.Y. 1994); F.N. Wolf v. Bowles, 610 N.Y.S.2d 757 (N.Y. Sup. Ct. 1994)). Additionally, the court found one other case addressing the issue of retroactivity of NASD Code amendments. *Id.* (citing Chor v. Piper, Jaffray & Hopwood, Inc., 862 P.2d 26, 29 (Mont. 1993)). The *Chor* court denied retroactive application of a rule change. *Id.* (citing *Chor*, 862 P.2d at 29). After briefly discussing the aforementioned cases, the *Nielsen* court did not apply these cases to its analysis. *Id.*

55. *Nielsen*, 873 F. Supp. at 145.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 145-46.

60. *Id.*

express language of this SEC Release, that the SEC apparently intended the amendment to apply retroactively to cover all existing arbitration agreements as of an effective date[61] prior to this court's order compelling arbitration.[62]

Moreover, in determining the persuasiveness of the SEC Release's apparent intent, the *Nielsen* court relied on *Edward D. Jones & Co. v. Sorrells*[63] interpretation and determination of a SEC Release's applicability to its corresponding NASD provision.[64] In *Jones*, the court relied significantly on a SEC Release's language to support its interpretation and enforcement of the NASD provision at issue.[65] Accordingly, the *Nielsen* court, in light of *Jones'* similar reliance on a SEC Release, held that the SEC's apparent intent with respect to the applicable amendment should not be disregarded.[66]

For its second distinction, the court noted that, unlike the plaintiff in *Kresock*, the agreement signed by Nielsen and PJH supported the conclusion that the rule changes should apply in this case.[67] The agreement provided that provisions of the agreement affected by a new regulation adopted by an exchange shall be deemed modified or superseded and shall continue to be effective.[68] Reasoning that the parties had already specifically addressed the possibility of rule changes in their agreement, the court concluded that the parties should be bound by the rule change at issue.[69]

Finally, in addition to the distinctions drawn with the *Kresock* decision, the *Nielsen* court rejected PJH's contention that the language of the simultaneously enacted amendment of Section 21 of the Code[70] should be interpreted to limit the rule changes' retroactive application.[71] The court stated that the language of the

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61. *Id.* at 146. Since the effective date of this amendment was October 28, 1992, it was subsequent to PJH's filing of the motion to compel (January 6, 1992), but several months prior to the court's order to compel arbitration (August 27, 1993). *Id.* at 139-40.

62. *Id.* at 140-41. In particular, the court relied on several clauses of the SEC Release: 1)"that changes apply to all 'open arbitrations and arbitration filings made on or after the effective date,'" 2)"'neither members nor their associated persons may use an existing arbitration agreement to compel a customer to arbitrate a claim that is encompassed by a class action,'" and 3)that "'regardless of any previously existing agreement to arbitrate,'" the rule change prohibits class actions from NASD arbitration. *Id.*

63. 957 F.2d 509 (7th Cir. 1992).

64. *Nielsen*, 873 F. Supp. at 146. It should be noted that the release in *Jones* addressed the interpretation of an existing NASD Code section and not the adoption of a NASD rule change and its retroactive application. *Id.* at 143.

65. *Id.* at 146.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* This amended section requires disclosure by the NASD members of the exception for class actions in arbitration agreements; however, only for agreements after October 28, 1993. *Id.* at 141.

71. *Id.* at 146.

amendment simply prevented NASD members from rewriting all previous arbitration agreements and did not prevent or limit retroactive application in this instance.[72] Therefore, based on the lack of specific, limiting language of the rule change and the plain statements expressed in the SEC Release indicating an intent for retroactive application, the *Nielsen* court held that the rule change should retroactively apply such that Nielsen's motion to vacate should be granted.[73]

V. COMMENT

Although certainly not a recent phenomenon, the *Nielsen* court recently struggled with the issue of retroactive application of newly enacted laws or rule changes. The court, however, appears to have appropriately and correctly applied the principle that a newly enacted rule should be applied prospectively unless there is a specific indication to the contrary requiring retroactive application.

Historically, the retroactive application of laws and statutes has been held to be "oppressive and unjust," and, therefore, "the essence of a law was that it be a rule for the future."[74] On the contrary, retroactive application is not considered "oppressive and unjust" if an express command necessarily implying retroactive application exists.[75] Combining these two traditional beliefs, it could be said that the presumption of retroactivity, absent an express command to the contrary, has been analyzed by determining whether the retroactive application violates fundamental notions of justice.[76]

In this context, one should analyze the retroactive application of the disputed NASD rule change in terms of whether such application would violate fundamental notions of justice. Despite its holding contrary to precedent established in *Kresock*, the *Nielsen* decision does not violate any fundamental notions of justice. Two significant factors account for this conclusion: the agreement signed by PJH and Nielsen and the express clauses of the SEC Release.[77]

First, the agreement contained a clause which specifically addressed new regulations adopted by NASD.[78] This clause expressly provided that "the provisions of this agreement so affected shall be deemed modified or superseded . . . and the provisions as so modified shall in all respects continue and be in full

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72. *Id.*

73. *Id.*

74. Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780 (1936).

75. *Id.*

76. *See Kaiser*, 494 U.S. at 855.

77. *Nielsen*, 873 F. Supp. at 145-46.

78. *Id.* at 146.

force and effect."[79] Since Nielsen signed the agreement with PJH at an apparent arms-length transaction, it would be wholly just and consistent with basic notions of justice to hold the respective parties to the terms of their agreement.

Second and most significantly, the SEC Release contained specific clauses strongly indicating the intent of NASD to apply this rule change retroactively to cover all arbitration agreements as of October 28, 1992, the effective date.[80] In particular, the SEC Release provided that the rule change proscribes class actions from NASD arbitration "regardless of any previously existing agreement to arbitrate" and that all "open arbitrations and arbitration filings" subsequent to the effective date are effected by the rule change.[81] Read together, these statements clearly indicate the intent of the SEC to retroactively apply this rule change.[82]

As mentioned previously, this decision does not contradict and remains consistent with precedent established within this jurisdiction. Although a different result occurred in *Kresock*, the court followed the same principles but arrived at a different result because of the aforementioned distinguishable facts.[83] Furthermore, since the SEC Release expressed a clear intent contrary to the presumption against retroactivity and fundamental notions of justice were not violated, the *Nielsen* court properly applied the NASD rule change retroactively.

VI. CONCLUSION

The *Nielsen* decision represents an accurate and appropriate application of the principle of presumption against retroactive application unless an express command to the contrary exists. By analyzing the relevant language of the arbitration agreement and the express command of the SEC Release intending retroactive application, the *Nielsen* court fully comported with fundamental notions of justice and effectively distinguished precedent established in earlier cases when it decided to retroactively apply a rule change which precluded arbitration of putative class actions.

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79. *Id.*
80. *Id.*
81. *See supra* note 62 and accompanying text.
82. *Id.* at 146.
83. *Id.* at 145.