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Supreme Court Issues Notice to Courts: Bifurcated Proceedings Still Required

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NOTES

Supreme Court Issues Notice to Courts: Bifurcated Proceedings Still Required

KPMG LLP v. Cocchi[1]

I. INTRODUCTION

The United States Supreme Court has made its preference for arbitration widely known through continued declarations of its policy to that effect.[2] In *KPMG v. Cocchi*, the Supreme Court reaffirmed that preference once again.[3] In that case, however, the Court also found a need to issue a reminder to lower courts that its decision in *Dean Witter v. Byrd*[4] was still the law of the land.[5] One of the most interesting questions arising from this clear reminder to adhere to precedent is why the Supreme Court felt the need to articulate it at all.

The Court may have been spurred into action by its recognition of an old judicial hostility toward arbitration that still adheres in a number of jurisdictions today. While some courts do little to hide their aversion to this method of dispute resolution, others harbor a more subtle distaste. This note will discuss the possible motivations driving the Supreme Court in issuing its *KPMG* opinion, and whether this reminder to lower courts was necessary.

II. FACTS AND HOLDING

The plaintiffs ("Plaintiffs") in this case were nineteen entities and individuals, of whom fifteen were Florida residents,[6] and all of whom purchased limited partnership interests in the Rye Funds.[7] The Rye Funds consisted of a collection of funds operating as hedge funds[8] and were managed by two entities: the Tremont

1. 132 S. Ct. 23 (2011).

2. *See* AT&T Mobility LLP v. Concepcion, 131 S. Ct. 1740, 1745 (2011); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-44 (2006); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Hall Street Assocs., LLP v. Mattel, Inc., 552 U.S. 576, 581-82 (2008).

3. *See* KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011) (noting that the Federal Arbitration Act exhibits a strong federal policy favoring arbitration as a method of resolving disputes).

4. 105 S. Ct. 1238 (1985).

5. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (holding that when a motion to compel arbitration was made, a court must grant it as to any arbitrable claims whether or not it would lead to bifurcated proceedings); *see also KPMG LLP*, 132 S. Ct. at 26 ("By not addressing the other two claims in the complaint, the Court of Appeal *failed to give effect to the plain meaning of the Act and to the holding of* ." (emphasis added)).

6. Brief of Respondent at 1, KPMG LLP v. Cocchi, 51 So. 3d 1165 (Fla. Dist. Ct. App. 2010).

7. *KPMG LLP*, 132 S. Ct. at 24. The Rye Funds consisted of a combination of three limited partnerships. *Id*.

8. Initial Appellate Brief at 2-3, KPMG LLP v. Cocchi, 51 So. 3d 1165 (Fla. Dist. Ct. App. 2010).

Group Holding, Inc., and Tremont Partners, Inc. (collectively, "Tremont").[9] KPMG,[10] an independent auditor, was hired by Tremont to audit the Rye Funds' financial statements.[11] The Rye Funds invested with Bernard L. Madoff Investment Securities, a broker-dealer owned and operated by Bernie Madoff.[12] This particular Rye Funds' investment was involved in Madoff's highly publicized Ponzi scheme[13] which resulted in millions of alleged losses.[14] Plaintiffs subsequently sued the Rye Funds, Tremont, and KPMG in a Florida circuit court.[15]

Plaintiffs asserted four separate claims against KPMG in its complaint: 1) negligent misrepresentation; 2) violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA);[16] 3) professional malpractice; and 4) aiding and abetting a breach of fiduciary duty.[17] The core of Plaintiffs' argument against KPMG was that KPMG did not use appropriate auditing standards in relation to the Rye Funds' financial statements.[18] KPMG made a motion in the circuit court to compel arbitration as provided for in the audit services agreement that existed between itself and Tremont.[19] The contract contained an arbitration clause[20] stating that disputes relating to services supplied by KPMG would be resolved by mediation or arbitration.[21] KPMG argued in its motion that Plaintiffs' claims arose as a result of the audit services KPMG performed under the contract and thus were derivative claims[22] subject to the arbitration clause.[23] The circuit court denied the motion[24] without explanation.[25]

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9. *KPMG LLP*, 132 S. Ct. at 24. Plaintiffs invested in the Rye Funds as limited partners. Tremont acted as the general partner and manager of the funds. Brief of Respondent, *supra* note 6, at 1-2.

10. KPMG is a worldwide system of professional firms offering tax, audit, and advisory services. KPMG employs over 145,000 employees that provide services in 152 countries across the globe. KPMG, https://www.kpmg.com/Global/en/Pages/default.aspx.

11. Brief of Respondent, *supra* note 6, at 4.

12. Initial Appellate Brief, *supra* note 8, at 3.

13. *See* Robert Lenzner, *Bernie Madoff's $50 Billion Ponzi Scheme*, FORBES.COM (Dec. 12, 2008, 6:45 PM), http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html.

14. KPMG LLP v. Cocchi, 51 So.3d 1165, 1167 (Fla. Dist. Ct. App. 2010). Tremont hired KPMG as auditor for the related financial statements and subsequently invested the funds with Madoff. Brief of Respondent, *supra* note 6, at 1-2.

15. Brief of Respondent, *supra* note 6, at 5. Plaintiffs filed in the Fifteenth Judicial Circuit Palm Beach County in the state of Florida. *Id*.

16. FLA. STAT. § 501.201 (2010).

17. KPMG LLP v. Cocchi, 132 S. Ct. 23, 24-25 (2011). Plaintiffs, subsequent to the issuance of the appellate court decision, amended their complaint to add a fifth claim against KPMG. *Id*. at 25.

18. *Id*. at 24.

19. *Id.* at 25.

20. *Id*. The clause stated that "[a]ny dispute or claim arising out of or relating to . . . the services provided [by KPMG] . . . (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved" by either mediation or arbitration. *Id*.

21. *Id*. The agreement afforded that mediation or arbitration would be the "sole" methods of dispute resolution authorized under the agreement. Initial Appellate Brief at 3, KPMG LLP v. Cocchi, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010).

22. The term "derivative liability" means that one's liability is "derived" from another's liability and one person cannot be liable unless the other is liable as well. Anthony G. Buzbee, *When Arbitrable Claims Are Mixed with Nonarbitrable Ones: What's a Court To Do*?, 39 S. TEX. L. REV. 663, 672 (1998) (citing BLACK'S LAW DICTIONARY 444 (6th ed. 1990)).

23. KPMG LLP v. Cocchi, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010). The parties agreed that Delaware law would govern in deciding the issue of whether the claims were direct or derivative. *Id*. at 1168. The test the Florida Court of Appeals used in deciding whether the Plaintiffs' claims were direct or derivative was established by the Delaware Supreme Court in Tooley v. Donaldson, Lufkin &

The Florida Court of Appeals for the Fourth District affirmed, focusing largely on the fact that the Plaintiffs did not expressly consent to the agreement that existed between KPMG and Tremont.[26] The appellate court, applying Delaware law,[27] found that the arbitration clause would be enforceable against Plaintiffs only if the Plaintiffs' claims were derivative claims resulting from the services performed by KPMG pursuant to its agreement with Tremont.[28] Concentrating exclusively on two of the four claims[29] brought by the Plaintiffs against KPMG, the Florida court of appeals found the negligent misrepresentation and violation of FDUTPA claims were direct claims, rather than derivative claims.[30] Based on this conclusion, the appellate court affirmed the circuit court's denial of KPMG's motion to compel arbitration.[31]

KPMG petitioned for writ of certiorari to the United States Supreme Court, which subsequently granted review.[32] The Court addressed only the claims brought by the Plaintiffs against KPMG.[33] The Court initially observed that the appellate court's opinion did not mention either of Plaintiffs' malpractice or breach of fiduciary claims, but rather centered exclusively on the Plaintiffs' negligent misrepresentation and violation of FDUTPA claims.[34] Based on the appellate court's failure to consider the two remaining claims, the Court found that the Florida court of appeals did not comply with the requirement of the Federal Arbitration Act (FAA) that it fully examine the complaint to evaluate whether any singular claim mandated arbitration in denying arbitration on the complaint as a whole.[35] Consequently, the Supreme Court vacated the holdings of the Florida

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Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) and involves asking the questions: "1) who suffered the harm, the corporation or the stockholders individually, and 2) who received the benefit of the recovery or remedy?" *Id.* To show direct harm under the Delaware test,

> [a] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

Id. at 1039.

24. *KPMG LLP*, 132 S. Ct. at 25.

25. Initial Appellate Brief, *supra* note 8, at 9.

26. KPMG LLP v. Cocchi, 88 So. 3d 327, 329 (Fla. Dist. Ct. App. 2012).

27. Both the Rye Funds and Tremont defendants were Delaware partnerships and all parties agreed that Delaware law applied to the transactions. *KPMG LLP*, 51 So.3d at 1168.

28. *KPMG LLP*, 132 S. Ct. at 25.

29. The appellate court addressed only the negligent misrepresentation and FDUTPA claims in its opinion. It did not discuss the professional malpractice or aiding and abetting a breach of fiduciary claims. *Id*.

30. *Id.* at 25. The Delaware test for determining when an action brought by limited partners was derivative or direct involved two questions: 1) who suffered the harm, limited partners individually or the corporation as a whole?; and 2) who got the benefit of the remedy or recovery? Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004).

31. *KPMG LLP*, 51 So. 3d at 1168.

32. *KPMG LLP*, 132 S. Ct. at 26.

33. *Id*. at 24. The Court did not address Plaintiffs' claims against Tremont nor the merits of Plaintiffs' claims against KPMG.

34. *Id*. at 26.

35. *Id*. The Federal Arbitration Act, 9 U.S.C. § 1, has been interpreted to require that when a complaint consists of arbitrable and nonarbitrable claims, courts must compel arbitration of the arbitrable

Court of Appeals for the Fourth District,[36] finding that the appellate court had not given effect to the FAA's plain meaning when it failed to address the two additional claims in the complaint.[37] The Court therefore remanded the case for further proceedings to determine whether either of the two remaining claims mandated arbitration.[38]

III. LEGAL BACKGROUND

The United States Supreme Court has described Section 2 of the Federal Arbitration Act as embracing a "liberal federal policy favoring arbitration."[39] Accordingly, the Court has repeatedly found that the FAA instructs that uncertainties relating to arbitration issues should be determined in favor of arbitration whenever possible.[40] The Supreme Court has interpreted the FAA to require controversies to be arbitrated if a valid arbitration agreement exists between the parties.[41] This obligation has been interpreted to cover controversies including both nonarbitrable and arbitrable claims, the latter compelling arbitration whether or not it leads to inefficient resolution of the overall dispute.[42] Although this concept seems straightforward, up until the 1980s it had not always been uniformly applied among federal courts.[43] This lack of uniformity led to the development of the intertwining doctrine, an approach that allows a trial court to try all arbitrable and nonarbitrable claims together when they are adequately factually intertwined.[44] The Supreme Court conclusively resolved the uncertainty permeating this area in 1985 with its often-cited opinion in *Dean Witter v. Byrd*.[45] This section will address the rise and fall of the intertwining doctrine, as well as the FAA as it applies to multiple claim disputes that involve arbitrable and nonarbitrable claims.

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claims when a party files a motion to compel regardless of whether the consequence is multiple proceedings in differing forums. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217-18 (1985).

36. *KPMG LLP*, 132 S. Ct. at 26. The order was given, and the per curiam opinion filed, on November 7, 2011. *Id*. at 23.

37. *Id.* at 26.

38. *Id.*

39. *See* AT&T Mobility LLP v. Concepcion, 131 S. Ct. 1740, 1745 (2011); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-44 (2006); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Hall Street Assocs., LLP v. Mattel, Inc., 552 U.S. 576, 581-82 (2008).

40. *Moses H. Cone Mem'l Hosp*., 460 U.S. at 24-25; *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 403-04 (1967); *Dean Witter*, 470 U.S. at 219; Vaden v. Discover Bank, 556 U.S. 49, 58 (2009).

41. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Section 2 of the FAA has been interpreted as constructing a "body of federal substantive law of arbitrability," which is to be applied to all arbitration agreement covered by the FAA. *See id.*

42. *Dean Witter*, 470 U.S. at 217.

43. *Id*. at 216-17 (discussing the split of authority among the circuits regarding what courts should do when faced with arbitrable and nonarbitrable claims in one petition).

44. *Id*.

45. 470 U.S. 213 (1985).

A. The Intertwining Doctrine

Beginning with *Wilko v. Swan*,[46] the Supreme Court took up the issue of what direction a court should take when a dispute presents arbitrable claims as well as nonarbitrable federal securities claims.[47] In *Wilko*, a customer brought suit against a securities brokerage firm pursuant to the Federal Securities Act of 1933, alleging omissions and misrepresentations concerning stock transactions.[48] The firm moved to compel arbitration pursuant to the arbitration agreement existing between the parties.[49] The district court denied the motion, finding the agreement to arbitrate deprived the customer of certain statutory remedies.[50] The Court of Appeals for the Second Circuit reversed.[51] The Supreme Court reversed again, reinstating the district court's initial determination that arbitration was not required for the federal securities claim.[52] Finding in favor of the customer, the Court ruled that the Federal Securities Act of 1933 provision concerning waiver of rights applied exclusively to the judicial process.[53] The Court decided Congress' intention regarding securities sales was better served by invalidating the arbitration agreement at issue, even if the agreement would ordinarily be covered by the FAA.[54]

The *Wilko* decision was interpreted differently among the federal courts, leading to a split among the circuits concerning what became known as the "intertwining doctrine."[55] Language in the *Wilko* opinion such as, "Congress [through the FAA] has afforded participants . . . an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration,"[56] led some circuits to construe the FAA as demonstrating an overarching goal of efficient dispute resolution, which could be best served by refusing to separate arbitrable and nonarbitrable claims the courts considered sufficiently "intertwined."[57]

Under the intertwining doctrine, when disputes containing arbitrable and nonarbitrable claims arise and are "sufficiently intertwined factually and legally,"[58] the whole controversy may be tried together notwithstanding an agreement

46. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989).

47. *Id*. at 430.

48. *Id*. at 428-29.

49. *Id*. at 429.

50. *Id*. at 429-30.

51. *Id*. at 430.

52. *Id*. at 435, 438. The Court was persuaded that the intention of Congress in including a nonwaivable provision in the Federal Securities Act was to put securities buyers on a different footing from other buyers and thus could not waive the ability to sue at a later time in an arbitration agreement. *Id*. at 435.

53. *Id*. at 437 ("As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 to apply to waiver of judicial trial and review.").

54. *Id*. at 435.

55. *Compare* Miley v. Oppenheimer & Co., 637 F.2d 318, 334-37 (5th Cir.1981); Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578 (E.D. Cal. 1982) *with* Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 733 F.2d 59 (8th Cir. 1984); Dickinson v. Heinold Securities, Inc., 661 F.2d 638 (7th Cir. 1981); Liskey v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983).

56. *Wilko*, 346 U.S. 438.

57. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985).

58. *Id*. at 216-17.

to arbitrate.[59] The court may use its discretion in determining whether claims are "sufficiently intertwined."[60] A court applying this doctrine hears the entire dispute whether or not specific claims are subject to an arbitration agreement.[61] A court rejecting this doctrine hears only those claims falling outside the arbitration agreement while ordering all arbitrable claims to proceed to arbitration.[62]

The circuits adopting the intertwining doctrine[63] asserted two reasons federal courts should refuse to compel arbitration in these circumstances.[64] First, the circuits asserted that the doctrine was needed in order to conserve the court's "exclusive jurisdiction over federal securities claims."[65] Otherwise, arbitration presented the possibility of state law claims being determined before the federal litigation, resulting in collateral estoppel[66] for facts determined in the arbitration.[67] Second, the supporting courts found the doctrine was needed for efficiency.[68] According to these supporting circuits, the doctrine would prevent bifurcated proceedings and litigation of identical fact questions when it declined to compel arbitration.[69] In contrast, the circuits which rejected the intertwining doctrine[70] found that, in cases containing arbitrable and nonarbitrable claims, the FAA deprived federal courts of discretion concerning arbitration.[71] These circuits found that the FAA required courts to compel arbitration of arbitrable claims when a party so moved, concluding that a court should not place its own notions of efficiency over those of Congress.[72]

In an effort to resolve the split among the circuits, the Supreme Court addressed and explicitly rejected the intertwining doctrine as to arbitration agreements in *Dean Witter v. Byrd* by deciding that bifurcated proceedings did not create a bar to compelling arbitration of any arbitrable claims covered in the agreement.[73]

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59. *Id.*; *see also Belke*, 693 F.2d 1023; *Miley*, 637 F.2d at 336; *Cunningham*, 550 F. Supp. at 58.

60. *Dean Witter*, 470 U.S. at 216-17.

61. *Belke*, 693 F.2d at 1026.

62. *Id.*

63. The Fifth, Ninth, and Eleventh Circuits embraced the doctrine, while the Sixth, Seventh, and Eighth Circuits declined its use. *Dean Witter*, 470 U.S. at 216-17.

64. *Id.* at 218.

65. *Id.* at 217.

66. Collateral estoppel is defined in the Restatement (Second) of Judgments: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

67. *Dean Witter*, 470 U.S. at 217.

68. *Id.*

69. *Id.* *See also* Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023, 1026 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318, 334-37 (5th Cir.1981); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 580 (E.D. Cal. 1982).

70. *See supra* note 70 (identifying the circuits following as well as the circuits rejecting the doctrine).

71. *See* Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 646 (7th Cir. 1981); Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 733 F.2d 59, 63 (8th Cir. 1984); Liskey v. Oppenheimer & Co., 717 F.2d 314, 319-20 (6th Cir. 1983).

72. *Dickinson*, 661 F.2d at 646.

73. *Dean Witter*, 470 U.S. at 217-18.

B. Bifurcated Proceedings

The FAA does not explicitly speak to whether the mandate to enforce arbitration agreements remains in force when bifurcated actions would result from the enforcement of such agreements.[74] The Supreme Court, however, has construed Congress' intent in passing the FAA to be that a court, when faced with a motion to compel arbitration, is obligated to grant that motion as to any arbitrable claims that exist.[75]

The Supreme Court addressed which path courts should take when faced with claims containing arbitrable and nonarbitrable complaints in *Dean Witter v. Byrd*, while also resolving the split among the circuits concerning the intertwining doctrine.[76] In *Dean Witter*, Byrd, an investor, brought suit alleging federal securities law and pendent state law violations by Dean Witter Reynolds, Inc., his securities broker.[77] Dean Witter Reynolds moved to compel arbitration of the state law claims pursuant to its arbitration agreement with Byrd.[78] The district court denied its motion, and the Ninth Circuit affirmed.[79] The Supreme Court thereafter reversed.[80]

In *Dean Witter*, the Court observed that the FAA requires that courts must compel arbitration when dealing with a claim covered by an arbitration agreement.[81] Until *Dean Witter*, the Ninth Circuit[82] had subscribed to the intertwining doctrine.[83] The Court acknowledged the Ninth Circuit's view that the FAA's goal of efficient resolution of proceedings was a worthy ambition.[84] Nonetheless, it reasoned that based on the FAA's plain language mandating arbitration when a valid arbitration agreement exists as well as the Act's legislative history,[85] Congress' primary intent in passing the FAA was to enforce parties' arbitration agreements, not simply to promote swift decision-making.[86] The Court concluded that when a motion to compel arbitration is made, a court must grant it as to any arbitrable claims whether or not it would lead to bifurcated proceedings.[87]

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74. *Id.* at 218-19.

75. *Id.* at 219.

76. *Id.* at 221. "[T]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute." *Id.*

77. *Id.* at 214.

78. *Id.* at 215.

79. *Id.* at 215-16

80. *Id.* at 217.

81. *Id.* at 218. "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.*

82. The Fifth and Eleventh Circuits also subscribed to the intertwining doctrine. *Id.* at 216-17.

83. *Id. See supra* note 63 and accompanying text.

84. *Dean Witter*, 470 U.S. at 218-19.

85. According to the court, the legislative history of the FAA demonstrates that it was passed in an effort to guarantee judicial enforcement of arbitration agreements entered by private parties. *Id.* at 221.

86. *Id.*

87. *Id.* at 220-21. The Court also found that a stay of proceedings or joined proceedings was not necessary to protect the interests of the federal court proceeding because the collateral estoppel rules sufficiently protected those interests. *Id.* at 222. Thus, the Court stated that district courts should not

As a result of *Dean Witter*, courts dealing with claims subject to arbitration under the FAA are now required to send those claims to arbitration whether or not all claims in the dispute are arbitrable.[88]

III. INSTANT DECISION

In a *per curiam* opinion,[89] the United States Supreme Court addressed KPMG's appeal of the denial of its motion to compel arbitration. At the outset, the Court noted that arbitration agreements covered by the FAA require enforcement in both federal and state courts.[90] Thus, state courts perform an important function in enforcing these agreements.[91] The Court observed that the FAA requires that when a dispute involves some arbitrable claims and some nonarbitrable claims, the arbitrable claims must be arbitrated regardless of whether this results in bifurcated proceedings.[92] Therefore, state and federal courts are obligated to diligently assess petitions so that they may divide arbitrable and nonarbitrable claims.[93] Consistent with this directive, courts do not have license to deny arbitration purely because certain claims may be determined in litigation without arbitration.[94] Following these comments, the Court addressed the denial of KPMG's motion to compel arbitration.

According to the Court, a review of the state court of appeals' opinion suggested that the appellate court did not determine individually whether all four[95] of the Plaintiffs' claims were arbitrable.[96] KPMG argued that arbitration of the Plaintiffs' claims was required because the audit services agreement between KPMG and Tremont was applicable to the Plaintiffs as well.[97] The Court did not question the court of appeals' finding that arbitration of the Plaintiffs' claims was only appropriate if those claims were determined to have derived from the services KPMG executed under the agreement for Tremont's benefit.[98] However, the Court did question the completeness of the appellate court's analysis in reaching its decision that arbitration should not be compelled for the entire dispute.[99] Examining the appellate court's failure to address the nature of two of the Plaintiffs'

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deny compelling arbitration in an effort to evade infringing on federal interests, even when it led to bifurcated proceedings. *Id*. at 223.

88. KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011).

89. *Id.* at 24.

90. *Id*.

91. *Id*. (citing Vaden v. Discover Bank, 556 U.S. 49, 59 (2009)).

92. *Id*. (citing *Dean Witter*, 470 U.S. at 217).

93. *Id*.

94. *Id*.

95. The Plaintiffs' claims against KPMG were negligent misrepresentation, FDUTPA violations, professional malpractice, and aiding a breach of fiduciary. *Id*.

96. *Id*. The court noted that the Florida Court of Appeals denied the motion to compel arbitration for any claim after deciding that two of Plaintiffs' claims were not arbitrable. *Id*.

97. *Id*. at 25.

98. *Id*. The parties agreed the arbitrability of the claims turned on whether the claims were considered direct or derivative of the agreement between KPMG and Tremont. *Id*.

99. *See id.* (noting that the question of which state's law was to apply to the dispute was not at issue, but what was at issue was the appellate court's failure to discern whether arbitration was required for any of the Plaintiffs' four claims).

claims in its opinion,[100] the Court found that the lower court failed in its duty to evaluate all claims separately for arbitrability.[101]

Turning back to its discussion of the FAA, the Court remarked on the resounding federal policy favoring arbitration.[102] The Court found this policy demanded enforcement of parties' arbitration agreements by courts.[103] The matter at issue, as stated by the Court, was the evident refusal by the appellate court to compel arbitration as to any of the Plaintiffs' four claims after its determination that two claims[104] presented nonarbitrable issues.[105]

The Court noted that the FAA states that written arbitration agreements concerning disputes emerging out of a contract in existence are "valid, irrevocable, and enforceable" except for reasons existing "at law or in equity for the revocation of any contract."[106] Relying heavily on its decision in *Dean Witter v. Byrd*,[107] the Court observed that the FAA, by its terms, did not grant lower courts discretion in enforcing signed arbitration agreements, but rather ordered the parties to continue on to arbitration for arbitrable issues whenever possible.[108] Hence, the Court stated, in the event a petition included arbitrable and nonarbitrable claims, and a party filed a motion to compel, a court must compel arbitration of any arbitrable claims.[109] According to the Court, this was true whether or not the consequence was "inefficient maintenance of separate proceedings in different forums."[110] The Court, in reinforcing the predominant theme of its opinion, instructed that all courts were obligated to analyze each petition with precision in order to evaluate whether any specific claim contained therein required arbitration.[111] If a court neglected this duty, a party denied its motion to compel arbitration was entitled to immediate review.[112]

The Court, in finding that the appellate court failed to assess the arbitrability of all four of the Plaintiffs' claims when it refused to compel arbitration as a whole after determining that two claims were nonarbitrable, held that the court of appeals abdicated the duty relegated to it under the FAA.[113] Therefore, the Court

100. The Court of Appeals did not decide whether the malpractice and breach of fiduciary duty claims were direct or derivative. *Id*.

101. *Id*. The Court quoted the Court of Appeals' opinion which found as the agreement as a whole that "the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." *Id*. (quoting KPMG LLP v. Cocchi, 51 So.3d 1165, 1167 (Fla. Dist. Ct. App. 2010)).

102. *Id*. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985)).

103. *Id*. (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985)). The Court also noted that the FAA did not require courts to disregard state law in allowing written arbitration agreements to be enforced by or against nonparties (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 (2009)).

104. The two claims the appellate court determined were not arbitrable were the negligent misrepresentation and FDUTPA violation claims. It did not address the malpractice or aiding a breach of fiduciary duty claims. *Id*.

105. *Id*.

106. *Id*. (quoting 9 U.S.C. § 2 (2006)).

107. 470 U.S. 213 (1985).

108. *KPMG LLP*, 132 S. Ct. at 25-26 (citing *Dean Witter*, 470 U.S. at 218).

109. *Id*. at 26 (finding such a result was required by the FAA and its terms).

110. *Id*. (citing *Dean Witter*, 470 U.S. at 217).

111. *Id*.

112. *Id*. (citing Southland Corp. v. Keating, 265 U.S. 1, 6-7 (1984) as support for its proposition).

113. *Id*. The Court also noted that the appellate court failed to follow the holding in *Dean Witter* as well as give plain meaning to the FAA. *Id*.

vacated the appellate court's denial of KPMG's motion to compel arbitration and remanded the issue to the Florida Court of Appeal for the Fourth District to evaluate whether either of the two unaddressed claims required arbitration.[114]

IV. COMMENT

KPMG LLP v. Cocchi is an example of the United States Supreme Court reinforcing its position that arbitrable claims must be arbitrated when a valid arbitration agreement exists between the parties.[115] The question is why the Court felt it needed to issue this reminder in the first place. The reason may have something to do with an old judicial hostility toward arbitration that still endures in some jurisdictions today.[116]

A. Lingering Hostility toward Arbitration

Despite the long history of arbitration in the United States,[117] judges early on displayed hostility toward arbitration agreements, often viewing such agreements as attempts to strip jurisdiction from the courts.[118] That hostility has continued into the modern era.[119] Some view the entire arbitration process as a second-class system offering only "an inferior brand of justice."[120] Specifically, judges may be especially hostile toward arbitration when there is a large disparity between the parties' financial standings.[121] This situation commonly arises when the dispute involves individuals and corporations.[122]

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114. *Id*.

115. *See Dean Witter*, 470 U.S. at 221 ("[T]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate[.]").

116. *See* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186 (2004) (suggesting that state and federal judges maintain, to some degree, the old judicial hostility toward arbitration).

117. *See, e.g.*, 1 THE PAPERS OF DANIEL WEBSTER – LEGAL PAPERS 322-32 (A. Konofsky & A. King eds., 1982) (describing references to arbitration in New Hampshire as early as the eighteenth century).

118. *See* C. Edward Fletcher, III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 393 (1987). *See also* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C.L. REV. 931, 971 (noting that in colonial times arbitration was often used in industry-wide in a certain place to settle internal disputes). An often cited example is that of the New York Chamber of Commerce which in 1768 established an arbitration system aimed at settling business disputes in accord with local trade practice instead of legal principles. This arbitration committee is thought to be the oldest committee in the United States today.

119. Fletcher, *supra* note 118, at 393-94.

120. *See* Frank E. Sander, H. William Allen & Debra Hensler, *Alternative Dispute Resolution Symposium: Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 887-88 (1996); *see also* Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 54 (2007) (noting this may be especially true for indigent parties).

121. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1490 (2008) (noting that many lower courts observe arbitration with skepticism, particularly as it relates to consumers). Bruhl also quoted one federal bankruptcy judge's comments on arbitration in the consumer context: "The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises

Critics have argued that individuals are in a weaker position due to a lack of resources and the potential for biased arbitrators who seek recurring business with a specific corporation to avoid delivering decisions the corporation would view as unfavorable.[123] Meanwhile, corporations are in a stronger position due to a familiarity with the process and greater access to records and past decisions or awards that the individual will generally not be able to attain.[124] Additional sources of judicial hostility may stem from the lack of usable precedent resulting from the private arbitration process[125] and that arbitrated disputes almost always end in compromise, even when there seems to be a clear victor in the dispute.[126]

In several recent cases,[127] courts harboring this hostility have refused to enforce arbitration agreements for a variety of reasons, such as finding them invalid under state contract law or for a lack of mutual assent.[128] Recent empirical data[129] and qualitative evidence[130] have caused a number of commentators and practitioners to propose that some courts have grasped upon state law contract defenses, particularly the unconscionability doctrine, as an excuse to invalidate arbitration agreements.[131] However, other courts are not quite as obvious in displaying their hostility toward agreements to arbitrate disputes.

In its *KPMG LLP v. Cocchi* opinion, the Florida Court of Appeals for the Fourth District, while not outright rejecting the Supreme Court's mandate in *Dean Witter*, effectively ignored it when it deemed the entire dispute nonarbitrable, evincing its own brand of judicial hostility toward arbitration. This passive-

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as a putrid odor which is overwhelming to the body politic." *Id.* (quoting In re Knepp, 229 B.R. 821, 827-28 (Bankr. N.D. Ala. 1999)).

122. Shweder, *supra* note 120, at 55.

123. *Id*. at 55-56.

124. *Id*. at 55.

125. *Id*. (noting that arbitration may result in important public issues evading the judicial process which in turn denies the common law a valuable source of progress).

126. *Id*. at 54-55 (citing Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984)).

127. *See, e.g*., Manfredi v. Blue Cross Blue Shield, 340 S.W.3d 126 (Mo. App. W.D. 2011) (arbitration agreement invalid on unconscionability grounds); Newton v. Am. Debt Services, Inc., No. C–11–3228 EMC, 2012 WL 581318 (N.D. Cal. Feb. 22, 2012) (arbitration agreement unenforceable as a whole on grounds of unconscionability); Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 383-84 (6th Cir. 2005) (mutual assent lacking); Cheek v. United Healthcare of Mid-Atlantic, Inc., 835 A.2d 656, 661-62 (Md. 2003) (lack of mutuality precludes enforcement of arbitration clause).

128. *See* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 470 (2006). Although the FAA states that valid arbitration agreements affecting interstate commerce should be enforced unless a valid exception applies, state law contract defenses such as fraud, duress, and unconscionability may be used to invalidate such arbitration agreements without contravening the FAA. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996).

129. *See* Randall, *supra* note 116, at 194-96 (recognizing an increase in the number of unconscionability claims raised in recent years by noting that judges are finding arbitration agreements unconscionable at a rate twice that of nonarbitration agreements and that twenty years before the article was published, judges had found arbitration and nonarbitration agreements unconscionable at approximately equal rates).

130. *See* Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 62 (2005) (noting that practitioners have started charging judges with generating a new type of unconscionability with a more rigorous standard that is special to the arbitration arena).

131. *See* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1286 (2011); *see also* Burton, *supra* note 128, at 470.

aggressive evasion of federal policy was not lost on the Supreme Court. In its *KPMG* opinion, the Court repeatedly noted the appellate court's failure to even try to evaluate each of the claims individually for arbitrability,[132] which the Court saw as being in conflict with the requirements of its precedent.[133] By omitting any reference to the *Dean Witter* rule that petitions must be assessed as a whole before a motion to compel arbitration of the entire dispute may be denied, the Florida appellate court avoided a charge of outright disobedience to a Supreme Court mandate, but did not avoid suspicion as to its true preference for litigation over arbitration.

It is mere speculation as to why the appellate court decided arbitration was an inadequate remedy for any of the individual claims in this case. Perhaps the appellate court was hesitant to allow the parties to escape any judgment of fault and associated stigma attached to such a designation.[134] Possibly, the Florida court of appeals considered the arbitration process unsuitable for this type of dispute due to the disparity in the parties' economic positions.[135] Or maybe that court just forgot to evaluate the other two claims.[136] Without a definitive statement from the appellate court as to why it did not assess each individual claim, any assignment of underlying purpose would be guesswork. Yet, the most probable inference to be drawn from reading the opinion authored by the Florida court of appeals is that it considered arbitration to be inadequate.[137]

Presumably, this lack of certain knowledge as to the true motivations of the appellate court explains why the Supreme Court did not explicitly address the appellate court's underlying reasons for determining that the entire dispute nonarbitrable. Nevertheless, the tone of the Court's opinion seems to suggest that the Justices were fully aware of the Florida court of appeals' discontented outlook on

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132. KPMG LLP v. Cocchi, 132 S. Ct. 23, 26 (2011) (noting that "[B]y not addressing the other two claims in the complaint, the Court of Appeal failed to give effect to the plain meaning of the Act and to the holding of *Dean Witter*.").

133. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation . . . .").

134. *See* Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 358 n.24 (2006) (noting the stigma that may attach to punitive or compensatory awards).

135. KPMG is a global company while the Plaintiffs are a collection of individuals who presumably would be in a weaker position in comparison. *See* Bruhl *supra*, note 121 at 1490 (quoting Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., concurring), *vacated sub nom.* Doctor's Assocs., Inc. v. Casarotto, 115 S. Ct. 2552 (1995)). The *Casarotto* court illustrated the strong opinions judges may hold concerning arbitration in the consumer context:

> What I would like the people in the federal judiciary . . . to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, [Montana's] laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.

Id.

136. *See KPMG LLP*, 132 S. Ct. at 26 (noting that the Florida Court of Appeals only evaluated two of the four claims in the Plaintiffs' petition).

137. *See generally* KPMG LLP v. Cocchi, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010).

arbitration.[138] While never overtly accusing the appellate court of unscrupulous behavior, the Court let it be known that this type of shirking of judicial duty would not go unnoticed.

B. A Not So Subtle Reminder

The Supreme Court's decision in *KPMG* prompts an inquiry into whether there has been a possible resurgence in judicial hostility toward arbitration. If the answer to that inquiry is yes, the next question concerns what exactly the Supreme Court was trying to remind lower courts of. The Court seemed to be mandating that lower courts remember three important tenets of arbitration. First, whether a claim is arbitrable or nonarbitrable is to be determined by the court.[139] Second, when a dispute involves both arbitrable and nonarbitrable claims, the court has a duty to decide which claims are arbitrable and which are not.[140] Finally, and most importantly, this duty extends to consideration of each individual claim in the petition.[141] By emphasizing lower courts' lack of discretion in directing parties to continue on to arbitration for any claims covered by a valid arbitration agreement, the Court has made its policy preference for arbitration clear.[142]

This policy preference may be seen by some as an attempt by the Court to manipulate parties into settlement of all claims.[143] The impending time and money obligations will most likely force parties to recognize the advantages to settlement, whether or not this option is in both parties' best interests.[144] Courts are

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138. For example, the opinion does not accuse the appellate court of intentional misapplication of the law, however it does appear to question the motives of the lower court: "Though the matter *is not altogether free from doubt*, a fair reading of the opinion *indicates a likelihood* that the Court of Appeal failed to determine whether the other two claims in the complaint were arbitrable." *KPMG LLP*, 132 S. Ct. at 24 (emphasis added); *see also id.* at 25 ("A fair reading of the opinion reveals nothing to suggest that the court came to the same conclusion about the professional malpractice and breach of fiduciary duty claims. Indeed, *the court said nothing about those claims at all*.") (emphasis added); and *id.* ("What is at issue is the Court of Appeal's *apparent refusal* to compel arbitration on any of the four claims based solely on a finding that two of them . . . were nonarbitrable.") (emphasis added).

139. AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986) ("[T]he question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

140. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation . . . .").

141. *KPMG LLP*, 132 S. Ct. at 26 ("[C]ourts must examine a complaint with care to assess whether any individual claim must be arbitrated. The failure to do so is subject to immediate review . . . ." (citing Southland Corp. v. Keating, 465 U.S. 1, 6-7 (1984)).

142. *See* AT&T Mobility LLP v. Concepcion, 131 S. Ct. 1740, 1742 (2011) ("Section 2 reflects a liberal federal policy favoring arbitration."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630-31 (1985); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

143. *See* Shweder, *supra* note 120, at 57 (2007) (noting that parties should not "feel coerced into settling in lieu of litigation").

144. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Fiss opines:

> Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subse-

often clogged and arbitration, though generally quicker and less expensive than litigation,[145] still requires the parties to commit many hours and extensive resources before an outcome is reached.[146] Thus, many parties, when weighing the pros and cons of continuing on to multiple proceedings, will often find that settlement is the most viable option.

However, a policy encouraging arbitration, and also settlements, is not necessarily a bad thing. By strictly enforcing agreements to arbitrate, the courts are giving effect to the parties' expectations and also respecting the parties' right to contract.[147] Moreover, an increase in the number of settlements helps eliminate strains on the already overtaxed court system.[148] Often arbitration will result in parties resolving their disputes earlier, and at lower cost, than would be possible if litigation, or even arbitration, were carried to their natural ends.[149] This allows the parties to receive relief faster,[150] a factor that could be important to consumers, especially in today's economic climate.[151]

This aspect may also play a significant role in the case of bifurcated proceedings. If one proceeding is completed before the other is resolved—the most likely scenario being that the arbitration finishes before the litigation—this may allow one party to obtain relief while the other proceeding is still pending.[152] Obviously

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> quent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Id.

145. *See* Karen A. Sasser, *Freedom to Contract for Expanded Judicial Review of Arbitration Agreements*, 31 CUMB. L. REV. 337, 337 (2001) (noting that "many parties favor arbitration because it is typically more efficient, more private, and less costly than litigation").

146. *See* Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 308 (2005) (noting that in commercial arbitration lawyers' involvement has increased and as a result arbitration time and costs have increased as well).

147. *See* Sasser, *supra* note 145, at 346.

148. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiffs Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 810 (1989).

149. *See* Shweder, *supra* note 120, at 53 (noting that alternative dispute resolution methods help to lower the parties' costs and time expenses by resolving cases more quickly and easing the burdens on the judicial system).

150. However, "most arbitration awards are not self-executing" and generally a court must confirm the award. This converts the award into a judgment that can be enforced with judicial powers. Alden L. Atkins and Adrianne Goins, *New York Courts Make it Easier to Seize Assets To Satisfy an Award*, 16 NO. 2 IBA ARB. NEWS 143, 144 (Sept. 2011).

151. *See* Lance Roberts, *Voices: Lance Roberts, On the 2012 Recession*, Financial Advisor, THE WALL STREET JOURNAL (March 21, 2010, 4:46 PM), http://blogs.wsj.com/financial-adviser/2012/03/21/voices-lance-roberts-on-the-2012-recession/?mod=google_news_blog. Roberts explains:

> Since the end of the recession in 2009, we've had an economy that [has] been built on inventory restocking and Federal Reserve intervention. In the meantime, the cost of living has risen and wages have stayed the same. Food and energy alone are eating up 20% of the average American's income.

Id. *See also* Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 603 (2010) (noting that the recent economic recession has resulted in a decline in the demand for legal services).

152. § 9 of the FAA concerning award of arbitrators provides:

the recipient of relief benefits from this occurrence, but there may also be a reciprocal, yet noticeably less attractive, benefit to the payor: the ability to spread payments out over time if the payor later has a judgment rendered against him pursuant to the litigation.

Arbitration may put justice within reach of parties who, due to circumstances such as a lack of legal knowledge or accessible resources, find litigation infeasible.[153] Also, because there are some important similarities between arbitration and litigation, parties can avoid the expense of trial while still retaining many of the benefits of litigation, such as giving the parties a chance to tell their story and having access to a neutral fact finder who will ultimately render a binding decision.[154] An additional advantage is that parties can hire arbitrators who have special knowledge with regard to a certain body of law, thus reducing the amount of time required for explanation of the relevant industry.[155] Further, these arbitrators will be more equipped to recognize either party's attempt to conceal or sugarcoat certain facts than their jury counterparts.[156]

The Supreme Court, whether or not intending to directly influence the decision of parties to continue on to arbitration and litigation, has at least indirectly shaped parties' choices in that regard by requiring bifurcated proceedings if arbitrable and nonarbitrable claims exist in one petition. The Supreme Court has been faced with a tradeoff between judicial efficiency in hearing disputes in a single proceeding and a party's constitutional right to access to the courts on the one hand, and respect of the parties' right to contract and earlier access to relief on the other. As this comment illustrates, the arguments on either end of the issue are persuasive. Yet, as evidenced by the Court's affirmance of its position to require arbitration of arbitrable claims regardless of whether it results in bifurcated proceedings, the Court has weighed both sides of the balance and chosen to adhere to its longstanding policy of favoring arbitration and to encourage non-judicial methods of resolving disputes.

Whether the lower courts will fall in line with the Supreme Court's clear preference for arbitrability in all respects, or continue to demonstrate a latent hostility toward arbitration, is yet to be seen. However, after the Supreme Court's reminder in *KPMG* that all arbitrable claims are to be compelled to arbitration

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> [i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9 (2006).

153. *See* Van Wezel Stone, *supra* note 118, at 958 (noting that the technicality of the judicial process may make it more difficult for everyday persons to understand their rights).

154. *See* Shweder, *supra* note 120, at 54 (noting that parties may sometimes impede negotiations when left on their own to resolve disputes because they are reluctant to accept an offer from an adversary and the use of a neutral third party can reduce this tendency thus encouraging resolution of disputes).

155. *Id*.

156. *Id*.

regardless of the lack of efficiency it may create, at least in this area, courts will find it much more difficult to avoid the Supreme Court's clear mandate.

VI. CONCLUSION

In *KPMG LLP v. Cocchi*, the U.S. Supreme Court asserted a clear reminder to courts that each claim in a dispute involving an arbitration agreement must be evaluated individually for arbitrability, and if arbitrable claims exist the parties must be compelled to arbitrate those claims upon motion by either party. The Court may have felt the need to issue this directive due to an underlying hostility to arbitration still evident in many jurisdictions.[157] Although the Supreme Court has continually heralded the advantages of alternative dispute resolution methods, such as lower monetary and time costs, clearing of dockets, and respect of parties' right to contract, some courts are still resistant to these practices. To truly eradicate those courts' hostility toward ADR in general, it may take more than a few gentle reminders from the Court. However, until a more forceful step is taken in this effort, by either the Supreme Court or Congress, the subtle prodding of courts to fulfill their duties, as articulated in the *KPMG* opinion, may have to do.

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157. *See* Randall, *supra* note 116, at 186 (noting that federal and state judges maintain some level of judicial hostility concerning arbitration.)