

2-1-1997

# De -mystifying Securities ADR: Reform and Resurgence after McMahon

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## Recommended Citation

Michael P. Coakley & Mary A. Bedikian, De -mystifying Securities ADR: Reform and Resurgence after McMahon, Mich. B.J., Feb. 1997, at 176.

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# De-mystifying Securities ADR: Reform and Resurgence after McMahon

By Michael P. Coakley and  
Mary A. Bedikian

In recent years, the pace of change in arbitration has been accelerating at such a rate that practitioners and arbitrators alike are hard pressed to remain well-versed. An anchor for those at sea are the underlying principles of arbitration. It is these principles that make it work, and drive the changes.

Over the last 12 years, the United States Supreme Court has decided 34 cases directly affecting securities arbitration. The broad sweep of these decisions favor arbitration, and set the stage for profound changes in the way responsible practitioners must now handle cases.

This article will first briefly review the changes that inhere in the federal law of arbitration. Next, it will cover recent developments, specifically the Ruder Report, a critical assessment of how arbitration works and should work to raise investor confidence in the viability of the arbitral forum. This is followed by a short discussion of the growth of other ADR methods, attributable in part to a wider use of arbitration. Finally, we will offer a look at the future of securities ADR.

## THE ROAD WELL-TRAVELLED

### The *Wilko* Decision

The pre-1980s history of mistrust of arbitration found its highest expression in the

1953 United States Supreme Court decision, *Wilko v Swann*.<sup>1</sup> In *Wilko*, an investor brought a misrepresentation suit against the brokers from whom he had purchased stock, seeking damages under the civil liabilities provisions of § 12(2) of the Securities Act of 1933. The margin agreement between the parties mandated arbitration of future disputes. Instead, the investor in his suit argued that the arbitration provision

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was invalid because § 14 of the Securities Act of 1933 prohibited a waiver of any provision in the Act, including the right to sue for fraud.<sup>2</sup> The Supreme Court found in the investor's favor, and held the claim non-arbitrable. In doing so the Court showed its distrust of arbitration as a perceived inferior method of dispute resolution for securities cases:

*Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings.*

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*This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," see, note 1, supra, cannot be examined. Power to vacate an award is limited.*

\*\*\*

*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 s 14, note 6, supra, to apply to waiver of judicial trial and review. (FN26)*

\*\*\*

*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.<sup>3</sup>*

Thus the Supreme Court in *Wilko v Swann* legitimized judicial disdain for arbitration even in the face of the United States Arbitration Act in a way that required decades to fix. *Wilko* was later extended by the circuit courts to securities disputes arising out of Section 10(b) of the 1934 Act.<sup>4</sup>

### The Erosion of *Wilko*

A shift away from *Wilko* occurred in *Scherk v Alberto-Culver Co*.<sup>5</sup> An agreement



between an American manufacturer and a German citizen provided that any controversy would be settled by arbitration before the International Chamber of Commerce in Paris. A dispute subsequently arose and the United States firm sought relief in American courts, claiming violations of § 10(b) of the Securities Exchange Act and Securities Exchange Commission (SEC) Rule 10b-5. The German citizen moved for a stay of litigation pending arbitration.

The district court and Court of Appeals, relying on *Wilko*,<sup>6</sup> held that the arbitration clause was unenforceable. The Supreme Court reversed, stating the agreement of the parties to arbitrate should be respected and enforced by the federal courts in accordance with the Federal Arbitration Act (FAA).<sup>7</sup> The Supreme Court eloquently explained:

*An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to*

*repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts. (Citation omitted.)*<sup>8</sup>

The tectonics shifted more decisively with the 1985 Supreme Court decision of *Dean Witter v Byrd*.<sup>9</sup> This decision, which enforced a predispute arbitration clause requiring the arbitration of retail securities claims, forcefully articulated the strong federal policy favoring arbitration, and provided a bedrock for the law of arbitration that has since developed. In *Byrd*, the Supreme Court said that arbitration of state law claims in securities cases is compelled under the FAA<sup>10</sup> when there exists a written agreement to arbitrate between the parties and a request to arbitrate is made. The Court expressly rejected the "doctrine of intertwining" under which the 5th, 9th, and 11th Circuits, in the interest of economy and efficiency, had refused to compel arbitration of arbitrable claims when in the Courts' view arbitrable claims were

"inextricably intertwined with nonarbitrable claims."<sup>11</sup>

In one of the most powerful statements ever made by the Supreme Court in favor of arbitration, the Court held in agreement with the 6th, 7th and 8th Circuits that:

*[T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.*<sup>12</sup>

The policy in favor of arbitration must be very strong indeed if it may overcome so decisively the Court's longstanding policy to promote judicial economy and efficiency.

### **The Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel....**

Further, Justice White, in his concurring opinion, suggested that Rule 10b-5 claims under the Securities and Exchange Act of 1934 may be arbitrable because such claims are implied, not express. In fact, by the time *Byrd* was decided by the Supreme Court, district courts had already ordered arbitration of Rule 10b-5 claims.<sup>13</sup> In the same year, the Supreme Court held that the FAA was designed to alleviate traditional judicial hostility to arbitration and establish a policy in its favor.<sup>14</sup> With *Byrd*, arbitration was beginning to throw off the negative cloak covering it since *Wilko v Swann* and began to realize the promise of arbitration Congress made possible with the 1925 Act.

### **The Final Sweep of Judicial Hostility**

On June 8, 1987, the United States Supreme Court decided *Shearson/American Express, Inc v McMahon*.<sup>15</sup> By a 5-4 vote, the Court held that clauses in securities agreements providing for arbitration of future disputes do not violate the anti-fraud provisions of the 1934 Securities Exchange Act,<sup>16</sup> and are thus enforceable in disputes involving SEC Rule 10b-5.<sup>17</sup> In this same

decision, the Court found unanimously that claims involving violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act<sup>18</sup> are arbitrable.

It was this case that showed, more than any prior case, the apparent tension between the FAA and the federal securities acts. The primary purpose of both the Securities Act of 1933<sup>19</sup> and the Securities Exchange Act of 1934 is the protection of the investing public. Section 14 of the 1933 Act and Section 29(a) of the 1934 Act prohibit any "condition, stipulation, or provision" binding a plaintiff to waive compliance with provisions of the acts and the rules and regulations of the SEC. Under the 1933 Act, investors are provided an express right to a private cause of action for fraud. Under the 1934 Act and Rule 10b-5, investors have an implied right to a private cause of action.

The primary purpose of the FAA is to provide for the enforcement of agreements to arbitrate future disputes and to enforce the awards issued for transactions involving interstate commerce.<sup>20</sup> Some felt that this policy favoring arbitration potentially conflicts with the securities acts when a broker seeks to compel an aggrieved investor to arbitrate based on a pre-existing arbitration agreement between the parties. However, in *McMahon* the Supreme Court found that arbitration provided adequate protection to investors with the oversight of the SEC and this gave the first indications it may overrule *Wilko*.

*Thus, the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time.*

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*Even if Wilko's assumptions regarding arbitration were valid at the time Wilko was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.<sup>21</sup>*

Two years after deciding *McMahon*, the Supreme Court in *Rodriguez de Quijas v Shearson/American Express, Inc.*<sup>22</sup> addressed the open question of the arbitrability of 1933 Act claims, holding that such disputes were indeed capable of resolution by arbitration under a "future disputes" clause. The Court stated:

*The Court's characterization of the arbitration process in Wilko is pervaded by what*

*Judge Jerome Frank called "the old judicial hostility to arbitration."*

\*\*\*

*To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.<sup>23</sup>*

*Wilko* was completely overruled.

### THE REFORM MOVEMENT: A CRITICAL ASSESSMENT BY THE SECURITIES INDUSTRY

Once judicial opinion on the feasibility of arbitration was clearly pronounced and understood in the securities arena, the industry, prompted by investor criticism, took an inward look at its procedures.

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In September 1994, the Board of Governors of the National Association of Securities Dealers, Inc. (NASD), appointed the Arbitration Policy Task Force (commonly referred to as the "Ruder Commission") to evaluate the securities arbitration process administered by the NASD and to suggest possible reforms. In January 1996, a 200-page comprehensive report was introduced.

The "most significant" issues identified were:

- The increased litigiousness in arbitration;
  - The growth in the use of predispute arbitration agreements;
  - The six-year eligibility rule;
  - The use of discovery in arbitration;
- and
- Punitive damages.

The task force believed that many of these issues are causing a stray from a

"model of informal, expeditious and inexpensive dispute resolution." The task force stressed that securities arbitration must provide "clear and significant advantages over the civil litigation system it has replaced."<sup>24</sup>

### Predispute Arbitration Agreements

The task force found that investor and employee representatives were critical of the perceived industry practice of requiring individual investors and prospective employees to sign predispute arbitration agreements before opening an account or obtaining employment. The negative impact of this perceived compulsory arbitration is the focus of the recommendations for change.<sup>25</sup>

Rejection of an outright ban on predispute arbitration clauses was conceded by the task force. It concluded that arbitration, even with its flaws, is preferable to civil litigation. Significantly, it also found that the available statistics do not support the conclusion that industry sponsored arbitration is biased against the investor. Finally, the task force believes that its recommendations are pro-investors.<sup>26</sup>

The language of the predispute agreement was a focus. Proposed changes include:

- Self-Regulatory Organization (SRO) rules as well as arbitration agreements expressly stating that the FAA, and not state arbitration law, governs securities arbitration;
- Predispute arbitration agreements should incorporate uniform language on critical substantive and procedural issues;
- Rewrite agreements in "plain English" and publish in "user friendly" designs; and
- Expand existing disclosures regarding the differences between court litigation and arbitration to include putting the customer on notice regarding time limitations on bringing claims.<sup>27</sup>

### The Six-Year Eligibility Rule

Section 15 of the NASD code imposes a six-year eligibility rule on claims. Unlike many statutes of limitations, the eligibility period is not subject to the doctrines of equitable tolling or estoppel. Nor does the rule extend any applicable statute of limitations.<sup>28</sup>

Problems that the Ruder Commission found with the eligibility rule included: frequent post-claim litigation results; and an increase in litigation results in the NASD

being named as a defendant which drains resources. In the arbitration process itself, the eligibility rule caused problems also in that it lacked definition of the "triggering event" and there was disagreement between industry members and investor representatives regarding who should make the eligibility determination.<sup>29</sup>

The task force recommends that the eligibility rule be suspended for a three-year period and that it be replaced with procedures to allow motions on statute of limitations grounds. In particular, it suggests that the NASD create procedures allowing defendant to move to dismiss on statute of limitations grounds before the merits hearings and that such motions be decided as soon as is practicable. There is a recommendation that Section 6 of the NASD code be amended to preclude a party that has signed a predispute arbitration agreement from seeking court intervention on procedural arbitrability issues until the arbitration is concluded.<sup>30</sup>

In addition, a modified eligibility rule has been adopted by the Securities Industry Conference on Arbitration (SICA) which, after comment, was to be submitted to the SRO rule-making bodies. Under this proposal, the director of arbitration would make the determination of eligibility, the event or occurrence is defined as the trade date, and claims determined to be ineligible for arbitration may be prosecuted in court.<sup>31</sup> SICA, then, has rejected the task force recommendation, but hopes to end the eligibility controversy with its own proposal.

### Punitive Damages

Polarization is wide between investors and the securities industry on the punitive damage issue in securities arbitration.<sup>32</sup> Lack of due process protection is the most prominent argument asserted against the awarding of punitives. The task force came up with a compromise. The report suggests a cap of the lessor of two times compensatory damages or \$750,000. It also would preclude awards of both RICO and punitive damages for the same claim and recommends that punitive damages be available in arbitration to the same extent in court for the same claims. The controlling state law of the investor's state of residence at the time of filing would determine punitive damage availability.<sup>33</sup>

### Discovery

Today, arbitration functions more like truncated litigation. This is because discovery requests have proliferated, and hardball litigation tactics have escalated. Suggestions made by the task force to alleviate this concern are:<sup>34</sup>

- Automatic production of "essential documents" within 45 days of the filing of the respondent's answer;

***The major arbitration forums of the securities SROs have been issuing arbitration awards publicly for seven years—since May 10, 1989.***

- No additional document requests without a showing that they are "reasonably likely to be relevant and important to the resolution of the issues in dispute";
- A limit on the number of information requests similar to that imposed by the Federal Rules of Civil Procedure;

- A ban on depositions except in exigent situations; and

- All discovery disputes would be resolved by the arbitrators, preferably by pre-hearing telephone conference.<sup>35</sup>

Many steps away from implementation, approval is required by the Board of Governors and NASD's National Arbitration and Mediation Committee for action. SICA, the SROS, and SEC will have the final say on which proposals to put into place.<sup>36</sup>

### THE "PUBLIC" VIEW OF ARBITRATION: HOW DO INVESTORS FARE?

One perception perpetuated in connection with securities arbitration is that investors do not fare as well when recovery is achieved. A companion perception is that investors do not prevail as often as in litigation. Both are misperceptions.

The major arbitration forums of the securities SROs have been issuing arbitration awards publicly for seven years—since May 10, 1989. Recently, a customer award survey was conducted.<sup>37</sup> This survey focused on investor disputes with brokerage firms. The survey looks at 10,000 awards involving investor-initiated claims—SRO,

#### SIZE OF CLAIM BREAKDOWN

(With Punitive Award Results)

Investor-Initiated Claims  
SRO, AAA & NFA Awards  
From 5/10/89 to 6/30/95

##### Claim Amount

\$0-10	3,395 awards, 1,683 customer wins, 29 punitive awards at \$238 total
\$10-50	2,309 awards, 1,274 customer wins, 48 punitive awards at \$1,289 total
\$50-100	1,183 awards, 660 customer wins, 33 punitive awards at \$2,572 total
\$100-500	1,653 awards, 991 customer wins, 59 punitive awards at \$13,134 total
\$500-1000	246 awards, 163 customer wins, 10 punitive awards at \$2,070 total
Over 1 Million	189 awards, 118 customer wins, 13 punitive awards at \$8,352 total
Money Not Specified	555 awards, 280 customer wins, 18 punitive awards at \$1,794 total <sup>38</sup>

AAA and the National Futures Association (NFA) awards included.

The chart on page 179 shows the distribution of awards over a seven-year period.

An analysis of the seven-year period (5/10/89 to 6/30/95) showed a steady downward trend in the "customer win" rate.<sup>39</sup> Since this rate corresponds directly with a rise in the settlement rate, it is natural to assume a link. Customer win rates have exceeded 60 percent at some arbitration forums. The General Accounting Office's 1992 study of securities arbitration reported a 59 percent "win" rate for customers at the SRO forums (vs. 60 percent at AAA) and a 60 percent "recovery" rate (vs. 57 percent at AAA).

Arbitrators awarded punitive damages in only about 2.1 percent of the awards. Arbitrators exceeded a punitive-to-compensatory award ratio of 3-to-1 in 12 percent of the punitive damages cases and exceeded a 5-to-1 ratio in only seven percent of such awards. The 2.1 percent average, was spread among awards with claims of all sizes.<sup>40</sup>

The AAA began making securities awards publicly available in May 1993. Only awards filed after that date and filed under the Securities Arbitration Rules are formally subject to the Public Award Program. The Securities Arbitration Commentator (SAC) also publishes awards and statistics. SAC has relied in the past solely upon the statistics released by AAA concerning its securities arbitration program. Today, we can refer to statistics developed from AAA's database of publicly available AAA awards.<sup>41</sup>

**AAA Securities Awards**  
Customer-Initiated Arbitrators Only  
From 5/1/93 to 6/30/95

83 total awards, 58 customer wins  
46 awards w/money claimed,  
32 customer wins<sup>42</sup>

The AAA processes a fairly high ratio of member/customer awards, generally dealing with debit balances. Most of these involve one national brokerage firm, so AAA decided to restrict its survey to customer-initiated arbitrations only—83.<sup>43</sup>

The AAA win rate of 70 percent appears valid for the overall period. It also appears to be settling in a range between 60-70 percent, still well above the win rates for

the major SRO arbitration forums. The AAA "recovery rate" of 44 percent falls in line with the recovery rate (39 percent) shown for all SRO awards on the broker-dealer chart.<sup>44</sup>

Michigan is included as one of the 10 most active states granting securities arbitration awards. New York, California, Florida and Texas lead the list as the chart below shows.

**AWARD ANALYSIS—  
TOP 10 STATES**  
From 5/10/89 to 6/30/95

1. NY 1227 total awards,  
692 customer wins
2. CA 1180 total awards,  
664 customer wins
3. FL 653 total awards,  
399 customer wins
4. TX 273 total awards,  
161 customer wins
8. MI 172 total awards,  
93 customer wins<sup>45</sup>

Despite disparities among the various states, each state seems to stay in character. If it's an option, practitioners' state situs choice may prove to be tactically worthwhile.

Through these survey results, parties and their attorneys may appreciate that the publishing of arbitration awards could contribute to settlement negotiations; better inform of tactical choices; and guide participants' strategic planning.<sup>46</sup>

**THE MOVEMENT TOWARD  
OTHER FORMS OF ADR**

The success of arbitration has triggered intense interest in other ADR methods. Chief among them is facilitative mediation, a process in which a neutral, appointed ei-

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ther by an administrative agency or the parties directly, assists the parties in resolving their dispute on their own terms.

The NASD has implemented a pilot Early Neutral Evaluation (ENE) program, that will be "incorporated into the existing dispute resolution services in 1997." ENE involves a neutral evaluation of the merits of a case. The pilot program encompassed some 25 percent of larger arbitration cases.<sup>47</sup>

Also, effective August 1, 1995, the NASD began a program for voluntary and non-binding mediation of customer disputes. To encourage participation, NASD is waiving fees for pending arbitrations. The mediation rules amend Part IV of the NASD rules, starting with Section 50. Copies may be obtained from any NASD office. The four arbitration offices will also be in charge of mediation.

On the non-SRO side, the AAA also has promulgated mediation rules. The rules were updated and effective August 1, 1994. Any party to an existing securities dispute may ask the AAA to ascertain whether the other party or parties are willing to submit the dispute to mediation. New cases or pending litigation are eligible.<sup>48</sup> A representative of AAA will explain the various dispute resolution techniques and assist the parties in choosing one that meets their needs. Once the AAA has the parties' agreement to submit a dispute to alternative resolution, it will administer the case under its applicable rules or procedures.<sup>49</sup>

Beyond mediation, ADR might take the form of nonbinding arbitration, minitrial, or any variation of these procedures on which the parties agree.<sup>50</sup> Mediators (also arbitrators) selected for this program are qualified, experienced neutrals with an understanding of current legal and business practices in the area of securities. The parties select the neutral best qualified to hear their controversy.<sup>51</sup>

The administrative fees of the AAA and the compensation arrangements for the neutral are set forth in the dispute resolution agreement. Pamphlets containing the

various procedures are available through any AAA regional office.<sup>52</sup>

A party may list a case with the AAA and request that the AAA invite the other party to join in a submission to mediation, as well as other ADR programs. The AAA will, upon request, provide a form to do so. Upon receipt of various requested information, AAA will contact the other party or parties to the dispute. If there is no agreement among the parties to submit the dispute to an ADR procedure, there is no charge to the filing party. If the matter settles as a result of AAA contact with the parties, the filing party will pay a \$150 fee. If there is a submission to an ADR procedure, the fee schedule in the appropriate AAA rules or procedures will apply.<sup>53</sup>



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the American, Michigan, Detroit, Federal and Oakland County Bar Associations, and the American Arbitration Association. He is an arbitrator for the New York Stock Exchange, Inc., National Association of Securities Dealers, American Stock Exchange, Inc. and the Chicago Board Options Exchange. He is also an arbitrator training instructor for these same associations, and mediates for the Wayne and Oakland County circuit and district courts.



Mary A. Bedikian is the regional vice-president of the American Arbitration Association (AAA)—Michigan Regional Office. She has been a member of the adjunct faculty at the University of Detroit Mercy School of Law since 1989 and developed a

model course in ADR that she currently teaches at both U of D and Wayne State University Law Schools. She serves as a volunteer mediator for the 46th District Court in Southfield, and is a member of the pro per employment panel in the United States District Court. She is a member of the State Bar of Michigan and the American, Federal, Oakland County, and Armenian Bar Associations. She is the former chair of the State Bar Section on Alternative Dispute Resolution.

## THE FUTURE OF SECURITIES ADR

Modern technology has and will continue to permeate the securities ADR field. Lawyers specializing in representing investors in arbitration are now located on the Internet. In June, a Florida law firm, Parker, Perlstein and Co., set up the "Internet Center for the Abused Investor" (<http://www.investoraid.com>). An investor may secure from this site information concerning the kinds of complaints commonly filed in arbitration.<sup>54</sup>

In April 1996, the U.S. Supreme Court decided *Doctors Associates v Casarotto*.<sup>55</sup> This ruling clarified the pre-emptive effect of the FAA. In *Casarotto*, the Court held that a Montana law, requiring arbitration clauses to be written in capital letters and underlined on the first page of contracts

**The strong policy favoring arbitration is largely undiminished, and it is likely to remain so for the foreseeable future.**

subject to arbitration, is inconsistent with the FAA because it limits the validity of arbitration agreements and is thus preempted by the Act. According to the Court, Montana's law "places arbitration agreements in a class apart from 'any contract' and singularly limits their validity."<sup>56</sup> *Casarotto* may mean that Michigan's distinction between so-called "statutory" versus "common law" arbitration is on the blocks, because the requirement that to be irrevocable the agreement must state the award may be enforced "in a court of competent jurisdiction," could be considered a limit on the validity of arbitration agreements thereby placing them in a class "apart from 'any contract,'" which *Casarotto* held impermissible.<sup>57</sup>

*Casarotto* is simply more evidence of the very strong policy favoring arbitration as a method of securities dispute resolution enunciated by the U.S. Supreme Court in *Byrd*, *McMahon*, and *Rodriguez de Quijas*. This favored status has led directly to a wider use of other ADR forms, namely early neutral evaluation and facilitative mediation. The strong policy favoring arbitration is largely undiminished, and it is

likely to remain so for the foreseeable future. It therefore seems destined to provide the engine driving growth and wide acceptance of all ADR mechanisms for all securities disputes. ■

### Footnotes

1. 346 US 427, 98 L Ed 168, 74 S Ct 182 (1953).
2. Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation, or provisions binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."
3. 346 US 436-438.
4. See, e.g., *Allegaert v Perot*, 548 F2d 432 (2d Cir NY 1977), cert denied, 432 US 910 (1977).
5. 417 US 506, 41 L Ed 2d 270, 94 S Ct 2449 (1974).
6. 346 US 427.
7. *Scherk* at US 520, 521, S Ct 2457, LEXIS 23, no L ED 2d.
8. *Scherk* at US 519, S Ct 2457, LEXIS 21, 22, no L ED 2d.
9. 470 US 213, 84 L Ed 2d 158, 105 S Ct 1238 (1985).
10. 9 USC 1 et seq.
11. 470 US 216-217.
12. *Id.*
13. See *Niven v Dean Witter Reynolds, Inc*, Fed Sec L Rep (CCH) P 92059 (M D Fla 1985); *mot. granted, in part, mot. denied, in part, Niven v Dean Witter Reynolds, Inc*, Fed Sec L Rep (CCH) P 92257 (M D Fla 1985) and *Walch v Dean Witter Reynolds, Inc*, Fed Sec L Rep (CCH) P 92060 (M D Fla 1985).
14. *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 87 L Ed 2d 444, 105 S Ct 3346 (1985); *later proceeding, Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 814 F2d 844 (1st Cir P R 1987).
15. 482 US 220, 96 L Ed 2d 185, 107 S Ct 2332 (1987).
16. 15 USC 78j(b).
17. 17 CFR 240.106-5.1.
18. 18 USC 1961 et seq.
19. 15 USC 77a et seq.
20. *Allied-Bruce Terminix Cos, Inc v Dobson*, 130 L Ed 2d 753, 1995 US LEXIS 689, 115 S Ct 834 (US 1995) (holding that the "involving commerce" phrase of the FAA extends the FAA's reach to the limits of Congress' Commerce Clause power).
21. 482 US 233.
22. 490 US 477, 104 L Ed 2d 526, 1989 US LEXIS 2397, 109 S Ct 1917 (1989).
23. 490 US 480-481.
24. Orrick, Herrington & Sutcliffe, January 30, 1996, Memorandum to Our Clients & Friends regarding Ruder Commission

## Lawyers and Judges AA/NA Groups MEETING DATES

**Monday 12:00 PM**  
St. Joseph Hospital East  
Bailey Room A  
Parkview and North Streets  
Mt. Clemens

**Monday 12:30 PM**  
Detroit Bar Association  
3rd Floor, Buhl Building  
Detroit

**Monday 6:30 PM**  
Freeland United Methodist Church  
205 E. Washington  
(Across the street from post office)  
Freeland

**Monday 7:00 PM**  
Prince of Peace Lutheran Church  
19100 Ford Road  
Ford Road (Altar Road)  
(Just west of Southfield Freeway)  
Dearborn

**Wednesday 12:00 PM**  
First Presbyterian Church  
(Conference Room—Lower Level)  
321 W. South St.  
Kalamazoo

**Wednesday 6:00 PM**  
Kirk In The Hills Presbyterian Church  
1340 West Long Lake Road  
(½ mile west of Telegraph)  
Bloomfield Hills

**Wednesday 6:00 PM**  
Unitarian Church  
2474 South Ballenger Road  
Lower Level, Room 2C  
(1 block south of Miller Road)  
Flint

**Thursday 8:00 PM**  
Central Methodist Church, 2nd Floor  
Corner of Capitol and Ottawa Streets  
Lansing

**Lawyers and Judges Counseling Helpline**  
**1-800-996-5522**

Report (Task Force regarding Securities Arbitration Procedures).

25. *Id.* at 2.
26. *Id.* at 2.
27. *Id.* at 2, 3.
28. *Id.* at 3.
29. *Id.* at 3.
30. *Id.* at 3.
31. See SEC ARB COMMENTATOR, Vol VIII, No 5, pp 1-7 (9/10/96).
32. *Mastrobuono v Shearson Lehman Hutton, Inc.*, 131 L Ed 2d 76, 1995 US LEXIS 1820, 115 S Ct 1212 (US 1995); *remanded without op.*, *Mastrobuono v Shearson Lehman Hutton, Inc.*, 54 F3d 779, 1995 US App LEXIS 18511 (7th Cir Ill 1995); *reported in full*, *Mastrobuono v Shearson Lehman Hutton, Inc.*, 1995 US App LEXIS 11297 (7th Cir Ill, May 15, 1995).
33. *Id.* at 4.
34. *Id.* at 4, 5.
35. *Id.* at 5.
36. *Id.* at 5.
37. Richard P. Rynder, *Public Customer Award Survey: The First 10,000 Awards*, SEC ARB COMMENTATOR, May, 1996 at 1.
38. *Id.* at 4.
39. "Customer win" rate and "customer recovery" rate terms are used often. Customer win rate compares the total number of awards to those in which the claimant prevails. It also is one in which the customer-claimant was granted some monetary award by the arbitrator(s). Thus, a survey sample of 1,000 awards that discloses 500 awards in which the claimant prevailed has a 50 percent customer win rate. Comparing the amount won with the losses claimed is also important. It establishes the average recovery rate. All awards through 1995 are included.
40. *Id.* at 4.
41. *Id.* at 8.
42. *Id.* at 9.
43. *Id.* at 8.
44. *Id.* at 9.
45. *Id.* at 5.
46. *Id.* at 1. Note: For more detailed charts and analysis see the complete article, Richard P. Rynder, *Public Customer Award Survey: The First 10,000 Awards*, SEC ARB COMMENTATOR, May, 1996 at 1.
47. *Id.*
48. AAA Securities Mediation Rules at 5.
49. *Id.* at 5.
50. *Id.* at 5.
51. *Id.* at 6.
52. *Id.* at 6.
53. *Id.* at 6.
54. WORLD ARB & MED REPORT, Vol 6, No 8, Aug 1995.
55. 134 L ED 2d 902, 1996 US LEXIS 3244, 116 S Ct 1652 (1996).
56. *Id.* at 910.
57. *Id.*

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