1994

Arbitration - The Third Circuit Re-Examines Its Traditional Approach to Adjudication of ERISA Claims

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As a private means of resolving disputes, arbitration is an inexpensive and efficient alternative to traditional judicial proceedings. 1 Although arbitration has been widely used in the collective bargaining context, 2 its use for adjudicating federal statutory claims has been the subject of extensive debate. 3


2. See 29 U.S.C. § 171 (1988) (Labor Relations Management Act). The Labor Relations Management Act, the current law regarding unions and collective bargaining, sets forth its position on alternative methods of dispute resolution in its declaration of purpose and policy:

   It is the policy of the United States that . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes.

Id.

3. See Leo Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 Hastings L.J. 299, 303 (1987) (stating that most significant concern with arbitration is importance of “preserving the role of institutions that have been entrusted with the task of promulgating and interpreting behavioral norms and are ultimately responsible to the public for the manner in which they discharge those tasks”); Edward M. Morgan, Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question, 60 S. Cal. L. Rev. 1059, 1077 (1987) (stating that some, but not all, suits arising under federal statutory claims are suitable for arbitration). But see Edward Brunet, Questioning the Quality of Alternative Dispute Resolution, 62 Tul. L. Rev. 1, 18-19 (1987) (discussing recent Supreme Court jurisprudence favoring arbitration of federal statutory claims). See generally Robert C. Castle & Paul Lansing, Arbitration of Labor Grievances Brought Under Contractual and Statutory Provisions: The Supreme Court Grows Less Deferential to the Arbitration Process, 21 Am. Bus. L.J. 49 (1983) (analyzing Supreme Court’s waning deference to findings and awards of labor arbitrators).
The Federal Arbitration Act\(^4\) (Act or Arbitration Act) authorizes arbitration of claims arising out of contracts affecting interstate commerce.\(^5\) The purpose of the Act, as indicated in its legislative history, is to avoid the delay and expense of litigation.\(^6\) Despite congressional authorization to arbitrate under the Act, courts precluded federal statutory claims from arbitration due to the Supreme Court's concern that arbitral forums were not suited to handle complex statutory disputes affecting substantive rights.\(^7\) One such area where substantial litigation has occurred\(^8\)


5. Id. Section 2 explains the validity, irrevocability and enforceability of agreements to arbitrate, stating that

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2.

6. H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). The House Report states that "[t]he bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple, . . . reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties." H.R. Rep. No. 96. Likewise, the Senate report states, in pertinent part, that "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. . . . The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 536.

7. See Wilko v. Swan, 346 U.S. 427, 438 (1953) (holding that claims arising under § 12(2) of Securities Act of 1934, 15 U.S.C. § 77l(2) (1988), are not subject to compulsory arbitration). The Supreme Court's distrust of arbitration, as articulated in Wilko, constituted the law regarding arbitration of federal statutory claims until 1987. The Court stated:

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," . . . cannot be examined. Power to vacate an award is limited . . . . In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.

Id. at 435-37 (citations omitted).

8. See, e.g., Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1122 (3d Cir. 1993) (holding statutory violations of ERISA subject to agreements to arbitrate); Graphic Communications Union v. GCIU, 917 F.2d 1184, 1188 (9th Cir. 1990) (holding arbitration clause valid where claim involves interpretation of plan, and not ERISA claim per se); Bird v. Shearson Lehman/Am. Express,
is the arbitrability of claims arising from statutory violations of the Employee Retirement Income Security Act (ERISA).\textsuperscript{9} Congress enacted ERISA, the federal law governing employee benefit plans,\textsuperscript{10} to assure

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For an overview of ERISA decisions in the circuit courts, see \textit{infra} note 72.

10. 29 U.S.C. §§ 1001-1145. Congressional enactment of ERISA officially preempted state law concerning the regulation of employee benefit plans. \textit{Id.} § 1144(a). Congressional intent to preempt state legislation in this area is made explicit in § 514 of ERISA. Section 514 reads, in pertinent part:

(a) \textit{Supersede; effective date}

Except as provided in subsection (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in 1001-1169. Of this subchapter, §§ 1001-1003 are comprised of findings, definitions and coverage provisions. Sections 1021-1145 consist of substantive regulations and limitations of coverage. Specifically, §§ 1021-1031 concern reporting and disclosure; §§ 1051-1061 govern participation and vesting; §§ 1081-1086 deal with funding; §§ 1101-1114 concern the role of fiduciaries; and §§ 1131-1145 apply to administration and enforcement. 29 U.S.C. §§ 1001-1145.
that the financial interests of employee pensions are adequately safeguarded.\(^\text{11}\)

The rules governing ERISA are quite complex.\(^\text{12}\) In fact, the complex nature of the statute has led to much debate as to whether statutory ERISA claims are suitable for arbitration or whether such disputes require a judicial forum.\(^\text{13}\) For example, the United States Court of Appeals for the Third Circuit in \textit{Barrowclough v. Kidder, Peabody & Co.}\(^\text{14}\) had previously held that statutory violations of ERISA were \textit{not} subject to arbitration.\(^\text{15}\) The Supreme Court, however, recently held in favor of arbitration for some violations of other federal statutes.\(^\text{16}\) In light of these decisions, the

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For an overview of ERISA decisions in the circuit courts, see \textit{infra} note 72, § 1003(a) of this title and not exempt under § 1003(b) of this title. This section shall take effect on January 1, 1975. 29 U.S.C. § 1144(a).


12. For a list of commentators who provide discussion explaining the complexities of ERISA, see \textit{infra} note 25.

13. For a listing of notable cases regarding arbitrability of ERISA claims, see \textit{supra} note 8.


15. \textit{Barrowclough}, 752 F.2d at 939-40.

Third Circuit re-evaluated the Barrowclough decision in Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.\(^{17}\) and now holds that statutory ERISA claims are subject to arbitration under the Act.\(^{18}\)

This Casebrief discusses the Third Circuit's approach to arbitration, analyzes the Pritzker decision, and considers the future ramifications in the Third Circuit for arbitration of statutory violations of ERISA. Part II discusses the evolving view of the United States Supreme Court concerning arbitration of federal statutory claims.\(^{19}\) Part III initially considers the Third Circuit's general approach to arbitration and then turns to its specific approach to arbitration of statutory ERISA claims.\(^{20}\) Part III also reviews the effect that some recent Supreme Court decisions have had in shaping the Third Circuit's view of arbitration.\(^{21}\) Finally, Part IV focuses on the impact the Pritzker decision will have on those seeking remedies in the Third Circuit for ERISA violations.\(^{22}\)

II. THE SUPREME COURT'S EVOLVING VIEW OF ARBITRATION

While some circuits have considered the issue, the Supreme Court has yet to rule on whether ERISA claims are subject to arbitration.\(^ {23}\) The Court has, however, made rulings on the validity of arbitration for disputes arising under other federal statutes. Specifically, the Court has focused on securities and employment discrimination claims.\(^ {24}\) These decisions are particularly useful in predicting how the Supreme Court will evaluate ERISA arbitration claims because ERISA involves both employee rights and certain aspects of securities law arising out of pension fund agreements.\(^ {25}\)

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17. 7 F.3d 1110 (3d Cir. 1993).
19. For a discussion of the Supreme Court's evolving view, see infra notes 23-71 and accompanying text.
20. For a discussion of the Third Circuit's approach to arbitration generally and, specifically, its approach to arbitration of statutory ERISA claims, see infra notes 72-99 and accompanying text.
21. For a discussion of the effect of some recent Supreme Court decisions on the Third Circuit's view of arbitration, see infra notes 100-21 and accompanying text.
22. For a discussion of the impact Pritzker will have on those seeking remedies in the Third Circuit for ERISA violations, see infra notes 122-42 and accompanying text.
23. See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1116-21 (3d. Cir. 1993) (applying Supreme Court decisions that upheld arbitration of other federal statutory claims because no Supreme Court case yet has addressed whether ERISA claims are subject to arbitration). For a discussion of analogous Supreme Court cases concerning arbitration, see infra notes 27-71 and accompanying text.
24. For a discussion of these rulings, see infra notes 27-71 and accompanying text.
While at one time the Court disfavored arbitration, these cases reflect the Court's recent approval of arbitration as an effective and efficient means of dispute resolution.26

The Supreme Court first considered the validity of arbitration of federal claims in Wilko v. Swan.27 In Wilko, a customer brought an action against a securities brokerage firm to recover damages under the anti-fraud provision of the Securities Act of 1933 (1933 Act).28 Several agreements between the parties contained stipulations to arbitrate all future disputes.29 The Wilko Court considered the validity of these arbitration agreements in light of language in the 1933 Act that appeared to require a judicial forum.30 Because the language of the statute explicitly mentioned a judicial forum, the Court found that the arbitration clauses contravened the clear intent of the statute and were, therefore, unenforceable.31


26. For a discussion of the prevailing Supreme Court view of arbitration in the McMahon and Rodriguez decisions, see infra notes 37-54 and accompanying text.
28. Wilko, 346 U.S. at 428. The anti-fraud provision contained in § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2) (1988) (1933 Act), provides that any person sell[ing] a security . . . which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements not misleading . . . shall be liable to the person purchasing such security from him . . . to recover the consideration paid for such security with the interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.
29. Wilko, 346 U.S. at 429-30. At the trial level, the respondent moved to stay the proceedings pursuant to § 3 of the Federal Arbitration Act in order to compel arbitration as stated in the margin agreements. Id. at 429. The district court denied the motion, holding that such an agreement to arbitrate denied petitioner of the judicial forum protections provided in the 1933 Act. Id. at 430 (citing Wilko v. Swan, 107 F. Supp. 75, 79 (1952)). A divided court of appeals determined that the 1933 Act did not prohibit arbitration and reversed. Id. (citing Wilko v. Swan, 201 F.2d 439, 445 (1953)).
30. Id. at 430-35. Construed together, the language of § 14 and § 22 of the 1933 Act appears to require a judicial forum. Section 14 provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1988). Section 22 of the Act provides that "[t]he district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a) (1988). Given this language, the Court required a judicial forum. Wilko, 346 U.S. at 430.
31. Id. at 434-35.
The Wilko Court stated that the right to select a judicial forum was the type of provision that could not be "waived." The Court viewed arbitration as an inadequate means for resolving statutory disputes. The majority presumed that arbitral tribunals could not handle complex statutory matters and that the streamlined procedures of arbitration negatively affected the plaintiff's substantive rights. Furthermore, the Wilko Court feared that the arbitrators would not follow judicial precedent because the Arbitration Act did not require the arbitrators to give reasons to support their findings. In the wake of the Wilko decision, arbitration agreements were generally disfavored as a means of dispute resolution for statutory claims.

Soon after deciding Wilko, the Court modified its decision when it decided Shearson/American Express, Inc. v. McMahon. In McMahon, the Court addressed whether claims arising under the anti-fraud provisions in section 10(b) of the Securities Exchange Act of 1934 (1934 Act) and the

32. Id. at 435. The Court reasoned that Congress intended buyers of securities under the Act to be placed on a different footing than other purchasers that may be subject to arbitration:
When the security buyer, prior to any violation of the [1933] Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the [1933] Act places upon his adversary.

Id.

33. Id. at 435-37.
34. Id.
35. Id. at 436.
36. See, e.g., De Lancel v. Birr, Wilson & Co., 648 F.2d 1255, 1258-59 (9th Cir. 1981) (holding member of Pacific Stock Exchange cannot be compelled to arbitrate federal securities claims); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 827-29 (10th Cir. 1978) (holding arbitration clauses void where federal securities laws were concerned); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 833-35 (7th Cir. 1977) (holding that absent presence of international concerns, arbitration agreement void and unenforceable with respect to claim arising under Rule 10b-5 of Securities Exchange Commission); Allegaert v. Perot, 548 F.2d 492, 436-38 (2d Cir.) (holding bankruptcy trustee could not be compelled to arbitrate claims under securities laws and Bankruptcy Act), cert. denied, 432 U.S. 910 (1977); Sibley v. Tandy Corp., 543 F.2d 540, 543 (5th Cir. 1976) (finding that federal securities law claims are not arbitrable), cert. denied, 434 U.S. 943 (1977).


38. 15 U.S.C. § 78j(b) (1988). Section 10(b) states:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
Racketeer Influenced and Corrupt Organizations Act (RICO) were subject to arbitration. The McMahon Court distinguished Wilko, stating that Wilko did not hold that arbitration was inadequate in all circumstances. Rather, the McMahon Court read Wilko to hold that waiver of a judicial forum is barred only where arbitration is inadequate to protect the substantive rights in question.

In McMahon, the Court held that Congress did not intend the 1934 Act to require a judicial forum for resolution of securities law claims. Although the underlying policies of the 1934 Act were substantially similar to those of the 1933 Act articulated in the Wilko case, the McMahon Court did not find the reasoning of Wilko dispositive. Thus, although the two

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id. § 1962(c). Section 1964(c) authorizes treble damages for those injuries to business or property as a result of unlawful activity under the statute. Section 1964(c) provides: "(c) Any person injured to his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover treble the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Id. § 1964(c). The McMahon Court concluded that neither the "district court" provision of § 1964, nor anything in the legislative history of the statute precluded arbitration of RICO claims. McMahon, 492 U.S. at 288. Further, the Court determined that no conflict existed between arbitration and RICO's underlying purpose. Id. at 299. Therefore, arbitration could exist as an acceptable means of dispute resolution for RICO claims. Id. at 242.

41. Id. at 228-29.
42. Id.
43. Id. at 227. The Court rejected the argument that Congress intended to preclude arbitration in § 29(a) of the 1934 Act, which declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." Id. (quoting 15 U.S.C. § 78cc(a) (1988)). Plaintiff McMahon argued that the provision compelling arbitration waived compliance of § 27 of the 1934 Act. Id. Section 27 provides, in pertinent part:

"The district courts of the United States ... shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." Id. (quoting 15 U.S.C. § 78aa (1988)).

44. McMahon, 492 U.S. at 228.
statutory provisions applied in each case were nearly identical, the Supreme Court reached opposite conclusions, thereby signaling a shift towards arbitration.

Incidentally, the McMahon decision marked a change in the Court's view of arbitration. Specifically, the McMahon Court recognized the Federal Arbitration Act's policy favoring arbitration and held that this policy should not be diminished merely because a party to an agreement raised a claim based on statutory rights. Moreover, the McMahon Court stressed that although the Federal Arbitration Act's mandate may be overridden by congressional demand, the burden is on the party against arbitration to prove that Congress precluded a waiver of a judicial forum for the particular statutory rights in question.

In 1989, two years after the decision in McMahon, the Supreme Court finally overruled Wilko in Rodriguez de Quijas v. Shearson/American Express Inc. Rodriguez addressed the same issue confronted in Wilko whether claims arising under the 1933 Act were subject to arbitration. However, the Rodriguez Court concluded that the reasons articulated in Wilko in favor of prohibiting arbitration were no longer sound. Although the Wilko Court had justified its interpretation of the 1933 Act based on an "old judicial hostility to arbitration," the Rodriguez Court no longer could justify the competing rationales of Wilko and McMahon merely because they were based on two slightly different securities laws. Thus, the Supreme Court now stands in favor of arbitration—at least in the area of securities law.

45. Id. at 238.
46. Id. at 226.
47. Id.
48. Id.
50. Id. at 482. Particularly, the Rodriguez Court rejected the Wilko Court's reasoning that § 14 of the 1933 Act nullified arbitration agreements because such an agreement "waive[s] compliance with any provision" of the Securities Act. 15 U.S.C. § 77n (1988); Rodriguez, 490 U.S. at 480.
51. Rodriguez, 490 U.S. at 480 (quoting Judge Jerome Frank in Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).
52. Id. at 477.
53. Id. at 486. The Court noted:
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.

Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act . . . .

Id. at 481.
While commentators have interpreted both McMahon and Rodriguez to favor arbitration for a broad array of statutory claims, the Supreme Court has been reluctant to allow arbitration for all statutory claims. For example, the Supreme Court has held that claims arising under Title VII of the Civil Rights Act of 1964 and § 1983 of the Civil Rights Act of 1871 are not subject to arbitration agreements. However, the


55. For a discussion of cases not allowing arbitration for statutory claims, see infra note 59.


57. 42 U.S.C. § 1983 (1988). Section 1983 provides, in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

58. See McDonald v. City of West Branch, 466 U.S. 284 (1984) (holding § 1983 claim not subject to arbitration); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding Title VII claim not subject to arbitration). In Alexander, the Supreme Court held that an African-American employee could challenge his termination under a Title VII claim in federal court, even though an arbitrator under the collective bargaining agreement upheld his termination “for cause.” Alexander, 415 U.S. at 42-43. The Alexander Court, while affirming arbitration as the method to resolve labor disputes arising under the collective bargaining agreement, rejected arbitration as a method to resolve Title VII disputes. Id. at 55-56. The Court’s decision was based primarily on three conflicts of interest that labor arbitrators would experience in Title VII claims. Id. First, the labor arbitrator must “effectuate the intent of the parties rather than the requirements of enacted legis-
Supreme Court has cast doubt on these holdings by remanding circuit court cases in these areas.\textsuperscript{59} The Supreme Court currently appears to favor arbitration of employment discrimination claims, as evidenced by its recent decision in \textit{Gilmer v. Interstate/Johnson Lane Corp.}\textsuperscript{60} In \textit{Gilmer}, the Court held that some claims arising under the Age Discrimination in Employment Act (ADEA)\textsuperscript{61} are subject to arbitration.\textsuperscript{62} Gilmer's employer, Interstate, required Gilmer to sign a registration agreement with the New York Stock Exchange which provided for arbitration of any employment dispute.\textsuperscript{63} After working with the company for seven years, Gilmer, then

\begin{footnotesize}
\begin{enumerate}
\item See Dean Witter Reynolds, Inc. v. Alford, 500 U.S. 930, 930 (1991) (vacating and remanding Fifth Circuit decision finding Title VII claims exempt from arbitration agreements). On remand, the Fifth Circuit reconsidered its former position and concluded that Title VII claims were subject to arbitration. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991). For a discussion of Bird v. Shearson Lehman/Am. Express, Inc., 871 F.2d 292 (2d Cir. 1989), a Second Circuit ERISA decision similarly vacated and remanded by the Supreme Court after precluding arbitration of the statutory claim involved therein, see \textit{infra} note 72.
\item For a discussion of the Supreme Court's holding in \textit{Gilmer}, favoring arbitration for ADEA claims, see \textit{infra} notes 62-68 and accompanying text.
\item \textit{Gilmer}, 500 U.S. at 35.
\item \textit{Id.} at 23. The registration agreement provided for arbitration of "\textit{any} controversy ... arising out of the employment or termination of employment of such registered representative." \textit{Id.} Such an agreement appears to be in direct conflict with § 1 of the Federal Arbitration Act, which prohibits arbitration of disputes arising out of employment contracts. 9 U.S.C. § 1 (1988). For the pertinent text of the statute, see \textit{infra} note 116. The Court addressed this potential conflict in footnote two of its opinion. \textit{Gilmer}, 500 U.S. at 25 n.2. The Court reasoned that § 1 of the Federal Arbitration Act was inapplicable because the arbitration clause
\end{enumerate}
\end{footnotesize}
sixty-two years old, was fired by Interstate.\textsuperscript{64} As a result of his dismissal, Gilmer filed suit alleging age discrimination, and Interstate moved to compel arbitration based on the registration agreement signed by Gilmer.\textsuperscript{65}

In its decision, the Supreme Court stated that parties are permitted to agree to arbitrate ADEA claims.\textsuperscript{66} In making its determination, the Court held that arbitration did not conflict with the fundamental social policies the ADEA outlined because arbitrators would be knowledgeable of the law and enforce the provisions of the statute.\textsuperscript{67} Therefore, because the Supreme Court trusted the statutory knowledge of the arbitrators, the requirement to adjudicate violations of statutory rights in a judicial forum was largely eviscerated.

Although the Gilmer decision gives a strong indication of the Supreme Court's view of arbitration under the ADEA, the validity of arbitration for other employment claims is not yet clear.\textsuperscript{68} ERISA is unique because it addresses both securities issues and employment law issues.\textsuperscript{69} While the

\begin{itemize}
\item in question was not contained in a contract for employment. \textit{Id.} Rather, Gilmer's arbitration clause was contained in a contract with the securities exchange, not with his employer, Interstate/Johnson Lane Corporation. \textit{Id.} Therefore, the Court stated that it would "leave for another day" whether a claim arising in an employment contract would violate §1 of the Federal Arbitration Act. \textit{Id.}
\item \textit{Gilmer}, 500 U.S. at 23.
\item \textit{Id.} at 24. The district court denied the employer's motion to compel arbitration, basing its decision on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). \textit{Id.} For a discussion of Alexander, see \textit{supra} note 58. On appeal, the Fourth Circuit reversed, stating that there is "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." \textit{Id.} (quoting Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990)).
\item \textit{Gilmer}, 500 U.S. at 35. In making its determination, the \textit{Gilmer} Court rejected the argument that the EEOC's enforcement role would be diminished with arbitration. \textit{Id.} at 28. The Court also distinguished the Alexander case which rejected arbitration for a Title VII claim. \textit{Id.} at 33-34. The Court reasoned that Alexander addressed whether arbitration of a contractually-based claim precluded subsequent judicial determination of statutory claims. \textit{Id.} Because the Alexander decision arose in a collective-bargaining context, and was not decided under the Federal Arbitration Act, the Court did not find the case controlling. \textit{Id.}
\item \textit{Id.} at 29. In rejecting the argument that arbitration would be inconsistent with the social policies of the ADEA, the Court analogized it to claims arising under other statutes which have been subject to arbitration. \textit{Id.} The Court stated:
\begin{quote}
The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under these statutes are appropriate for arbitration. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."
\end{quote}
\textit{Id.} at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 687 (1985)).
\item For a discussion of the differing positions the Supreme Court has taken on the arbitrability of employment claims, see \textit{supra} notes 59-67 and accompanying text.
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\item For a discussion of the differing positions the Supreme Court has taken on the arbitrability of employment claims, see \textit{supra} notes 59-67 and accompanying text.
\item For citations that provide a general overview of ERISA, see \textit{supra} note 25.
arbitrability of securities claims has been recognized,\textsuperscript{70} the issues concerning the arbitration of employment-related claims have not been conclusively settled by the Supreme Court.\textsuperscript{71} Therefore, the issue of whether arbitration is permitted under ERISA has been left for the federal circuit courts to decide.

\section*{III. The Third Circuit's Approach to Arbitration}

After \textit{McMahon} and \textit{Rodriguez}, various circuit courts of appeals have addressed ERISA litigation, with the majority of the circuits holding that ERISA claims are proper subjects of arbitration.\textsuperscript{72} Historically, the Third

\textsuperscript{70} For a discussion of the arbitrability of securities claims, see supra notes 38-53 and accompanying text.

\textsuperscript{71} For a discussion of the arbitrability of employment-related claims, see supra notes 59-68 and accompanying text.


In \textit{Sulit}, the United States Court of Appeals for the Eighth Circuit examined both the legislative history of ERISA and the Supreme Court's decision in \textit{McMahon} to hold that agreements to arbitrate pension funds were valid. 847 F.2d 475, 477-79 (8th Cir. 1988). Sulit, Inc. engaged Dean Witter to maintain the Sulit, Inc. pension plan, agreeing to mandatory arbitration over any dispute arising out of the pension fund agreement. \textit{Id.} at 476. In its reasoning, the \textit{Sulit} court viewed claims regarding pension funds under ERISA as substantially similar to anti-trust claims, which were subject to arbitration in \textit{McMahon}. \textit{Id.} at 477. Therefore, the Eighth Circuit enforced the validity of arbitration agreements for ERISA-based claims. \textit{Id.}

The Second Circuit's decision in \textit{Bird} v. Shearson Lehman/American Express, Inc. is particularly helpful in understanding how the Supreme Court would decide the issue of ERISA-based arbitration, if the issue were to come before the Court. 871 F.2d 292 (2d Cir. 1989). The Second Circuit in \textit{Bird} held that an arbitration clause under an ERISA-covered plan conflicted with the language in ERISA that provided for "ready access to the federal courts." \textit{Bird}, 871 F.2d at 296. The Second Circuit construed that phrase to mean that "Congress envisioned the federal courts as the central forum for enforcement of ERISA." \textit{Id.} at 297. Because of this language, the Second Circuit concluded that Congress intended ERISA to be exempted from the Federal Arbitration Act and any agreements to arbitrate. \textit{Id.} at 295-97.

The Supreme Court, however, after examining the Second Circuit's decision in \textit{Bird}, remanded the case for the Second Circuit to reconsider its ruling in light of the \textit{Rodriguez} decision. Bird v. Shearson Lehman/Am. Express, Inc., 493 U.S. 884 (1989). On remand, the Second Circuit held that the ERISA mandate of "ready access to federal courts" did not inherently conflict with the mandatory arbitration clause in question. Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116, 120-22 (2d Cir.), \textit{cert. denied}, 111 S. Ct. 2891 (1991). The Second Circuit interpreted \textit{Rodriguez} to mean that arbitration agreements should be enforced absent proof that: (1) the statute explicitly prohibited arbitration; or (2) the purpose of the statute conflicted with an agreement to arbitrate. \textit{Id.} at 119. Thus, although the Supreme Court has not spoken on the issue of ERISA-based arbitration, it has indicated how it would decide a case with facts similar to \textit{Bird}. See Joseph R. Simone, \textit{ERISA and Arbitration: Where Are We?}, in \textit{820 Securities Arbitration 1993: Products, Procedures, and Causes of Action} 171 (Practicing Law Institute, July-Aug. 1993) (providing general discussion of \textit{Bird} and its implications).
Circuit has not favored arbitration for resolution of federal statutory claims.\textsuperscript{73}

For example, prior to \textit{McMahon} and \textit{Rodriguez}, the Third Circuit held in \textit{Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.}\textsuperscript{74} that claims arising out of the anti-fraud provisions of the 1934 Act were \textit{not} subject to arbitration.\textsuperscript{75} The issue proposed in \textit{Jacobson} was whether arbitration provisions in brokerage transaction agreements are enforceable under the Arbitration Act.\textsuperscript{76} The \textit{Jacobson} court relied on both the Supreme Court decision in \textit{Wilko} and Third Circuit precedent\textsuperscript{77} to find that arbitration was improper.\textsuperscript{78} Although the Supreme Court in \textit{McMahon} overruled the \textit{Jacobson} decision when it subjected claims arising out of the 1934 Act to arbitration,\textsuperscript{79} the opinion in \textit{Jacobson} illustrates the Third Circuit’s reluctance to recognize arbitration agreements.\textsuperscript{80} In fact, the language used in the \textit{Jacobson} opinion suggests that the Third Circuit would not change its opinion of arbitration unless specifically mandated by the Supreme Court.\textsuperscript{81}

Before the Supreme Court decisions in \textit{McMahon} and \textit{Rodriguez}, the Third Circuit first addressed whether statutory ERISA claims were subject to arbitration in \textit{Barrowclough v. Kidder, Peabody & Co.}\textsuperscript{82} In \textit{Barrowclough},

\textit{McMahon}, \textit{Rodriguez}, see \textit{Amaro v. Continental Can Co.}, 724 F.2d 747 (9th Cir. 1984). In \textit{Amaro v. Continental Can Co.}, the Ninth Circuit held that a claimant is not required to exhaust arbitration procedures for contractual grievances for statutory violations of ERISA. \textit{Id.} at 752. In \textit{Amaro}, employees alleged that company officials laid off personnel in order to prevent them from obtaining the requisite years of service to qualify for the pension plan. \textit{Id.} at 748. The Ninth Circuit reasoned that in enacting ERISA, Congress created statutory rights independent of any collectively bargained rights. \textit{Id.} at 749. The \textit{Amaro} court held that because ERISA provided claimants with “ready access to federal courts,” such a right could not be foreclosed by a contractual arbitration agreement. \textit{Id.} at 750.

\textit{Jacobson}, 797 F.2d at 1201-02.

\textit{Jacobson} court stated: “The Ayres opinion [which applied the Wilko rule to claims under the 1934 Act] . . . binds this panel unless we can conclude that it has been overruled by subsequent Supreme Court cases.” \textit{Id.} (citations omitted) (footnote omitted).

\textit{McMahon}, 797 F.2d at 1201 (rejecting argument that recent Supreme Court jurisprudence was signaling shift away from authority of Ayres in Third Circuit).

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\textit{Ayres opinion [which applied the Wilko rule to claims under the 1934 Act] . . . binds this panel unless we can conclude that it has been overruled by subsequent Supreme Court cases.” \textit{Id.} (citations omitted) (footnote omitted).
the Third Circuit expressed its disfavor of arbitration by holding that claims arising under ERISA were not subject to arbitration. Barrowclough, a former employee of the defendant, brought suit to enforce the terms of an unfunded deferred compensation plan and sought damages and attorney's fees under ERISA. The Third Circuit distinguished contractually-based pension claims from claims arising under statutory violations of ERISA. The Barrowclough court held that, while contractually-based claims may be subject to arbitration, claims arising from statutory violations are to be brought in federal court notwithstanding an agreement to arbitrate. The court stated that the provisions of ERISA contain a complex and evolving body of federal law designed to be enforced by the federal courts. Arbitration would hinder a uniform interpretation of ERISA claims because arbitrators are not bound to follow the law or precedent and may base their decisions on the contractual provisions at stake, rather than on federal statutory law. For these reasons, the Barrowclough court held that pension claims arising out of ERISA could not be addressed outside a judicial forum. The Third Circuit's reluctance to enforce arbitration for federal statutory claims, ERISA or otherwise, remained the state of the law in the Third Circuit until 1993.

Even after the Supreme Court's opinions in McMahon and Rodriguez, the Third Circuit continued to disfavor arbitration for other federal statut-

83. Id. at 941.
84. Id. at 926-27.
85. Id. at 939-41. The Barrowclough court noted the distinctions between contractually-based rights and statutory rights arising under a federal protective statute such as ERISA when it stated: "While courts could defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers". Id. at 940 (quoting Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737 (1981)).
86. Id. at 941.
87. Id. at 940-41; see also 29 U.S.C. § 1001(b) (1988). Section 29 provides, in pertinent part:
(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries
It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.
29 U.S.C. § 1001(b) (emphasis added).
88. Barrowclough, 752 F.2d at 941.
89. Id. Barrowclough's claims, which were independent of alleged violations of substantive provisions of ERISA, were held arbitrable, but those claims that arose under substantive provisions of ERISA were to be addressed in a judicial forum. Id. at 939-41.
90. For a discussion of how the Frasher decision changed the law, see infra notes 100-42 and accompanying text.
tory claims. For example, in *Nicholson v. CPC International, Inc.*, the Third Circuit held that claims arising under the ADEA were not subject to arbitration. Nicholson, an attorney for CPC International, signed an executive employment contract which provided for arbitration of any controversy arising under the contract. When Nicholson was told that his position was being eliminated due to corporate restructuring, Nicholson alleged age discrimination and filed claims under the ADEA. Pursuant to the provisions of Nicholson’s employment contract, CPC moved to compel arbitration of the ADEA claim, a motion which the district court later denied. On appeal, the Third Circuit examined the text and legislative history of the ADEA, as well as the underlying purpose of the statute. While the Third Circuit did not find the text and the legislative history conclusive of whether arbitration should be allowed, it did find that the enforcement provisions of the ADEA conflicted with mandated arbitration. It reached this conclusion despite the view expressed by the Supreme Court in *McMahon* that the Federal Arbitration Act establishes a “federal policy favoring arbitration.” Thus, the Third Circuit is not in-

91. 877 F.2d 221 (3d Cir. 1989).
92. Id. at 230-31.
93. Id. at 222-23. The contract provided, in pertinent part:
Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration, conducted before a panel of three arbitrators in New York City in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrators’ award in any court having jurisdiction. The expense of such arbitration shall be borne by the Company.

94. Id.
95. *Nicholson*, 877 F.2d at 223. Judge H. Lee Sarokin, in denying the motion to compel arbitration, relied on his previous decision in Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543 (D.N.J. 1987). *Nicholson*, 877 F.2d at 223. In *Steck*, Judge Sarokin held that the text and history of the ADEA evidenced Congress’ intent to preclude arbitration. *Steck*, 661 F. Supp. at 547 (stating that court has examined the ADEA’s legislative history, as well as that of the civil rights statutes upon which it was closely modeled, and has discerned a Congressional intent to preclude waiver of judicial remedies under the ADEA”). Judge Sarokin also stated that the Supreme Court’s decision in *McMahon* did not alter the *Steck* holding. *Nicholson*, 877 F.2d at 223.
97. Id. at 227. Specifically, the *Nicholson* court found as determinative the Equal Employment Opportunity Commission’s (EEOC) obligation to enforce the ADEA. Id. Because an employee is required to file a charge of discrimination with the EEOC before any court action can be taken, the *Nicholson* court stated that there would be little incentive for employees to file charges if they could not subsequently litigate their cases in court. Id. Furthermore, Congress’ intent behind the filing requirement was to document alleged cases of discrimination so as to gather information for future recommendations to Congress. Id. If arbitration were allowed, few cases would be reported by an employee, thus frustrating congressional intent. Id.
clined to automatically validate an arbitration agreement, but instead, will look to the text, history, and purpose of the statute in question to determine whether arbitration should be permitted.99

In 1993, the Third Circuit re-examined ERISA issues in Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.100 Despite its stance against arbitration, the Third Circuit in Pritzker held that statutory violations under ERISA were subject to arbitration.101 In Pritzker, Pritzker and others,102 as trustees of a pension and profit sharing plan,103 sued Merrill Lynch104 under ERISA for breaches of fiduciary duty.105 Merrill Lynch moved to compel arbitration based on the Arbitration Act and the arbitration clause contained in the Cash Management Agreements.106 The district court de-

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99 While the Nicholson opinion is instrumental in understanding the Third Circuit's reluctance to enforce agreements to arbitrate, the Nicholson decision was overruled by the Supreme Court decision in Gilmer which held that claims arising under the ADEA are arbitrable. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 95 (1991). Therefore, Nicholson should only be read from a historical perspective and not as a current interpretation of the state of the law in this area. For a discussion of Gilmer, see supra notes 60-68 and accompanying text.

100 7 F.3d 1110 (3d Cir. 1993).

101 7 id. at 1115-16.

102 Id. at 1112. Plaintiffs, the Trustees of the Penn Electric Supply Company Profit Sharing Plan, consisted of Eli Pritzker, Sol Cooperstein and Jack Levin. Id.

103 Id. The pension plan was created for the benefit of the employees of the Penn Electric Supply Company, Northeast Electric Supply Company, Coatesville Electric Supply Company, M & G Electric Supply Company and Doylestown Electric Supply Company. Id. All of the aforementioned companies were co-plaintiffs in the suit. Id.

104 Id. The defendants to the appeal included Merrill Lynch, Pierce, Fenner & Smith, Inc.; Belinda P. Stewart (the financial consultant and investment purchaser to the Accounts) and Merrill Lynch Asset Management, Inc. Id.

105 Id. at 1113. In Count One, the Trustees alleged that defendants breached their fiduciary duties by purchasing investment fund units without approval. Id. In Count Two, the Trustees alleged that Merrill Lynch Asset Management, Inc. was liable for defendants' violations because they "knowingly" credited the transactions to the accounts. Id. In Count Three, the Trustees alleged that the investment purchases violated § 406 of ERISA because Stewart, the financial consultant, received a sales commission on the transaction. Id.; see also ERISA § 406, 29 U.S.C. § 1106 (1988). Section 406 of ERISA states, in pertinent part:

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Id. § 1106(b).

106 Pritzker, 7 F.3d at 1113.
nied the motion to compel based on its decision in Barrowclough. The Third Circuit Court of Appeals, however, reversed the district court and found that Barrowclough was inconsistent with recent Supreme Court jurisprudence.

The Third Circuit interpreted McMahon and Rodriguez to hold that the concerns enunciated in Barrowclough disfavoring arbitration were no longer applicable. First, the Third Circuit reasoned that arbitration of ERISA claims would not stifle judicial development of the law because not all pension fund agreements contain arbitration clauses. The Pritzker court analogized this case to Gilmer, where the Supreme Court permitted arbitration under the ADEA. The Gilmer Court stated that judicial development of the ADEA would not be hampered by arbitration because "it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." Therefore, the Pritzker court found no reason to conclude that the judicial development of ERISA would be hindered by an agreement to arbitrate.

Second, the Pritzker court stated that an asset management agreement between trustees and a brokerage firm is not an employment contract that would be exempt from arbitration under § 1 of the Arbitration Act. The Third Circuit, therefore, distinguished the "Cash Management Agreements" in question from employment contracts:

The Cash Management Agreements did not implicate workplace conditions, terms of employment or other topics ordinarily covered by employment contracts. Moreover, there was no management-labor relationship between the defendants and the plan

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107. Id.

108. Id. at 1112, 1118-21. This Casebrief focuses on the second issue decided by Pritzker. Whether statutory ERISA claims are subject to arbitration. See id. at 1113 ("[W]e must . . . decide whether their statutory ERISA claims are subject to arbitration despite our holding in Barrowclough."). The Pritzker court addressed two other issues: (1) whether the Trustees agreed to arbitrate the claims (i.e. whether the arbitration clause was valid) and (2) whether the claim was subject to arbitration even though neither Stewart nor Merrill Lynch Asset Management signed the arbitration agreement. Id. For a discussion of the validity of the arbitration clause, see Pritzker, 7 F.3d at 1114-15. For a discussion of the signatories to the clause, see Pritzker, 7 F.3d at 1121-22.

109. Id. at 1117-20.

110. Id. at 1119.

111. Id. at 1119-20; see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25, 35 (1991) (allowing arbitration for ADEA claim). For a discussion of Gilmer, see supra notes 60-68 and accompanying text.

112. Gilmer, 500 U.S. at 32.

113. Pritzker, 7 F.3d at 1119.

114. Id. at 1119-20; see also Federal Arbitration Act, 9 U.S.C. § 1 (1988) (providing, in pertinent part, that "nothing herein contained shall apply to contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce").
beneficiaries; instead, their relationship . . . was a common one between a brokerage firm and its clients.\textsuperscript{115}

Because of these differences, § 1 of the Arbitration Act did not preclude disputes arising out of the asset management agreements from arbitration.\textsuperscript{116}

Third, the \textit{Pritzker} court distinguished its facts from certain Supreme Court cases that permitted litigation of employment discrimination claims\textsuperscript{117} "despite the completion of arbitral proceedings."\textsuperscript{118} The Third Circuit noted that these cases differed from \textit{Pritzker} in that they did not arise under the Arbitration Act, but rather arose in a collective bargaining context.\textsuperscript{119}

Finally, the Third Circuit dismissed the notion that arbitrators would not follow ERISA law simply because the Arbitration Act does not require arbitrators to set forth the basis of their ruling.\textsuperscript{120} The court stated that this concern was based on a distrust of arbitration, a position to which the Supreme Court no longer adheres.\textsuperscript{121}

\section*{IV. \textit{Pritzker}: Its Implications for Those Practicing in the Third Circuit}

To practitioners in the Third Circuit, the \textit{Pritzker} opinion signals a reversal by the Third Circuit from its prior holdings against arbitration.\textsuperscript{122} Those practitioners favoring the enforcement of arbitration clauses can make strong arguments that \textit{Pritzker} should be broadly interpreted to encompass many, if not all, statutory claims arising under an agreement to arbitrate.\textsuperscript{123} However, given the Third Circuit's general disfavor of arbitration, those practitioners favoring a narrower interpretation of \textit{Pritzker} also may legitimately support their attempts to require a judicial forum.\textsuperscript{124}

\textsuperscript{115} \textit{Pritzker}, 7 F.3d at 1120.
\textsuperscript{116} Id.
\textsuperscript{117} For a discussion of the cases in which the Supreme Court has permitted litigation instead of arbitration, see supra note 58.
\textsuperscript{118} \textit{Pritzker}, 7 F.3d at 1120.
\textsuperscript{119} Id. at 1120-21.
\textsuperscript{120} Id. at 1121.
\textsuperscript{121} Id.
\textsuperscript{122} For a discussion of prior Third Circuit holdings against arbitration, see supra notes 74-99 and accompanying text.
\textsuperscript{124} For a discussion of the Third Circuit's position on arbitration agreements, see supra notes 74-99 and accompanying text.
The Pritzker court noted that it overruled Barrowclough based on the Supreme Court's trend and the "current strong federal policy" favoring arbitration.\textsuperscript{125} Given the Third Circuit's prior reluctance to impose arbitration, however, it is possible that the Third Circuit does not share the Supreme Court's approval of arbitration for a wide array of statutory claims.\textsuperscript{126} While the Third Circuit is bound to follow Supreme Court precedent, the Third Circuit may distinguish a case which factually does not fall within the confines of a previous Supreme Court decision. For example, the Supreme Court has never addressed whether statutory violations arising out of employment contracts are subject to arbitration.\textsuperscript{127} If, for instance, a claim arose which alleged an ERISA violation in a contract of employment, the case would be one of first impression for the Third Circuit. Given the clear language of § 1 of the Arbitration Act prohibiting arbitration of violations arising out of employment contracts,\textsuperscript{128} the Third Circuit could hold that a judicial forum is required.

Indeed, the Pritzker court contemplated such a fact pattern in a footnote of the opinion.\textsuperscript{129} The footnote provides: "[i]n contrast to this case, certain types of statutory ERISA claims may arise in such a fashion or may so implicate employees' rights that they come within the provision of the Federal Arbitration Act which precludes arbitration of contracts of employment." \textsuperscript{130} Furthermore, in the text of the opinion, the Pritzker court was careful to point out that the arbitration clauses in question were not contained in employment contracts, but were contained in separate "asset management agreements between the Trustees and the brokerage firm which agreed to manage plan funds." \textsuperscript{131} Therefore, arbitration may not

\textsuperscript{125} Pritzker, 7 F.3d at 1115-16. The court noted its reluctance in overruling Barrowclough:

We commend the district court judge for faithfully adhering to this circuit's precedent in applying Barrowclough despite his understandable inclination to compel arbitration given the current strong federal policy favoring this method of resolution. We are likewise mindful that the doctrine of stare decisis counsels reluctance when we are confronted with a situation calling for the internment of a precedent; however, we have not hesitated to act when we discover that our decisions have fallen out of step with current Supreme Court jurisprudence.

\textit{Id.} at 1115. The court further mentions in footnote five of the opinion that Barrowclough is overruled only with regard to the arbitration of statutory claims: "Barrowclough remains the law of this circuit in other respects . . . ." \textit{Id.} at 1115 n.5.

\textsuperscript{126} For a discussion of the Third Circuit's prior approach to arbitration, see supra notes 74-99 and accompanying text.

\textsuperscript{127} See Gilmer v. Intersate/Johnson Lane Corp, 500 U.S. 20, 25 n.2 (1991) (stating that it would "leave for another day" decision of whether claims arising under employment contracts violate § 1 of Federal Arbitration Act).

\textsuperscript{128} For pertinent language of § 1 of the Federal Arbitration Act, see supra note 114.

\textsuperscript{129} See Pritzker, 7 F.3d at 1112 n.1 ("[T]his opinion should not be read to require arbitration of statutory ERISA claims in all instances. . . . We do not address, for example, labor or any other bargaining process . . . .").

\textsuperscript{130} Id.

\textsuperscript{131} Id. at 1120.
be proper for an ERISA claim that arises out of a provision in an employment contract or "so implicate[s] employees' rights" that arbitration would be improper.

Another way to limit the Pritzker decision would be to argue that the legislative history shows an intent not to arbitrate. In the legislative history of ERISA, the Senate version contained a section allowing for arbitra-

132. Although arbitration may be improper under the Federal Arbitration Act, which excludes arbitration of employment contracts, at least one scholar notes that state law may still have some role in enforcing arbitration agreements. See Perritt, supra note 25, § 7.10 (Supp. 1993) (finding choice-of-law clause in arbitration agreement that applies state law is not preempted by Federal Arbitration Act (citing Thompson McKinnon Securities, Inc. v. Cucchiella, 594 N.E.2d 870, 873 (Mass. App. Ct. 1992))).

133. Pritzker, 7 F.3d at 1112 n.1.

134. See H.R. 4200, 93d Cong., 1st Sess. (1973), reprinted in 2 Senate Comm. on Labor and Public Welfare, Legislative History of Employee Retirement Income Security Act of 1974, at 1883, 2096-98 (1976) (outlining arbitration provision). The Senate version of ERISA, as outlined below, provided for arbitration, while the current version does not. Id. This fact lends credence to the idea that Congress may have intended to preclude arbitration as a method of dispute resolution under ERISA. The arbitration section of the Senate version provides, in pertinent part:

SEC. 691 ARBITRATION; CIVIL ACTIONS BY PARTICIPANTS AND BENEFICIARIES.

(a) Arbitration Procedure—Each employee pension benefit plan subject to this part shall provide—

(1) a procedure for the fair and just review under the plan of any dispute between the administrator of the plan and any participant or beneficiary of the plan, and

(2) an opportunity, after such review and a decision by the administrator (or a failure to make a decision within a reasonable period of time by the administrator), for the arbitration of such disputes.

(b) Civil Actions—A participant or beneficiary of such a plan may bring a civil action in accordance with the provisions of section 693 of this Act in lieu of submitting the dispute to arbitration under the plan.

(c) Alternative Procedures—If a dispute under a plan is subject to procedures established by collective bargaining for the resolution of such dispute, the Secretary of Labor, upon written request by a plan administrator, may waive the application of subsections (a), (b), and (e) to such dispute if he determines that the procedures provided for are reasonably fair and effective.

(d) Application of Law Relating to Section 301 of Labor Management Relations Act, 1947—
The arbitration of disputes in accordance with the requirements of this section, and judicial proceedings relating thereto, shall be governed by the laws, decisions, and rules applicable to the arbitration of disputes under section 301 of the Labor Management Relations Act, 1947.

(e) Payment of Arbitration Costs—The cost of any arbitration proceedings required under this section (including arbitrators' fees) shall be paid by the plan under which the dispute arises, unless the arbitrator determines that a participant's or beneficiary's allegations are frivolous and assesses all or a portion of such cost to that party.

(f) Information and Assistance—The Secretary shall inform participants and their beneficiaries under plans to which this part applies of
tion between the plan administrator and any participant. The current version of ERISA contains no such arbitration section. At least one commentator has recognized that the deletion of the arbitration section may be "a message from Congress to the courts that ERISA confers rights which may not be precluded from the judicial forum."

However, most commentators do not give much weight to the proposed arbitration section in the Senate version of ERISA and, therefore, have found no textual or legislative history precluding arbitration. More importantly, the Pritzker court did not mention this portion of legislative history, but instead, cited general statements of the legislative purpose to hold that Congress did not intend to preclude arbitration. Indeed, while the proposed arbitration section is useful in determining congressional intent, it is possible that the arbitration section was deleted because Congress thought the broad scope of the Federal Arbitration Act would cover ERISA claims. Therefore, while the legislative history is not

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their rights under this part. The Secretary is authorized to furnish assistance to such participants and their beneficiaries in obtaining such rights.

(g) The Secretary shall prescribe rules and regulations necessary to carry out this action.

Id.

135. For the legislative history of ERISA, see supra note 134.

136. ERISA, 29 U.S.C. §§ 1001-1461 (1988); see also Brice, supra note 123, at 175 (noting deletion of arbitration provision in current version of ERISA).

137. Brice, supra note 123, at 175.

138. See, e.g., Shell, supra note 37, at 558 ("ERISA's legislative history provides even less support than the statute's text for an FAA [Federal Arbitration Act] exception."). Shell does not mention the proposed arbitration section, but instead cites to a conference report that references § 301 of the Labor-Management Relations Act. Id.; see also H.R. CONF. REP. NO. 1280, 99th Cong., 2d Sess. 327 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5107 (stating that all ERISA actions "in Federal or state courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under § 301 of the Labor-Management Relations Act of 1947"). Earlier cases referenced this conference report as evidencing congressional intent to limit arbitrability in cases under the Federal Arbitration Act. Shell, supra note 37, at 558-59; see also Bird v. Shearson Lehman/ Am. Express, Inc., 871 F.2d 292, 297-98 (2d Cir. 1989) (examining similarities between legislative histories of ERISA and Labor-Management Relations Act and concluding that violations of both acts are to be resolved within judicial forum); Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 936 & n.12 (3d Cir. 1985) (same), overruled by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110 (3d Cir. 1993). However, Shell dismissed the inference that the conference report showed congressional intent to limit arbitration. Shell, supra note 37, at 559. Shell states: "[w]hatever light this language may shed on the arbitration of claims in the labor context, a review of the entire passage demonstrates that it is far from a clear statement on arbitration under the FAA." Id.

dispositive of the issue, it may provide a starting point in limiting the arbitration of ERISA claims.

Although the Pritzker holding may be limited to certain defined circumstances, the Third Circuit will nonetheless be impacted by an increase in the number of arbitration agreements contained within ERISA plans and by an increase in the amount of claims taken to arbitration. While some plaintiffs may fear that arbitration proceedings award lower damages than would be awarded in a judicial forum, this concern is unfounded for two reasons. First, under ERISA, damages are contract-based, making the amount awarded to a plaintiff consistent, regardless of whether damages are awarded in an arbitration or judicial proceeding. Moreover, punitive damages and damages for emotional distress or mental suffering are generally not recoverable under ERISA, thus further quashing any added incentive to enter the judicial forum. Second, the text of ERISA is silent on whether a jury trial is available under the statute, which has led most courts of appeals to hold that no such right to a jury trial exists. Therefore, because ERISA provides for neither punitive damages, nor a jury trial, the incentives for a judicial forum are not particularly strong. Combine these factors with the efficiency of an arbitral forum, which may provide a remedy within a matter of months rather than years, and arbitration becomes a viable alternative for dispute resolution of statutory ERISA claims.

V. CONCLUSION

The Pritzker decision, holding in favor of arbitration, signals a significant departure from past Third Circuit jurisprudence. This shift is buttressed by strong Supreme Court precedent favoring arbitration of federal statutory claims. While practitioners can still make a sound argument for limiting arbitration in certain contexts under Pritzker, the advantages of arbitration warrant a broad interpretation of the decision to afford ERISA beneficiaries an inexpensive, efficient alternative for the resolution of their claims.

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140. See PERRITT, supra note 25, § 3.37 (explaining contractual nature of damages under ERISA).
141. Id.
142. Id. § 7.11.