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APPLYING THE WILKO DOCTRINE'S ANTI-ARBITRATION POLICY IN COMMODITIES FRAUD CASES

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Courts have long endorsed private arbitration as an alternative to litigation. Congress has taken an equally strong stance in support of arbitration, as evidenced by its passage of the United States Arbitration Act. Despite arbitration's generally favored status, for public policy reasons the United States Supreme Court's 1953 decision in Wilko v. Swan exempted cases involving Securities Act violations from the federal arbitration statute's reach. Recognizing the vital public interests promoted by similar federal protective legislation, courts have broadened

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1. See, e.g., Scherk v. Alberto-Culver Co., 417 U.S. 506, reh'g denied, 419 U.S. 885 (1974) (arbitration agreements are valid, irrevocable, and enforceable). In an effort to allow contract parties to avoid the costliness and delays of litigation, courts have recognized that arbitration of non-anti-trust or non-securities claims should be mandated, and the antitrust or securities claims stayed where the arbitrable claims permeate the case and the antitrust or securities claims are weak, peripheral, or secondary. See, e.g., Applied Digital Tech., Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978).


the Wilko rule and prohibited arbitration of federal antitrust, securities exchange, bankruptcy, patent, and RICO claims as against public policy.

A question has arisen in recent years as to whether and under what circumstances the Wilko doctrine should be extended to the commodities field. The majority of courts confronted with this issue before 1982 refused to apply Wilko to void commodities futures contract arbitration clauses on the basis that the Commodity Futures Trading Commission Act and its statutory precursors were not sufficiently analogous to antitrust, securities, and other public-oriented protective legislation. In 1982, Congress amended the commodities statute to sanction arbitration in most cases, a decision that seemed to reject the anti-arbitration holding in Wilko. Unfortunately, the scope and effectiveness of the 1982 legislation's arbitration mandate remain in doubt.

This article examines the impact of the commodities statute's 1982 arbitration provisions. As background, a description of affected commodities market participants is provided to illustrate the relationships


9. For a discussion of extending the Wilko doctrine to the commodities field, see notes 115-122 infra and accompanying text.

governed by typical arbitration agreements. This description is followed by a review of the historical development of commodities futures market regulation. The United States Arbitration Act and the origin and progeny of the Wilko doctrine's anti-arbitration exception in non-commodities cases are then discussed. After examining the Wilko doctrine's applicability to commodities futures contracts before 1982, this article next notes certain problems created by the different language found in the commodities statute's 1982 arbitration amendments. The article then explores whether the 1982 arbitration enactments preclude Wilko arguments based on antitrust, securities, and RICO claims predicated on underlying commodities transactions. Because the current commodities arbitration provisions do not appear to preempt antitrust, securities, and RICO actions, legislative solutions are offered.

The Commodities Futures Market

Roles and Strategies of Market Participants

Generally, there are two classes of customers trading in commodities futures contracts—hedgers and speculative investors. While

11. The term "commodity" includes the following: wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill reeds, butter, eggs, solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soy bean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soy beans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and other goods. 7 U.S.C. § 2 (1982).

12. Every aspect of the futures contract is standardized except price. Leist v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980). Standardization also makes the contracts fungible. Id. Commodity futures contracts are transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market, exchange, or board of trade. 7 U.S.C. § 2 (1982). Commodity futures contracts have also been defined as bilateral executory agreements for the purchase and sale of a particular commodity. See Leist v. Simplot, 638 F.2d at 283. For a discussion of futures contracts, see Fishman, Commodities Futures: An Introduction For Lawyers, 65 Chi. Bar Record 306 (1984).


14. Speculators are individuals who assume the risk of price fluctuations without a corresponding interest in the cash market. Fishman, supra note 12, at 313. A speculator's role in the markets is to take the risks that the hedger is unwilling to accept. The profit opportunity makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market because the composite bids and offers of large numbers of individuals tends to broaden a market. The broadened market allows the larger trade hedging orders to be executed with minimum price fluctuations. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to
either class of customer can be a buyer\textsuperscript{15} or seller of futures contracts,\textsuperscript{16} only hedgers produce and process the underlying commodity.\textsuperscript{17}

Commodities producers hedge against anticipated price declines in the cash market\textsuperscript{18} by entering into equivalent\textsuperscript{19} short\textsuperscript{20} futures contracts for the month in which they expect to sell their physical commodities. In contrast, commodities processors hedge\textsuperscript{21} against anticipated price increases by going long\textsuperscript{22} for the month in which they expect to purchase the commodities. Hedgers thus use the futures market to lock in future prices as insurance\textsuperscript{23} against unfavorable price fluctuations. As a result, losses caused by cash market declines in the producer’s case, or by price

the floor broker’s inability to find an equally large but opposing hedge order at the same price to complete the match. \textit{1974 House Report}, supra note 13, at 138.

\begin{itemize}
\item 15. A buyer commits himself to accept delivery of the commodity and pay the agreed price. Leist v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980).
\item 16. A seller of a futures contract commits himself to deliver the commodity at a fixed date in the future. 1 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud \S 4.6 (421) (1979); \textit{See 1974 House Report}, supra note 13, at 130.
\item 18. In occasional instances, however, people do use futures trading as an alternative market for the physical commodity. \textit{1974 House Report}, supra note 13, at 132. Delivery is made through the clearinghouse by transfer of warehouse receipts or rights to loaded freight cars and then transported according to the purchaser’s instructions. Cargill, Inc. v. Hardin, 452 F.2d 1154, 1157 (8th Cir), cert. denied, 406 U.S. 932 (1971).
\item 19. The cash market is the open forum where sellers and purchasers distribute the actual, physical commodity. Leist v. Simplot, 638 F.2d 283, 288 (2d Cir. 1980). A cash transaction means the actual purchase or sale of a commodity—as when a farmer sells grain to a grain elevator or the elevator operator sells to a miller. Fishman, supra note 12, at 308.
\item 20. The producer sells an amount of futures contracts equivalent to the amount of tangible commodity he expects to produce. For example, a wheat farmer who anticipates harvesting 5,000 bushels of wheat would sell a commodity future contract equivalent to 5,000 bushels of wheat.
\item 21. A customer who has sold a futures contract, someone committed to deliver the commodity in the future, is said to be in a “short” position. Leist v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980).
\item 23. While hedging performs an insurance function, it is actually quite different from insurance. Unlike typical insurance, the risks faced by those dealing in the cash market, the market for the actual commodity, are not spread among those similarly situated. Rather, the risks in the cash market are shifted to customers in the futures market. Bianco, \textit{The Mechanics of Futures Trading:}
increases in the processor's case, are offset by profits earned in futures transactions.24

The commodities exchange system would not function, however, if only hedgers sold and purchased commodities futures contracts.25 Speculative investors, with no underlying interest in the cash market, are essential to assume the risks hedgers seek to shift.26 While speculators and hedgers are distinct in theory, there actually is no clear line of demarcation between them in practice. Hedgers frequently do not merely balance their cash market risks in the futures market, but engage in some speculation as well—buying or selling futures contracts based on price expectations.

Domestic and international investor interest in expanding commodities markets has sparked a host of creative new financial futures contracts.27 Newly created contracts have consisted of precious metals, petroleum, Eurodollars, Government National Mortgage Association commitments, and other sophisticated instruments. With the development of those new markets and products, the Commodity Futures Trading Commission ("CFTC") has attempted to ensure investor protection. The CFTC's efforts, however, sometimes have been thwarted by unscrupulous exchanges, brokers, and sales representatives.


24. Except when delivery is actually taken, a short and a long must liquidate their positions prior to the closing of trading in the particular futures contract by purchasing opposite contracts to offset their positions. Leist v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980). A short must purchase an equal number of long contracts; a long must sell an equal number of short contracts; Id. Although the means by which this is done is routinely referred to as futures trading, futures contracts are not "traded" in the normal sense of the word. Rather, they are formed and discharged. Clark, Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act, 27 EMORY L.J. 1175, 1176 (1978). If during the contract holding period the price of the contract future declined, usually because of market events, the short will realize a profit; if the contract future price has risen, the long will realize a profit. See Cargill v. Hardin, 452 F.2d 1154, 1157 (8th Cir.), cert. denied, 406 U.S. 932 (1971) (discussion of price movement).

25. As a general rule, "for a market to be broad enough to be efficient and to accommodate the extremely large orders that come in from time to time from dealers and commercial firms, 50 to 75 percent of the open interest and volume of trading must come from speculators—this is essential to sustain a viable market." Johnston, Understanding the Dynamics of Commodity Trading: A Success Story, 35 BUS. LAW. 705, 709 (1980).

26. Speculators are essential to the market. They provide transactions which add liquidity and enable hedgers to enter the market at any time instead of waiting until another hedger wants to take an opposite position. Fishman, supra note 12, at 313. 1974 House Report, supra note 13, at 138. As other commentators have noted, Congress has recognized that the speculator is what makes the commodity futures market work. BRONBERG & LOWENFELS, supra note 16, at § 4.6 (462).

27. For a discussion of international commodities transactions, see Markham & Bergin, The Role of the Commodity Futures Trading Commission in International Commodity Transactions, 18 GEO. WASH. J. INT'L L. & ECON., 581 (1985).
Customer Losses Caused by Fraud

Because this article focuses principally on fraud charges arising out of commodities transactions, a brief review of common fraud situations provides helpful background for understanding how such claims arise. One of the most frequently recurring problems concerns misrepresentations as to the nature of commodities trading and the risks attending it. For example, overzealous sales representatives may exaggerate the profits or minimize the risks associated with commodities trading. In some instances, investment policies and goals are misrepresented. In other instances, market mechanics, costs, fees, and the nature of the investment may be distorted or simply not disclosed. And in more extreme cases, high-pressure "boiler room" sales campaigns are undertaken through unsolicited mailings and telephone calls to induce hasty and unsuitable commodities investments.

Another recurring problem is churning. Churning refers to excessive trading by brokers to generate commissions and fees for themselves rather than profits for their customers. Whether churning has occurred depends on a variety of factors, including market conditions, commission size, and customer sophistication. Churning can be difficult to prove and affects sophisticated and unsophisticated investors alike.

Fraud claims extend to a variety of areas beyond misrepresentations and churning. Some of the more noteworthy examples are price manipulation, unallocated trades, and unauthorized transactions. This


31. See, e.g., Myron v. Hauser, 673 F.2d 994 (8th Cir. 1982).


38. See, e.g., Lincoln Commodity Services, v. Meade, 558 F.2d 469 (8th Cir. 1977); Haltmier v. Commodity Futures Trading Comm'n, 554 F.2d 556 (2d Cir. 1977); Herman v. T. & S. Commod-
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sketch of fraud problems is intended to be merely illustrative rather than exhaustive.

When a customer's investment results in a loss due to fraud, the customer is understandably and justifiably distraught. The customer's recourse, however, may be quite limited if a commodities agreement containing an arbitration clause was signed when the customer opened the account. To appreciate fully the significance and propriety of this limitation on a customer's recourse, it is important to consider the role Congress assigned arbitration in the overall commodities market regulatory scheme.

Regulatory Background


39. The Code of Federal Regulations requires a customer's consent to arbitration be voluntary; 17 C.F.R. § 180, 3(b)(4) (1984). Normally, a customer separately signs both the commodity agreement and the included arbitration clause of that agreement.

40. Each exchange is required to establish an arbitration procedure for customers who have claims or grievances against any member of the contract market; 7 U.S.C. § 7(a)(1) (1982). This procedure is a distinct and separate customer grievance procedure from the reparations proceedings administered by the Commodity Futures Trading Commission. Fishman, supra note 12, at 323.


42. In 1922, Congress passed the Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 998 (codified as amended at 7 U.S.C. §§ 1-23 (1982)). The purpose of the Grain Futures Act was to prevent and remove obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges. The constitutionality of the Grain Futures Act under the commerce clause power was sustained in Chicago Board of Trade v. Olsen, 262 U.S. 1, 31-40 (1923).


44. The Grain Futures Act was actually the second congressional attempt to enact a comprehensive regulatory statute with respect to trading in agricultural commodities. The first comprehensive statute was the Futures Trading Act of 1921. Pub. L. No. 67-66, 42 Stat. 187 (1921). The principal provisions of the original Act were immediately declared invalid in Hill v. Wallace, 259 U.S. 44, 63-69 (1922), on the ground that the Act was a congressional attempt to regulate by means of the taxing power. Shortly after the decision in Hill, Congress enacted the Grain Futures Act, which was substantially similar to the Future Trading Act, but based on the commerce clause of the Constitution. See Chicago Board of Trade v. Olsen, 262 U.S. 1, 31-40 (1923) (constitutionality sustained).

45. The supply of commodity goods and demand of processors' dictated the market conditions until the early part of the twentieth century. See generally A. SCHLESINGER, JR., THE COMING OF
eled by economic stagnation, threatened the viability of unorganized commodities markets. In an attempt to bolster prices, commodities futures contracts were recognized. As the practice of trading in futures contracts developed, boards of trade were organized.

The New Deal, 27-84 (1959) (President Roosevelt created new restraints on supply and demand in the agriculture industry during his famous first 100 days in office); A. Smith, The Wealth of Nations, 47-59 (1789) (regulation is unnecessary, impractical, and dangerous); for a discussion of laissez-faire and the savings and loan industry, see Note, FSLIC Federal Receivership Appointments For Allegedly Insolvent State Savings and Loan Associations: A Plot To Federalize State Savings and Loans Against Their Will? Telegraph Savings and Loan Association v. Schilling, 33 DePaul L. Rev. 783 (1984) (when regulation becomes necessary, active judicial review is necessary to check overzealous regulators).

46. Prior to futures contracts, agricultural products were sold at central markets. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 756 U.S. 353, 357-58 (1982). At these central markets, price was adversely affected by temporary local commodity gluts or scarcities. Irwin, Legal Status of Trading in Futures, 32 Ill. L. Rev. 155, 158 (1937). There was a strong tendency to have a disastrous post-harvest price depression as supply gluts vastly exceeded demand. Id. at 159. In 1937 for example, well over 50% of the U.S. wheat surplus was marketed by farmers in the first four months of the crop year, July to October. Id. at 158. Prior to the technological advancements in wheat storage existing in 1937, even greater percentages of crops went immediately to market after harvest.


48. See generally, A. Schlesinger, Jr., The Coming of the New Deal, 27-84 (1959) (organizing commodities markets).

49. Trading in wheat futures contributes to the marketing of wheat in the following ways: (1) it aids in price determination; (2) it assists in the handling of the heavy after-harvest movement; (3) it makes hedging possible; (4) it provides quotations suitable for wide dissemination; (5) it permits arbitrage; (6) it promotes the maintenance of price structure in tributary areas; (7) it provides for a continuous market; and (8) it results in some chance of ownership on futures contracts. Irwin, supra note 46, at 157.

50. Futures trading evolved from the system of "time contracts" developed during the late 19th century. Campbell, supra note 17, at 215. The Chicago Board of Trade was the first exchange in the United States to recognize trading in grain futures as a distinct commercial practice. I. Taylor, History of the Chicago Board of Trade of the City of Chicago, 146, 192, 317 (1917). Despite its humble birth, the Chicago Board of Trade is the United States' largest futures exchange, averaging 300,000 contracts valued at nearly $30 billion changing hands daily. Frank, Bobby Goldberg is Out to Jazz Up an "Old Gray Lady," Bus. Wk., Mar. 4, 1985, at 100.

51. At one time, the time honored attitude had been that futures contracts are gambling contracts if, at the making of the agreements, the parties did not intend to make and receive delivery on the contracts. Irwin, supra note 46, at 155; for a detailed treatment of this doctrine see Taylor, Trading in Commodity Futures—A New Standard of Legality?, 43 Yale L.J. 63 (1933). Speculation in commodity futures has, at times, been invectively attacked, see Campbell, supra note 17, at 219, n.17. It is currently a well settled issue that a speculator's role as gambler is needed in futures markets to provide liquidity. See supra notes 25-26 and accompanying text.

52. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 358 (1982). At organized exchanges, standardized agreements covering specific quantities of graded agricultural commodities to be delivered during specified months in the future were bought and sold pursuant to rules developed by the traders themselves. Id. The exchanges developed standard terms describing the quantity and quality of the commodity, the time and place of delivery, and the method of payment; the only variable was price. Id. See Irwin, Evolution of Futures Trading, 83-85 (1954) (establishing the early futures trading regulations). Under different conditions from grain, but with a
Congressional concern eventually arose over the boards of trade's inability to curtail their members from manipulating prices and disseminating misleading market information. Demands for federal regulation became insistent, sparked by speculative excesses on the grain exchanges during the post-World War I period of falling prices and farm depression. In response, Congress enacted extensive legislation regulating commodities futures exchanges. The first comprehensive legislation, the Grain Futures Act of 1922, established the basic pattern of all regulation to follow, concentrating trading on central exchanges subject to the supervision and control of the federal government.

The Grain Futures Act was substantially strengthened by amendatory legislation in 1936 and renamed the Commodity Exchange Act ("CEA"). The CEA's fundamental purpose was "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." The CEA implemented major revisions, such as extending the regulatory ambit of the Grain Futures Act beyond grain to include a broader range of commodities.

similar pattern of development, unorganized trading in time contracts in cotton developed in the 1870s into organized futures trading on cotton exchanges in New York, New Orleans, and Liverpool. See Edwards & Edwards, A Legal and Economic Analysis of Manipulation in Futures Markets, 4 J. FUTURES MARKETS 333 (1984) (discussion of the effects of manipulation on the economy). One of the primary purposes of the Commodity Exchange Act was to prevent price manipulation. Campbell, supra note 17, at 233.

Traders on a commodity futures exchange require assurance that there are no market participants who have preferential access to information. United States of America v. Dial, No. 83-3172, 84-1339 (7th Cir. March 19, 1985).

Although Congress was concerned about customer protection against manipulation, the passage of the Grain Futures Act of 1922 did not eliminate the problem. Considerable discussion in recent years has focused on the need for more investor protection in futures markets. For an economic and legal analysis of the need for additional governmental regulation, see Fischel & Grossman, Customer Protection in the Futures and Securities Markets, 4 J. FUTURES MARKETS 273 (1984).

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58. Leist v. Simplot, 638 F.2d 283, 293 (2d Cir. 1980).
59. Act of June 15, 1936, ch. 545, § 1, 49 Stat. 1491 (1936). The constitutionality of the Commodity Exchange Act was sustained in Nelson v. Secretary of Agriculture, 133 F.2d 453, 455 (7th Cir. 1943); Board of Trade v. Milligan, 90 F.2d 855, 857-860 (8th Cir. 1937), cert. denied, 302 U.S. 710 (1937); Moore v. Chicago Mercantile Exchange, 90 F.2d 735, 736-741 (7th Cir. 1937), cert. denied, 302 U.S. 710 (1937). All trading in futures contracts is within the reach of the commerce power. Corn Products Refining Company v. Benson, 232 F.2d 554, 565 (2d Cir. 1956).
The basic form and scope of governmental regulation of commodity futures markets remained substantially unchanged until 1974 when Congress passed the Commodity Futures Trading Commission Act ("CFTCA").\textsuperscript{62} The CFTCA amounted to a complete overhaul of the CEA.\textsuperscript{63} The CFTCA amendments broadened the statute's regulatory coverage from the agricultural commodities with which it had been historically concerned to include "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."\textsuperscript{64} Consistent with this expanded coverage, the CFTCA transferred enforcement of its provisions from the Department of Agriculture to a newly created Commodity Futures Trading Commission (CFTC).\textsuperscript{65}

The CFTC was designed to be an independent federal regulatory commission patterned after and similar to the Securities and Exchange Commission.\textsuperscript{66} The CFTC was organized to focus upon specific problems relating to commodity markets.\textsuperscript{67} The CFTC's exclusive authority\textsuperscript{68} to regulate and monitor the futures markets was intended to provide it with extensive regulatory and enforcement responsibility.\textsuperscript{69} Pursuant to these responsibilities, the CFTC's power has come to span all aspects of futures trading, including the regulation of exchanges\textsuperscript{70} and market participants.\textsuperscript{71}


\textsuperscript{63} Leist v. Simplot, 638 F.2d 283, 295 (2d Cir. 1980).

\textsuperscript{64} 88 Stat. 1389 (1974).

\textsuperscript{65} For a highly informative explanation of the Commodity Futures Trading commission's jurisdiction, operating areas and authority, see Fishman, supra note 12, at 314-318.


\textsuperscript{67} Fishman, supra note 12, at 314.

\textsuperscript{68} Since the CEA of 1974, state law has been preempted by federal regulations. Consequently, states may act in the commodities field only pursuant to explicit authorization. Fishman, supra note 12, at 316. For example, section 6(d) of the CEA specifically allows the states to bring enforcement proceedings for perceived CEA violations. 7 U.S.C. § 13(a)2 (1982).

\textsuperscript{69} Fishman, supra note 12, at 316.

\textsuperscript{70} The CFTC affects the exchanges' operations in three ways. First, it has the power to designate contract markets. 7 U.S.C. § 7 (1982). Second, the CFTC also has the power to approve or alter exchange rules. 7 U.S.C. § 12(a)(7) (1984). Last, its broad emergency powers empower it to take whatever action "is necessary to maintain and restore orderly trading." 7 U.S.C. § 12(a)(9) (1984).

\textsuperscript{71} The CFTC exercises its authority to regulate market participants by requiring them to register with the CFTC. 7 U.S.C. § 6 (1982); 17 C.F.R. §§ 1.7-1.11 (1984). In addition to registration, participants must file reports relating to their activities in the markets. See, e.g., Fishman, supra note 12, at 318 (a discussion of reports required to be filed). Finally, the CFTC has the power to establish fitness standards for market participants required to be registered. See, e.g., 7 U.S.C. § 6 (p) (1982) (this authority includes the power to require specific individuals to complete educational courses.
One of the primary objectives and mandates of the CEA and CFTCA was customer protection. Unlike the CEA, however, the CFTCA was not silent on the subjects of customer grievances and claims. The CFTCA added two remedial provisions for the protection of individual customers. Section 106 of the CFTCA authorized the CFTC to grant "reparations" to any customer complaining of a CEA violation, or a CEA implementing regulation violation, committed by any futures commission merchant, floor broker, commodity trading advisor, or commodity pool operator. In addition, section 209 of the CFTCA required every contract market to provide an arbitration procedure for the settlement of customers' claims less than $15,000.

The initial arbitration provision was of questionable value because of the statutory restrictions on its use. In 1982 the United States Comptroller General recommended that steps be taken to make arbitration a more available and effective method of customer recourse. In response, a congressional committee proposed an amendment to section 209 to enhance the attractiveness of arbitration. The House Agriculture Committee suggested eliminating the $15,000 ceiling on arbitration claims in the expectation that customers with claims exceeding $15,000 would be encouraged to arbitrate their claims instead of petitioning the CFTC for

relating to their activities, hence insuring the competency of those who operate in the futures markets).

72. For a discussion of duties imposed on market participants to insure customer protection, see Fishman, supra note 12, at 318-322. See also 1982 House Report, supra note 55 (customer protection via the CFTC).

73. A reparations proceeding administered by the CFTC is a distinct and separate customer grievance procedure from the arbitration procedure. Fishman, supra note 14, at 316 (they both serve as alternative vehicles to insure customer protection on contract markets operated pursuant to the CEA and the rules promulgated thereunder).

74. See Fishman, supra note 12, at 318. (Commodity Trading Advisors advise others on the value of commodities).

75. Id. (commodity pool operators operate funds or pools of money for trading in the commodity markets).


77. 88 Stat. 1389, 1401 (1974). Section 209 added the following language to the CEA:

[E]ach contract market shall provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: Provided that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this subsection shall not include a futures commission merchant or a floor broker.


79. Id. at 3904.
The committee believed that arbitration would be an equally viable forum for resolving customer claims in excess of $15,000 and perceived no logical reason why reparations should be the only out-of-court forum for resolution of such disputes.81

Congress adopted the House Agriculture Committee's amendment as part of the Futures Trading Act of 1982.82 Congress created an action for actual damages as the exclusive private remedy for most violations of the commodities statute and explicitly approved arbitration to resolve such claims.83 Congress also removed the $15,000 limit on arbitrable contract market claims84 and inserted the following broad language in favor of arbitration: "Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration."85

As this brief history suggests, Congress has displayed considerable interest in regulating the volatile commodities market. To bolster public confidence in the commodities industry, Congress created a complicated regulatory framework to curb market abuses and to provide appropriate remedies, including arbitration. Unfortunately, the precise role Congress intended arbitration to play in this regulatory scheme is unclear. The commodities statute's ambiguous language and minimal legislative history offer little guidance in determining the extent to which courts are to compel arbitration in lieu of court proceedings in commodities cases governed by the 1982 legislation. It is therefore useful to examine the Wilko doctrine's securities law origin and extension to other fields before considering the Wilko decision's application in the commodities field.

80. Id. at 3905.
81. Id. The committee's proposed amendment to section 209 would also delete the CEA language requiring that the arbitration procedures not result in any compulsory payment except as agreed upon by the parties. This change is intended to make clear that awards rendered on counterclaims in arbitration are binding without the necessity of an agreement. The amendment does not affect the existing requirement that the use of arbitration by the customer is voluntary or the CFTC's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue. Id.
83. 7 U.S.C. § 25(a).
84. 1982 House Report, supra note 55. Also, the provision requiring an agreement for compulsory payments is removed. This revision is intended to ensure that arbitration awards on counterclaims are binding on both parties. Finally, the definition of the term "customer" is broadened to include any person for or on behalf of whom a member of a contract market effects a transaction on such contract market, except another member of that contract market. Thus, the definition now includes futures commission merchants or floor brokers who have a claim based on a customer relationship with such contract market member, provided they are not member of the same contract market. Id.
THE FEDERAL ARBITRATION ACT AND THE WILKO EXCEPTION

The United States Arbitration Act\(^{86}\) has long embodies a strong federal policy encouraging arbitration.\(^{87}\) The Arbitration Act was designed both to allow contracting parties to avoid the expense and delay of litigation\(^{88}\) and to place arbitration provisions upon the same footing as other contract clauses.\(^{89}\)

Section 2 of the Arbitration Act provides that written arbitration contracts must be enforced by the courts.\(^{90}\) Courts strive to uphold arbitration clauses because to do otherwise would allow one party to ignore the contract and to seek recourse via the courts.\(^{91}\) To allow judicial re-

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88. See Wilko v. Swan, 346 U.S. 427, 431 (1953) (arbitration is an alternative to the complications of litigation). Arbitration supporters believe arbitration is faster, less costly, more informal, more private, and more confidential than litigation. Moreover, arbitrators frequently have an expertise in the field of the dispute. Meyerowitz, The Arbitration Alternative, 71 A.B.A.J. 78, 79 (1985). The advantages of arbitration are as follows: alleviating civil court congestion; permitting adjudication of claims not otherwise heard; confidentiality in commercial disputes; selecting an expert as arbitrator; and business convenience. Rayner, Arbitration: Private Dispute Resolution, 22 U.W. Ont. L. REV. 33, 36-44 (1984). Arbitration cases are generally processed more quickly than court cases and arbitration cases are more likely to be decided, rather than settled. However, arbitration processing is not necessarily less costly than court processing. Kritzer & Anderson, The Arbitration Alternative, 8 JUST. Sys. J. 6 (1983). On the other hand, litigation supporters contend that the federal district courts are not overburdened and that most cases are settled anyway. Cooley, Puncturing Three Myths About Litigation, 70 A.B.A.J. 75 (1984) (approximately 88 percent of all civil cases filed in American courts are settled). The disadvantages of arbitration are as follows: no jury trial; lack of formal procedure; common law is incapable of developing new principles; and no public hearings. Rayner, Arbitration: Private Dispute Resolution, 22 U.W. Ont. L. REV. 33, 36-44 (1984).
90. Section 2 provides as follows:
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.
91. See The Breman v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (the arbitration contract fixing an arbitration forum for resolution of all disputes “was made in an arm’s length negotiation by experienced and sophisticated businessmen, and absent some compelling and counterveiling reasons it should be honored by the parties and enforced by the courts.”).
course would frustrate one of the contract's essential features and would lead to prolonged litigation, a risk contracting parties seek to eliminate by means of the arbitration clause.\footnote{92.} If a contracting party attempts to avoid the contract by filing suit in a United States District Court, the adverse party may petition that court to stay the action, pursuant to section 3 of the Arbitration Act, until arbitration has been completed in accordance with the agreement.\footnote{93.} Indeed, the moving party may petition the court not only to enforce the arbitration agreement but also to compel the filing party to submit its claim to arbitration pursuant to section 4 of the Arbitration Act.\footnote{94.}

A judicially-created exception to the Arbitration Act's enforcement provisions, however, has been established for certain cases involving protective federal legislation.\footnote{95.} This exception was created, among other

\begin{footnotes}
\item[93.] Section 3 provides as follows:
If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

\item[94.] Section 4 provides as follows:
A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five day's notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearings and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return duty of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
\footnote{9 U.S.C. § 4 (1982).}
reasons, to enhance the integrity of certain marketplaces by protecting the investing public. The protective federal legislation exception comes into play when a conflict arises between fundamental policies of "federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a 'prompt, economical and adequate solution of controversies.'" Implicit in this judicial exception is the rationale that an arbitral forum is not adequate to effectuate the policies underlying protective legislation.

The landmark Supreme Court decision creating the exception to arbitration enforcement was Wilko v. Swan. In Wilko, a customer purchased stock from a securities brokerage firm. Subsequently, the value of the stock decreased substantially, causing the customer to sell the stock for a loss. The stock purchaser filed suit in the United States District Court, claiming that the loss was due to the brokerage firm's misrepresentations and omissions of information in violation of the Securities Act of 1933.

Pursuant to section 3 of the Arbitration Act, the brokerage firm moved to stay the trial court proceedings pending arbitration. The brokerage firm maintained that every controversy was controlled by the terms of the contract agreement between the purchaser and the firm, which established arbitration as the method of resolving all future controversies. The district court agreed with the customer and refused to stay the action. On appeal, the United States Court of Appeals for the Second Circuit reversed the trial court and stayed the action. The customer thereafter petitioned the Supreme Court for a writ of certiorari. The Court framed the issue in Wilko as whether agreements to arbitrate future controversies were binding on stock purchasers, thereby waiving compliance with the Securities Act of 1933.

Before the Supreme Court, the stock purchaser argued that arbitration clauses were void because Congress intended, in enacting section 14 of the Securities Act, to prevent sellers from maneuvering buyers into a position that would weaken their ability to recover under the Se-


The purchaser specifically contended that compulsory arbitration weakened his ability to enforce his rights under the Securities Act because arbitration lacked the certainty of a lawsuit. The purchaser also contended that the arbitration clause was void under section 14 because it waived compliance with the Securities Act provision that granted courts jurisdiction over suits. The brokerage firm responded by asserting that arbitration was merely a trial substitute that provided the same rights as court proceedings. The firm therefore claimed the Securities and Arbitration Acts did not conflict in either their language or congressional purposes. Finally, the brokerage firm maintained that each statute functioned within its own scope, the former to protect investors and the latter to simplify recovery for actionable violations by issuers or dealers in securities.

The Supreme Court rejected the brokerage firm's arguments. The Court reasoned that the arbitration clause preempted the purchaser's right to trial and thus created a conflict between the mutually exclusive remedies afforded by the Securities and Arbitration Acts. The Wilko Court held the arbitration clause void because it effectively waived compliance with a provision of the Securities Act in violation of section 14 of that statute.

In support of its holding that the right to select the judicial forum cannot be waived under section 14, the Court noted that Congress desired rigid compliance with the Securities Act to protect disadvantaged buyers, many of whom stand in a bargaining position inferior to that of brokerage houses. The Court also suggested that protecting the investing public strengthened the integrity of the marketplace. Consequently, the Supreme Court reversed the appellate court and affirmed the trial court that had refused to stay the purchaser's action at law pending arbitration.

**The Wilko Rationale Extended to Other Fields**

Since *Wilko*, courts have struggled to define the scope of the anti-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.”

101. 48 Stat. 86, as amended 49 Stat. 1921, codified at 15 U.S.C. § 77v(a). Section 22(a) provides: “The 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.”

102. Section 22(a) of the Securities Act was waived. See note 111.

arbitration doctrine's impact. Wilko and its progeny have applied the doctrine's rationale to create court-imposed exceptions voiding arbitration agreements in various fields of law beyond securities law. A review of leading decisions illustrates that the doctrine has been extended to antitrust, patent, bankruptcy, and RICO actions.

In American Safety Equipment v. Maguire, the licensee claimed its license agreement violated the Sherman Antitrust Act. The agreement granted the licensee an exclusive license to use the licensor's trademark, but also allowed sublicensing to anyone not competing with the licensor. In addition, the license agreement required the licensee to refrain from selling and marketing various products that competed with those of the licensor. The license agreement contained an arbitration clause.

After their business relationship soured, the licensee filed suit against its licensor in the district court seeking a declaratory judgment that the license agreement was illegal and void from its inception. The complaint alleged that several clauses of the agreement violated the Sherman Act because they unlawfully extended the licensor's trademark monopoly and unreasonably restricted American Safety's business. In response, the licensor demanded that American Safety arbitrate all issues relating to the license agreement, and moved to stay American Safety's declaratory judgment action pending arbitration. The trial judge held that the arbitration clause in the agreement was broad enough to encompass both the antitrust violation claims and the validity of the license agreement, finding no public policy against referring them to arbitration. Accordingly, the judge stayed American Safety's declaratory judgment action pending arbitration, and American Safety appealed.

The Second Circuit Court of Appeals defined the issue broadly as whether the statutory right American Safety sought to enforce was "of a character inappropriate for enforcement by arbitration." The Second Circuit held that Congress intended antitrust claims to be resolved in the courts, rejecting arbitration for two reasons. First, the court noted the public nature of antitrust law enforcement, observing that antitrust violations can affect thousands of people and inflict staggering economic damage. Because the Sherman Act was designed to remedy such violations by promoting the national interest in a competitive economy, the court concluded that a plaintiff asserting his rights under the antitrust statute is

104. 391 F.2d 821 (2d Cir. 1968).
106. Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1953).
analogous to a private attorney-general protecting the public's interest. Second, the court in *American Safety* emphasized that judicial proceedings are better suited than arbitration procedures for resolving antitrust issues because antitrust cases tend to be complicated and involve extensive and diverse evidence. Accordingly, the court of appeals vacated the trial court's stay pending arbitration and required the trial court to decide the issues of antitrust law.108

*American Safety* represents an important extension of the *Wilko* doctrine. The *Wilko* Court denied arbitration because the Securities Act specifically conferred jurisdiction on the courts. In *American Safety*, the court acknowledged that the Sherman Act did not specifically grant jurisdiction to the courts. Nevertheless, the *American Safety* court denied arbitration because the public policy behind federal antitrust legislation—protecting the broad public interest in competition—demanded court intervention to assure proper enforcement. Thus, the court in *American Safety* held that the Sherman Act modifies and supercedes the Arbitration Act where arbitration would frustrate the intent of Congress.

The court in *Beckman Instruments v. Technical Development*109 agreed with the rationale espoused in *American Safety* and extended it to the patent law field. *Beckman* involved a licensee who refused to pay royalties for the use of an amplifier covered by Technical's patent. The refusal precipitated a demand by Technical for arbitration under the terms of the license agreement. In response, Beckman filed suit in the district court challenging the validity of the patent and the legality of the sub-licensing agreement. The district court refused to stay the court proceedings pending arbitration.

The Seventh Circuit Court of Appeals affirmed, holding that patent claims are not arbitrable. The *Beckman* court noted that challenges to allegedly invalid patents110 are encouraged because federal policy favors free competition in ideas which do not merit patent protection.111 The court denied arbitration because the balance of equities demonstrated that the licensor's interests did not weigh heavily when measured against the important public interest in permitting full and free competition in the use of ideas belonging in the public domain. In effect, the court in *Beckman* held that, unlike arbitration, judicial proceedings protect the

108. The *American Safety* court did not rule out arbitration of all aspects of the dispute. The court held that arbitration was inappropriate to decide whether the license agreement was valid insofar as that empowered the arbitrator to decide issues of antitrust law. *Id.*
110. *Id.* at 59.
public interest in promoting free competition by allowing patent challengers to act as private attorney-generals.

The *Wilko* arbitration prohibition has also been applied to bankruptcy claims. *In re Cross Electric Co., Inc.* involved a lawsuit by a chapter 11 debtor under the Bankruptcy Reform Act of 1978 to recover on a pre-petition contract containing an arbitration clause. The defendant creditor, who had asserted no claim against the estate, moved to dismiss the debtor's lawsuit, alleging that the Virginia bankruptcy court lacked subject matter jurisdiction in light of the arbitration clause.

The bankruptcy court recognized that the question presented was one of first impression under the Bankruptcy Reform Act. In dismissing the defendant's motion to compel arbitration, the bankruptcy court held that in drafting the Bankruptcy Reform Act of 1978, Congress intended to insure the expeditious and orderly processing of all cases involving law, equity, and admiralty coming within the bankruptcy courts' jurisdiction. The court found that its jurisdiction included all civil proceedings arising under Title 11, including exclusive jurisdiction of all property of the debtor wherever located. Further, the bankruptcy court found that matters affecting contractual provisions as to arbitration should be left to the discretion of the court to abstain or not to abstain under 28 U.S.C. § 1471(d). The court elected not to compel arbitration, noting that the issues raised in the complaint could be expeditiously heard and determined by the courts. The court also noted that relegating bankruptcy matters to protracted arbitration proceedings where discovery rules may not be available could prolong indefinitely a decision in bankruptcy matters.

**Applying Wilko In Commodities Cases**

*Anti-arbitration Arguments Before The 1982 Legislation*

Unlike most protective federal legislation scrutinized under the *Wilko* doctrine, the present commodities statute includes arbitration provisions, as did its precursors since 1974. Surprisingly, this distinction was afforded little weight in the commodities cases decided before the effective date of the 1982 legislation. The early commodities decisions are nonetheless valuable for the insights they offer concerning courts' receptiveness to *Wilko* arguments in future cases.

As previously noted, the commodities statute originally contained

113. Deitrick, supra note 2, at 36.
114. *Id.*
no arbitration clause. In adopting an arbitration provision in 1974, Congress apparently paid little attention to arbitration's impact on or consistency with the overall regulatory scheme then in place. Indeed, the 62-page legislative history devoted a scant two paragraphs to the unprecedented arbitration section. As passed, section 209 simply required contract markets to provide fair and equitable arbitration procedures for claims under $15,000 voluntarily submitted by customers.

Despite the 1974 legislation's express authorization of arbitration under certain circumstances, some early decisions rejected arbitration as a means of resolving commodities-trading disputes. For example, in Milani v. Conticommodity Services, Inc., a customer sued his account executive and commodities brokerage firm for alleged violations of the commodities statute. The account executive and brokerage firm moved to compel arbitration pursuant to the United States Arbitration Act, relying upon a provision in the customer's commodities contract that mandated arbitration of any controversies arising out of or relating to the contract. The court noted that arbitration was arguably an appropriate forum in light of the limited authorization of arbitration in section 209 of the commodities statute and the general authorization of arbitration in the federal arbitration statute. Nevertheless, the trial court refused to order arbitration, citing Wilko and its progeny as authority for the proposition that protection of investors and preservation of the marketplace's integrity can be accomplished effectively only through judicial proceedings.

A similar ruling was made in Bache Halsey Stuart, Inc. v. French. In French, the customer executed a contract to trade commodity futures. After sustaining heavy losses, the customer filed a reparations action with the CFTC pursuant to section 14 of the commodities statute and regulations thereunder. The brokerage firm refused to recognize the reparations request, and informed the customer that the brokerage firm intended to seek arbitration, as mandated in the customer's contract with the brokerage firm. When the customer refused to arbitrate, the brokerage firm initiated a lawsuit in the United States District Court to compel arbitration.

After reviewing the tension between the federal arbitration statute and the need for judicial enforcement of protective federal legislation first recognized in Wilko, the trial court ruled that the anti-arbitration exception should be extended to commodities disputes. The court considered

the CFTC a public forum comparable to a court, and therefore granted the customer’s request to dismiss the brokerage firm’s demand for arbitration. In recognizing the CFTC as an appropriate public forum in which to resolve the commodities dispute, the court in French specifically acknowledged the ruling in Milani that courts are an equal, though not exclusive, forum for adjudicating commodity claims.

Still another case recognizing the reach of Wilko in the commodities context was Breyer v. First National Monetary Corp. In Breyer, the customers signed a commodities trading agreement that contained an arbitration clause. After the customers’ account sustained heavy losses, the brokerage firm liquidated the customers’ holdings to satisfy the deficit created by the customers’ losses. The brokerage firm attempted to do so by instituting arbitration against the customers. The customers responded by initiating an action in the United States District Court seeking damages for violations of the commodities statute and an order preliminarily enjoining any arbitration proceedings pending the litigation’s outcome.

The trial court acknowledged the general federal policy favoring arbitration and its subsequent qualification by the anti-arbitration exception established in Wilko. The court in Breyer then noted the specific, limited arbitration mandate found in section 209 of the commodities statute. The court viewed the arbitration requirement in section 209 as implying Congress’ reluctance to authorize arbitration as a general remedy for violations of the commodities statute. Accordingly, the court in Breyer agreed with the customers, invoked Wilko, and enjoined the brokerage firm from seeking arbitration.

Although the foregoing decisions favored extension of the Wilko doctrine to the commodities law field, subsequent opinions by the courts of appeals rejected the anti-arbitration exception for commodities claims. The Seventh Circuit in Tamari v. Bache & Co. (Lebanon) S. A. L. became the first court of appeals to do so. Over a vigorous dissent by Circuit Judge Luther Swygert, the majority in Tamari distinguished the application of the securities statute in Wilko from the application of the commodities statute in Tamari on the basis that the securities legislation contained an anti-waiver provision not found in the commodities legislation. In the alternative, the Seventh Circuit ruled that the savings clause

in the commodities statute exempted pre-1975 claims such as the one before it from the recent amendments to the commodities enactment.

A number of cases after Tamari also rejected Wilko as applied to commodities claims. In Ingbar v. Drexel Burnham Lambert, Inc.\textsuperscript{119} the First Circuit concluded that neither Wilko nor its progeny implied that the commodities statute should be read to forbid pre-dispute arbitration agreements. After noting the commodities statute's omission of an anti-waiver section similar to the one relied upon by the Supreme Court in Wilko, the First Circuit pointed out that the commodities statute had an arbitration provision and that the CFTC had promulagated regulations specifically allowing the use of pre-dispute arbitration clauses. The court of appeals in Ingbar deferred to the CFTC's administrative expertise, approved the arbitration agreement, and ordered the trial court to permit arbitration to proceed.

Following the First Circuit's lead, the Fifth Circuit in Smoky Greenhaw Cotton v. Merrill Lynch Pierce Fenner & Smith, Inc.\textsuperscript{120} also refused to extend Wilko to commodities cases. The Fifth Circuit acknowledged the similarity between the securities and commodities markets, but suggested that Congress desired to regulate these markets in different manners. In particular, the court of appeals in Smoky Greenhaw Cotton read the commodities statute as emphasizing extra-judicial resolution of disputes, at least to the extent that Congress specifically authorized reparations proceedings before the CFTC. Although the court in Smoky Greenhaw Cotton acknowledged Congress' silence as to the permissibility of pre-dispute arbitration agreements, the court viewed the CFTC's regulations authorizing such agreements and the commodities statute's reparations provisions as sufficient authority to warrant rejection of the Wilko doctrine in the commodities setting.

The Third Circuit also rejected the Wilko doctrine's extension to commodities claims. In Salcer v. Merrill Lynch Pierce Fenner & Smith, Inc.,\textsuperscript{121} the Third Circuit enforced a commodities contract arbitration clause on the ground that the customer had voluntarily elected to have his claim submitted to arbitration by executing the contract. The court of appeals in Salcer stated that the arbitration agreement did not violate any requirements set forth in the CFTC's regulations promulgated pursuant to the commodities statute. The court's one-paragraph discussion did not cite or discuss Wilko or its progeny.

\textsuperscript{119} Ingbar v. Drexel Burnham Lambert Inc., 683 F.2d 603 (1st Cir. 1982).
\textsuperscript{120} Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., 720 F.2d 1446 (5th Cir. 1983).
\textsuperscript{121} Salcer v. Merrill Lynch Pierce Fenner & Smith, Inc., 682 F.2d 459 (3rd Cir. 1982).
In summary, before the 1982 arbitration amendments to the commodities statute, every court of appeals asked to consider extending Wilko to commodities claims refused to do so. Recent trial court rulings not involving the 1982 legislation have also declined to follow Wilko in the context of commodities fraud disputes. Thus, for a variety of reasons, Wilko arguments met with little success before 1982.

**Impact Of The 1982 Arbitration Amendments To The Commodities Statute**

Despite the strongly pro-arbitration tenor of the decisions rendered before the 1982 legislation, future challenges to commodities contract arbitration clauses may still be successful. The success of such attacks will depend on the reach of the 1982 commodities legislation's arbitration mandate. While the 1982 amendments appear to foreclose Wilko arguments in actions arising directly under the commodities statute, recent cases reflect some plaintiffs' unsettling creativity in framing commodities frauds as antitrust, securities, and RICO violations, all of which fall within the Wilko doctrine's anti-arbitration exception. Such claims appear to be beyond the reach of the commodities statute's 1982 arbitration provisions, posing new and difficult Wilko hurdles for those who seek to enforce arbitration clauses.

The logical starting point for determining the scope of the 1982 commodities statute's arbitration mandate is the language of the statute itself. Arbitration is sanctioned in several sections, but the language in these sections differs. For private actions against contract markets and registered futures associations, the commodities statute authorizes settlement of customers' claims and grievances by means of fair and equitable procedures, including arbitration, so long as the procedures are "voluntary" from the standpoint of the aggrieved customer. In contrast, for private actions against persons other than contract markets, contract market clearing organizations, board of trade, and registered futures associations, the statute simply states that it does not limit the rights of parties to agree in advance of disputes upon any claim-resolution forum, including arbitration. This particular arbitration provision only governs claims "under this section," meaning private actions against those

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125. Id.
persons enumerated in section 25(a). The legislative history for the 1982 arbitration amendment demonstrates Congress' intent to treat contract markets and registered futures associations differently from other market participants for purposes of private actions, but the history offers no explanation as to the Congressional intent behind the different language employed in the various arbitration amendments.126

Although Congress' attempt to encourage arbitration as a dispute resolution forum is laudable, the statute's use of different language in its arbitration sections may hinder contract markets and registered futures associations in their efforts to enforce arbitration clauses agreed to in advance of disputes. To the extent that sections 7(a)(11) and 21(b)(10) of the amended commodities statute state that arbitration "shall be voluntary" without further stating that arbitration can be voluntarily elected at the pre-dispute stage, aggrieved customers may argue that pre-dispute arbitration agreements in form adhesion contracts are involuntary. This argument finds support in the dissent in Tamari v. Bache & Co. (Lebanon) S.A.L.,127 where Judge Swygert suggested it is unreasonable to assume that unsophisticated commodities customers have sufficient knowledge, background, or foresight to make "voluntary" elections as to arbitration at the pre-dispute stage of executing their contracts. This was precisely the point the Supreme Court made in Wilko:

When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts [by virtue of an arbitration agreement], 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 Securities Act places upon his adversary.128

In defense of contract markets and registered futures associations, the argument can be made that arbitration clauses in form commodities contracts should be considered "voluntary" because of the manner in which those clauses are presented. The CFTC has promulgated regulations that define the term "voluntary" and expressly approve contractual arbitration clauses so long as they are accompanied by qualifications printed in bold type.129 These qualifications must include an explanation that civil court litigation, CFTC reparations proceedings, and private arbitration are available to resolve disputes. The bold print qualifications

must also explain that agreement to the arbitration provision is not required and may result in a waiver of a customer’s right to sue in court. Given such clear and unequivocal contract language, a customer’s separate signed endorsement of an arbitration clause should be deemed “voluntary” as that term is used in the statute.

A second and greater deficiency in the 1982 arbitration amendments concerns the limiting language accompanying the private right of action established in section 25. As previously noted, subsection (a) creates a private right of action for actual damages sustained by customers as a result of violations of the commodities statute by certain enumerated persons. Subsection (b) then approves arbitration as a means of resolving customer claims “under this section.” Because the phrase “under this section” is clear and unambiguous, commodities fraud actions arising under statutes other than the commodities legislation appear to fall outside the arbitration mandate found in section 25(b).

In light of the narrow applicability of the arbitration provision in section 25(b), creative plaintiffs’ attorneys faced with contractual arbitration clauses can be expected to plead their clients’ fraud claims as violations of other federal legislation, notably the antitrust, securities, and RICO statutes. As previously indicated, actions under each of these statutes have been held to fall within the Wilko doctrine’s anti-arbitration exception. A cursory examination of recent cases demonstrates that plaintiffs are now using such non-commodities statutes as vehicles for recovery in commodities fraud cases. The use of these statutes is significant because they provide plaintiffs with far stronger remedies against commodities firms than are ordinarily available in arbitration.

The tremendous impact of the RICO statute on civil litigation is undeniable. Two or more acts of garden-variety business fraud can and often do constitute a violation of RICO, and the Supreme Court’s recent decision in Sedima, S.P.R.L. v. Imrex rejected the notion that an organized crime nexus or special racketeering injury must be demonstrated in RICO actions. The Supreme Court’s Sedima decision has assured the continued use of RICO claims in all areas of business litigation, including the commodities field. Examples of relatively simple commodities fraud claims which were artfully transmuted into highly dangerous RICO actions can be found in Minpeco, S.A. v. Conticommodity Services, Inc., Parnes v. Heinhold Commodities, Inc., Heinhold Commodities, Inc. v.

133. 548 F. Supp. 20 (N.D. Ill. 1982).
Although none of the foregoing commodities cases involved the arbitration provision now found in section 25(b) of the commodities statute, the arbitrability of RICO claims under the general federal arbitration statute has already been addressed by a number of courts. Representative of these decisions is S.A. Mineracao da Trindade-Samitri v. Utah International Inc., in which the court considered the conflicting policies underlying the federal arbitration and RICO statutes. Relying heavily on the Second Circuit Court of Appeals' decision in American Safety Equipment v. J.P. Maguire, the court in Utah International held that the important public policy embodied in the anti-racketeering statute should not be enforced in private arbitration proceedings. The Utah International court therefore held that contractual arbitration clauses are void to the extent that they mandate arbitration of RICO claims. Thus, commodities firms will find themselves robbed of the benefit of their arbitration clauses if customers frame their court pleadings in terms of RICO violations rather than private actions under section 25 of the commodities statute.

A similar though more esoteric problem is presented by antitrust claims. Although antitrust rules have somewhat limited application in the commodities context due to the commodities statute's antitrust provision, antitrust claims still can arise and present significant exposures for commodities firms. For example, in Strobl v. New York Mercantile Exchange, the Second Circuit Court of Appeals held that price manip-
ulation in violation of the commodities statute also contravened the antitrust laws. A similar holding regarding monopolization can be found in *Strax v. Commodity Exchange, Inc.*\(^{141}\)

In those cases where antitrust claims arise out of underlying commodities transactions, the *Wilko* doctrine's anti-arbitration exception clearly voids contractual arbitration clauses. Numerous decisions have established this point, at least with respect to domestic transactions. The only exception in the antitrust area concerns the arbitrability of claims involving international transactions.\(^{142}\)

Commodities transactions can also give rise to securities fraud claims. The commodities statute itself specifically recognizes that commodity pools are subject to the Securities Act of 1933 and the Securities Exchange Act of 1934.\(^{143}\) Although the authorities are in conflict, some decisions have held that discretionary commodity trading accounts are subject to the securities laws because they constitute "investment contracts" as that term is defined in the Supreme Court's decision in *Securities Exchange Commission v. W.J. Howey Co.*\(^{144}\) Securities fraud claims, of course, can never be arbitrated since they were the subject of the Supreme Court's decision in *Wilko*.

The impact of the non-arbitrability of antitrust, securities fraud, and RICO claims can be readily appreciated after comparing the different remedies available in arbitration proceedings. Treble damages,\(^{145}\) punitive damages,\(^{146}\) and attorneys' fees\(^{147}\) can be recovered in federal court commodities fraud actions simply by pleading those actions as violations of the antitrust, securities, and RICO statutes and by joining such allegations with pendent claims of common law fraud or breach of fiduciary duty.\(^{148}\) In contracts, attorneys' fees generally cannot be obtained as part

143. 7 U.S.C. § 6m (1982).
148. For a good general discussion of the increasing frequency of RICO allegations in commodities fraud cases, see Sackheim, Leto, and Friedman, *Commodities Litigation: The Impact of RICO*, 34 DEPAUL L. REV. 23 (1984). For an example of a case discussing the applicability of the securities laws to commodities fraud claims, see *Strobl v. New York Mercantile Exchange*, No. 84-7328 (2d Cir.) July 5, 1985.
of the arbitral award, and in many instances treble damages and punitive damages also may be unavailable in arbitration.

The impact of court proceedings in lieu of arbitration is even more readily appreciated in cases of wide-spread commodities fraud. In such situations, federal class actions can be brought to seek appropriate judicial relief at minimal cost to class members, many of whom otherwise would never discover or remedy the frauds. Class actions can last for many years and prove very costly from a defense standpoint, even when individual class members receive relatively small damage awards at the conclusion of the litigation.

A Legislative Proposal

To remedy the defects in the 1982 legislation, Congress should amend the commodities statute to include far broader arbitration provisions. In particular, a separate section addressing arbitration of any and all claims arising out of underlying commodities transactions should be included in the commodities statute. The arbitration provision should be drafted so that its language preempts commodity fraud actions brought under antitrust, securities, RICO, and other statutes that may apply to commodities transactions. A similar provision should be included to preclude claims founded on state law that arise out of commodities transactions.

A broad federal arbitration provision might be drafted as follows:

**ARBITRATION**

(1) **Availability:** In all instances in which fraudulent or other-

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150. An argument can be made that in some instances statutory damages, such as those specified in the RICO statute, could be awarded under certain circumstances. See, e.g., Kamakazi Music Corp. v. Robbins Music Corp., 534 F. Supp. 57 (S.D.N.Y. 1981), aff'd, 684 F.2d 228 (2d Cir. 1982) (copyright Act damages awarded).

wise improper conduct, actions, or advise is alleged or claimed to have occurred in connection with commodities transactions, investments, contracts, or market activity, arbitration or other private dispute resolution proceedings shall be permitted to resolve such allegations or claims, even if such allegations or claims arise under statutes, rules, regulations, or laws other than the federal commodities laws codified in 7 U.S.C. § 1 et seq. Arbitration or other private dispute resolution proceedings may be agreed upon by the parties in advance of any dispute or anytime after a dispute has arisen. In the event the parties desire to agree upon arbitration or other private dispute resolution proceedings in advance of any dispute, such agreements must be in writing and must contain an explanation as to the availability of court or reparations proceedings as alternatives to arbitration or other private dispute resolution proceedings.

(2) Regulations: The Commodity Futures Trading Commission is authorized and directed to promulgate appropriate regulations setting forth the manner in which contracts must explain the availability of court or reparations proceedings as alternatives to arbitration or other private dispute resolution proceedings.

(3) Jurisdiction: In all instances in which the parties have agreed to arbitration or other private dispute resolution proceedings, any party may invoke the agreement as a basis for compelling arbitration or other private dispute resolution proceedings in lieu of court or reparations proceedings. Federal and State courts shall decline jurisdiction of any and all commodities disputes described above in subsection (1) of this section whenever any party moves to compel arbitration or other private dispute resolution proceedings pursuant to the parties' agreement. Federal and State courts shall enforce any award or decision resulting from arbitration or other private dispute resolution proceedings. Failure to request arbitration or other private dispute resolution proceedings before answering a complaint in Federal or State court shall waive a party's right to compel arbitration or other private dispute resolution proceedings, but the parties may mutually agree upon arbitration or other private dispute resolution proceedings in lieu of court or reparations proceedings at any point in the litigation.

(4) Statutory Construction: In addressing the policies, purposes, and language of this arbitration provision, courts shall interpret the terms of this provision as broadly as possible to encourage arbitration or other private dispute resolution proceedings in lieu of court or reparations proceedings.

By broadening the commodities statute's arbitration mandate along these lines, Congress can avoid conflicting court decisions as to the applicability of the Wilko doctrine under various federal and state statutes that may apply in a given commodities case. Such legislation would reduce the uncertainty surrounding commodities transactions and litigation, thereby improving the efficiency of the commodities market and reducing costs to commodities firms that must comply with federal regulations governing their activities.
CONCLUSION

Congress' desire to protect the investing public from unscrupulous commodities firms has a long and involved history. Although the lower courts seemed to accept the notion that arbitration was permissible for commodities fraud claims arising prior to the advent of the 1982 commodities legislation, the arbitration provisions enacted by that legislation are rather limited. Commodities contract arbitration clauses thought to be valid in light of the 1982 legislation are almost certain to be circumvented by means of clever pleadings recasting commodities fraud claims as antitrust, securities fraud, and RICO actions rather than private actions under section 25 of the commodities statute. To correct this important shortcomings in the 1982 legislation, Congress should amend the commodities statute and broaden its arbitration mandate so that all commodity fraud claims are subject to arbitration, regardless of the statute under which they are claimed to arise.