OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1708

TITLE DEAN WITTER REYNOLDS, INC., Petitioner v. A. LAMAR BYRD

PLACE Washington, D. C.

DATE December 4, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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DEAN WITTER REYNOLDS, INC., :

Petitioner, :

V. : No. 83-1708

A. IAMAR BYRD :

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Washington, D.C.

Tuesday, December 4, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:53 o'clock a.m.

APPEARANCES:

EUGENE W. BELL, ESQ., Ics Angeles, California; on behalf of the petitioner.

ERIC V. BENHAM, ESQ., San Diego, California; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Reynolds against Byrd.

Mr. Bell, you may proceed whenever you are ready.

ORAL ARGUMENT OF EUGENE W. BELL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BELL: Thank you. Mr. Chief Justice, and may it please the Court, this case is here today, I believe, because the District Court did precisely that which this Court subsequently declared in its decision Southland versus Keating that a federal judge should not do.

That is, the District Court undermined the expectations of the petitioner who desired arbitration pursuant to a contract related to interstate commerce.

This case involves a civil suit filed in the Federal District Court by a customer against the securities broker/dealer. The complaint asserts four claims under state law, all of which are subject to a valid preexisting agreement to arbitrate.

The customer, in addition to asserting these four state law claims, asserts one claim under the Securities and Exchange Act of 1934. The petitioner sought arbitration of the four state law claims, but the

District Court denied that arbitration, because that court in its subjective determination felt that the factual and legal issues involved in all of the claims were intertwined. The Ninth Circuit affirmed.

In this regard, the Ninth Circuit is joined by two other circuits who have come down in effect in the same way on a similar issue. On the other side of the coin, there are three circuits that have come down on the opposite side of this issue. Thus, there is an even split between six circuits that have considered this issue called intertwining.

The question thus presented today is whether the District Court erred in denying the petitioner's motion for an order compelling arbitration of the respondent's state law claims and staying that arbitration pending judicial resolution of the respondent's claim under the federal securities laws.

QUESTION: Mr. Bell --

MR. BELL: Yes?

QUESTION: -- do you think we should assume that a prior arbitration of the state law claims would have preclusive effect in a subsequent federal trial involving the same issues?

MR. BELL: If you are talking collateral estoppel, I do not believe so, because the mechanisms of

arbitration generally are such. There are no findings of fact. There is no record. There is really nothing that would be available to a court, state or federal, subsequently to determine whether or not there was anything decided that would really --

QUESTION: So in your view, at least, the prior arbitration of the state claims would not have preclusive effect?

MR. BELL: Absolutely not. The facts underlying this case are as follows.

QUESTION: Mr. Bell, is it not your view, though, that the arbitration should await the federal case?

MR. BELL: No, sir.

QUESTION: Oh, you want the arbitration to proceed?

MR. BELL: I personally would subscribe to the Dickenson theory approach, and that is one of the circuits that have decided against intertwining, and it feels that the protections afforded under the '34 Act are better served by reserving to the federal district court the right of priority to determine the federal securities law claim and thus stay the aribration until that federal securities law claim has in fact been determined.

QUESTION: We must have misunderstood one another.

MR. BELL: I am sorry.

QUESTION: You say the federal trial should go first.

MR. BELL: Yes, I do.

QUESTION: Yes, that's what I thought your position was.

MR. BELL: Yes. Yes, that is our position. If the facts underlying this claim are as follows. As alleged by the respondent in his complaint --

QUESTION: Of course, your position really evaporates, I suppose, if Wilco doesn't apply to this case.

MR. BELL: That is the subsidiary question involved here, Mr. Justice White.

QUESTION: Don't you have to address that?

MR. BELL: Yes, I intend to address that.

QUESTION: Okay. I thought that might be -- you can take your own order.

MR. BELL: Initially I was just going to give you a little of the background of the facts of this case.

QUESTION: Yes, sir.

MR. BELL: According to the complaint, the

securities broker/dealer or his registered representative, its registered representative advised Dr. Byrd that if he were to sell his dental practice and invest some $160,000 into the stock market under the management of this registered representative, that the dentist would receive about $4,000 a month, I assume in perpetuity, or at least for his lifetime for annual income.

The complaint alleges that the registered representative altered the client information forms in certain ways. It further alleges that after the account was open for a short period, that the registered representative engaged in unauthorized trading for this account, and that the registered representative started dealing in options, and in naked options.

The complaint further alleges that both the registered representative and the branch office manager in this particular branch assured the plaintiff that the account was okay and that everything was doing well, even though the statements in the confirms might have indicated otherwise to the doctor, and in fact when the account apparently had lost about $100,000.

Now, out of this common nucleus of fact, the doctor alleges violations of the California state securities laws, alleges common law fraud and deceipt,

alleges breach of fiduciary duty on behalf of the broker/dealer firm, and alleges negligence, and with respect to three of those claims he is seeking punitive damages which clearly are not available under a Section 10(b) claim. He lastly alleges also a Section 10(b) claim.

Now, the Court, as we have said, indicated that the facts and the legal issues were so intertwined that to separate those issues and to send the four claims to arbitration after first adjudicating the 10(b)(5) claim would be a waste of efficiency.

The problems with that decision and the intertwining theory are both legal and practical. First, from a legal standpoint, the Court seems not to be listening to the music of Cone when Cone indicated that the federal court should have a healthy regard for the federal policy favoring arbitration.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 12:59 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Bell, you may continue.

ORAL ARGUMENT OF EUGENE W. BELL, ESQ.,

ON BEHALF OF THE PETITIONER - RESUMED

MR. BELL: Again, Mr. Chief Justice, and may it please the Court, we had mentioned or I had mentioned just prior to the adjournment that the Ninth Circuit in similar circuit opinions had caused some legal problems.

I mentioned the language in the Cone case where this Court recited a healthy regard for a federal policy favoring arbitration, and likewise in the Keating case this Court stated that contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.

Now, the decisions of the Ninth, Fifth, and Eleventh Circuits are in contravention of those statements, and they are frustrating the rights of parties who feel that they are entitled to arbitration pursuant to a valid contract to get that arbitration.

QUESTION: You are really walking a -- going up one side of the street and down the other. You want the arbitration -- you want the right to arbitrate certain of these provisions, but then you want to delay

arbitration.

MR. BELL: I recognize, sir, that --

QUESTION: And you want to wait until -- delay the arbitration, one of the purposes of which is speed and economy. You want to delay that until maybe three or four years later you finish a Securities Act trial.

MR. BELL: Mr. Justice White, if you would permit me, I am not saying that that is what I would want to do.

QUESTION: No, but that is what --

MR. BELL: I am saying that that is what the Dickenson --

QUESTION: That is what your motions were aimed at.

MR. BELL: That is correct, and I am --

QUESTION: Well, you are stuck with the Wilco case basically.

MR. BELL: Well, we are stuck with the Wilco case, at least to this point, but --

QUESTION: Well, without it -- you are stuck with it. Without it, you are --

MR. BELL: Then there would be no intertwining because there would be no federal claim subject --

QUESTION: Well, I know, but you wouldn't be -- you would be arbitrating everything --

MR. BELL: Yes, sir.

QUESTION: -- including the Securities Act claim.

MR. BELL: Yes, sir, Mr. Justice.

QUESTION: Which you don't want to do. Or do you?

MR. BELL: I would like to.

QUESTION: I see.

MR. BELL: I would like to have this Court revisit whether or not Wilco applies to '34 Act claims or 10(b)(5) claims because of the distinctions that this Court noted itself in the Scherk case, those distinctions primarily being the fact that 10(b)(5) or the rights created to sue under 10(b)(5) are not expressly provided in the '34 Act.

QUESTION: Well, Congress said Wilco is based on the fact that Congress had provided --

MR. BELL: Special rights under the '33 Act, but those special rights are not to be found in the 1934 Act, and this Court analyzed that proposition in the Scherk case and in my opinion came very close to providing one with a platform to say that the Wilco rationale, the Wilco holding does not apply to a claim brought as an implied private right of action under Section 10(b) of the 1934 Act. It is my view that it

does not apply, but the Courts below primarily, and certainly the Ninth Circuit have just assumed that this Court's holding in Wilco with regard to Section 12(2) of the 1933 Act --

QUESTION: All the Courts of Appeals have --

MR. BELL: They have all assumed it.

QUESTION: Yes.

MR. BELL: They have all assumed it, and it is out of that assumption that this intertwining policy really has grown, but even if this Court, to continue for a moment on Wilco, even if this Court were to use this opportunity, the subsidiary question to make the pronouncement that Wilco does not apply to claims brought as implied rights under the '34 Act, that wouldn't remove the intertwining argument, because that argument could then next be presented in connection with a situation where there is an express statutory right and a special right of the type that this Court determined in Wilco attaches to Section 12(2) of the 1933 Act, and someone then could bring a case that would combine a claim that is specifically, let's say, brought with regard to Section 12(2) of the '33 Act and move into that claim on the common nucleus of facts stakeoff claims that would be subject to arbitration, and the intertwining argument would then raise its ugly head

again.

So, while we would encourage this Court to take a look at whether Wilco does apply in fact to implied rights brought under Section 10(b), we can't stop there. We must also look at the intertwining, whether or not that fits with this Court's and Congress's scheme of things that it provided for in arbitration.

QUESTION: Apart from the Wilco question, Mr. Bell, if the prior arbitration of the state law claims would not have preclusive effect in the handling of the Federal Securities Act litigation, then why should the District Court have to stay the arbitration?

MR. BELL: Well, Justice O'Connor, I don't think it does, and Justice White brought up this question. My personal view is that to give full force and effect to the Congressional mandate favored in arbitration is a speedy remedy, but the arbitration should proceed the more lengthy judicial resolution of the claims brought that are not subject to arbitration.

I think there would be great benefits to be derived from that. It is subjective, but that is my personal opinion. The reasoning, however, of the Court in the Dickenson case, and that is the landmark case that says intertwining is bad, the reasoning of the

Court there is that if you were to allow the arbitration to go first, it might somehow interfere with the federal court's exclusive rights under the '34 Act to determine actions that are brought to it under the '34 Act.

I am just adopting for the purposes of our motion and what is before here, I have adopted the Dickenson rationale and approach. Certainly procedurally that is what I adopted, but we do not embrace that approach. I would respect your suggestion and certainly Justice White's suggestion that perhaps a more practical way of approaching it is to permit the arbitration to proceed first, and to let the --

QUESTION: Mr. Bell, you suggested earlier that there would be no res judicata or estoppel effect of the arbitration -- would you take the same position if the arbitration went forward and there were judicial enforcement of the arbitrator's award, so you do have a judicial decree determining certain rights?

MR. BELL: I am not sure, Justice Stevens, that I understand your question.

QUESTION: Say there is an arbitration. The arbitrator rules for one party or the other, but the other party doesn't accept the arbitration, and there has to be a lawsuit to enforce the award, and then the court enters a judgment, presumably -- I don't know

whether it would be the state court or the federal court -- saying pay X dollars on this claim.

Would not that have estoppel effect?

MR. BELL: I don't believe so, sir, because while there are, as you correctly noted, provisions for in effect converting an arbitration award into a judgment, in view of the fact that you do not have before the Court, in the case I have seen, you do not have findings of fact from the arbitrators. You really -- you don't have anything to guide any subsequent court other than a one-page award that says the claimant shall receive X, or the claimaint shall not receive anything.

There is nothing on a piece of paper that would indicate what factual issues, what legal --

QUESTION: Well, there could be. It seems to me there could be. An arbitrator could say, I think the basic agreement gave the agent authority to make all these trades, and therefore I am ruling in favor of the broker.

MR. BELL: I recognize the possibility of that.

QUESTION: And that judgment could say the same thing.

MR. BELL: I recognize the possibility. I am just saying that --

QUESTION: It doesn't always have to be.

MR. BELL: -- in practical life it doesn't really happen.

QUESTION: But if it did happen that way, I suppose that would pretty well answer that issue, wouldn't it?

MR. BELL: If it did happen that way, and there were findings, and in effect it was confirmed by a judgment of a court, you would have a much stronger argument for collateral estoppel.

QUESTION: Mr. Bell, I gather you risk punitive damages in the federal court, suit, don't you?

MR. BELL: Well, with regard to -- as you know, Justice Brennan, with regard to Section 10(b)(5) claims, or claims under the '34 Act anyway, that Act by its own language does not permit damages beyond actual damages suffered by the plaintiff.

That in my opinion is the reason that almost every plaintiff seeking -- bringing a garden variety lawsuit these days against a security broker tries to drag in state law claims upon which he can seek punitive damages. It leads to confusion of the jury. It leads to multiple instructions, sometimes that apparently are --

QUESTION: But there couldn't be any in the

arbitration, could there?

MR. BELL: Well, that issue I know has been decided in the state of New York, and the highest court in the state of New York has held that as a matter of public policy, arbitrators are not permitted to award punitive damages. To my knowledge, that is the only state that has ruled on that proposition.

QUESTION: I take it if these state court suits had been brought in state court here, it would have gone to arbitration, would it not?

MR. BELL: That is correct.

QUESTION: So then you are sure you wouldn't be exposed to punitive damages?

MR. BELL: That is correct.

QUESTION: Does that have anything to do with your desire to get into arbitration rather than to stay in the federal court?

MR. BELL: Of course it does. Of course it does. Particularly when you have a situation where the access to the federal court in the first place is a claim under the '34 Act that doesn't permit punitive damages, and yet in every one of these cases they are seeking punitive damages.

It seems to me an anomaly that should not be tolerated by the court system, and one way of doing it

is giving full force and effect to the arbitration agreement. This Court has declared that parties cannot avoid arbitration by resorting to court. They did that in January of this year in the Keating case, and yet it is happening every day, and the courts are still permitting it.

I sincerely believe, and of course the State of California very frequently and most recently has again embraced arbitration of disputes between customers and their stockbrokers, and it says if there is a valid arbitration agreement, we are going to enforce it, and you must arbitrate those claims.

So, the plaintiff now, under the approach of the Ninth Circuit, all he has to do is take those same claims across the street to the federal court, add on a claim or an alleged claim under the '34 Act, and say I am home free, I do not have to arbitrate, and that is one of the evils, I believe, of the intertwining approach.

This Court further has declared in the Prima Paint case that with regard to an application under Section 3 of the Arbitration Act that the court can consider only two issues. In the Southland case it specified these more precisely. Only two limitations on a party's right to arbitrate.

One is the arbitration clause, part of a written contract or a maritime agreement or a written contract affecting and arising out of interstate commerce, and I think it is beycnd peradventure now that these margin agreements and agreements with regard to option acccunts that ccntain arbitration clauses in many instances, not uniformly, are certainly contracts arising out of interstate commerce.

The only other limitation that this Court said in the Keating case would affect a party's right to arbitrate are such limitaticns that are prcvided by either law or in equity for the revocation of any contract. Well, it escapes me whether it is anything in the intertwining theory that speaks of that being a ground to revoke the arbitration clause itself. It is not. It is more of a procedural argument.

These statements of Congress mandating arbitration and the statemerts cf this Court simply leave no room for denying arbitration cn the basis cf some subjective and, I submit, debatable theory that the arbitration claims are intertwined.

In your recent Cone decision, this Court recognized that if it is necessary in order to give full force and effect to a valid arbitration clause, that you must divide the dispute and have that dispute resclved

in separate forums, that that should be done, and that is precisely what the petitioner is requesting be done here, is that if in fact claims under the '34 Act or 10(b)(5) are not subject to arbitration, then we want the claims divided, and the Court recognized that as a valid principle in the Cone case.

The Ninth Circuit and other circuits have attempted to rationalize their holding using Wilco as a basis for the rationalization, but that rationalization fails for these reasons.

First, as I mentioned earlier, Wilco involved what this Court perceived to be a conflict between two Congressionally mandated statutes and ended up in its analysis saying one prevailed over the other. That is quite a different story that we have here, when we have a clear Congressional mandate favoring arbitration, and for a court to say we have some theory here regarding an implied right of action that will overcome that Congressional mandate.

It seems that that doesn't square with Wilco. This Court in the Keating case made reference in a footnote to an attempt by the California Supreme Court to analogize Wilco, and this Court stated that Wilco was two federal Congressional statutes, and that it is a far different thing when you are dealing with a state's

attempt to legislate a new exception to arbitration, and this Court didn't buy that, and said that the state could not legislate a new method to escape arbitration.

Well, if a state can't legislate it, how can a federal judge create it? I will just finish with Wilco.

QUESTION: May I ask one quick question before you do?

MR. BELL: Yes.

QUESTION: Under your view of the Seventh Circuit position, which I guess is the same one you take in this case, when may the arbitration go forward, after all appeals have been completed in the federal trial, or after the trial?

MR. BELL: I don't believe that that has been precisely decreed, Justice Stevens. The courts have used the word "judicial resolultion" of the federal securities law claim. I assume judicial resolution includes the full rights of appeal.

QUESTION: So it could be a several year delay.

MR. BELL: It might be. It might be. But once again, that might indicate that perhaps a preferable way to go is to permit the arbitration to precede the trial of the federal securities law claim.

I just want to point out that the other thing which we mentioned where the Wilco analogy fails, I believe, is that the Wilco analogy did have the two Congressional statutes as opposed to an implied right, and I will just touch briefly in the time that I am going to have left here on the practical consequences of the intertwining thecry.

It leads to forum shopping. We have already discussed that, people looking around -- now they look around for the right circuit, in addition to the right state or federal court. It leads to uncertainties. How can a lawyer advise a client for whom he has drafted an interstate commerce type contract that contains an arbitration, how can he say the courts will enforce this arbitration, because any clever lawyer trying to break it can just invent some claim perhaps which is not subject to arbitration under some decree of this court and "intertwine" it and it would -- just rank uncertainty as to the enforceability of arbitration clauses.

The other thing that of course it would do, if you read the language of the Ninth Circuit opinion in this case, it encourages the federal district courts to use their own discretion in analyzing the facts alleged in the complaint to see if in their determination there

is factual and legal intertwining. It would create just a morass of additional burdens on the District Court.

Every time one of these cases come in, they have to take the time, analyze the complaint or the pleadings to that state to determine first if there is intertwining and then go from there. I would like to reserve the balance. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Benham.

ORAL ARGUMENT OF ERIC V. BENHAM, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BENHAM: Thank you, Mr. Chief Justice, and may it please the Court, respondent in this case, Dr. Byrd, sees the issue before the Court as being whether the District Court has discretion to deny arbitration of claims which are otherwise arbitable when those claims are factually and legally intertwined with a nonarbitrable federal securities claim.

This draws into question the scope of the Federal Arbitration Act and its impact on federal protective legislation. Dr. Byrd starts from the premise that his claim under the Securities and Exchange Act of 1934 is not artibrable. He did not seek arbitration of that claim in the District Court. Nevertheless, the issue has been raised by the

Securities Industry Association in their amicus brief.

In Wilco versus Swan, this Court held that arbitration of claims brought under the Securities Act of 1933 could not be impelled to be arbitrated. While the Supreme Court has not held -- ruled on whether '34 Act claims can be arbitrated, every Court of Appeal which has addressed the question has found that the logic of Wilco versus Swan is equally applicable to claims brought under the Securities and Exchange Act.

Recently the Securities and Exchange Commission has issued a rule requiring brokers to disclose that claims brought under the securities statutes are not subject to arbitration, and finding that the failure to disclose that fact is deceptive and fraudulent.

Consequently this case concerns only the arbitrability of the pending claims. The Courts of Appeal which have addressed this issue are evenly split. The Sixth, Seventh, and Eighth Circuits have held that the District Court has no discretion to retain jurisdiction over pending claims.

QUESTION: I suppose our judgment, if we were to make it, that Wilco was not applicable to a claim under the '34 Act, even though that question is not squarely presented, might affect our judgment as to the

force of the intertwining argument.

MR. BENHAM: It certainly would, Your Honor. There is no question about that. However, I would contend it is not before the Court, and it is not part of the motion that was made in the District Court, and that in any case if the Court does consider that issue, that it should determine that the '34 Act claims are not subject to arbitration based on the same reasoning as the Court applied in Wilco versus Swan.

The Circuit Courts of Appeal which have held that the District Courts do not have discretion to keep the pendent claims have done so on the basis of finding that the Arbitration Act compelled severance and separate arbitration in all circumstances without regard for the attendant conditions of that case.

The Fifth, Ninth, and Eleventh Circuits, however, have held that the District Courts have discretion to retain jurisdiction of the entire case to promote the protective purposes of federal protective legislation where the pending claims are factually and legally intertwined with the federal securities claim.

QUESTION: Well, normally, even if there is an intertwining, so to speak, the Federal District Court isn't required to entertain the pendent claims, is it?

MR. BENHAM: It is a matter of discretion,

Your Honor, yes.

QUESTION: Normally, yes. What if in a case like this the District Court just said, well, I am just not going to entertain the pendent claims, we will just try the Securities Act claim. What would then happen to the pendent claim? It would be arbitrated, wouldn't it?

MR. BENHAM: It would be arbitrated, Your Honor.

QUESTION: Quickly, too.

MR. BENHAM: Yes. Well, it depends on whether the arbitration precedes the file on the federal securities claim or whether it waits until --

QUESTION: Well, why should it wait? Why should it wait?

MR. BENHAM: Well, if it occurs first.

QUESTION: I would guess an arbitration proceeding could nine times out of ten proceed and be concluded before the securities trial is even well under way.

MR. BENHAM: The petitioner maintains that a prior arbitration of the pending claims would not affect the federal securities claims, but every Court of Appeal which has considered the question, including those which have opted for a bifurcated proceeding, have expressed

concern over the effect that a prior arbitration would have.

QUESTION: What would be wrong with that?

MR. BENHAM: Well, it would take from the District Court its exclusive jurisdiction over the federal securities claim by deciding the issues in the arbitral forum.

QUESTION: Well, it wouldn't be trying a federal issue. It would be trying -- the only thing that would be preclusive would be findings of fact that are -- been litigated.

MR. BENHAM: Your Honor, that is the point of the intertwining exception. It is not all pending claims, only those which are factually and legally intertwined. If the common law fraud claim is decided through arbitration, those factual findings regarding the common law fraud are virtually identical to those which will be decided in the federal securities claim.

QUESTION: What is wrong with the federal court having to defer on the same set of operative facts to litigation in some other forum on factual questions? That doesn't prevent their decision on -- making a federal decision on the law.

MR. BENHAM: No, it does not. However, it does take away from the court the power to entertain the

entire question dealing with the --

QUESTION: Well, that is true in any case of res judicata or collateral estoppel, but why shouldn't ordinary principles of collateral estoppel and res judicata apply to a Federal Securities Act claim just like any other claim that is made in federal court?

MR. BENHAM: Because, Mr. Justice Rehnquist, the Congressional purpose was to retain for federal securities claims the exclusive jurisdiction of the courts. It provides an additional forum.

QUESTION: You can't say that in this case. Congress didn't say a word about trying a 10(b) claim like this.

MR. BENHAM: Well, that's true in the '33 --

QUESTION: Well, how can you say what the Congressional intention was then?

MR. BENHAM: From the --

QUESTION: Like you could in Mokov.

MR. BENHAM: I will admit, Your Honor, that the circumstances are not identical. However, the circumstances are substantially similar, and are part of the legislative program to provide protection for investors.

QUESTION: Don't you think it is odd to say that pendent claims need not be entertained by a

District Court, and you have to go on and say, and they can't be -- and yet they can't be tried out until some other case is tried? I think that is very odd.

MR. BENHAM: No, Your Honor. I think it is a matter of the discretion of the District Judge.

QUESTION: Well, I know the discretion of the District Judge, but say he says, I exercise my discretion not to entertain these pendent claims.

MR. BENHAM: And that has happened.

QUESTION: Yes, and yet you would still say that the arbitration may not proceed on the pendent claims that have been rejected by the District Court.

MR. BENHAM: I don't know that I would, Your Honor. Under Section 3 of the Arbitration Act, it requires that the arbitration proceed first. In reality, Dean Witter is asking for an exception to the Arbitration Act to have the trial proceed first. However, this is a matter within the discretion of the District Judge as to whether the prior arbitration will adversely impact the federal securities claim.

QUESTION: I agree that your opponent's position is not exactly clear, but at one point in his argument he seemed to say that he would be delighted if the arbitration could go forward.

MR. BENHAM: I believe that is true, and yet

that was not their motion.

QUESTION: You would oppose the arbitration going forward, however, on the grounds that it would interfere with the exclusive jurisdiction of the federal court.

MR. BENHAM: That's correct.

QUESTION: What's the purpose, then, in contracting parties agreeing to dispose of their cases by arbitration if these blocks are going to be erected?

MR. BENHAM: That is a good question, Your Honor.

QUESTION: This Court has certainly said, and all the Courts of Appeals have said they favor arbitration. Is that not so?

MR. BENHAM: Certainly, and this Court also has reaffirmed quite recently its strong support of resolving disputes through arbitration. Nevertheless, there are a number of factors which in this case do not make arbitration a reasonable way to resolve the problem.

First of all, the purpose behind arbitration is to provide a more efficient and quicker resolution of the dispute. That would not occur in this case.

QUESTION: But the reason it wouldn't occur is because of objections you make to speedy arbitration, it

seems to me. I mean, these aren't objections that the party seeking arbitration is making. These are blocks that you are putting up. If you would remove the blocks you put up, there would be a speedy arbitration.

MR. BENHAM: Your Honor, in any case there will still be a bifurcated proceeding. First, one either --

QUESTION: Well, as long as you are right on the Wilco issue.

QUESTION: If you are right on Wilco.

QUESTION: Yes.

MR. BENHAM: That's correct, Your Honor.

QUESTION: Mr. Benham, do you agree that under the federal act you would not be entitled to punitive damages?

MR. BENHAM: Yes, we do, Your Honor.

QUESTION: Do you think it would be in an arbitration, under the arbitration contract between the parties?

MR. BENHAM: Well, the arbitration provision provides that it should be -- shall be arbitrated according to the laws of the State of New York, and under the laws of the State of New York, arbitrators cannot award punitive damages.

QUESTION: Yes, so you would have to try the

cases together for you to obtain punitive damages.

MR. BENHAM: Well, there is reason, Your Honor, to challenge the efficacy of the choice of law that would apply in arbitration in this case, but if New York law is applied, it is true that punitive damages would not be obtained.

QUESTION: Would you get them in the federal courts if it severed the state law claim?

MR. BENHAM: I believe we would, Your Honor. The restrictions only as --

QUESTION: On what theory?

MR. BENHAM: Well, the only restrictions, not on the federal claim, on the state law claims. There is no restriction in awarding punitive damages to the state law claim.

QUESTION: No, but would the arbitration agreement, wouldn't the state court send the case to arbitration?

MR. BENHAM: If they were actually brought in the state court?

QUESTION: Yes.

MR. BENHAM: Yes. Presumably they would. I am not sure I understood your question.

QUESTION: Well, I don't quite understand where you get punitive damages.

MR. BENHAM: Well, in the state law claims brought, as long as they are tried in a state -- in a court, there is a right to punitive damages.

QUESTION: In a state court?

QUESTION: Could those state law claims be tried in the state law -- state courts in light of the arbitration provision?

MR. BENHAM: Unless it was invalidated, it could not.

QUESTION: But coming back to my question, if the claims are tried together on pendent jurisdiction in the federal court, the federal court can award punitive damages on the state law claim.

MR. BENHAM: Yes, Your Honor.

QUESTION: Right.

QUESTION: Doesn't it strike you as somewhat odd that you should be able to bring a state law claim as a pendent claim in federal court, and although, if it were tried in state court you couldn't get punitive damages because it would go to arbitration, nonetheless you get punitive damages in federal court?

MR. BENHAM: No, Your Honor, it does not, as long as the case is tried in any court. If it were actually tried in a state court for whatever reason, if under any circumstances the arbitration agreement were

not enforceable, punitive damages could be obtained under the state law claims.

It is only in arbitration, and only in arbitration under the laws of the state of New York that punitive damages cannot be obtained. Even if arbitration is held, it may be that the law of the state of New York will not be applied.

QUESTION: What if it were arbitrated under the law of the state of California? Is there a judicial authority as to whether punitive damages may be awarded by an arbitrator under a California arbitration contract?

MR. BENHAM: I could find no authority on that. Presumably they would be, in that what cases have dealt with the issue at all have indicated that in arbitration the parties are not to lose any right they would have in court.

QUESTION: That, too, is kind of inconsistent with the theory of arbitration, isn't it? I mean, you don't take a set of rights into court -- that you have in court into arbitration. The whole purpose of arbitration is to speed things up and get a quick resolution, not to track in a bunch of judicial remedies.

MR. BENHAM: Well, that is true. However, it

is also -- the purpose is not to take away legal rights. If there is a legal right to punitive damages in state court, it should also be available in arbitration.

QUESTION: I don't see why. You are entitled to your opinion, obviously. So am I.

(General laughter.)

MR. BENHAM: You certainly are. Despite the holding of the Seventh Circuit Court of Appeals in Dickenson versus Heinhold Securities, the Federal Arbitration Act does not expressly require a bifurcation and separate arbitration in a mixed claims case. The question is whether that bifurcation is impliedly required.

We believe that an examination of the Congressional record behind the Arbitration Act and a balancing of the values at stake indicate that arbitration should not be compelled.

It was recently pointed out in Southland Corporation versus Keating that the legislative history of the Federal Arbitration Act indicates a limited Congressional purpose, to remove -- impediments to the enforceability of arbitration agreements.

In Scherk versus Alberto Culver this Court stated that the purpose was "to place arbitration

agreements on the same footing as other contracts," and in Primo Paint Corporation versus Conklin Manufacturing Company it was to make those agreements "as enforceable as other contracts but not more so."

Now, in Moses H. Cone versus Mercury Construction Company and Southland Corporation versus Keating, this Court has expressed a strong -- confirmed the strong federal policy favoring arbitration disputes, but a policy favoring enforcement of arbitration agreements does not require arbitration in all circumstances.

Indeed, Section 2 of the Arbitration Act provides for judicial exception. Section 2 states that arbitration agreements are subject to revocation on such grounds as exist in law or equity for the revocation of any contract. Since the grounds for such revocation are not specified in the Act, the judiciary may create such exceptions as are justified so long as they are not inconsistent with the Congressional purpose.

The intertwining doctrine is just such a judicially created exception, which is justified by three factors. First, the impact of bifurcation on the federal securities claim, the additional time and expense of prosecuting two separate proceedings, and third, the adhesive nature of this arbitration

agreement.

In Wilco versus Swan, this Court balanced two competing values, prompt and economical resolution of disputes through arbitration versus promotion of effective implementation of federal protective legislation. In that case the promotion of the federal securities protective scheme was given priority.

This case involves the same values, but in a different context. Bifurcation and separate arbitration will impact on the federal securities claim. Under Section 3 of the Federal Arbitration Act, as I pointed out previously, the arbitration must proceed first, and in that case, as we have discussed, the collateral estoppel effect will interfere with the court's exclusive jurisdiction over the federal securities claim.

QUESTION: It would not, though, I take it, if you adopted the Seventh Circuit view.

MR. BENHAM: If you adopt the Seventh Circuit's view, we would contend that it also impacts on the federal securities claim in a more subtle way in that it puts the plaintiff to a choice as to whether to litigate his claim in two separate forums or whether to forego either the federal securities claim or the pending claims.

QUESTION: Well, that impacts on the pendent claim, but if he has the right to choose, how does it impair his federal claim, because he can go forward with his federal claim unimpaired by the other claim under the Seventh Circuit view. I am not saying it is the right view.

MR. BENHAM: You mean that because of the delay and expense of prosecuting two separate proceedings, he cannot do both?

QUESTION: Well, no, because the arbitration must await the conclusion of the federal proceeding in order to protect the very value that you are relying on, namely, the integrity of the federal claim.

MR. BENHAM: Nevertheless, it is possible that a plaintiff may decide to forego the federal securities claim and proceed only on the state -- the pending claims because of the delay and expense of resolving the entire matter.

Inasmuch as the federal legislation preserves the state law remedies and we consider that as part of the scheme, protective scheme that the state law remedies are preserved, to the extent that the plaintiff is put to a choice because he cannot perhaps afford the time and delay and expense of two separate proceedings, then he must make a choice, and it has an impact on the

federal securities claim, albeit indirect.

QUESTION: Well, the impact is, he may have something he prefers. He may have a better option, is what you are saying.

MR. BENHAM: That is true. Dean Witter claims that in this case arbitration is a value which is entitled to priority, but severance and separate arbitration will not promote prompt and economic resolution of this dispute. Rather, Dean Witter seeks arbitration in spite of it causing delay in efficiency and additional expense.

Petitioner cites numerous cases favoring arbitration, but arbitration has been favored because it promotes prompt and economical resolution of disputes, not because it is inherently better. In Bernhardt versus Polygraphic Company of America, this Court recognized the shortcomings of arbitration, limited discovery, absence of any record or other articulation of the factual or legal conclusions, extremely limited right of review, no jury trial, no rules of evidence.

Despite these drawbacks, the benefits of arbitration are to be encouraged where they have been freely negotiated for by parties of equal bargaining power. In both Wilco and Bernhardt this Court acknowledged the importance of the right to choose a

judicial forum for the resolution of disputes. That right should not be considered waived in advance without a showing that such waiver was knowing and intelligent.

Ultimately, the only value promoted by requiring a severance and separate arbitration in this case is arbitration itself. Dean Witter relies on the sanctity of its contract as justification for compelling arbitration, but this is not a contract which is freely negotiated for by parties of equal bargaining power.

It is a standard form contract substantially identical in its terms to that which was before this Court more than 30 years ago in Wilco versus Swan, and which is used by the amici curiae and others throughout the securities industry in their customer agreements.

Dean Witter correctly points out that the adhesive nature of a contract does not automatically make it unenforceable under California law. It does, however, subject that agreement to special scrutiny, and the invalidation of provisions which are not within the reasonable contemplation of the parties.

QUESTION: Is that an issue in this case whether apart from the Securities Act rule of Wilco this contract would have been enforceable under California law?

MR. BENHAM: Not directly whether it would be

enforced. However, it is a factor relating to whether the District Judge should have discretion to retain jurisdiction or not. The only justifications for arbitration are that it is the agreement of the parties or that it is more efficient and economical.

QUESTION: Yes, but I --

MR. BENHAM: In the context of this case, neither of those exist.

QUESTION: Well, but I take it someone under -- someone who is assigned an arbitration contract under California law is presumably bound by it unless it was not enforceable under the law of California. Isn't that correct?

MR. BENHAM: That is true, Your Honor.

QUESTION: So isn't the question before the District Judge is this contract enforceable under California law?

MR. BENHAM: Yes, Your Honor, I guess it would be.

QUESTION: He doesn't have to go into all the other factors. Once he decides it is enforceable, whether or not he thinks the party got a good exchange for his bargain really doesn't matter, does it?

MR. BENHAM: That's correct, Your Honor. As I indicated in the context of this case the justifications

for arbitration are not present. It would not be more economical. It would not give effect to the agreement of the parties. And it could adversely affect the federal securities claim.

Dean Witter relies on this Court's recent decisions in Moses H. Cone Memorial Hospital versus Mercury Construction Company and Southland Corporation versus Keating. Those cases reaffirm the strong federal policy favoring arbitration, but they are readily distinguished from this case. Neither involve federal protective legislation. Both cases involve arbitration provisions which were prenegotiated by the parties.

In Southland versus Keating, the Court quoted Brayman versus Zapata Offshore Company. The effect of the agreement was made at arm's length by parties experienced and sophisticated. Finally, in Moses H. Cone and Southland the benefits of arbitration were available in part, in Southland because there was no bifurcation, and in Moses H. Cone because there was no bifurcation as to any particular defendant.

In conclusion, bifurcation and separate arbitration of the pending claims is not expressly required, and is counter to the goals of the Arbitration Act.

QUESTION: May I just ask you -- maybe this is

obvious, but I am just trying to think it through. Is it correct that the net effect of the intertwining doctrine in your position is that whenever a District Judge finds intertwining, that the arbitration agreement is totally unenforceable. It really is just read out of the contract?

MR. BENHAM: As to those claims which are legally and factually intertwined.

QUESTION: Which are pendent to the federal claim.

MR. BENHAM: And there are circumstances where, although acknowledging the intertwining doctrine, certain claims were nevertheless sent to arbitration, for example in Sibley versus Tandy.

QUESTION: Your argument really is strongest in a case where everything would be tried at once, presumably where you get total intertwining in effect.

MR. BENHAM: Yes.

QUESTION: The net effect, though, is to just make a nullity out of, A, the arbitration agreement itself, and B, the federal policy in favor of arbitration.

MR. BENHAM: It does in that particular circumstance.

QUESTION: Maybe it is the right answer. I

don't know. But it does have that consequence.

MR. BENHAM: That's correct.

QUESTION: And I suppose you would say that if the District Judge found intertwining, he necessarily would entertain the pendent claims rather than exercise his discretion not to?

MR. BENHAM: No, he would have the discretion to entertain them or not.

QUESTION: Even though he found them intertwining?

MR. BENHAM: That is all we are asking for, Your Honor, is that the District Judge have the discretion to make that decision.

QUESTION: Well, he should never find intertwining if he is going to not entertain it. He wouldn't have to find it. He wouldn't have to go to all that trouble.

MR. BENHAM: That's true, Your Honor.

QUESTION: What standard would guide his discretion if you say he has a preoption of either trying it all in one ball of wax or saying, well, I will do what your opponents want? Is there any standard to guide him?

MR. BENHAM: I think he would have to find that the issues were factually and legally intertwined.

QUESTION: Right.

MR. BENHAM: And he --

QUESTION: Having found that, what standard then guides his discretion?

MR. BENHAM: Whether there would be an adverse impact on the federal securities claim by severing the claims and sending them to arbitration. Bifurcation and separate arbitration is not expressly required and is counter to the goals of the Arbitration Act. It may adversely affect implementation of the federal securities laws, and it is a matter which is not freely bargained for by the parties.

This Court should recognize the intertwining doctrine as a valid, judicially created exception to the requirements of the Federal Arbitration Act. It should approve the proper exercise of discretion by the District Judge retaining jurisdiction of the entire case, and it should affirm the judgment of the Ninth Circuit Court of Appeals.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Bell?

MR. BELL: Yes, sir. Thank you.

CHIEF JUSTICE BURGER: You have four minutes remaining.

ORAL ARGUMENT OF EUGENE W. BELL, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BELL: It is of interest to me that the attention of the argument focused quickly on punitive damages, which are, of course, not available under the federal laws. Doesn't that indicate that the state issues substantially predominate in this case, and if that is the case, shouldn't we look to this Court's reasoning in United Mine Workers versus Gibbs, where this Court, in talking about the entertaining of pendent claims stated that if the state issues substantially predominate, if there would be different levels of proof, likelihood of perhaps confusion of the court or the jury, that the Court should feel free to dismiss those pendent claims rather than retainment.

And the argument --

QUESTION: Mr. Bell, I am still a little confused. If the state law claims are tried in federal court, do you agree that punitive damages may be awarded?

MR. BELL: I agree that there are cases that so hold.

QUESTION: How about this case?

MR. BELL: The Ninth Circuit has awarded punitive damages under -- has affirmed the award of punitive damages when a 10(b)(5) claim was tried along

with state claims and said that while we can't --

QUESTION: But in the state claims?

MR. BELL: Beg pardon?

QUESTION: Allow punitive damages --

MR. BELL: For the state claims only.

QUESTION: -- for the state claims only.

MR. BELL: The state claims only.

QUESTION: Well, now, tell me, if this case were tried in California state courts, if those state claims were brought there, I gather there could be no punitive damages, could there?

MR. BELL: No, because under -- the claims would be referred to arbitration.

QUESTION: That's what I thought, yes.

MR. BELL: And to return to the question asked earlier about arbitration, I believe the rationale of the New York state opinion with regard to an arbitrator's power to award punitive damage would be applied in almost any state that considered it, and that is that punitive damages are not a matter of a plaintiff's right.

It is a way that a state has or a judicial system has of enforcing its policies and making sure that people don't have reckless disregard for those policies, and they are assessed against a person for

reckless conduct. They are not awarded to anybody. He just happens to be the incidental beneficiary.

So, punitive damages aren't a matter of right, and I can see why the state would say that arbitrators aren't the people we want to feel we have empowered to award punitive damages and enforce this policy.

A question that was raised earlier with regard to the grounds of revoking under the Southland-Keating case, the Court recognized that in addition to whether it is a contractor involving maritime or interstate commerce, you could look legitimately at any grounds that exist in law or in equity to revoke the contract generally.

And to say that the intertwining was a ground for revoking it just flies in the face of the conduct, because once a court finds intertwining, he doesn't revoke the arbitration. He says it can go forward, but in my discretion I will either let it go forward or I won't let it go forward. He doesn't revoke the agreement and say that it is a nullity. So that argument just doesn't seem to swing.

And lastly, with regard to the rebuttal on the question of freely bargained for contracts and the provisions in the contract, I have examined the record here. There isn't one scintilla of evidence before this

Court in the record that any facts were considered at any level by the District Court or beyond or even presented by Dr. Byrd that this contract was not freely negotiated, that he had any doubts about the contract, or that -- I am sorry. Thank you.

CHIEF JUSTICE BURGER: Your time has expired, Mr. Bell.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:46 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1708 - DEAN WITTER REYNOLDS, INC., Petitioner v. A. LAMAR BYRD

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BY Paul A. Richardson

(REPORTER)