1987

The Preclusive Effect of Arbitral Determinations in Subsequent Federal Securities Litigation

Beth H. Friedman

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation

Available at: https://ir.lawnet.fordham.edu/flr/vol55/iss4/7

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
THE PRECLUSIVE EFFECT OF ARBITRAL DETERMINATIONS IN SUBSEQUENT FEDERAL SECURITIES LITIGATION

INTRODUCTION

The Federal Arbitration Act of 19251 (Arbitration Act) demonstrates a strong policy favoring the availability of speedy and efficient methods of dispute resolution.2 The Securities Exchange Act of 19343 (Exchange Act) was designed to ensure investor protection in the securities industry4 and it gives injured parties recourse to the federal courts.5 A conflict exists between the right to enforce an agreement to arbitrate securities disputes and the right to bring claims under the Exchange Act in federal court.6 The Supreme Court resolved this conflict, in part, when it held that pendent state law claims7 must be submitted to arbitration, even

---


2. See Wilko v. Swan, 346 U.S. 427, 431 (1953) ("The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation."); see also infra notes 34-39 and accompanying text.


4. See infra note 101 and accompanying text.

5. The Exchange Act both expressly and implicitly creates in the investor a right to sue for violations of the statute. See infra note 103 and accompanying text (creation of express civil liabilities); see also infra note 110 and accompanying text (judicial creation of an implied right of action under § 10(b) of the Exchange Act).

6. In determining the arbitrability of claims under the Securities Act, the Supreme Court highlighted the competing statutory concerns.

Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights.


7. Pendent state securities law and common law claims such as breach of contract, fraud and breach of fiduciary duty are arbitrable. See Liskey v. Oppenheimer & Co., 717 F.2d 314, 320-21 (6th Cir. 1983) (plaintiff’s claims of breach of contract, breach of fiduciary duty, common law negligence and violations of state securities laws are subject to arbitration pursuant to a valid predispute agreement); Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 642-43 (7th Cir. 1981) (various state law claims arbitrable); Timberlake v. Oppenheimer & Co., Fed. Sec. L. Rep. (CCH) ¶ 92,336 (N.D. Ill. 1985) (arbitration required as to claims of common law fraud and deceptive business practices); see also Note, The Severability of Arbitrable and Nonarbitrable Securities Claims, 41 Wash. & Lee L. Rev. 1165, 1166-67 (1984) [hereinafter Severability of Claims] ("Securities claims based on state law generally are subject to arbitration pursuant to valid arbitration agreements.").
though federal jurisdiction may be exercised over Exchange Act claims. By endorsing parallel proceedings in different fora, however, the decision whether an issue determination in arbitration has preclusive effect on subsequent federal securities litigation was left to the district courts.

To resolve this issue, the courts need to balance the federal interest in providing a forum for victims of violations of the securities laws, 8. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985). In Byrd, the defendant assumed that the plaintiff's federal securities law claims were nonarbitrable and did not move to compel arbitration of those claims. Id. at 215. The Court, therefore, addressed the issue of whether to compel arbitration of pendent state law claims when the federal claim is heard in federal court. Id. at 216. The Court declined to resolve the issue of whether claims under the Exchange Act may be submitted to arbitration. Id. at 216 n.1. The arbitrability of claims arising under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), is unresolved among the circuit courts of appeals. Eight circuits have adopted a rule that claims brought under § 10(b) of the Exchange Act are not arbitrable. See Bustamante v. Rotan Mosle, Inc., 802 F.2d 815, 816 (5th Cir. 1986); Wolfe v. F. Hutton & Co., 590 F.2d 1032, 1038 (11th Cir. 1986) (en banc); Johnson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1202 (3d Cir. 1986); Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 527 (9th Cir. 1986); McMahon v. Shearson/American Express, Inc., 788 F.2d 94, 98 (2d Cir.), cert. granted, 107 S. Ct. 60 (1986); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1030-31 (6th Cir. 1979); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 829 (10th Cir. 1978); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., 558 F.2d 831, 836 (7th Cir. 1977). Two circuits have adopted the contrary position that claims under § 10(b) may be submitted to arbitration. See Page v. Moseley, Hallgarten, Estabrook & Weedon, Inc., 806 F.2d 291, 298 (1st Cir. 1986); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1399 (8th Cir. 1986). The Supreme Court recently granted certiorari to decide this issue. See McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir.), cert. granted, 107 S. Ct. 60 (1986). If the Court determines that actions under § 10(b) may not be submitted to arbitration, the resultant bifurcated proceedings will place the determination of the preclusive effect of the arbitration of related claims in the hands of the district courts. See infra notes 53-58 and accompanying text. A decision holding that pre-dispute agreements to arbitrate claims under § 10(b) are valid will require lower courts to consider the application of preclusion to bifurcated cases currently pending in the federal courts. A determination of the arbitrability of § 10(b) is beyond the scope of this Note. For an analysis of this issue see, Note, Arbitrability of Claims Arising Under the Securities Exchange Act of 1934, 1986 Duke L.J. 548 (1986) [hereinafter Arbitrability of Claims].


10. Preclusion is a judicially created doctrine that restricts parties from relitigating claims or issues previously decided. See infra notes 59-70 and accompanying text. See generally 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §§ 4401-4426 (1981) [hereinafter Wright] (discussing rules of preclusion).

11. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 223 (1985) (district courts must frame preclusion rules in light of relevant federal interests). Since Byrd, at least one district court has addressed the preclusive effect of arbitration in the context of the federal securities laws. In O'Neill v. Merrill Lynch, Pierce, Fenner & Smith, No. 84 C 3181, slip op. (N.D. Ill. Jan. 30, 1987), the court stated that to preserve the effectiveness of arbitration, issues determined therein should be given some preclusive effect in federal court. Id. at 7. On the facts of the case, however, the court held that issue preclusion could not be applied. Id. at 10.

12. Where a right of action has been created by federal statute and federal courts are given jurisdiction to hear the claims, there exists a federal interest in protecting access to the federal forum. See McDonald v. City of W. Branch, 466 U.S. 284, 289-90 (1984); see also Note, The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction
Against the public interest in judicial economy and finality.

In the context of other statutory rights, the Supreme Court has held that when there is a federal interest in protecting a judicial forum for resolution of the statutory claim, and arbitration cannot adequately protect that claim, issue preclusion may not be raised as a bar to federal consideration of the issue. Thus, courts must address two issues to decide whether preservation of a judicial forum for securities claims requires a similar bar to the application of preclusion. The first is whether the implied right of action under section 10(b) of the Exchange Act creates a federal jurisdictional interest. The second is whether the arbitral proceedings adequately protect that interest.

This Note proposes a framework to identify appropriate circumstances for applying preclusive effect to arbitral determinations. This framework accommodates the concerns of the Exchange Act, the Arbitration Act and judicial concerns of economy and finality.

---

over Section 10(b) of the Securities Exchange Act of 1934, 46 N.Y.U. L. Rev. 936, 961 (1971) [hereinafter Exclusive Federal Jurisdiction] ("A federal court must first consider its obligation to protect its exclusive jurisdiction.").


14. See 18 Wright, supra note 10, § 4403, at 15 ("The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means of finally ending private disputes."); 1B J. Moore, J. Lucas & T. Currier, Federal Practice, ¶ 0.405[2], at 189-90 (2d ed. 1984) [hereinafter Moore] (underlying policy of preclusion "is the objective of judicial finality").


19. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); see also infra note 110 and accompanying text (discussion of implied right of action under § 10(b)).


21. See supra note 16 and accompanying text; see also infra Part III.

22. See supra note 17 and accompanying text; see also infra Part III.

23. The Exchange Act is designed to protect investors from fraud and manipulation in the securities industry. See infra notes 99-111 and accompanying text.


25. See supra notes 13-14 and accompanying text; see also infra Part II.
examines the history of arbitration and its role in the modern securities industry. Part II analyzes the judicial doctrine of issue preclusion and explores Supreme Court precedent in analogous areas of law. Part III reviews the legislative history of the Exchange Act, the overriding federal interest that guarantees a forum for actions arising under section 10(b) of the Exchange Act and the procedural limitations of arbitration. Part IV concludes that the federal jurisdictional interest in hearing claims under section 10(b) limits the application of issue preclusion. It then proposes guidelines for identifying circumstances when preclusion would be appropriate.

I. THE POLICY FAVORING ARBITRATION

Historically, American courts denied enforcement of contract provisions mandating arbitration of disputes arising out of the contract. Although faced with changing social conditions and an increasingly congested judicial system, American courts felt constrained to follow

26. Arbitration has existed as a means of dispute resolution for centuries. See Allison, Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies, 64 N.C.L. Rev. 219, 222 (1986) (arbitration is of ancient origin); Emerson, History of Arbitration Practice and Law, 19 Cleve. St. L. Rev. 155, 155 (1970) ("Long before laws were established, or courts were organized . . . men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes."); Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. 595, 597 (1927) (arbitration was an authorized dispute resolution mechanism as far back as the seventh century).

27. American judges in the nineteenth century were "hostile to arbitration." See Mixed Claims, supra note 6, at 528-29. American reluctance to enforce arbitration agreements was largely a product of English precedent. See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-85 (2d Cir. 1942). English courts were jealous for their jurisdiction and refused to enforce agreements to arbitrate. See id. at 985 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) (considering the enactment of the Federal Arbitration Act)). Their reluctance to enforce arbitration agreements has been attributed, in part, to "the desire of the judges, at a time when their salaries came largely from fees, to avoid loss of income." Id. at 983. This philosophy became strongly embedded in English precedent and was subsequently adopted by American courts. See id. at 985 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)); see also Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."); Mitchell v. Dougherty, 90 F. 639, 644-45 (3d Cir. 1898) (arbitration agreement unenforceable because it would oust courts of their jurisdiction); Dickson Mfg. Co. v. American Locomotive Co., 119 F. 488, 490 (M.D. Pa. 1902) (parties may not contract to "oust the courts of their jurisdiction").

28. The 1920's were characterized by a diversification of occupations, an influx of immigrants, an increasing population and an ever growing number of new enterprises, all resulting in multitudinous controversies. See Letter from Judge Moses H. Grossman, Executive Head of the Arbitration Society of America, to Hon. William Draper Lewis, Secretary, the American Law Institute (Dec. 24, 1923), quoted in Jones, Historical Development of Commercial Arbitration in the United States, 12 Minn. L. Rev. 240, 257 n.64 (1928).

29. See Allison, supra note 26, at 226 (congested court dockets in the early twentieth century resulted in long delays in the litigation of commercial disputes); Jones, supra note 28, at 258 ("On January 1, 1923, 27,000 untried cases were on the supreme court calendars in New York County. Using every effort, the court can dispose of about 8,000 cases
this precedent.\textsuperscript{30} Pressured by the business community,\textsuperscript{31} Congress enacted the Federal Arbitration Act of 1925\textsuperscript{32} and formally recognized arbitration as a valid alternative to judicial dispute resolution.\textsuperscript{33}

The Arbitration Act required\textsuperscript{34} federal courts to refer to arbitration all claims arising out of contracts containing a valid arbitration clause,\textsuperscript{35} and thereby granted such agreements the same status as other contractual

\textsuperscript{30} See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) ("The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it."); Atlantic Fruit Co. v. Red Cross Line, 276 F. 319, 322 (S.D.N.Y. 1921) (although viewing the old rule as anachronistic, the court felt constrained to follow prior decisions holding arbitration agreements unenforceable), aff'd, 5 F.2d 218 (2d Cir. 1924); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007 (S.D.N.Y. 1915) (criticizing the custom of standing upon "the antiquity of the rule [rather] than upon its excellence or reason").

\textsuperscript{31} American businessmen pressed for more rapid dispute resolution that would respond to the practical nature of business. See Mixed Claims, supra note 6, at 529; see also Note, Effect of the United States Arbitration Act, 25 Geo. L.J. 443, 445-46 & n.20 (1937) (businessmen preferred to settle disputes according to practical considerations, rather than principles of law).


\textsuperscript{33} Section 2 of the Arbitration Act provides:

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.


The Act also gives the courts of the United States power to stay federal proceedings where the issue therein is referable to arbitration, see 9 U.S.C. § 3 (1982), and provides that where a party fails to arbitrate under the agreement, the party may petition any federal district court to compel arbitration in accordance with the agreement. See 9 U.S.C. § 4 (1982). Section 10 permits vacation of an arbitration award upon motion of any party under limited circumstances. See 9 U.S.C § 10 (1982). See infra note 129 and accompanying text.

\textsuperscript{34} See 9 U.S.C § 2 (1982); see also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The legislative history of the [Arbitration] Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."); Allison, supra note 26, at 227 ("The Arbitration Act goes far beyond merely validating arbitration clauses and in several ways mandates the active involvement of federal courts in implementing the Act's pro-arbitration policy."); Mixed Claims, supra note 6, at 530 ("Courts can no longer refuse to enforce valid arbitration agreements between parties.").

\textsuperscript{35} An agreement to arbitrate is valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C § 2 (1982).
provisions. Congress intended to reduce the burdens of litigation through a guarantee of access to swift and cost effective fora for dispute resolution. This intent has been implemented through an expansive construction of the Arbitration Act and a liberal interpretation of arbitration agreements.

The Supreme Court in Dean Witter Reynolds Inc. v. Byrd, addressed the question whether district courts must compel arbitration of pendent state law claims when federal securities claims will be heard in federal court. The Court held that the language and the legislative intent of the Arbitration Act mandate that parties shall proceed to arbitration on all matters within the scope of their agreement. Compelling the arbitration was deemed necessary to protect both the contractual rights of the parties and their rights under the Arbitration Act. The Court, therefore, held that state law claims must proceed to arbitration, even


37. See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) ("It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.") (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 269 (1926) ("The evils which arbitration is intended to correct are three in number: (1) The long delay . . . [due to the] great congestion of the court calendars . . . . (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world.").

38. See, e.g., Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 452-53 (1935) (section 3 of the Arbitration Act interpreted expansively to effectuate congressional purpose); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959) ("Any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.").


41. See id. at 214.

42. See id. at 217-19. In Byrd, the plaintiff brought an action in federal district court alleging violations of §§ 10(b), 15(c) and 20 of the Exchange Act and various state laws. Id. at 214. When plaintiff invested funds with defendant, plaintiff signed a customer's agreement that any controversy arising out of the contract be settled by arbitration. Id. at 215. Defendant filed a motion to sever the pendent state law claims, compel arbitration of those claims and stay the arbitration pending resolution of the federal litigation. Id.

43. See id. at 221.

44. See id.
when parallel proceedings in separate fora would result.\textsuperscript{45}

The Court further ruled that motions to stay arbitration pending judicial resolution of the federal securities claims must be denied,\textsuperscript{46} noting that the Arbitration Act requires the arbitration to proceed without delay.\textsuperscript{47} Prior to \textit{Byrd}, lower courts sought to protect their jurisdictional interest in hearing claims under section 10(b) from the preclusive effect of a prior arbitral determination of related state law claims.\textsuperscript{48} This was accomplished either by denying arbitration of the pendent claims\textsuperscript{49} or staying the arbitral proceedings.\textsuperscript{50} The \textit{Byrd} Court stated, however, that a stay of arbitral proceedings is not necessary to protect the federal court's jurisdictional interest,\textsuperscript{51} and therefore directed arbitration and litigation of the respective state and federal claims to proceed simultaneously.\textsuperscript{52}

\textsuperscript{45} See \textit{id.} at 217.

\textsuperscript{46} See \textit{id.} at 222 (a stay is not needed to protect the federal interest in adjudication of federal securities claims).

\textsuperscript{47} See \textit{id.} at 225 (White, J., concurring) ("[b] related enforcement" of the Arbitration Act frustrates purpose of agreements to arbitrate so arbitration and litigation should proceed simultaneously).

\textsuperscript{48} See Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982) (denial of arbitration is necessary "to protect the jurisdiction of the federal court and avoid any possible preclusive effect"); Miley v. Oppenheimer & Co., 637 F.2d 318, 336 (5th Cir. 1981) (federal court must protect its exclusive jurisdiction).

\textsuperscript{49} See, e.g., Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982) (district courts should not sever arbitrable claims when they are "inextricably" intertwined with nonarbitrable claims); Miley v. Oppenheimer & Co., 637 F.2d 318, 336 (5th Cir. 1981) (refusing to compel arbitration of pendent state law claims); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 582 (E.D. Cal. 1982) (denying motion to compel arbitration of pendent claims). This approach relied on the judicially created "doctrine of intertwining," which requires a refusal to compel arbitration when the same factual and legal conclusions must be drawn from common evidentiary facts. See Miley v. Oppenheimer & Co., 637 F.2d 318, 335-36 (5th Cir. 1981). Courts utilized this exception to the Arbitration Act to protect exclusive federal jurisdiction over securities claims from the potential collateral estoppel effect of the prior arbitration. \textit{Id.} The courts also felt that it would be inefficient to bifurcate a mixed claim lawsuit because it would frustrate the purpose of the Arbitration Act to promote speedy and efficient dispute resolution. See Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552, 554 (9th Cir. 1984), rev'd, 470 U.S. 213 (1985); Cunningham, 550 F. Supp. at 584. See generally \textit{Mixed Claims}, supra note 6, at 540-47 (analyzing court approaches to intertwined claims); \textit{Severability of Claims}, supra note 7, at 1168-70 (same).

\textsuperscript{50} See, e.g., Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 62-63 (8th Cir. 1984) (rejecting the intertwining doctrine and directing lower courts to stay arbitration pending judicial resolution of federal securities claims to protect federal jurisdiction); Liskey v. Oppenheimer & Co., 717 F.2d 314, 318 (6th Cir. 1983) ("district court has discretion to stay arbitration . . . . [t]o preserve its full authority to decide the nonarbitrable issues without any collateral estoppel consequences from a prior arbitration" (quoting Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 644 (7th Cir. 1981) (emphasis in original))).

\textsuperscript{51} See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222 (1985) ("neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal-court proceeding").

\textsuperscript{52} See \textit{id.} at 222 (district courts should not manipulate the ordering of bifurcated proceedings); \textit{id.} at 225 (White, J., concurring) (presumption should be that proceedings will go forward simultaneously).
By confirming the right to enforce an agreement to arbitrate pendent state law claims,\(^5\) without determining the arbitrability of the federal claim,\(^4\) the Byrd decision created the need to determine the preclusive effect of an arbitral determination in federal securities litigation.\(^5\) Although the Court suggested that it is uncertain that such arbitral determinations will have any preclusive effect on the litigation of nonarbitrable federal securities claims,\(^5\) it nevertheless required district courts to take into account federal interests in framing rules of preclusion.\(^5\) The lower courts are left, therefore, to consider what preclusive weight, if any, shall be given prior arbitral determinations in federal securities litigation.\(^5\)

II. APPLICATION OF PRECLUSION TO PRIOR ARBITRATIONS

A. The Preclusion Doctrine

To accomplish its function of dispute resolution,\(^5\) the civil court system requires a mechanism that provides an end to litigation.\(^6\) Courts have created doctrines of preclusion\(^6\) to ensure judicial finality.\(^6\)

[References and footnotes]

53. Id. at 221.
54. Id. at 216 n.1; see also supra note 8 (addressing the arbitrability of § 10(b) claims).
55. See id. at 223 ("The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us . . . and we do not decide it.").
56. See id. at 222 ("[I]t is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims.").
57. See id. at 223 ("Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection.") (dictum).
58. Whether a court orders the proceedings to go forward simultaneously, see Girard v. Drexel Burnham Lambert, Inc., 805 F.2d 607, 611 (5th Cir. 1986); Bustamante v. Rotan Mosle, Inc., 802 F.2d 815, 817 (5th Cir. 1986); see also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring) (presumption should be that arbitration and litigation "will each proceed in its normal course"); or stays the federal proceedings pending arbitration, see, e.g., Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 807 F.2d 16, 20-21 (1st Cir. 1986); Jope v. Bear Stearns & Co., 632 F. Supp. 140, 144 (N.D. Cal. 1985); Leone v. Advest, Inc., 624 F. Supp. 297, 303 (S.D.N.Y. 1985); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 567-68 (N.D. Cal. 1984), it is likely that an arbitrator's decision will precede disposition of the federal litigation. See Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 748-49 & n.3 (1981) (Burger, C.J., dissenting) (arbitration is swifter and less expensive than litigation); Bustamante v. Rotan Mosle, Inc., 802 F.2d 815, 817 (5th Cir. 1986) (unlikely that judicial proceedings will reach conclusion before arbitral proceedings); Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1025 (11th Cir. 1982) ("Arbitration provides a speedier . . . method of dispute resolution than does litigation . . . ."). Thus, the district courts will need to determine what weight, if any, should be given to the arbitral result. See Byrd, 470 U.S. at 223 ("The [preclusive] effect of an arbitration proceeding is at issue only after arbitration is completed . . . .")
59. See Southern Pac. R.R. v. United States, 168 U.S. 1, 49 (1897) ("[T]he very object for which civil courts have been established . . . is to secure the peace and repose of society by the settlement of matters capable of judicial determination."); see also Montana v. United States, 440 U.S. 147, 153 (1979) (finality is a major goal of the judicial process).
60. See Southern Pac. R.R. v. United States, 168 U.S. 1, 48-49 (1897) (rule preventing duplicitive litigation necessary to maintain social order).
61. See 1B Moore, supra note 14, ¶ 0.405[11], at 257 ("The doctrine of [preclusion] is
preclusion bars a party from bringing suit on the same cause of action already brought before another forum.\textsuperscript{63} Issue preclusion prevents relitigation of issues actually and necessarily determined in the prior suit, although the second suit may be based on a different cause of action.\textsuperscript{64} Rules of preclusion aid in conserving judicial resources, preventing inconsistent judgments, eliminating vexatious litigation and promoting public confidence in the judiciary.\textsuperscript{65} Preclusion is not granted when the

---

\textsuperscript{63} A judge-made doctrine and exemplifies the important public policy that litigation come to an end."

The terms "claim preclusion" and "issue preclusion" are the modern terms for res judicata and collateral estoppel, respectively. Originally, the term res judicata was used to refer to a variety of concepts regarding the preclusive effects of a judgment in a subsequent action. See 1B Moore, supra note 14, ¶ 0.405[1], at 178; 18 Wright, supra note 10, § 4402, at 6; Holland, \textit{Modernizing Res Judicata: Reflections on the Parklane Doctrine}, 55 Ind. L.J. 615, 615-16 (1980). Used in this broad sense, res judicata encompasses the effect of a final judgment both as a bar to further action upon the same claim, and as an estoppel as to matters necessarily litigated, although the claim in the subsequent action is different. 1B Moore, supra note 14, ¶ 0.405[1], at 178. Recent cases tend to limit the term res judicata to the former usage and utilize the term collateral estoppel to indicate the latter. See Allen v. McCurry, 449 U.S. 90, 94 & n.5 (1980) (noting the limited interpretation of res judicata); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 & n.5 (1979) (using res judicata in its limited sense); 18 Wright, supra note 10, § 4402, at 8-11. For clarity, this Note uses the term claim preclusion to denote the operation of a judgment as a bar to further action on that claim and issue preclusion to indicate an estoppel as to issues previously determined. See Allen v. McCurry, 449 U.S. 90, 94 n.5 (1980) (noting terminology of claim and issue preclusion).

62. See Montana v. United States, 440 U.S. 147, 153 (1979) ("Application of both doctrines [claim and issue preclusion] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions."); see also Brown v. Felsen, 442 U.S. 127, 131 (1979) (preclusion ensures judicial finality); Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) (Preclusion "is a rule of fundamental and substantial justice, 'of public policy and of private peace' . . . .") (citing Kessler v. Eldred, 206 U.S. 285 (1907)); 18 Wright, supra note 10, § 4403 (enumeration of public and private values served by preclusion doctrines).

63. Under claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876); 1B Moore, supra note 14, ¶ 0.405[1], at 181; 18 Wright, supra note 10, § 4407, at 48. Claim preclusion bars not only issues actually raised in the prior proceeding, but bars relitigation of all issues that could have been brought in the prior action. See Allen v. McCurry, 449 U.S. 90, 94 (1980); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378 (1940); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

64. See Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). Before the defense of issue preclusion may be invoked, certain prerequisites must be met: (1) the issue must be the same as that involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue must have been an essential part of the judgment in the prior action. See Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985); Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 243-44 (5th Cir. 1983); Williams v. Bennett, 689 F.2d 1370, 1381 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983).

opposing party shows that she was denied a full and fair opportunity to litigate that issue in the earlier action. By preventing unnecessary duplicative litigation and promoting speedy yet efficient claim resolution, the doctrine of preclusion is in harmony with the Arbitration Act's goal of promoting efficient dispute resolution. In the context of securities litigation, courts are reluctant to utilize claim preclusion, which would bar federal litigation, finding issue preclusion to be a more appropriate preclusive mechanism.

66. See Allen v. McCurry, 449 U.S. 90, 95 (1980); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971); see also infra note 146 (discussing application of the full and fair opportunity test).

67. See supra note 65 and accompanying text.


69. Courts and commentators generally state that a prior adjudication of state law securities claims does not have claim preclusive effect on a subsequent suit under § 10(b). See Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.), cert. denied, 423 U.S. 841 (1975); Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968); Capital Invs., Inc. v. Bank of Sturgeon Bay, 430 F. Supp. 534, 536 (E.D. Wis. 1977), aff’d, 577 F.2d 745 (7th Cir. 1978); see also 5C A. Jacobs, Litigation and Practice Under Rule 10b-5 § 239, at 10-107 (1986) [hereinafter Jacobs] (a prior adjudication has no claim preclusive effect on a subsequent 10b-5 suit); Exclusive Federal Jurisdiction, supra note 12, at 943 (noting that only one court found the requisite identity of claims required to bar 10b-5 litigation on the basis of claim preclusion). This conclusion is based on the exclusive jurisdiction of federal courts to adjudicate § 10(b) claims, see 15 U.S.C § 78aa (1982); see also Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.) (exclusive jurisdiction precludes application of claim preclusion), cert. denied, 423 U.S. 841 (1975), and the fact that an action under Rule 10b-5 is a different cause of action than the state claim. See Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.), cert. denied, 423 U.S. 841 (1975); Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968); 5C Jacobs, supra, § 239, at 10-107. But see Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985) (an arbitration decision can have claim or issue preclusive effect even if the underlying claim involves the federal securities laws); Schattner v. Girard, Inc., 668 F.2d 1366, 1369 (D.C. Cir. 1981) (same); O'Neill v. Merrill Lynch, Pierce, Fenner & Smith, No. 84 C 3181 slip op. (N.D. Ill. Jan. 30, 1987) (same); Maidman v. O'Brien, 473 F. Supp. 25, 29-30 (S.D.N.Y. 1979) (same).

70. Courts recognize issue preclusion as a defense regardless of whether the prior determination was made by a state court or by an arbitration panel. See, e.g., Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361-62 (11th Cir. 1985) (issue preclusion applied to facts determined in arbitration); Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.), cert. denied, 423 U.S. 841 (1975) (prior state court determination may have issue preclusive effect on securities litigation); Verrinion Corp. v. Benjamin, 440 F.2d 105, 108 (2d Cir.), cert. denied, 402 U.S. 987 (1971) (issue preclusion applies where state court determined an issue arising in subsequent federal litigation); Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968) (to the extent that state and federal suits are based on the same facts, issue preclusion may apply). See generally 5C Jacobs, supra note 69, at § 239 (discussing applicability of claim and issue preclusion in the context of 10b-5 litigation); Exclusive Federal Jurisdiction, supra note 12, at 941-47 (same); Note, Res
B. Supreme Court Precedent for Granting Preclusive Effect to Prior Arbitrations

The Federal Full Faith and Credit Statute,71 which requires federal courts to give the same preclusive effect to a state court judgment as would the courts of a state rendering the judgment,72 does not apply to arbitrations.73 Any rule of preclusion for arbitral determinations, therefore, is judicially fashioned.74

The Supreme Court has not yet considered the degree of preclusive effect to be accorded a prior arbitral determination in a subsequent federal securities action.75 The Court has addressed the issue of granting preclusive effect to arbitration where other federal statutory rights are implicated.76 In these other contexts, the Court has determined the degree of preclusive effect to be granted an arbitral determination by analyzing the extent to which the right at issue is intended to be judicially enforceable77 and the adequacy of arbitral proceedings in adjudicating that right.78

When a statute creates an express right of action79 and grants federal


75. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 223 (1985). The Byrd Court stated that it is unlikely that arbitration will have any preclusive effect on the litigation of nonarbitrable federal securities law claims. Id. at 222. The Court went on to state that arbitration proceedings will not necessarily preclude federal litigation, implying, arguably, that preclusion is, at least theoretically, possible. Id. at 223. Ultimately, the Court directed lower courts to consider federal interests in framing preclusion rules, thereby recognizing the potential applicability of the doctrine. Id.
the judiciary has an obligation to protect the federal right. The Court, therefore, has consistently concluded that preclusion cannot be applied to bar a federal action when the court's jurisdiction is conferred by statute and the arbitration is procedurally inadequate to protect the parties' federal rights.

The question of arbitral reliability focuses on the expertise and authority of the arbitrator and the general standards of arbitration. An arbitrator may lack the expertise necessary to adjudicate questions of federal law. Because arbitrators are trained in "the law of the shop," statutory or constitutional questions are beyond their realm of competence. Moreover, because the arbitrator's authority emanates from the contract, she is neither required nor permitted to use congressional policy concerns in making a determination. Furthermore, the procedural limitations


81. See McDonald v. City of W. Branch, 466 U.S. 284, 289 (1984); see also Exclusive Federal Jurisdiction, supra note 12, at 961 ("A federal court must first consider its obligation to protect its exclusive jurisdiction.").


When issues under federal law are substantially similar to those under state law, concern over the limited expertise of the arbitrator may be eliminated. See infra notes 121-22 and accompanying text.

88. See Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 744 (1981) ("[E]ven though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so."); Alexander v. Gardner-Denver Co,
inherent in arbitrations cast doubt on the adequacy of its result where federal rights are implicated. The combination of these factors motivated the Court to establish a general bar to the application of issue preclusion, rather than inquire into the reliability of the arbitration on a case by case basis.

The Court's analysis suggests that when a federal statute creates an express right to a judicial forum, the inability of arbitration to protect the federal jurisdictional interest prevents the arbitration from precluding subsequent federal litigation. In Byrd the Court indicated that the implied right of action under section 10(b) and Rule 10b-5 creates sufficient federal interest either to limit significantly or to deny preclusive effect to arbitral determinations in subsequent federal securities litigation. The degree of preclusive effect, if any, to be granted to securities arbitration, therefore, depends on two factors. The first is whether the Exchange Act mandates judicial resolution of claims arising under sec-

415 U.S. 36, 53-54 (1974) (arbitrator has no authority to invoke public laws and is limited to resolving questions of contractual rights).

The Court has noted that because contractual and statutory rights have legally independent origins, they should remain equally available to the injured party to preserve the statute's efficacy. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974).

89. The Court has raised concerns over the procedural inadequacies of arbitration, such as: "'[t]he record of the arbitration proceedings is not as complete [as a judicial record]; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.'" McDonald v. City of W. Branch, 466 U.S. 284, 291 (1984) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974)). For a discussion of arbitral procedures see infra notes 124-29 and accompanying text.


96. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222-23 (1985). See also supra notes 56-57 and accompanying text. This result has been reached in the context of at least one other implied federal right of action. In an action under the Federal Employer's Liability Act, 45 U.S.C. § 60 (1982), the court held that "although no direct cause of action is granted by federal statute, we apply the Supreme Court's reasoning and do not raise the insurmountable barriers of [preclusion]." Gonzalez v. Southern Pac. Transp. Co., 773 F.2d 637, 645 (5th Cir. 1985).
The second is whether the issue determinations made by an arbitral forum are sufficiently reliable to effectuate congressional purposes.

III. THE FEDERAL INTEREST AND ARBITRAL ADEQUACY

A. The Federal Securities Acts

The Securities Act of 1933 and the Exchange Act were designed to protect the investing public through the establishment of federal supervision over the securities market. Congress intended private civil remedies to be an integral part of achieving this goal. Recognizing that purchasers of securities do not occupy equal bargaining positions with issuers and broker/dealers, Congress intended to provide greater protection to purchasers of registered securities.
tended both acts to give the investor added protection through access to a federal forum,105 thereby supplementing existing common law and federal and state statutory remedies.106

Section 10(b) of the Exchange Act,107 and Rule 10b-5 promulgated thereunder,108 were created to protect the investor against fraud.109 The right of action under Rule 10b-5, however, is implied.110 Because denial of this implied right of access to a judicial forum would thwart congres-

---


106. Section 16 of the Securities Act states that “[t]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.” 15 U.S.C. § 77p (1982). A nearly identical provision is found in § 28(a) of the Exchange Act. “The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.” 15 U.S.C. § 78bb(a) (1982). See Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) (“the remedies in each Act were to be supplemented by ‘any and all’ additional remedies”).

107. Section 10(b) reads in relevant part: “[i]t shall be unlawful for any person . . . [to] use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78j (1982).

108. Rule 10b-5 provides in relevant part: “[i]t shall be unlawful for any person . . . (a) [t]o employ any device, scheme, or artifice to defraud, . . . (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . ..” 17 C.F.R. § 240.10b-5 (1987).


110. There is very little evidence of legislative intent in the construction of § 10(b) or Rule 10b-5. See Bromberg & Lowenfels, Securities Fraud and Commodities Fraud, § 2.2(331), at 2-22 [hereinafter Bromberg & Lowenfels]; 5 Jacobs, supra note 69, § 5.01, at 1-170 (“legislative history of Section 10(b) is so meager that little can be drawn from it concerning the scope of 10b-5”). What little evidence exists, however, indicates that the section was intended to be expansive. Thomas G. Corcoran, one of the drafters of § 9(c), the predecessor to § 10(b) stated “[s]ubsection (c) says, ‘Thou shalt not devise any other cunning devices.’ . . . [i]t is a catch-all clause to prevent manipulative devices.” reprinted in 5 Jacobs, supra note 69, § 5.01, at 1-165.

There is no indication in the language or legislative history of § 10(b) or Rule 10b-5 that Congress contemplated the creation of a civil right of action under this section. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975). See generally 1 Bromberg & Lowenfels, supra, § 2.2(300-420), at 2:18-2:30 (legislative and administrative history of § 10(b) and Rule 10b-5). The Supreme Court, however, has clearly established an implied private right of action under § 10(b) and Rule 10b-5. See Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

The implication of a right under § 10(b) is necessary to effectuate congressional purposes in regulating the securities industry. See Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 524 (9th Cir. 1986) (§ 10(b) implies a private right of action because the deterrent effect of a private remedy is necessary to effectuate control over the securities industry); see also J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (courts must "be alert to provide such remedies as are necessary to make effective the congressional purpose").
sional purposes, there is a strong federal interest in preserving jurisdiction over Rule 10b-5 claims. It, therefore, may not be infringed upon by issue determinations of an alternate forum when that forum’s procedures cannot adequately protect the federal right under section 10(b).

B. The Reliability of Arbitration

Because the federal courts have sufficient interest in protecting their jurisdiction over Exchange Act claims, courts must decide whether the arbitral procedures are inherently insufficient to safeguard the litigant's federal rights. Under the Supreme Court analysis, such insufficiency would mandate a general denial of preclusive effect to arbitrators' findings. The arbitrator's inability to expertly adjudicate statutory or constitutional claims, and her limited scope of authority are significant factors in denying preclusive effect to arbitral determinations. This has been of particular concern to the Court when constitutional rights or considerations are implicated. The Court is reluctant to foreclose federal consideration when an arbitrator has not addressed the constitutional aspects of an individual's claim.

Unlike federal statutes involving constitutional issues, there is substan-

111. Once a right has been implied under a federal statute, there is no justification for granting it less protection than an express cause of action because “[t]o say that a private cause of action is implied is to say that Congress intended such an action to exist.” Wolfe v. E.F. Hutton & Co., 800 F.2d 1032, 1039 (11th Cir. 1986) (Tjoflat, J., concurring); see Arbitrability of Claims, supra note 8, at 568-69 & n.139. Furthermore, 15 U.S.C. § 78aa (1982) expressly reserves exclusive federal jurisdiction over violations of the Exchange Act or the rules and regulations thereunder. See Exclusive Federal Jurisdiction, supra note 12, at 940-47.

112. See supra notes 79-82 and accompanying text.
113. See supra notes 99-112 and accompanying text.
114. See supra notes 78, 84-90 and accompanying text.
115. See supra note 91 and accompanying text.
116. See supra notes 86-88 and accompanying text.
117. See supra notes 79-82 and accompanying text.
118. See supra notes 78, 84-90 and accompanying text.
119. See supra note 91 and accompanying text.
120. See supra note 84 and accompanying text.
121. See supra notes 79-82 and accompanying text.
122. See supra notes 99-112 and accompanying text.
123. See supra notes 78, 84-90 and accompanying text.
124. See supra note 91 and accompanying text.
125. See supra notes 86-88 and accompanying text.
126. See supra notes 79-82 and accompanying text.
127. See supra notes 99-112 and accompanying text.
128. See supra notes 78, 84-90 and accompanying text.
129. See supra note 91 and accompanying text.
130. See supra notes 84 and accompanying text.
131. See supra notes 79-82 and accompanying text.
132. See supra notes 99-112 and accompanying text.
133. See supra notes 78, 84-90 and accompanying text.
134. See supra note 91 and accompanying text.
135. See supra notes 86-88 and accompanying text.
tial similarity between the purposes and policies underlying federal and state securities laws—investor protection against fraud in the securities industry.121 Because the issues in arbitration are substantially similar to those reserved for federal adjudication, and involve parallel policy considerations, the arbitrator will apply an analysis that is fundamentally equivalent to that which a federal court would apply. The concern of foreclosing relitigation of an issue that has not been given complete consideration should not arise. These similarities between the underlying concepts of federal and state securities actions, therefore, dispel the concern over the limited expertise and authority of the arbitrator.122 Be-


Although the elements of securities claims under federal and state laws are not identical, see Herman & MacLean v. Huddleston, 459 U.S. 375, 388-89 (1983); see also supra note 70 and accompanying text, the concepts underlying the actions are the same. See Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 582 (E.D. Cal. 1982) (“In truth, the claims under Rule 10b-5 and the common law breach of duty, fraud, and negligence claims appear to be nothing more or less than compatible theories of liability for the same basic tort ...”). Indeed, the “doctrine of intertwining,” see supra note 48 and accompanying text, used by federal courts before Byrd to protect exclusive jurisdiction over federal securities claims by denying arbitration of closely related arbitrable claims, illustrates the underlying conceptual similarities between federal and state securities actions. See Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552, 554 (9th Cir. 1984), rev’d, 470 U.S. 213 (1985); Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318, 335 (5th Cir. 1981); see also 5 Jacobs, supra note 69, § 2, at 1-6 (“Common law has an important bearing on 10b-5 because courts discussing the Rule frequently analogized to tort concepts.”); 3 L. Loss, Securities Regulation 1430 (2d ed. 1961) (“It is impossible to describe the statutory fraud concepts that have developed under the securities laws without some summary of what has gone before.”).

Furthermore, courts addressing the arbitrability of claims under § 10(b), see supra note 8, have noted the similarity between securities actions under federal law and common law. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring) (rule of nonarbitrability “is not necessarily appropriate where the cause of action is ... not so different from the common-law action”); Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291, 297-98 (1st Cir. 1986) (rights under Exchange Act are more akin to commercial disputes than constitutional rights); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1398 (8th Cir. 1986) (quoting Justice White’s concurrence in Byrd); Shotto v. Laub, 632 F. Supp. 516, 526 (D. Md. 1986) (same); Jope v. Bear Stearns & Co., 632 F. Supp. 140, 142-43 (N.D. Cal. 1985) (same).

An arbitrator skilled to decide issues under state securities laws or common law, therefore, will be able to give adequate protection to the federal interests at stake. See Glaberson, When the Investor Has a Gripe, N.Y. Times, Mar. 29, 1987, § 3, at 1 (securities arbitrators have expertise to handle complicated issues in investor complaints).

122. Because state and federal securities actions are conceptually and circumstantially similar, an arbitrator authorized to settle disputes arising from an agreement with a broker or dealer does not exceed his authority by deciding the factual issues underlying both claims. A standard arbitration agreement may read as follows:
cause the arbitrator may be sufficiently skilled to adjudicate securities claims, an absolute bar to preclusion is not warranted.

The question of the procedural adequacy of the arbitral process,\textsuperscript{123} however, remains relevant to the question of whether the arbitration can sufficiently safeguard the federal litigants' statutory rights under Rule 10b-5 and thereby carry preclusive weight in a judicial forum. Securities arbitrators are not bound by formal rules of evidence.\textsuperscript{124} While an arbitration panel has the power to subpoena documents or witnesses,\textsuperscript{125} the parties to the arbitration lack the advantage of discovery.\textsuperscript{126} Arbitrators need not make written findings of fact\textsuperscript{127} nor state the reasons underlying

---

\textsuperscript{123} See supra notes 89-90 and accompanying text. For a general discussion of securities arbitration, see Katsoris, \textit{The Arbitration of a Public Securities Dispute}, 53 Fordham L. Rev. 279, 285-89 (1984); \textit{Arbitrability of Claims}, supra note 8, at 552-54.


\textsuperscript{125} See Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980); \textit{Commercial Metals Co. v. International Union Marine Corp.}, 318 F. Supp. 1334, 1335 (S.D.N.Y. 1970); see also M. Domke, supra note 124, § 24:03, at 370 (arbitration statutes of 42 states and the United States Arbitration Act give arbitrators the power to issue subpoenas to compel the appearance of witnesses and production of documents); Katsoris, supra note 123, at 286-87 & n.52 (“arbitrators . . . shall have subpoena power as provided by law”).

\textsuperscript{126} The parties to an arbitration lack the power to subpoena documents or witnesses. \textit{See} Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) (parties to arbitration have no right to discovery); Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9, 11 (E.D. Pa. 1960) (arbitration rules do not provide parties with “the discovery procedures provided in the Federal Rules of Civil Procedure”); \textit{see also} Katsoris, supra note 123, at 287 n.52 (contrasting judicial discovery procedures with those of securities arbitration).

\textsuperscript{127} See Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 n.4 (1956) (arbitrators need not disclose facts underlying their decisions); Ufheil Constr. Co. v. Town of New Windsor, 478 F. Supp. 766, 768 (S.D.N.Y. 1976) (arbitrators need not make detailed findings of fact), \textit{aff'd mem.}, 636 F.2d 1204 (2d Cir. 1980); M. Domke, supra note 124, § 29-06, at 435-36 (arbitrators need not make formal findings of fact); \textit{Arbitrability of Claims}, supra note 8, at 553 (same).
Finally, judicial review of arbitration awards is extremely limited. An arbitration conducted under these limitations, therefore, may not fully guarantee that the parties' federal securities claims are adequately protected.

In appropriate circumstances, the need for promoting extrajudicial methods of dispute resolution outweighs the right to a federal forum.

If the facts of a case demonstrate that the parties in fact suffered no procedural deprivations in arbitration, preclusion may be an appropriate device for ensuring an end to litigation. The Supreme Court in *Byrd* indicated that a federal court may grant an arbitral determination preclusive effect provided it frames its preclusion rules in a manner consistent with the federal jurisdictional interest. The securities laws create suffi-
cient federal interest to merit close analysis of arbitral adequacy.\textsuperscript{135} Such scrutiny reveals that arbitral determination of securities issues may not always be insufficient to protect the litigants' statutory rights.\textsuperscript{136} The conflict between the need for judicial economy\textsuperscript{137} and the need to protect injured investors' statutory rights,\textsuperscript{138} therefore, may best be resolved by permitting preclusion only in very limited circumstances.\textsuperscript{139}

IV. WHEN SHOULD AN ARBITRAL ISSUE DETERMINATION PRECLUDE RELITIGATION OF THE SAME ISSUE IN A SUBSEQUENT FEDERAL SECURITIES ACTION?

In formulating preclusion rules a court must try to reconcile the purposes of statutes giving rise to litigation with those designed to control litigation.\textsuperscript{140} A court must also be mindful of the congressional grant of jurisdiction over Exchange Act claims to the federal courts.\textsuperscript{141} Accordingly, a framework for applying issue preclusion that seeks to satisfy the competing concerns of the Arbitration Act,\textsuperscript{4} the Exchange Act\textsuperscript{143} and general notions of finality and economy,\textsuperscript{144} must emphasize the federal interest in preserving jurisdiction over securities claims.

A district court can best protect its jurisdictional interest\textsuperscript{145} by first requiring the proponent of preclusion to prove the reliability of the arbitra-

---

\textsuperscript{135} See supra notes 99-111 and accompanying text.

\textsuperscript{136} See supra notes 113-33 and accompanying text. Since Byrd, at least two lower courts have determined that arbitral findings may be granted issue preclusive effect in subsequent federal litigation. In Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352 (11th Cir. 1985) the court interpreted Byrd and the McDonald line of cases as prescribing

\textsuperscript{137} See supra notes 59-70 and accompanying text.

\textsuperscript{138} See supra notes 75-83 & 99-111 and accompanying text.

\textsuperscript{139} See infra notes 145-63 and accompanying text.


\textsuperscript{141} See supra notes 75-92 and accompanying text.

\textsuperscript{142} See supra notes 26-52 and accompanying text.

\textsuperscript{143} See supra notes 99-112 and accompanying text.

\textsuperscript{144} See supra notes 13-14 & 59-68 and accompanying text.

\textsuperscript{145} See supra notes 99-112 and accompanying text.
Initial inquiry into the prerequisites of preclusion should include an analysis of the standards of proof applied in arbitration. Issue preclusion may not apply when there are shifts in the burden of proof or changes in the requisite degree of persuasion between the two proceedings. Discrepancies in standards of proof may foreclose a finding that the arbitrator necessarily ruled on whether the offered proof was insufficient to meet the standards utilized in federal securities actions.

If the court finds that the traditional criteria of issue preclusion are met, the proponent of preclusion must further prove that the arbitration had many or all of the same procedural guarantees provided in a judicial proceeding. Fundamental to this inquiry is a finding that the parties were represented by counsel. The absence of attorneys in arbitration should alert a court to the likelihood that the parties' claims in arbitration were not pressed vigorously.

146. Under ordinary circumstances, issue preclusion is available without a need to prove the quality of the prior determination. See 18 Wright, supra note 10, § 4423. Customarily, the burden of pleading and proving the prerequisites of issue preclusion rests on the proponent of preclusion, see Davis & Cox v. Summa Corp., 751 F.2d 1507, 1518 (9th Cir. 1985); Barker v. Norman, 651 F.2d 1107, 1130 (5th Cir. Unit A July 1981); 18 Wright, supra note 10, § 4405, at 38. Preclusion is applied unless the opposing party shows she was denied a full and fair opportunity to litigate in the first action. See Frye v. United Steelworkers, 767 F.2d 1216, 1221 (7th Cir.) ("[W]hen all factors required for [issue preclusion] are present, it is the party opposing preclusion who must demonstrate that applying [issue preclusion] in a specific case would result in particularized unfairness ... "), cert. denied, 106 S. Ct. 530 (1985); Wickham Contracting Co. v. Board of Educ., 715 F.2d 21, 26 (2d Cir. 1983) (preclusion is applied absent showing of particularized unfairness). Requiring the proponent of preclusion to carry the full burden of demonstrating the reliability of the particular arbitration assures that the federal right is not erroneously supplanted. Permitting preclusion only on a showing of specific circumstances places primary emphasis on the right to a federal forum.

147. See supra note 64; see also O'Neil v. Merrill Lynch, Pierce, Fenner & Smith, No. 84 C 3181, slip op. at 9 (N.D. Ill. Jan. 30, 1987) (application of issue preclusion failed because court could not determine that issues were necessarily litigated). This Note contends that even where a party meets the prerequisites to issue preclusion, the doctrine may not be applied until the court examines the procedural aspects of the particular arbitration. See infra note 166 and accompanying text.

148. See Kunzelman v. Thompson, 799 F.2d 1172, 1176 (7th Cir. 1986); Guenther v. Holmgreen, 738 F.2d 879, 888 (7th Cir. 1984), cert. denied, 469 U.S. 1212 (1985); 18 Wright, supra note 10, § 4422, at 209.

149. See O'Neil v. Merrill Lynch, Pierce, Fenner & Smith, No. 84 C 3181, slip op. at 9 (N.D. Ill. Jan. 30, 1987) (possibility that arbitrator applied "clear and convincing" standard of proof to unsuccessful common law claim made it impossible to infer that evidence was insufficient under the "preponderance of the evidence" standard of federal securities litigation); infra note 166 and accompanying text.

150. Representation by an attorney in judicial proceedings is fundamental to notions of due process. See Powell v. Alabama, 287 U.S. 45, 69 (1932) (representation by counsel in civil or criminal proceedings is an aspect of due process); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir.) (litigants need "the guiding hand of counsel at every step in the proceedings"); cert. denied, 449 U.S. 820 (1980); M. Domke, supra note 124, § 24-01, at 362 ("[A] party has the right to be represented by an attorney at any time during any part of the arbitration.").

151. See Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985) (noting representation by counsel as aspect of arbitrable reliability); Carlisle, Getting
Access to discovery is strong evidence of arbitral reliability.\textsuperscript{152} Discovery promotes fairness by permitting parties to ascertain facts and information that may be exclusively within the possession of others.\textsuperscript{153} When a party is refused access to relevant information, it is unlikely that she could adequately present her case. In such a situation, preclusion might be inappropriate.\textsuperscript{154}

The proponent of preclusion should demonstrate that evidence presented in arbitration conformed to the evidentiary standards utilized in federal court.\textsuperscript{155} Without assurance that the arbitrator's decision rested on evidence that would be admissible in federal court, a court should not rely on the arbitral findings.\textsuperscript{156}

Finally, the party seeking preclusion should prove that the parties had the opportunity to cross-examine witnesses in arbitration. Cross-examination is a right of constitutional dimension\textsuperscript{157} that reveals the potential unreliability of a witness' testimony.\textsuperscript{158} Without the ability to test a witness' credibility, arbitral reliability is suspect.\textsuperscript{159}

The preceding factors are fundamental indicia of arbitral reliability. This list is not, however, exclusive\textsuperscript{160} and these factors need not all be


Absence of counsel should not be conclusive evidence of arbitral unreliability. The proponent of preclusion may prove to the court that even without counsel, the opposing party vigorously pressed his claim in arbitration and suffered no deprivation from proceeding pro se.


\textsuperscript{153} See United States v. Proctor & Gamble Co., 356 U.S. 677, 682-83 (1958); Hickman v. Taylor, 329 U.S. 495, 501 (1947); C. Wright, supra, § 81, at 540; Carlisle, supra note 151, at 86.


If the proponent of preclusion can prove that discovery would not have provided the other party with any additional evidence, the court remains free to find that the arbitration was reliable. See Carlisle, supra note 151, at 98.

\textsuperscript{155} See Fed. R. Evid. 402 (all relevant evidence is admissible subject to specific limitations); see also Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985) (fact that parties presented relevant evidence indicated arbitral reliability).

\textsuperscript{156} Arbitrations conducted without formal rules of evidence may decide issues on the basis of evidence that would be inadmissible in a judicial proceeding. See M. Domke, supra note 124, § 24.02, at 364-65; Carlisle, supra note 151, at 87.


\textsuperscript{158} See id. at 496-97; 5 J. Wigmore, Evidence § 1367, at 32 (Chadbourn rev. 1974).

\textsuperscript{159} See 5 Wigmore, supra note 158, § 1367, at 32; Carlisle, supra note 151, at 97. Accord Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985) (fact that parties examined and cross-examined witnesses in arbitration contributed to a finding of arbitral reliability).

\textsuperscript{160} The foregoing factors are those aspects of judicial proceedings that affect due process or the reliability of the evidence. Lesser factors affecting the formality of the arbitral

present to apply preclusion. If the court is satisfied by a totality of the circumstances that the parties suffered no disadvantage in arbitration, it may, in its discretion, defer to the arbitrator's findings through the doctrine of issue preclusion. This framework goes beyond the “full and fair opportunity” test by placing the burden of proving arbitral reliability upon the proponent of preclusion, thereby requiring the court to examine the quality of the prior proceeding before invoking issue preclusion.

Increasing the burden on the proponent of preclusion properly balances the interests of economy and finality with the Court's concern that the federal forum be preserved. Delegating the additional burden of proceedings may also be relevant to a finding of reliability, including the opportunity to make opening and closing arguments, see K. Sinclair, Federal Civil Practice §§ 15.20, 15.43 (2d ed. 1986); see also Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985) (fact that parties made opening and closing arguments indicated arbitral reliability), and written factual findings by the arbitrators or the ability to infer such findings from the record. See M. Domke, supra note 124, § 24-07, at 386-87; see also Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985) (although arbitration panel made no specific factual findings, the court inferred issues which were necessarily determined).


162. See supra notes 59-68 and accompanying text. The Supreme Court has stated that the factfinding process in arbitration is not equivalent to judicial factfinding. See McDonald v. City of W. Branch, 466 U.S. 284, 291 (1984); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974). If the arbitration is procedurally reliable, an assumption of non-preclusion is no longer warranted and the arbitral determinations should be given the same deference as determinations of a court. Accord Restatement (Second) of Judgments §§ 83(2), 84(3) and comment (c) (1982).

163. See supra note 66 and accompanying text.

164. See supra notes 147-54 and accompanying text.

165. In O'Neill v. Merrill Lynch, Pierce, Fenner & Smith, No. 84 C 3181, slip op. (N.D. Ill. Jan. 30, 1987), the court stated that federal court examination of the arbitration that must precede application of issue preclusion is sufficient to ensure an investor's right to a federal forum for her securities law claims. Id. at 7. The court in O'Neill held that preclusion could not be applied because the record did not state what standard of proof was used by the arbitrator, and it therefore was possible that the arbitrator did not necessarily rule on whether the plaintiff's proof was insufficient to meet the standard utilized in federal securities actions. Id. at 9. While O'Neill's result is in accord with the Supreme Court precedent that protection must be given to a federal statutory right, see supra notes 79-83 and accompanying text, its analysis must be carried further. The court correctly found that the potential differences in standards of proof made preclusion inappropriate. See supra note 154. Even when the standards are clearly the same, however, the court cannot apply issue preclusion if the prior arbitration was procedurally deficient. A court must go beyond the prerequisites of issue preclusion and examine the arbitration for spe-
proving arbitral adequacy to the proponent of preclusion is necessary to ensure that the plaintiff’s rights under section 10(b) are effectively protected.166 Permitting issue preclusion when procedural sufficiency has been demonstrated, permits courts to effectuate the intent of the parties to the arbitration clause.167 As a result, the burden on federal courts is eased by promoting concepts of finality168 and speedy resolution of claims,169 thus serving the goals of the Arbitration Act.170

Denying preclusive effect to an arbitral decision does not render the determination meaningless. The arbitral decision still is admissible as evidence and accorded weight as the court deems appropriate.171 If, on the other hand, the court grants preclusive effect to the arbitration, the stringency of the proponent’s burden172 ensures that the opposing party merely is prevented from litigating identical issues in two fora.173

CONCLUSION

The federal courts have a strong interest in protecting rights granted by federal statutes. The judiciary also has an interest in conserving its resources, minimizing inconsistent results and establishing finality to litigation. A court can best protect these countervailing interests in the securities field by requiring proof of specific arbitral reliability before precluding relitigation of the issue in a judicial forum. Delegation of the burden of proof to the proponent of preclusion places primary emphasis on the federal right to a judicial forum. Because preclusion can be applied only on a showing that the arbitration afforded the parties the opportunities available in judicial adjudication, the court has the power to prevent unnecessary duplication where the arbitration clearly was reliability.

166. See supra notes 107-12 and accompanying text.
167. See supra notes 34-36 and accompanying text.
168. See supra notes 62 & 65 and accompanying text.
169. See supra notes 57 & 65 and accompanying text.
170. See supra notes 26-39 and accompanying text. An arbitration that offers all the procedural guarantees of judicial adjudication likely will lose much of the efficiency for which it was selected. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 (1974) ("[I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."). Because a federal statutory right is implicated, however, a great degree of reliability is required before a party may preclude federal consideration of the claim.
171. Relevant factors to determine the weight given an arbitral decision include the degree of procedural fairness in arbitration, the adequacy of the arbitral record and the competence of the particular arbitrators. See McDonald v. City of W. Branch, 466 U.S. 284, 292 n.13 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 743 n.22 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974).
172. See supra notes 147-54 and accompanying text.
173. See supra notes 59-65 and accompanying text.
able. This model accommodates the competing federal concerns and proposes a uniform standard for case by case analysis.

Beth H. Friedman