



10-1973

Merrill Lynch, Pierce, Fenner & Smith v. Ware

Lewis F. Powell Jr.

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D

DISCUSS

Denial is recommended
by S G - persuasively

SUPPLEMENTAL MEMO RE MEMO FROM SG
No. 72-312
Merrill, Lynch v. Ware (one of Jay's cases)

The Conference asked for the views of the SG. The SG recommends that cert be denied, stating essentially that the preemption issue was not properly presented below. As to the California statutory provision's effect on federal antitrust laws, the SG states:

"It is well-recognized that state laws preserving competition can effectively complement federal antitrust policy, and even, in the exercise of the state's reserved police powers, go beyond it, so long as the functioning of the federal system is not disturbed."

The point of the latter argument is, I take it, that the California law ~~des~~ violate the Commerce Clause by unduly interfering with interstate commerce.

DENY

This is an outrageous case, but it seems to turn on Calif. law.

Join Three

Resp., an employee of Merrill, Lynch, terminated his employment & joined a competing firm. DISCUSS

Under M/L's profit sharing plan, Resp. forfeited certain benefits by his voluntary resignation to go with a competing firm.

Also, Resp. had agreed in writing to "arbitrate" any controversy.

Yet, Resp. sued under a Calif. Labor Law which authorized suits for

PRELIMINARY MEMO "wages" regardless of arbitration acts. Timely

No. 72-312

Cert to Calif. Ct. of App. 1st App. dist.

MERRILL, LYNCH v. WARE

Join three SHW (See my discussion)

1. SUMMATION. The basic question is whether state laws permitting actions for the collection of wages to be maintained in a judicial forum and state laws prohibiting restraint on occupational changes withstand any preemptive effect of self regulating rules of the New York Stock Exchange promulgated pursuant to § 6 of the Security Exchange Act of 1934. The California Court of Appeals First Appellate District concluded the state policies were paramount. The California Supreme Court apparently declined review. Petitioners seek review of the decision of the California Court of Appeals.

Petr. claims that Securities Act of '34 authorizes self-regulating rules & preempts field. This is not clear from Act.

2. FACTS. In July 1958 Respondent became an employee of petitioner Merrill Lynch at its San Francisco office as an account executive, remaining until 1969 when he voluntarily terminated his employment. He then became an employee of a competitor with Merrill Lynch. As a full time employee of Merrill Lynch respondent was able to participate in its profit sharing plan. At the termination of his employment respondent's account in the profit sharing fund was credited with 733 vested units and 1,258 unvested units. Article 11.1 of the profit sharing plan provides:

A participant who, in the determination of the Committee, voluntarily terminates his employment with the corporation . . . and engages in an occupation which is, in the determination of the Committee, competitive with the corporation . . . shall forfeit all rights to any benefits otherwise due or to become due from the trust fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

On April 18, 1969 the administrative committee of the plan made a determination that respondent had voluntarily terminated his employment with Merrill Lynch and had entered into competitive employment. Under Article 11.1 of the plan, the committee thereupon caused to be forfeited any and all rights respondent had in the plan.

Merrill Lynch is a member of the New York Stock Exchange which is registered under § 6 of the Securities Exchange Act of 1934 which authorizes the enforcement of rules and bylaws promulgated by such exchange.

Under Rule 345 of the Exchange, respondent executed a written application for approval of employment and was approved and registered.

On the application was written the following statement:

Agmt. executed by Respondent.

I agree that any controversy between me and any . . . member organization arising out of my employment on the termination of my employment by and with such . . . member organization shall be settled by arbitration at the instance of any such party in accordance with the constitution and rules then obtaining of the New York Stock Exchange.

At the time this form was executed by respondent, a rule of the Exchange provided for arbitration of all matters arising out of the termination of employment.

3. OPINION OF THE COURT BELOW. In the court below, respondent contended that § 229 of the California Labor Code voided the arbitration agreement. That section provides that:

Action to enforce the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate.

The California court decided that the intent of the statute was to provide in the first instance a judicial forum where there exists a dispute as to wages. The court then decided that the term wages should include not only periodic monetary earnings of an employee but also the other benefits to which he was entitled as a part of his compensation, such as the profit sharing plan in question. The court then decided that § 229 and the strong state policy protected thereby voided the arbitration clause in the application for employment.

Respondent also contended in the court below that the forfeiture provision is unlawful as a restraint of trade under the California

Business and Professions Code § 16600. That section explicitly declares that:

Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

The California court then quickly decided that the above section voided the forfeiture provision in Article 11.1 of the Merrill Lynch profit sharing plan.

4. CONTENTIONS OF THE PARTIES. Petitioner's chief contention is that the decision of the California court greatly interferes with the desire of Congress, expressed in § 6 of the Securities Exchange Act of 1934, to establish a statutory scheme of supervised self regulation by stock exchanges. Petitioner contends that the application of California Labor Code 229 defeats that very objective and renders the self regulatory rule of the exchange a nullity. Petitioner analogizes this case to federal labor law where petitioner contends the principle is firmly established that incompatible doctrines of local law must give way to principles of federal labor law. Petitioner contends self regulation of the exchanges is thwarted by any possibility that arbitration may or may not be permitted under the laws of different states. Petitioner contends that uniformity can only be assured by permitting the self regulatory arbitration provisions of the exchange to prevail over inconsistent local laws and thereby fulfill the congressional objectives.

Petitioner also contends that federal courts have consistently upheld arbitration rules in the face of challenges under federal antitrust laws to the conduct or acts or rules sought to be arbitrated. Petitioner contends that if federal antitrust laws cannot overcome the federal policy of arbitration and self regulation, neither can similar state laws.

Petitioner contends that that part of the decision of the court below which voided the forfeiture provision operated as an unreasonable burden on interstate commerce. Petitioner contends that its profit sharing plan operates on a national and international level, that its employees are engaged in interstate commerce, that except for three states, others have upheld the forfeiture provision, and finally that the decision of the court below leaves Merrill Lynch with the alternative of maintaining two plans, one for California and one for the rest of its personnel, national and international.

Petitioner concludes briefly that this case has great importance for a large number of major corporations who have similar forfeiture provisions in their profit sharing plans.

Respondents, in a seemingly disjointed brief, contend this decision does not involve application of any state or federal antitrust laws. Respondents' chief contention seems to be that the intent behind the Securities Exchange Act of 1934 is to insure fair dealing and to protect investors, and that the Act does not apply to situations involving

employer-employee relations within the securities industry, despite the existence of any private arbitration agreement. Respondents further contend that the decision of the California Court of Appeals is not a final order but is rather interlocutory in nature, since in point of fact no judgment has been entered on the pleadings in this case. Respondent concedes, however, that such orders as this are made appealable under the California Code of Civil Procedure.

5. DISCUSSION. At first blush this appears to present a significant preemption question under § 6 of the Securities Exchange Act of 1934 (Appendix A). There is no discussion in either the briefs or the opinion below of the actual wording or legislative history of this section of the Act. Nor is any relevant precedent of this Court cited by the parties which is helpful to the issues herein. In the absence of the above, I will hazard my own views as to why the preemption claim petitioner makes may be deficient:

(1) Though some significant argument can be made that the intent of § 6 is to promote Exchange self regulation in the interest of protecting the investing public, one could question whether a rule which dealt not with protection of the investing public, but rather with internal employment matters within the exchange claims the same statutory protection.

(2) Unlike the Labor Management Relations Act, the Securities Exchange Act does not of itself command arbitration. The policy of

arbitration thus finds support not in the wording of a federal statute but rather in the rules of the exchange promulgated pursuant to very broad statutory authority.

(3) Section 6 of the Securities Exchange Act does attach some importance to the existence of state laws:

Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the state in which it is located. (emphasis added).

(4) The state laws which were used to strike down the forfeiture provision of petitioner's profit sharing plan and the arbitration provision of the Exchange promoted valid state interests: in the one case the desire of California to make a judicial forum available for the settlement of wage disputes in the first instance, and on the other the state interest in protecting occupational mobility for its citizens. But just how far and in what instances state interests can be allowed to fracture the uniformity of the Exchange regulations seems an important question.

There is a response.

WILKINSON

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

§78f. Registration of national securities exchanges.

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents below specified:

* * *

(2) Such data as to its organization, rules or procedure, and membership . . .

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange;" . . .

* * *

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

No. 72-312 Merrill Lynch v. Ware

Summer Memorandum

This is a brief memorandum, dictated after having read most of the briefs. It is entirely preliminary and, in large degree superficial. Further study is indicated.

State of the Case

Petitioner, a member of the N.Y. Stock Exchange, had a profit sharing plan which provided that an employee who voluntarily terminates employment and engages in competition forfeits his vested interest in the plan. Respondent terminated his employment and went to work for a competing broker. He sued in the California state court, seeking his accrued share of the profit sharing fund (all of which came from contributions by the employer).

The trial court, without opinion, held for respondent. The California Court of Appeals affirmed, holding: (i) that the contract between petitioner and respondent was valid, including the provision therein for arbitration; (ii) but that the forfeiture provision of the profit sharing plan was an unlawful restraint of trade violative of California Code Sec. 16,600 and thus unenforcable; and (iii) also that respondent's action was a suit for "wages" and thus could be maintained under California Labor Code Sec. 229 without regard to the arbitration agreement.

Questions Presented

Although the questions presented on the briefs in this Court do not, in all respects, conform to those addressed by the California Court - and also in some respects the questions seem confused and unclear - they may be summarized generally as follows:

(a) whether California Sec. 229, as applied to the arbitration agreement between a New York Stock Exchange member and its employee, conflicts with - and is preempted by - Rule 347(b) promulgated by the SEC under the Act of 1934.

(b) whether California Sec. 16,600 is, in effect, preempted by Rule 347(b) ~~which~~ of the N.Y. ~~which~~ Stock Exchange - which provides that any controversy between an employee and member organization "shall be settled by arbitration".

(c) whether the application of California law to an interstate brokerage firm burdens interstate commerce.

Discussion

The California Court held that the forfeiture provision in the agreement was ineffective (void) under California Sec. 16,600 as being a contract "in restraint of trade". In view of this holding, it is not clear to me - at least at this point in my study - why the Court reached the second question as to arbitration. But it went on to hold that profit sharing benefits are "wages" under California law, and that under California Sec. 229 disputes as to wages are not

arbitrable. I suppose we are bound by these interpretations of California law.

This brings us to the question of "preemption" - which is the ~~primarily~~ primary issue argued by the parties. The Solicitor General (SG) in a memorandum amicus devotes primary attention to the preemption issue. He argues that federal policy favoring arbitration, as reflected in Sec. 301 of the Labor Management Relations Act, is not applicable as that statute applies only to questions arising under collective bargaining agreements - not to individual contracts. But the SG's brief does not address fully, or as specifically as I would have hoped, the petitioner's position that Sec. 229 prohibiting arbitration of wage disputes unless arbitration is required by a collective bargaining agreement, conflicts with - and is preempted by - Rule 347(b) of the New York Stock Exchange which requires arbitration of employment disputes between member firms and their employees. This rule was promulgated under Sec. 6 of the Act of 1934, and is in accord - it is argued with a congressional policy of assuring order and uniformity in the securities industry with respect to employer/employee relationships. Reliance is placed by petitioner on Silver v. New York Stock Exchange, 373 U.S. 341 - which I need to read more carefully.

I find nothing of substance in the Interstate Commerce argument, but remain in considerable doubt as to the narrow

preemption issue (as I understand it) relied on primarily by petitioner.

Research by my Clerks

The appropriate law clerk should read the relevant authorities and the briefs more carefully, with the view to educating me as to the preemption issue. The briefs of the parties scatter their shots in so many directions, it is difficult in a hurried reading to identify the possibly meritorious positions from those that may be quite irrelevant. Moreover, although vast numbers of cases are cited, I have not found one which even approaches being dispositive. In short, further study is indicated.

JCJjr/gg 10-3-73

*Reah Silver 373 U.S. 541 - relevant but far from controlling
Presumption is chief issue. Is the Arbitration Rule so
close to core of Fed. statute as to pre-empt the Calif. law.*

MEMORANDUM

TO: Justice Powell

FROM: John Jeffries

DATE: October 3, 1973

No. 72-312, Merrill Lynch, Pierce, Fenner & Smith
v. Ware, et al

The parties in this case have filed two long essays in the misuse of authority. It may be helpful, therefore, to begin by sorting out some of the issues that I consider irrelevant.

First, this case is not controlled by the United States Arbitration Clause, 9 U.S.C. §§ 1 et seq. Petitioner contends that the statute creates federal substantive law equally applicable in federal and state courts. Despite the explicit dictum to that effect in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 221 F. ed 482 (2nd Cir. 1959), it is not entirely clear that this is the law. The remedies provisions in §§ 3 and 4 are limited by terms to the federal courts. Even if §§ 1 and 2 are applicable in state courts, then provisions have little impact on this case. Section 2 provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law and in equity for the revocation of any contract." Thus the federal substantive policy favoring arbitration

is dependent on the legality of the agreement under state law. Furthermore, as respondent points out, it is at least arguable that the exemption in § 1 reaches this employment contract ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). Some courts, however, have construed this exception to encompass only workers engaged in the actual movement of goods in interstate commerce. E.g., Dickstein v. DuPont, 443 F. 2d 783 (1st Cir. 1971). The opinion of this Court in Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967) (endorsing the severability doctrine as a matter of federal substantive law), is not applicable to this case. That decision rested on § 4 of the Act and was expressly limited to the federal courts.

Second, this case does not implicate Wilko v. Swan, 346 U.S. 427 (1953). In Wilko an investor sued a securities brokerage firm in federal court. The defendant invoked the U.S. Arbitration Act to compel arbitration pursuant to an agreement signed by the customer. This Court held waiver of the right to a judicial forum barred by § 14 of the 1933 Act, 15 U.S.C. § 77n :

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

This case does not involve the 1933 Act, but respondent relies on the parallel anti-waiver provision in § 29(a) of the 1934 Act, 15 U.S.C. § 78 cc(a):

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of and exchange required thereby shall be void."

Respondent correctly points out that the 1934 anti-waiver provision, unlike § 14 of the 1933 Act, is not limited to purchasers of securities. Respondent, however, does not claim any substantive right under the federal securities laws; he attacks the validity of his employment contract under a California antitrust statute. Therefore, enforcement of the arbitration agreement would not effect a waiver of compliance with any securities statute, rule, or regulation. To my mind, § 29(a) is by its terms inapplicable. And if § 19(a) does reach this case, petitioner claims an exemption from its force under § 28(b) of the Act, 15 U.S.C. § 78bb(b):

"Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to become bound thereby"

Some courts have construed § 28(b) as exempting arbitration agreements from the anti-waiver rule of § 29(a). E.g., Brown v. Gilligan, Will & Co., 287 F. Supp. 766 (S.D.N.Y. 1968). Respondent contends that Brown is bad law and in any event inapplicable to this case because concerned two member firms. It may be true that the policy behind Wilko v. Swan is more nearly applicable to a dispute between a member firm and an employee than to a dispute between two member firms, § 28(b) on its face reaches "any person." If the question is whether an agreement to arbitrate is an "action" within the meaning of the statute, ample precedent calls for an affirmative answer. Brown, supra; Coenen v. R.W. Pressprich & Co., 453 F. 2d 1209 (2nd Cir. 1972).

Third, respondent's argument concerning Article VIII, § 6 of the NYSE constitution is irrelevant to this case. See pp. 13-14 of the brief, Article VIII provides that any dispute between a member and a non-member must be submitted to arbitration "at the instance of such non-member." Respondent apparently believes that Exchange Rule 347(b) is invalid because it allows a member firm to compel arbitration in any dispute with a registered representative. Whatever the merit of this claim (and I am inclined to believe there is none), it is properly addressed to the arbitrator, at least in the first instance.

The case most nearly in point is Silver v. NYSE, 373 U.S. 341 (1963). In Silver this Court considered the accomodation of the 1934 Act with federal antitrust law. As Justice Goldberg phrased it, the question was whether the exchange's duty of self-regulation was so comprehensive as to constitute an implied repealer of the antitrust laws. Of course, Silver does not control this case. The latter does not involve the interface between competing federal statutes but rather, as the parties sometimes seem to forget, a question of federal preemption of state law. But analysis of this issue should be informed by reference to the reasoning of Silver.

The general scheme of exchange self-regulation is aptly described in Silver:

"Thus arose the federally mandated duty of self-policing by exchanges. Instead of giving the Commission the power to curb specific instances of abuse, the Act placed in the exchanges a duty to register with the Commission, § 5, 15 U.S.C. § 78e, and decreed that registration could not be granted unless the exchange submitted copies of its rules, § 6(a)(3), 15 U.S.C. § 78f (a)(3), and unless such rules were "just and adequate to insure fair dealing and to protect investors," § 6(d), 15 U.S.C. § 78f (d). The general dimensions of the duty of self-regulation are suggested by § 19(b) of the Act, 15 U.S.C. § 78s(b), which gives the Commission power to order changes in exchange rules respecting a number of subjects. . . .

"One aspect of the statutorily imposed duty of self-regulation is the obligation to formulate rules governing the conduct of exchange members. The Act specifically requires that registration cannot be granted "unless the rules of the exchange include provision for expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade" §6(b), 15 U.S.C. § 78f (b). 373 U.S. , at 352-53.

As the guiding principle for reconciling this duty with the antitrust laws, the Court announced that, "Repeal is to be implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. , at 357. The passage quoted above identifies two normative criteria for exchange rules. They should (1) "insure fair deal and . . . protect investors and (2) discourage "conduct or proceeding inconsistent with just and equitable principles of trade." An exchange rule fulfilling one of these goals should have preemptive effect.

If you accept Silver as the appropriate framework for analysis of the preemption issue, the case boils down to this: ^{Issue} ~~is~~ ^{Does} an exchange rule requiring arbitration of any dispute which develops between a member firm and its registered representative and which arises out of the employment or termination of employment of that representative "fall within the scope and purposes of the Securities Exchange Act"?

Silver, 373 U.S., at 361. In other words, is such a rule sufficiently close to the core of the statutory duty of self-regulation that it preempts the California statute guaranteeing a judicial forum?

The scant authority that exists suggests an affirmative answer. Rust v. Drexel Firestone, Inc., 352 F. Supp. 715 (S.D. N.Y. 1972); Dickstein v. DuPont, 413 F. 2d 783 (1st Cir. 1971). Neither of these cases, however, is directly on point. Although I have not exhausted the opportunities for research, I do not believe you will find substantial guidance in the decisions of the lower courts. I might add that I think your evaluation of the competing interests involved will be decidedly more perceptive and sophisticated than anything I could come up with. The exchange's interest in requiring arbitration of employment-related disputes between members and their registered representatives does not strike me as slight or trivial; nor do I believe it is essential to the continued fulfillment of its statutory duty of self-regulation.

There is one point I would like to make. To my mind, the substance of the underlying dispute between these parties -- whether the California antitrust statute invalidates the employment contract -- is relevant to this case in its current posture. The issue is whether the exchange rule requiring arbitration preempts the California statute guaranteeing a judicial forum. This question would be the same no matter what the underlying dispute between the parties.

No. 72-312, Merrill Lynch v. Ware

SUPPLEMENTAL MEMORANDUM RE DISPOSITION

Disposition along the following lines seems appropriate to me. In light of the confusion below about the relevant issues, this Court should identify the controlling question, announce the appropriate standard for determination of that question, and remand for reconsideration by the California courts. To my mind, the controlling issue is "preemption," though as a prelude to that question, this Court should determine the effect of the U.S. Arbitration Act in this context. The appropriate standard for deciding the preemption question is derived from Silver. Of course, as you will see from reading Silver, bare reference to that case does not greatly illumine the issue, but I would take that case as the starting point and develop a test grounded in the relation of any Exchange rule to the statutorily imposed duty of self-regulation. This Court should state explicitly that the California anti-trust law is only secondarily relevant to the arbitration issue. The remand would leave the parties with a much narrower field of combat and give the lower courts some guidance.

JCJjr

See SG's Brief & my note on cover.

1. Fed Labor Rel. Act applies to collective bargaining agreements - not to private cts. (This position may have been abandoned.)
2. Nothing to the Commerce Clause argument - each state imposes ~~its own~~ state subjects foreign corps. to numerous regulations.
3. The only issue of ~~any~~ possible substance is ^{whether} ~~that~~ Calif. Code 229 (outlawing arbitration agts as to claims for "wages") is preempted by Rule 347(b) of Act of 1934 (Self-regulation by Security Industry). SG says not ~~that~~ (See p 9^{at 224} of Brief of Oct 5) In ~~the~~ memo. of Jan 3, 1973, SG suggests record is inadequate as to this issue).

Issue before us is whether Arbitration Clause may be enforced in Calif.

I'm inclined to Affirm.

Orrick (for Petr).

The arbitration clause is ~~is~~ included in the ct. of employment signed by Resp.

Barton (for Resp)

Argues that Frame v. Merrill Lynch, ~~is~~ in effect, has been over-ruled.

Orrick (Rebuttal)

Disagrees with SG - argues that SG has ignored the legislative history of Act of 34 which shows solicitude for employees (their qualifications, compensation, integrity) of brokerage firms.

Relies on 6(c) of Act authorizing Exchanges to adopt rules & regulations:

Under U.S. law, this Arbitration Clause would be valid & enforceable. (What if U.S. changed its law to adopt a statute like Calif. 229?)

10/12/73

Affirmed - 6 to 2

The Chief Justice

Affirmed ^{of Decision} _{for Expediency} ^{Granted}
Brief of SEC is permissible.

Douglas, J.

Affirmed
State has legitimate interest.

Brennan, J.

Reversed
⁽⁶⁰⁾
Fed. Act provides that Exchange
may adopt rules. A literal
reading of Act supports position
of Petr.

Stewart, J.

Passed
(may disqualify)

White, J. Reverse

Agrees with Brennan.

Also does not like to
repudiate ~~the~~ lightly ~~the~~ a
plan for substitution

Marshall, J. Affirm

Blackmun, J. Disq or Affirm

Calif. statute does not
invalidate Fed ~~policy~~ policy

Powell, J. Affirm (tentative)

Rehnquist, J. Affirm (very strongly)

b(c) applies only to
the Act - not to what a
State does.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 26, 1973

Dear Harry:

Please join me in your opinion
in 72-312, Merrill, Lynch v. Ware.

W

William O. Douglas

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 27, 1973

Re: No. 72-312 - Merrill Lynch, Pierce, Fenner
& Smith Inc. v. Ware

Dear Harry:

I give up. Join me please.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

*I think this means that there will be no
other bus to catch. do that want, I recommend
a join.*

JGJ

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 27, 1973

Re: No. 72-312 - Merrill Lynch, Pierce, Fenner
& Smith Inc. v. Ware

Dear Harry:

I give up. Join me please.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

November 28, 1973

No. 72-312 Merrill Lynch, Pierce, etc. v. Ware

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. November 28, 1973

RE: No. 72-312 Merrill Lynch, Pierce, etc.
v. Ware

Dear Harry:

I also give up. Please join me.

Sincerely,

Dice

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. November 28, 1973

RE: No. 72-312 Merrill Lynch, Pierce, etc.
v. Ware

Dear Harry:

I also give up. Please join me.

Sincerely,

Brennan

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 28, 1973

72-312 - Merrill Lynch v. Ware

Dear Harry,

I should appreciate your adding the following at the foot of your opinion for the Court in this case:

MR. JUSTICE STEWART took no part in the decision of this case.

Sincerely yours,

PS
/

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 28, 1973

Re: No. 72-312 -- Merrill Lynch, Pierce, Fenner & Smith, Inc.,
v. Ware et al.

Dear Harry:

Please join me in your opinion.

Sincerely,


T. M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 28, 1973

Re: No. 72-312 - Merrill Lynch, et al., v. Ware

Dear Harry:

Please join me.

Sincerely,

WRM

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

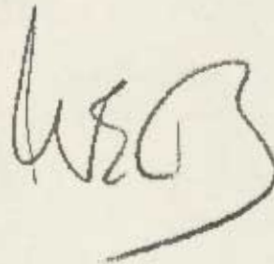
November 29, 1973

Re: 73-312 - Merrill Lynch, Pierce, Fenner & Smith
v. Ware

Dear Harry:

Please join me.

Regards,



Mr. Justice Blackmun

Copies to the Conference

[C. 11/26/93]

Justice Powell:

I was mistaken about Justice Brennan writing a dissent in this case. Apparently, his vote is not altogether firm. I understand that Justice White intends to dissent.

Jeg r.

*Journal
Douglas*

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell ✓
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Recirculated: 11/26/73

No. 72-312

Recirculated: _____

Merrill Lynch, Pierce, Fenner & Smith, Inc., Petitioner,
v.
David Ware et al. } On Writ of Certiorari to
the Court of Appeal of
California, First Appel-
late District.

[December —, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether certain rules of the New York Stock Exchange, promulgated as self-regulating measures pursuant to § 6 of the Securities Exchange Act of 1934, 15 U. S. C. § 78f, and a broker's employee's pledge to abide by those rules, pre-empt avenues of wage relief otherwise available to the employee under state law. The California Court of Appeal answered this in the negative. 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (1972). Because of the significance of the question in the area of federal-state relations, we granted certiorari. 410 U. S. 908 (1973).

I

Respondent David Ware in July 1958 entered the employ of petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc., a New York corporation, as a registered representative or "account executive" in the petitioner's San Francisco office. Ware worked there continuously until March 1969 when he voluntarily terminated that relationship and accepted a similar position in San Francisco with one of Merrill Lynch's competitors.

*Reviewed
generally
11/26. Opinion
is difficult
to follow & not
convincing. Yet,
result may be
correct - at least
as I view it
under Calif law.
See UCT
rather devastating
comments.
I'll review
draft more
carefully.*

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Merrill Lynch is a broker-dealer in securities and is a member-corporation of the New York Stock Exchange. Since prior to 1958, the firm has had a noncontributory Profit Sharing Plan for its employees in the United States. Under the Plan an employee may have allocated to his account both vested and unvested units, as therein described. Article 11 of the Plan relates to "Forfeiture of Benefits" upon the happening of specified events. One such event is competitive activity:

"11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

The Committee referred to is provided for by the Plan's Art. 1. It has not less than five nor more than nine persons (not necessarily employees) appointed by Merrill Lynch and serving "at the pleasure of the Corporation." Article 1.2 states that the Committee "shall administer the Plan" and "shall determine any questions arising in the administration, interpretation and application of the Plan, which determination shall be conclusive and binding on all persons."

At the time Ware terminated his employment with Merrill Lynch in March 1969, both vested and unvested units were allocated to his account. Upon his departure, the Committee, pursuant to Art. 11.1, determined that Ware, by entering competitive employment, had forfeited all rights to benefits due or to become due him under the Plan.

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In January 1970 Ware filed this class action suit in California state court against Merrill Lynch and the members of the Committee. The class purported to consist of Ware and all other similarly situated former Merrill Lynch employees in California. Declaratory relief was sought to the effect that Art. 11.1 was "unlawful and void under applicable California law," and that the defendants were obligated to pay all vested units credited from December 30, 1960, to the date of termination of employment.

Although the statute was not cited in the complaint, the parties appear to agree that the suit rested principally on § 16600 of the California Business and Professions Code. This reads:

"Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

In its answer, Merrill Lynch alleged that the provisions of Art. 11.1 were a reasonable restraint on competition under the laws of New York or of the United States; that, pursuant to Art. 22.1¹ of the Plan, it was to be construed according to the laws of New York; that under New York law Art. 11.1 is lawful, valid, and enforceable; that a condition of Ware's employment with Merrill Lynch was approval by the New York Stock Exchange; that Ware, at the time of his employment in 1958, executed a written application, on an Exchange form, for approval of his employment as a registered representative, as required by the Exchange's Rule

¹"22.1 The validity of the Plan or of any of the provisions thereof shall be determined under and shall be construed according to the laws of the State of New York."

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345 (a)(1);² that by ¶ 30 (J) of that form Ware agreed that any controversy with a member arising out of the termination of his employment shall be settled by arbitration at the instance of any party;³ that the Exchange approved the application; that Ware's sole remedy was arbitration; and that a declaration that Art. 11.1 was invalid under the laws of California would cause Merrill Lynch to discriminate in the administration of the Plan and would deprive it of due process of law.

² "Rule 345. (a) No member or member organization shall

(1) permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have registered with and is acceptable to the Exchange, . . ."

³ Paragraph 30 (J) of the Exchange form reads:

"(J) I agree that any controversy between me and any . . . member organization arising out of my employment or the termination of my employment by and with such . . . member organization shall be settled by arbitration at the instance of any such party in accordance with the Constitution and rules then obtaining of the New York Stock Exchange."

Paragraph 30 (d) of the same form reads:

"(d) I have read the Constitution and Rules of the Board of Governors of the New York Stock Exchange and, if approved, I hereby pledge myself to abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange as the same have been or shall be from time to time amended, and by all rules and regulations adopted pursuant to the Constitution, and by all practices of the Exchange."

Rule 347 (b) of the New York Stock Exchange, adopted in April 1958, prior to Ware's employment, provides:

"(b) Any controversy between a registered representative and any . . . member organization arising out of the employment or termination of employment of such registered representative by and with such . . . member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

It is thus apparent that ¶ 30 (J) of the form follows the language of the Exchange's Rule 347 (b).

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Merrill Lynch, invoking § 1281.2 of the California Code of Civil Procedure,⁴ petitioned the state court for an order directing arbitration pursuant to the above quoted ¶ 30 (J) and Ware's pledge, contained in his application for approval of employment, that he would "abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange" and that he submitted himself "to the jurisdiction of such Exchange."

Ware opposed arbitration on the grounds that no contract to arbitrate existed between him and Merrill Lynch; that if an agreement to this effect existed, it was a contract of adhesion; and that, since § 16600 made the forfeiture provision illegal under California law, it was not arbitrable.

The state trial court, by minute order, denied the petition to compel arbitration.

Merrill Lynch then appealed. The California Court of Appeal held that a written agreement to arbitrate did exist; that the Exchange form was "a contractual agreement"; and that the "approval and registration by Merrill Lynch made the application a contract between the parties." 24 Cal. App. 3d, at 40-41, 100 Cal. Rptr., at 795-796. The court went on to hold, however, that the forfeiture clause was invalid and unenforceable under California law, when applied to California residents, as

⁴§ 1281.2 Order to arbitrate controversy; petition; determination of court.

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

"(a) The right to compel arbitration has been waived by the petitioner, or

"(b) Grounds exist for the revocation of the agreement . . ."

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being in restraint of trade. 24 Cal. App. 3d, at 42-43, 100 Cal. Rptr., at 796-797. Cited as supporting authorities were *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971), where the same forfeiture clause was held ineffective under California law, but where the court also held that an enforceable agreement to arbitrate existed,⁹ and *Muggill v. Reuben H. Donnelley Corp.*, 62 Cal. 2d 239, 398 P. 2d 147 (1965).

Finally, the Court of Appeal, while taking note of California's "strong public policy" favoring arbitration, held that Merrill Lynch's contributions under its Profit

⁹ In *Frame*, decided only five months earlier, the same California Court of Appeal reversed a trial court's order denying arbitration and thus seemingly arrived at an ultimate result opposite that reached in the present case. The court held, 20 Cal. App. 3d, at 671-673, 97 Cal. Rptr., at 813-815, that *Frame* (like *Ware*) had made an agreement to arbitrate; that there was no basis for using the doctrine of adhesion to avoid arbitration; that the forfeiture provision of Art. 11.1 was ineffective under § 16600; that the agreement's provision that New York law was to apply "must not be allowed to defeat" the policy of § 16600, that, however, the entire contract was not necessarily unlawful; and that a

"latent question exists as to whether the agreements of the parties may be construed as applying only to such permissible subjects of restraint as breaches of confidence and misappropriation of trade secrets. Other questions may be raised as to the time and circumstances of respondent's employment and the amount of any benefits earned and remaining unpaid. All of these matters, whether they involve questions of law or questions of fact are in the first instance properly subject to arbitration." 20 Cal. App. 3d, at 673, 97 Cal. Rptr., at 815.

But no mention was made in *Frame* of §§ 200 and 229 of the State's Labor Code, see n. 8, *infra*, and, as the court later said in *Ware*, 24 Cal. App. 3d, at 43, 100 Cal. Rptr., at 797, "[t]he *Frame* court did not consider the effect of section 229 of the Labor Code on the arbitration agreement." Apparently, neither side in *Frame* sought review by the California Supreme Court.

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Sharing Plan were wages, within the meaning of §§ 200⁶ and 229⁷ of the California Labor Code, and that § 229 gave Ware "the right to bring his claim in court in spite of any agreement to arbitrate." 24 Cal. App. 3d, at 43-44, 100 Cal. Rptr., at 797-798. Merrill Lynch's petition for hearing by the Supreme Court of California was denied without opinion. See 24 Cal. App. 3d, at 45.

II

The broad issue thus presented to us is the extent to which authority delegated under a federal regulatory statute pre-empts state law. Specifically, we are concerned with the questions (a) whether, in the context of the present case, § 229 of the California Labor Code, which would preclude compulsory arbitration of wage disputes, is ineffective under the Supremacy Clause; (b) whether § 16600 of the California Business and Professions Code unduly interferes with federal regulation of the securities industry; and (c) whether the California legislation unconstitutionally burdens interstate commerce.

⁶ § 200. Definitions

⁷ As used in this article: (a) 'Wages' includes all amount for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

⁸ § 229. Actions to enforce payment of wages; effect of arbitration agreements

"Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement."

Section 229 was added to the Code in 1959. Cal Stats. 1959, c. 1939, p. 4532.

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In order to resolve these questions, we think it necessary to review the principles of stock exchange preemption delineated in this Court's decision a decade ago in *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963), and to examine the genesis of the federal Act and of the California statute.

A. In *Silver* the Court considered whether, and to what extent, the federal antitrust laws apply to securities exchanges regulated by the 1934 Act. It held that the mere passage of the Act did not effect, *pro tanto*, a repeal of the federal antitrust laws, but that particular instances of exchange regulation that fall within the scope and purposes of the Act may be justified and will be upheld against antitrust challenge. *Id.*, at 357-361. With respect to the specific question there presented, it was clear that the New York Stock Exchange had exercised its "tremendous economic power," *id.*, at 361, against two nonmembers by discontinuing their direct wire-telephone connections with members of the Exchange without notice, hearing, or statement of reasons. It was the Court's view, under the circumstances, that procedural guarantees were necessary in order to protect against the possibility of antitrust practices and to provide the "extremely beneficial effect in keeping exchange action from straying into areas wholly foreign to the purposes of the Securities Exchange Act." *Id.*, at 362. See also, *Ricci v. Chicago Mercantile Exchange*, 409 U. S. 289, 300-301 (1973).

In contrast with *Silver*, we are not confronted here with conflicting federal regulatory schemes. The present controversy concerns the interrelationship between statutes adopted, respectively, by the Federal Government and a State. The analytical framework of *Silver* is instructive, nonetheless. There the Court reviewed carefully the regulatory securities exchange scheme that Congress had adopted in order to identify the character

proscribed

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and purposes of the Act and the extent to which instances of exchange self-regulation were necessary to the furtherance of congressional aims and objectives. 373 U. S., at 349-361. It was mindful, also, of the purposes behind the conflicting statutes which, in that case, were the antitrust laws. So here, we may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.*, at 357.⁸ The principle that emerged from *Silver*, and the premise upon which the Court based its judgment, was that conflicting law, absent repealing or exclusivity provisions, should be pre-empted by exchange self-regulation "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." *Id.*, at 361.

B. The Securities Exchange Act of 1934, as amended, 15 U. S. C. §§ 78a to 78hh-1, "regulates securities markets and the business of securities brokers and dealers." Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess., 3 (1963). Two types of regulation are reflected in the Act. Some provisions impose direct requirements and prohibitions. Among these are mandatory exchange registration, restrictions on broker and dealer borrowing, and the prohibition of manipulative or deceptive practices. Other provisions

⁸ This approach is supported by decisions extending back to the turn of the century. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960); *International Assn. of Machinists v. Gonzales*, 356 U. S. 617 (1958); *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944); *Savage v. Jones*, 225 U. S. 301 (1912).

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are flexible and rely on the technique of self-regulation to achieve their objectives. *Ibid.* Supervised self-regulation, although consonant with the traditional private governance of exchanges, allows the Government to monitor exchange business in the public interest." MR. JUSTICE DOUGLAS, when he was Chairman of the Securities and Exchange Commission, observed that this permits the exchanges to "take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." W. Douglas, *Democracy and Finance* (Allen Ed. 1940) 82.

The Act provides for stock exchanges to be registered by the Commission. § 6, 15 U. S. C. § 78f. It outlaws securities transactions conducted on unregistered exchanges. § 5, 15 U. S. C. § 78e. It conditions registration on a showing that the exchange has rules that are "just and adequate to insure fair dealing and to protect investors." § 6 (d), 15 U. S. C. § 78f (d).

⁹ The first attempt at exchange regulation arose after the panic of 1907 when, in response to public concern over speculation, President Theodore Roosevelt urged Congress to take action. 42 Cong. Rec. 1347, 1349 (1908). Nothing of significance happened, however, until after the 1929 stock market crash. It became apparent that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and of matters related thereto." Securities Exchange Act of 1934, § 2, 15 U. S. C. § 78b. Self-regulation was adopted as a means of policing the exchanges. The tradition, as has been noted, had been one of self-governance; the financial community was strongly opposed to governmental control of daily exchange business; and the task was deemed to be of such magnitude that Government simply could not regulate effectively every aspect of the industry. Comment, 48 Minn. L. Rev., 597-598 (1964); L. Loss, *Securities Regulation*, Vol. 2, pp. 1175-1176 (1961), and Vol. 5, pp. 3138-3139 (1969).

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An exchange seeking registration must also meet other requirements. It must agree "to enforce so far as is within its powers compliance by its members" with the Act and the Commission's rules and regulations thereunder. § 6 (a)(1), 15 U. S. C. § 78f (a)(1). It must include in its rules a provision for the disciplining of a member "for conduct or proceeding inconsistent with just and equitable principles of trade." § 6 (b), 15 U. S. C. § 78f (b). And it must supply to the Commission copies of its constitution, articles of incorporation, and bylaws, and such data or other information as the Commission may require "as being necessary or appropriate in the public interest or for the protection of investors." § 6 (a)(3) and (2), 15 U. S. C. § 78f (a)(3) and (2).

i

The Commission's direct authority with respect to exchange self-regulation is supervisory. Apart from its responsibilities in registering exchanges, the Commission may "alter or supplement" the rules of an exchange if such action is "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." § 19 (b), 15 U. S. C. § 78s (b).¹⁹ This authority, however, relates to 12 designated subject areas and "similar matters." *Ibid.* As a consequence, some exchange rules are not subject to direct Commission scrutiny, *In re Rules of the New York Stock Exchange*, 10 S. E. C. 270, 294 (1941), and, instead, if they do not operate contrary to the interests of insuring fair dealing and protecting investors, would kindle no federal curiosity and would serve no identifi-

Commission

¹⁹ The Commission also has broad rule-making power under the Act. See, for example, §§ 8, 9, and 11, 15 U. S. C. §§ 78h, 78i, and 78k. No question is presented in this case as to the authority of the Constitution to promulgate rules affecting the operation of stock exchanges.

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able public purpose. It is to be noted, moreover, that the Commission has exercised its direct supervisory power sparingly. Securities Industry Study, Report of the Subcommittee on Securities, Committee on Banking, Housing and Urban Affairs, S. Doc. No. 93-13, 93d Cong., 1st Sess., 180 (1973).

Apart from registration and direct Commission supervision, the only other qualification on exchange autonomy is the statutory requirement that any rules promulgated and enforced by an exchange not be "inconsistent with this [Act] and the rules and regulations thereunder and the applicable laws of the State in which it is located." § 6 (c), 15 U. S. C. § 78f (c).

From this review of relevant portions of the Act, it is apparent that Congress accorded maximum scope to self-regulation, and reposed powers in the Commission "to be exercised as needed but in such manner as to allow maximum initiative and responsibility to the self-regulators." Report of the Special Study, *supra*, Pts. 4-6, at 726. In the words of the Senate Report issued at the time of enactment,

"Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S. Rep. No. 792, 73d Cong., 2d Sess., 13 (1934).

It is thus clear that the congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices. To the extent that any exchange rule or practice contravenes this policy, or any authorized rule or regulation under the Act, the rule may be subject to appropriate

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federal regulatory supervision or action. Correspondingly, any rule or practice not germane to fair dealing or investor protection would not appear to fall under the shadow of the federal umbrella; it is, instead, subject to applicable state law.

C. On the other side are the California statutes. By the addition of § 229 to its Labor Code in 1959 California codified for the wage earner, with the solitary collective bargaining agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate. Selected 1959 Code Legislation, 34 Cal. St. B. J. 581, 706-707. This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance. The statute's legislative history is sparse, but the exception carved out for collective bargaining disputes provides the obvious conclusion that it was the individual, nonunion and otherwise unprotected wage earner who was the intended beneficiary of the State's grace in providing this remedy. This conclusion is fortified by the fact that § 200 (a) of the Code defines "wages" broadly to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, place, commission, basis, or other method of calculation." And the California court itself has noted "the established policy . . . of protecting and promoting" the right, " 'favored' in the law," of the wage earner "to all wages lawfully accrued to him." *City of Ukiah v. Fones*, 64 Cal. 2d 104, 108, 410 P. 2d 369, 371 (1966). It may be, too, that the legislature felt that arbitration was a less than adequate protection against awarding the wage earner something short of what was due compensation. In any event, there is

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the harder substance of California case law. In *Local 659 v. Color Corp. of America*, 47 Cal. 2d 189, 302 P. 294 (1956), decided prior to the addition of § 229 to the Labor Code, the court held that the then § 1280 of the State's Code of Civil Procedure, providing for the enforcement of an arbitration clause in a contract and characterizing it as "irrevocable," was subject to waiver or mutual rescission. The statute provided that arbitration was required "save upon such grounds as exist at law or in equity for the revocation of any contract."¹¹ California, thus, does not exclude a remedy available at law or in equity for the revocation of any contract that happens to contain an arbitration clause.

This conclusion as to the broad and liberal intendment of § 229 is reinforced by the Court of Appeal's observation in the present case, 24 Cal. App. 3d, at 44-45, 100 Cal. Rptr., at 798, that the State's Arbitration Act, revised in 1961, embraced no attempt to change the right of action first accorded the wage earner only two years earlier in 1959. The record is clear, moreover, that legislative attention was drawn in 1961 to § 229. The California Senate was asked to reconsider its unanimous vote in favor of the Arbitration Act on the ground that there was legislative uncertainty as to its effect upon § 229. 2 Journal of the Senate 2215-2218 (May 4, 1961). The motion to reconsider was later waived, and the bill was transmitted to the Assembly. *Id.*, at 2287 (May 8, 1961). Thus, the Senate had in mind the rights accorded wage earners by § 229, and those rights were placed in focus with the "historic friendliness of California to the institution of arbitration." E. Feldman, *Arbitration Modernization—The New California Arbitration Act*, 34

¹¹ Section 1280 was repealed and replaced in 1960 to make the saving clause now read, "save upon such grounds as exist for the revocation of any contract." Cal. Stats. 1961, c. 461, pp. 1541-1542, §§ 1 and 2.

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So. Calif. L. Rev. 413, 414 (1961). Section 229 thus survived subsequent legislative scrutiny and has now manifested itself as an important state policy through interpretation by the California courts.

One might also consider, as the respondent suggests here, the California antitrust policies embodied in § 16600 of the Business and Corporation Code, quoted, *ante*, p. —. This statute has been in effect for many years and is well entrenched in case law and in commentary.²³ We need not pursue in depth the policy considerations supporting this statute because, in our judgment, § 16600, standing alone and apart from § 229, under existing case law, would not provide the necessary support to uphold a challenge to arbitration. Our inclination in this respect is buttressed by the different results reached by the California Court of Appeal in this case and in *Frame*, *supra*, respectively. In *Frame*, the court decided that the "strong California public policy" against restraining one from engaging in a lawful business foreclosed the application of the more permissive New York law to the forfeiture provision of the profit-sharing plan. Although California public policy thus served to nullify the contract's forfeiture provision, arbitration, nonetheless, was not ~~concluded~~. By way of contrast, the present case provoked a claim under § 229, in addition to Ware's reliance on § 16600, in the face of Merrill Lynch's motion to compel arbitration. The California court declared again that the forfeiture clause was invalid but, in addition, held that the arbitration clause was unenforceable, relying on § 16600 and § 229, respectively. With this analysis of the state statutes made by the California court, we rest on that court's interpretation of state law and do not, and in fact cannot, disturb its determination

²³ See citations following § 16600 in West's Ann. Calif. Bus. & Prof. Code, p. 41, *et seq.*

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that under those statutes arbitration will lie in the one instance but not in the other.

With this background, we turn to specific arguments advanced by the petitioner here.

III

A. Merrill Lynch suggests that Rule 347 (b) of the New York Stock Exchange, set forth in n. 3, *supra*, falls under the Exchange's mandate to protect the investing public and to insure just and equitable trade practices.¹³ Its contention is that confidence in the industry and in the integrity and ability of its members has been jeopardized by failures of major brokerage houses with consequent substantial losses to the public. Investor confidence would be further undermined, it is said, by protracted litigation between member firms and their employees over disputes that arise out of employment relationships; public airing of every claim of this kind will erode confidence in the market; and arbitration, on the other hand, will internalize these disputes and provide an expeditious and economical method of resolution by arbitrators familiar with industry customs and practices.

As is seen by our discussion above, §§ 6 (d) and 19 (b) of the Act, 15 U. S. C. §§ 78f (d) and 78s (b), establish the measure of congressionally delegated authority for self-regulation in the national interest. Section 6 (d) requires that exchange rules be "just and adequate to

¹³ The phrase "just and equitable trade practices" does not have its verbatim counterpart in the statute. It would be inappropriately used to justify Rule 347 (b). This is because the standard refers to rules adopted pursuant to § 6 (b) of the Act, 15 U. S. C. § 78f (b), providing for the expulsion, suspension or disciplining of a member "for conduct or preceeding inconsistent with just and equitable principles of trade." Arbitration is not the type of disciplinary rule that § 6 (b) contemplates.

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insure fair dealing and to protect investors." Section 19 (b) gives the Commission limited power over certain types of exchange rules "for the protection of investors or to insure fair dealing in securities" or to "insure fair administration" of the exchanges.¹⁴ Measured by these standards, we conclude that the policy arguments advanced by Merrill Lynch do not require pre-emption of contrary state law by Rule 347 (b).

To begin with the obvious, there is nothing in the Act and there is no Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes.¹⁵ It is also clear that Rule 347 (b) would not be subject to the Commission's modification or review under § 19 (b). The United States, as *amicus*, concedes as much, and we conclude, as the Government suggests, that the relationship between compulsory employer-employee arbitration and fair dealing and investor protection is "extremely attenuated and peripheral, if it exists at all." Brief for the United

¹⁴ As noted above, *ante*, p. —, the Commission's review power over exchange rules is circumscribed by certain subject matter limitations explicitly enumerated in § 19 (b). None of the subject matter categories suggests that the Commission has review authority with respect to a rule requiring arbitration of employer-employee disputes.

¹⁵ This Court and other federal courts, of course, have endorsed the suitability of arbitration to resolve federally created rights. *Wilko v. Swan*, 346 U. S. 427, 431 (1953); *Coenen v. R. W. Pressprich & Co.*, 453 F. 2d 1209 (CA2 1972), cert. denied, 406 U. S. 949 (1972). See other cases cited by MR. JUSTICE WHITE in his dissenting opinion in *U. S. Bulk Carriers, Inc. v. Arguelles*, 400 U. S. 351, 374-375 (1971). These cases, however, concern situations where a federal act itself has provided for arbitration. Yet in *Wilko v. Swan* an investor customer's agreement to arbitrate was held void under § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, notwithstanding the provisions of § 3 of the Arbitration Act, 9 U. S. C. § 3. See *Perma Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967).

States 9. Merrill Lynch has not alleged that arbitration will effect fair dealing or result in investor protection. It suggests only that investor confidence not be shaken further by public airing of employer-employee disputes. There is no explanation of why a judicial proceeding, even though public, would undermine investor confidence. It is difficult to understand why muffing a grievance in the cloakroom of arbitration would prevent lessening of confidence in the market. To the contrary, for the generally sophisticated investing public, market confidence may tend to be restored in the light of impartial public court adjudication. Furthermore, it should be apparent that, so far as investor confidence is concerned, compulsory arbitration of a labor dispute is no substitute for direct effective disciplinary action against any abusive exchange practice. Other rules of the exchange serve this very function. Rule 345 (b), for example, permits the exchange to disapprove, and thereby to forestall, the employment of any person, and Rule 345 (c) spells out punitive measures for "conduct inconsistent with just and equitable principles of trade," or "acts detrimental to the interest or welfare of the Exchange," or "conduct contrary to an established practice of the Exchange." These measures, designed to insure fair dealing and to protect investors, are of the kind directly related to the Act's purposes and ordinarily would not be expected to yield to provisions of state law.

B. Rule 347 (b) cannot be categorized, as the petitioner suggests, as part of a need for uniform national regulation. There is no revelation in the Act or in any Commission rule or regulation that nation-wide uniformity of an exchange's housekeeping affairs is necessary or desirable. And Merrill Lynch has not demonstrated that national uniformity in the area of wage claims is vital, in some way, to federal securities policy.

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Convenience in exchange management may be desirable, but it does not support a plea for uniform application when the rule to be applied is not necessary for the achievement of the national policy objectives reflected in the Act. Indeed, Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation. Cf. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 234-236 (1947); *Campbell v. Hussey*, 368 U. S. 297, 302 (1961). Instead, Congress intended to subject the exchanges to state regulation that is not inconsistent with the federal act. Section 6 (c), 15 U. S. C. § 78f (c), explicitly subjects exchange rules to a requirement of consistency with the Act "and the applicable laws of the State in which it is located." "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co. v. Jenzen*, 322 U. S. 202, 209 (1944). And we observed in *Silver* that the scheme of self-regulation provides in some cases for no agency check on exchange behavior and, therefore, "[s]ome form of review of exchange self-policing, whether by administrative agency or by the courts, is . . . not at all incompatible with the fulfillment of the aims of the Securities Exchange Act." 373 U. S., at 359.

C. It is also argued that the applicable state laws referred to in § 6 (c) are the laws of the State in which the exchange itself is located. Thus, because the New York Stock Exchange is in the City of New York, it is said that "the applicable laws" are those of New York, and that the California court was in error in not applying New York law that would have compelled arbitration of this dispute and would have validated the forfeiture provision of the Profit Sharing Plan.

We are not persuaded that this is what Congress intended. Section 6 (c) has no independent existence cre-

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ating some sort of spurious uniformity of application for all States. It has meaning only in the context of the assertion of a federal interest, and it hinges on our determination that the particular rule be integrally related to or substantially effect the aims and purposes of the Act. It merely requires that any exchange rule adopted outside the context of the Act be consistent with the laws of the State in which the exchange is located.¹⁶

If the rule is sought to be enforced in another State, normal conflicts principles come into play, and the rule's effect depends on the resolution of that conflict. Were this not so, there would be no purpose behind the choice of law clause in the Profit Sharing Plan itself. More importantly, the uniform application Merrill Lynch's interpretation of the Act would purportedly foster is seen to be ephemeral when one considers that broker-dealers like petitioner are also members of exchanges located outside New York, and are therefore subject, under the "state of location" theory, to other States' laws. In effect, we are asked to sacrifice the individual's expectation of uniform treatment in the State of his residence for uniformity of application of the effect of an exchange's rules. We decline to do so because we believe

¹⁶The Act contains other provisions indicating the intent of Congress that state law continues to apply where the Act itself does not. Thus, § 28 (a), 15 U. S. C. § 78bb (a), states that the rights and remedies provided by the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity." It further provides that nothing in the Act "shall affect the jurisdiction of the securities commission . . . of any State . . . insofar as it does not conflict with the provisions" of the Act "or the rules and regulations thereunder." Section 28 (b), 15 U. S. C. § 78bb (b), provides that nothing in the Act "shall be construed to modify existing law . . . with regard to the binding effect . . . of [exchange] action taken . . . to settle disputes between its members . . . on any person who has agreed to be bound thereby."

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that Congress intended that those elements of the old regime of complete self-regulation, that is, those elements not related to the federal objectives, be subject to state law and to established conflicts principles when their application out-of-State comes into controversy. After all, a stock exchange is organized as an association in accordance with the laws of the State of its location. Any assertion of extraterritorial jurisdiction contends, of course, with the public policy of the State in which this jurisdiction is sought. To ascribe more to § 6 (c) would be contrary to the congressional scheme and to what might be regarded as common sense.

D. MR. JUSTICE BRENNAN has stated,

“The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142 (1963).

In other contexts, pre-emption has been measured by whether the state statute frustrates any part of the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U. S. 714, 724 (1963); *Perez v. Campbell*, 402 U. S. 637 (1971); *Rice v. Board of Trade*, 331 U. S. 247, 253-255 (1947). And only last term MR. JUSTICE DOUGLAS, in speaking for the Court, observed that while prior cases on pre-emption “are not precise guidelines,” because “each turns on the peculiarities and special features of the federal regulatory scheme in question,” it is where there is in existence a pervasive and comprehensive scheme of federal regulation that pre-emption follows in order to fulfill the federal statutory purposes. *City of Burbank*

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v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624, 638-639
(1973).

In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. These policies prevail in the absence of interference with the federal regulatory scheme. We find no such interference and we also find in the structure of the Act an intent on the part of Congress that state policies in this area should operate vigorously.

E. It is suggested, finally, that the petitioner's Profit Sharing Plan operates on a national level; that it is open to all eligible Merrill Lynch employees in the United States; that the respondents' employment is interstate in nature, as is Merrill Lynch's business; and that the application of the California statutes would unduly burden interstate commerce.

What has been said above provides the answer to this argument. It is in line with the principle, long established, that the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766-767 (1945); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R. Co.*, 393 U. S. 129 (1968); *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440 (1960).

The judgment of the Court of Appeal is affirmed.

It is so ordered.

