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program, Congress did not intend to allow claims under the FTCA for wrongful termination of benefits. The court implied that, if a constitutional violation does not warrant awarding monetary damages under the FTCA, the wrongful termination of benefits likewise may not warrant awarding monetary damages. Consequently, the Fourth Circuit court held that the FTCA did not provide the plaintiff with a cause of action for the wrongful termination of her husband's Social Security benefits.

SECURITIES

In *Newcome v. Esrey*, 862 F.2d 1099 (4th Cir. 1988), the United States Court of Appeals for the Fourth Circuit considered whether an arbitration clause was enforceable to prevent litigation of a claim under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. section 78j(b) (1988), and whether section 17(a) of the Securities Act of 1933, 15 U.S.C. section 77q(a) (1988), provided a private right of action for fraud. In *Newcome* the plaintiff, Newcome, hired the defendant, Esrey, a stockbroker, to invest Newcome's stock portfolio at Esrey's discretion. Newcome signed a customer's agreement that provided for the arbitration of any controversy arising out of Newcome's relationship with Esrey. Dissatisfied with Esrey's ability to produce profits, Newcome sued Esrey for fraud and breach of fiduciary duty.

Newcome alleged that Esrey overtraded, or "churned," the securities in Newcome's account solely to generate excessive commissions for Esrey. Esrey defended on the grounds that section 17(a) of the Securities Act of 1933 does not create a private cause of action and, alternatively, that Newcome agreed to submit any claim to arbitration. The United States District Court for the Western District of Virginia, relying on *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), ruled that section 17(a) of the Securities Act of 1933 impliedly creates a private cause of action. The district court, however, dismissed the suit, holding that, based upon section 17(a) and section 10(b), Newcome had waived the right to pursue actions by agreeing to arbitrate any claims.

Newcome appealed, arguing that neither the section 10(b) nor the section 17(a) claim was subject to the arbitration provision in the customer's agreement. Initially, the Fourth Circuit relied on *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987), which held that agreements that subject section 10(b) claims to arbitration are valid, and affirmed the district court's dismissal of Newcome's section 10(b) claim. The Fourth Circuit then addressed whether Newcome's section 17(a) claim was subject to the arbitration provision. In resolving this issue, the *Newcome* court first considered whether section 17(a) creates a private cause of action. The Fourth Circuit reviewed its holding in *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), which stated that "section 17(a) supports a private damage claim for the fraudulent sale of a security." The *Newcome* court noted, however, that the Fourth Circuit reached the *Newman* decision without the benefit of the United States Supreme Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975).

The Fourth Circuit examined the four factors listed in *Cort* that courts are to use in determining whether a federal statute impliedly creates a private cause of action. First, the plaintiff must show that the plaintiff is a member of the class of whose *especial* benefit Congress enacted the statute; that is, that the statute creates a federal right of action for the plaintiff. Second, the plaintiff must demonstrate that the legislature intended to create a private right of action. Third, the plaintiff must prove that implying a private remedy is consistent with Congress's purpose in drafting the Securities Act of 1933. Finally, the plaintiff must demonstrate that courts should infer a cause of action based solely on federal law because the cause of action is one not traditionally relegated to state law. The *Newcome* court stated that the first three criteria of *Cort*, those criteria concerning the indicia of legislative intent, were the primary factors for courts to consider in deciding whether Congress intended to create a private cause of action in section 17(a).

The *Newcome* court split its analysis of the legislative intent into two parts. First, the court examined the language of section 17(a) of the 1933 Securities Act to determine whether Congress intended to create a private remedy. The Fourth Circuit noted that, while section 17(a) characterizes the listed conduct as "unlawful," the section is entirely silent as to enforcement. The court also found that Congress expressly created private causes of action for buyers of securities in other provisions of the 1933 Securities Act. The *Newcome* court further reasoned that, because Congress drafted section 17(a) as a general prohibition rather than as a benefit to a certain class, courts should not imply a private right of action. The Fourth Circuit concluded that, because some sections of the Securities Act of 1933 that Congress passed in conjunction with section 17(a) contain private remedies which address the same conduct and benefit the same class as section 17(a), Congress specifically provided protection only to certain investors from certain conduct. The Fourth Circuit reasoned that Congress did not provide any such protection for investors in section 17(a).

Second, the Fourth Circuit reviewed the legislative history of the Securities Act of 1933 to determine whether Congress intended to create a private right of action for fraud in section 17(a). The *Newcome* court found that section 17(a) was the result of a compromise between the House of Representatives version and the Senate version of the Act. The Senate version did not provide for civil liability. The House version also did not provide for any civil remedy. The *Newcome* court thus concluded that the lawmakers viewed section 17(a) as a general prohibition against fraudulent conduct to be enforced by criminal and injunctive action, not by civil action.

Applying *Cort*'s third indicator of legislative intent, the Fourth Circuit noted that the Securities Act of 1933 comprehensively regulates the securities markets and includes a detailed procedure for enforcement. When the *Newcome* court viewed section 17(a) against the other enforcement provisions of the Act, the court concluded that implying a right of action under section 17(a) would interfere with the civil liabilities that Congress expressly created. The Fourth Circuit also recognized that Congress imposed certain

procedural restrictions upon plaintiffs who sue under other sections of the Act. The *Newcome* court then noted that section 17(a) lacked any such restrictions. The Fourth Circuit considered this lack of restrictions in section 17(a) as further evidence that implying a private right of action under section 17(a) would be inconsistent with Congress's purpose in drafting the 1933 Securities Act. Finally, the Fourth Circuit noted that Congress provided investors a private right of action under section 10(b) of the Securities Act of 1934, 15 U.S.C. section 78j(b) (1988), which addresses conduct similar to the conduct that section 17(a) of the Securities Act of 1933 prohibits.

The *Newcome* court concluded that Congress provided investors with a balanced system of remedies in drafting the federal securities laws. The Fourth Circuit reasoned that, if the court permitted plaintiffs to bring negligence actions under section 17(a), plaintiffs could escape the procedural limitations Congress specifically intended to apply to such actions. Accordingly, the Fourth Circuit held that Newcome failed to prove that Congress intended to create a private remedy under section 17(a) and that Newcome failed to show that such a remedy would be consistent with the purpose of the scheme of federal securities laws. The Fourth Circuit, therefore, affirmed the district court's decision to dismiss Newcome's complaint.

In *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989), the Fourth Circuit court considered, first, whether the district court erred in refusing to order arbitration of federal claims under the Securities Act of 1933, 15 U.S.C. sections 77a-77bbbb (1988) (Securities Act), the Securities Exchange Act of 1934, 15 U.S.C. sections 78a-78kk (1988) (Exchange Act), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. sections 1961-1968 (1988) (RICO); and second, whether the district court erred in compelling arbitration of various state law claims. In *Jeske* an investor, Herbert A. Jeske, began dealing with a stockbroker, George E. Brooks, in late January 1983. At that time Brooks was an employee of Robinson-Humphrey Company (Robinson-Humphrey), a subsidiary of Shearson-Lehman Brothers, Inc. (Shearson-Lehman). In March 1983 Jeske signed a standard customer's agreement with Brooks. The agreement contained an arbitration clause covering all disputes over matters relating to the agreement.

Several months after Jeske signed the customer's agreement, the Securities and Exchange Commission (SEC) adopted rule 15c2-2 (codified at 17 C.F.R. section 240.15c2-2(a) (1987), which made fraudulent a stockbroker's act of binding a customer to the arbitration of future disputes between them arising under the federal securities laws. Rule 15c2-2 took effect on December 28, 1983. The SEC rescinded the rule effective October 21, 1987.

In 1986 the plaintiff, Jeske, filed suit against Brooks, Robinson-Humphrey, and Shearson-Lehman in the United States District Court for the Western District of North Carolina. Jeske alleged that Brooks recommended several unfit investments that resulted in losses and, therefore, that Jeske was entitled to recovery under the Securities Act, the Exchange Act, the SEC rules, and RICO. Jeske also asserted a variety of state law claims against the defendants based on theories of fraud, breach of contract,

negligence, breach of fiduciary duty, and violations of the North Carolina Securities Act and the North Carolina Unfair Trade Practices Act.

The defendants moved to stay litigation pending arbitration. The district court ruled that Jeske's state law claims were arbitrable but that Jeske's federal claims were not. The district court, therefore, compelled arbitration of Jeske's state claims but refused to order arbitration of Jeske's federal claims. Both Jeske and the defendants appealed.

On appeal to the Fourth Circuit, the Fourth Circuit determined that, while the parties' appeals were pending, the Supreme Court's opinion in *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. 271 (1988), called the Fourth Circuit's jurisdiction into question. In *Gulfstream* the Supreme Court abolished the *Enelow-Ettelson* doctrine, which had provided courts a basis of jurisdiction to review interlocutory orders granting or denying motions to stay litigation pending arbitration. In *Jeske*, however, the Fourth Circuit held that, despite *Gulfstream*, 28 U.S.C. section 1292(a)(1) (1982) enabled litigants to appeal orders denying stays pending arbitration or refusing to compel arbitration. The *Jeske* court, however, observed that, after *Gulfstream*, whether the court had jurisdiction to review orders compelling arbitration or staying legal proceedings pending arbitration still was unclear.

The Fourth Circuit determined that Congress resolved the ambiguity regarding the court's jurisdiction by amending the Federal Arbitration Act, 9 U.S.C. sections 1-14 (1988). The *Jeske* court explained that the amendment to the Federal Arbitration Act specifies that the court does have jurisdiction to consider an appeal from an order that refuses a stay pending arbitration or from an order that denies a motion to compel arbitration. The Fourth Circuit, however, noted that the amendment does not grant the court jurisdiction to review an interlocutory order that compels arbitration or that grants a stay pending arbitration. Accordingly, the *Jeske* court addressed the merits of the defendants' appeals that challenged the district court's refusal to compel arbitration of the federal claims, but dismissed Jeske's appeals that challenged the order to compel arbitration of Jeske's state law claims.

In considering whether Jeske's federal claims were arbitrable, the Fourth Circuit determined that the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), was controlling. The *Jeske* court found that *McMahon* made clear that Jeske's federal claims under RICO and the Exchange Act were arbitrable. The Fourth Circuit, however, found that Jeske's Securities Act claim was more problematic. The *Jeske* court observed that in *Wilko v. Swan*, 346 U.S. 427 (1953), the Supreme Court held that claims under the Securities Act were nonarbitrable. The Fourth Circuit, however, noted that in *McMahon* the Supreme Court refused to apply *Wilko*'s holding to preclude arbitration of claims arising under the Exchange Act. The *Jeske* court concluded that, although *McMahon* did not expressly overrule *Wilko*, *McMahon* repudiated *Wilko*'s rationale. Accordingly, the court concluded that *Wilko* no longer was good law with regard to *Wilko*'s holding that claims under the Securities Act of 1933 are non-

arbitrable. In *Jeske*, therefore, the Fourth Circuit held that all of Jeske's federal claims were arbitrable.

Having found Jeske's federal claims arbitrable, the Fourth Circuit addressed Jeske's claim that the arbitration clause in the parties' agreement was invalid and, therefore, that the court had no basis for compelling arbitration. Jeske's argument was twofold. First, Jeske asserted that the SEC's adoption of rule 15c2-2 rendered the arbitration clause void. Second, Jeske argued that the general agreement itself was void for lack of consideration and because of overreaching, unconscionability, and fraud in the inducement of the agreement. In rejecting Jeske's first argument the Fourth Circuit found that rule 15c2-2 did not nullify the arbitration clause. The *Jeske* court explained that because the SEC had rescinded rule 15c2-2 the arbitration clause did not conflict with the SEC rule. The Fourth Circuit court recognized that the SEC did not rescind rule 15c2-2 until after Jeske filed suit against the defendants. Nevertheless, the *Jeske* court decided to give retroactive effect to rule 15c2-2's rescission.

The Fourth Circuit noted that three other circuits already had applied rule 15c2-2's rescission retroactively. Moreover, the *Jeske* court stated that the usual rule is that courts should decide federal cases under the law existing at the time of the decision. The Fourth Circuit conceded that courts should not decide federal cases under existing law if a change in the law unfairly disrupts a litigant's course of conduct or reasonable expectations. The court, however, concluded that in *Jeske* no injustice would result if the court retroactively applied rule 15c2-2's rescission. The Fourth Circuit reasoned that Jeske could not have relied on rule 15c2-2 because the SEC did not adopt the rule until eight months after Jeske entered into the customer's agreement with the defendants. Moreover, the court concluded that no evidence showed that Jeske would not have signed the agreement had Jeske known that his securities claims would be arbitrable. Accordingly, the Fourth Circuit held that because the SEC had rescinded rule 15c2-2 the arbitration clause in the customer's agreement was valid.

In considering Jeske's second argument that the arbitration clause was invalid because the general agreement itself was void for lack of consideration and faults in the inducement of the agreement, the Fourth Circuit concluded that, because the alleged defects pertained to the entire contract rather than specifically to the arbitration clause, the court should leave the alleged defects to the arbitrator for resolution. In *Jeske*, therefore, the Fourth Circuit reversed the portion of the district court judgment that refused to compel arbitration of Jeske's federal claims under RICO, the Securities Act, and the Exchange Act, and remanded the case to the district court with instructions to compel arbitration of Jeske's federal claims and to stay litigation of the federal claims pending arbitration. Having found that the Fourth Circuit lacked jurisdiction to review the district court's order compelling arbitration of Jeske's various state-law claims, the Fourth Circuit dismissed Jeske's appeals.

In *Tafflin v. Levitt*, 865 F.2d 595 (4th Cir. 1989), *aff'd*, 110 S. Ct. 792 (1990), the Fourth Circuit considered, first, whether certificates of deposit

are "securities" within the meaning of the Securities and Exchange Act of 1934, 15 U.S.C. section 78a-78kk (1988) (Exchange Act), and second, whether the district court erred in refusing to consider the plaintiffs' claims under the Racketeering Influenced and Corrupt Organizations Act, 15 U.S.C. sections 1961-1968 (1988) (RICO). In *Tafflin* the Maryland legislature designated a single judge in the Baltimore City Circuit Court to hear all claims arising out of conservatorship or receivership proceedings for failed savings and loan associations. Additionally, after the collapse of Maryland Savings and Share Insurance Corporation (MSSIC), a state-chartered corporation created to insure accounts in Maryland that were not federally insured, the legislature created a successor to MSSIC, the Maryland Deposit Insurance Fund (MDIF). Accordingly, after Old Court Savings and Loan (Old Court) collapsed, the Baltimore City Circuit Court converted the conservatorship into a recievership, with MDIF serving as the receiver. MDIF expressly stated that it would not compensate owners of Old Court certificates of deposit for interest accruing after November 8, 1985. Moreover, MDIF stated that, as to interest accruing before November 8, 1985, it would pay interest to owners at interest rates lower that the rates prescribed in the certificates of deposit. Consequently, the plaintiffs, purchasers and holders of Old Court certificates of deposit, filed suit against MDIF, MSSIC, Old Court, and counsel to MSSIC and Old Court in the United States District Court for the District of Baltimore, Maryland.

The plaintiffs in *Tafflin* alleged causes of action arising under the Exchange Act and RICO. The district court granted the defendants' motion to dismiss on the grounds that the plaintiffs failed to allege a claim under the Exchange Act. The district court reasoned that certificates of deposit were not "securities" within the meaning of the Exchange Act. Moreover, the district court refrained from considering the RICO claim because the plaintiffs also had raised the RICO claim in the Circuit Court for Baltimore City. The plaintiffs appealed the judgment to the United States Court of Appeals for the Fourth Circuit.

On appeal, the Fourth Circuit considered whether certificates of deposit were "securities" within the meaning of the Exchange Act. To resolve the issue, the Fourth Circuit reviewed the United States Supreme Court decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982). In *Marine Bank* the Supreme Court held that long-term certificates of deposit that federally insured banks issue are not "securities" within the meaning of the Exchange Act. The Supreme Court reasoned that certificates of deposit that federally insured banks issue are subject to comprehensive regulations which sufficiently protect the rights of purchasers and, therefore, make the application of the Exchange Act unnecessary. Accordingly, the Fourth Circuit in *Tafflin* determined that the Exchange Act does not apply if comprehensive regulations govern issuers of certificates of deposit. Finding that the regulations governing the Maryland savings and loans were intensive, the Fourth Circuit held that the Old Court certificates of deposit were not "securities" within the meaning of the Exchange Act and, therefore, that the plaintiffs did not have a cause of action under the Exchange Act.

The Fourth Circuit next considered whether the district court properly abstained from deciding the plaintiffs' RICO claims. To resolve the issue of whether state courts can consider RICO violations, the court relied on the Fourth Circuit's decision in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988). In *Brandenburg* the Fourth Circuit held that state courts have jurisdiction to consider RICO violations. The *Brandenburg* court reasoned that if comprehensive regulations govern a state chartered institution, a federal court properly may decline jurisdiction over a RICO claim. Accordingly, the Fourth Circuit in *Tafflin* affirmed the district court's decision to allow the Circuit Court for Baltimore City to consider the plaintiff's RICO claims.

On May 30, 1989, the United States Supreme Court granted the defendants certiorari with review limited to the question of whether a state court can hear a RICO claim. *Tafflin v. Levitt*, 109 S. Ct. 2428 (1989). In considering whether state courts have concurrent jurisdiction over RICO claims, the Supreme Court observed that, unless a statute expressly or impliedly grants exclusive jurisdiction to federal courts, state courts are presumed to have concurrent jurisdiction. *Tafflin v. Levitt*, 110 S. Ct. 792 (1990). In *Tafflin* the Supreme Court, however, noted that under *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), the presence of any one of three factors can rebut the presumption of concurrent jurisdiction: explicit statutory directive, unmistakable implication from legislative history, or clear incompatibility between state jurisdiction and federal interests.

The *Tafflin* Court then proceeded to analyze whether any of these factors were present in the RICO statute. The Supreme Court in *Tafflin* first observed that RICO grants permissive jurisdiction to federal courts and that RICO contains no language to suggest that Congress intended federal courts to have exclusive jurisdiction over RICO claims. Consequently, RICO contains no explicit statutory directive that would exempt RICO from the presumption of concurrent jurisdiction. Next, the Supreme Court reviewed RICO's legislative history, finding no indication that Congress even considered the issue of concurrent jurisdiction over RICO claims. Accordingly, the *Tafflin* Court determined that RICO's legislative history, by its silence, failed to exempt RICO from the presumption of concurrent jurisdiction. Finally, in considering whether state jurisdiction over civil RICO claims is clearly incompatible with federal interests, the Supreme Court noted that because civil RICO claims do not involve criminal sanctions, allowing state courts concurrent jurisdiction poses no significant danger that federal criminal law will be applied inconsistently. While the *Tafflin* Court conceded that the defendants legitimately were concerned about the need for consistency in applying federal criminal law, the Court stated that federal courts would remain fully responsible for interpreting and applying federal criminal laws, thus alleviating the defendants' concern. Additionally, the Court stated that federal interpretations of relevant federal criminal statutes guide state courts adjudicating civil RICO claims, and thus, state court adjudications of civil RICO claims only would affect negligibly the uniform interpretation and application of federal criminal law. Furthermore,