



SECURITIES ARBITRATION ALERT 2017-22 (6/7/17)

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- **Did You Know?** FINRA's Tenth Anniversary is Coming Up in July.

McMAHON AT 30: THE LEGACY. *For the past several weeks we've been looking back at [Shearson/American Express v. McMahon](#), 482 U.S. 220 (1987), the ground-breaking Supreme Court case dealing with securities arbitration. Last in our series marking the case's 30th anniversary on June 8th is a look at its legacy. To do that, we sought comments from some key figures from that era.* At issue in *McMahon* was whether claims arising out of both the Securities Exchange Act of 1934 (which in [section 29\(a\)](#) prohibits "any condition, stipulation, or provision binding any person to waive compliance with any provision of the Act") and the Racketeer Influenced and Corrupt Organizations Act, were arbitrable under the FAA. As we learned on June 8, 1987, a somewhat divided Court, replete with partial concurrences and dissents, held 5-4 that claims arising out of the Securities Exchange Act of 1934 were arbitrable under the FAA. SCOTUS also ruled 9-0 that Racketeer Influenced and Corrupt Organizations Act claims were arbitrable.

McMahon's Lasting Impact

We reached out to individuals who were either involved in the *McMahon* case or were active in the securities arbitration field, asking them to describe the case's legacy. Their comments appear below, starting with counsel for the parties and then segueing to others involved with securities arbitration back in 1987.

Theodore G. Eppenstein argued the case for the McMahons: "My life's trajectory changed in 1987 when I arrived at the Supreme Court after winning the [McMahon appeal](#) in the Second Circuit.... The opportunity to argue the McMahon's case before the Supreme Court, in effect representing the public's interest in seeking an alternative to mandatory arbitration, was a watershed moment in the next phase of my professional career. [Among other things,] it led to my Congressional trifecta of appearances on behalf of investors and invitations to the lecture circuit in the U.S. and at symposia in Moscow and Cairo. The highlight has been my work as a Public Member of the Securities Industry Conference on Arbitration ("SICA").... The securities arbitration process has improved significantly over the years - for example, the elimination of the mandatory industry arbitrator - but there's still work to be done, such as 'win-rate' statistics and mandatory arbitration."

Theodore A. Krebsbach argued the case for Shearson/American Express: "Back in the mid-1980's, Jeffrey Friedman and I were Shearson in-house lawyers who, based upon our personal experience, were certain that SRO arbitration was the fairest and most cost-effective and efficient forum for resolving investor disputes with stock-brokerage firms. Due to SEC oversight and other factors, we were also convinced that pre-dispute agreements to arbitrate federal securities claims at SROs should be enforced, despite the United States Supreme Court's [Wilko v. Swan](#), [346 U.S. 427 (1953)] precedent to the contrary. Encouraged by Shearson's General Counsel, the late Philip J. Hoblin, Jr., we began filing and arguing motions to compel arbitration of such claims in federal district and circuit courts throughout the country. Just two years after *McMahon* was decided, we successfully petitioned, briefed and argued [Rodriguez v. Shearson/American Express, Inc.](#) [490 U.S. 77 (1989)], in which the Supreme Court not only enforced pre-dispute agreements to arbitrate '33 Act claims, it also took the rare action of reversing its own *Wilko v. Swan* precedent. Countless professionals at FINRA and elsewhere have worked tirelessly over the past 30 years to ensure that securities arbitration remains fair and that the process continuously evolves to meet the ever-changing needs of investors and the securities industry."

Professor Constantine N. ("Gus") Katsoris, Educator, Arbitrator, Securities Industry Conference on Arbitration Founding Member: "*McMahon* vastly broadened the use of arbitration for the resolution of disputes between the investing public and the securities industry. In reaching its decision the Court emphasized the great strides that had been achieved in legitimatizing the process and removing much of the mistrust it had previously expressed in *Wilko v. Swan* some 34 years earlier. Among the intervening events the Court referred to was the establishment of SICA in 1977 and its enactment of its *Uniform Code of*

Arbitration which added stability and clarity to the process. Counsel before the *McMahon* Court are both friends, i.e. Ted Eppenstein was a co-Public Member with Peter Cella and myself at SICA for many years; and, Ted Krebsbach was a student of mine whom I had the privilege of sponsoring for admission to the Supreme Court in a Fordham Admission Ceremony just months before the case was argued. Congratulations to both of them, as they both made excellent presentations before the Court."

Deb Masucci was NASD's Director of Arbitration: "At the time *McMahon* was argued and decided, all of the staff at the NASD was committed to a fair arbitration process for broker/dealer customers, broker/dealer employees, and the broker/dealer industry, but the program was not very well known or understood. The *McMahon* decision took the voluntary program out of the shadows into sunshine, a double-edged sword. Since the *McMahon* decision, the staff continued its commitment to fairness and the securities dispute resolution program has been a leader of changes to the field. Publicly available awards, the expansion of mediation to resolve disputes, expansive disclosures for arbitrators, required education for arbitrators and then mediators, and the establishment of law school securities clinics to help small investors resolve disputes have their roots in the securities area. We should all be proud of the advancements and accomplishments of the program throughout the many years of change, criticism, and growth."

George Friedman was AAA's Vice President for Case Administration, and was responsible for the securities book of business: "Bob Coulson, AAA's president at the time, was prescient. He saw the decision coming, and had me start working on specialized rules before the Court ruled. AAA eventually formed a task force that developed the Association's *Securities Arbitration Rules*. There's no doubt *McMahon* was a very significant, seminal case. It paved the way for a series of Supreme Court decisions holding that federal statutory right cases could be arbitrated under a predispute arbitration agreement. It gets cited all the time, such as by SCOTUS in [*American Express Co. v. Italian Colors Restaurant*](#) [570 U.S. ___, 133 S.Ct. 2304 (2013)]. And I suppose it led indirectly to me becoming NASD's Director of Arbitration 11 years later."

Rick Ryder, Founder and President of the *Securities Arbitration Commentator*: "Arbitration had been a key aspect of our litigation strategy during my time at PaineWebber. I left my position as PWI's Litigation Manager in late 1987 with the idea of starting SAC. With the Supreme Court's decision in June, the September SEC (Ketchum) letter recommending an SRO Code overhaul to SICA, and the claims avalanche of the October Crash, *McMahon* kicked off a set of events that combined to spark a seismic shift in securities arbitration. I wanted to be there to record it! One of the first things [we reported](#) was a 54% jump in the SRO caseload from 2,828 in 1986 to 4,364 in 1987 (*SAC*, Vol. 1, No. 4)!"