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Mark J. Loewenstein
University of Colorado Law School

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Rethinking Statutory Antiwaiver Provisions Following the Lloyd's of London Litigation

Mark J. Loewenstein*

In the Lloyd's of London cases, the United States Courts of Appeals upheld certain forum-selection clauses that effectually deprived investors of the protections of the federal securities laws as if the investors had expressly waived those protections. This article examines statutory antiwaiver provisions in light of the Lloyd's cases, exploring the effect those provisions have on the administration of the federal securities laws, and suggests that the law be amended to allow contractual waiver in certain circumstances.

Introduction

This essay is about those statutory provisions, generally found in consumer protection and civil rights laws, that prohibit persons from contractually avoiding the law's protective provisions. Courts and commentators refer to such provisions as "antiwaiver" or "non-waiver" provisions. At first glance, the purpose and meaning of such provisions seem clear and obvious—to guaranty that the protective provisions of the law will not be lost to the terms of an over-reaching contract.¹ By contrast, because some statutes expressly preclude waiver, one might reasonably assume that the

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*Mark J. Loewenstein is a Professor of Law at the University of Colorado, Boulder, Colorado. The author wishes to thank his colleague, Curtis Bradley, for his helpful comments and suggestions on an earlier draft of this essay, and Catherine Woods and Scott James for their research assistance.

absence of such a provision means that contracting parties may waive the protections of the statute. In practice, however, the interpretation of an antiwaiver section, and the meaning of a statute without an antiwaiver section, are not so simple. While some exceptions exist, numerous cases suggest that a person for whose benefit a statute was enacted generally cannot waive the protections of the statute by contract, either because the waiver violates the public policy as expressed in the law, or because the waiver would be unconscionable. Thus, courts generally interpret statutes without an antiwaiver section as though such a section were present in the statute.

More startling, in a recent series of cases, the federal courts held,

The principal exception relates to statutes that do not reflect a broad public interest that would be adversely affected if the statute’s protections were waivable. For instance, the statute of frauds may be waived by the person who would otherwise be able to invoke its protections. See Williston on Contracts 485 (4th Ed. 1998). See also, American Broadcasting Companies, Inc. v. Roberts, 461 N.E.2d 856, 857 (N.Y. 1984), where the court upheld a collective bargaining agreement that waived certain rights to meal breaks that the employees had under the New York Labor Law. The New York Court of Appeals concluded that:

We perceive no overriding public policy that prevents waiver or modification of the precise statutory terms so long as the legislative purpose is not undermined.

Later in the opinion, referring to other cases in which the courts enforced waiver, the court noted that:

[t]he focus in these cases, in which there was no express legislative indication that waiver was precluded, is upon the existence of a bona fide agreement by which the employee received a desired benefit in return for the waiver, the complete absence of duress, coercion or bad faith and the open and knowing nature of the waiver’s execution.

Id. at 859. Compare, cases collected in note 3, infra.

E.g., Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 704 (1945) (“a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.”); Redel’s Inc. v. General Electric Co., 498 F.2d 95, 99 (5th Cir. 1974) (prospective release of antitrust violations “is clearly against public policy”); Green v. Republic Steel Corp., 338 N.E.2d 594, 596 (N.Y. 1975) (agreement prospectively waiving unemployment benefits unenforceable because it would “conflict with the purpose of the legislation which was designed to benefit those in need of assistance.”)

in effect, that an investor could waive the protections of the federal securities laws, notwithstanding the antiwaiver sections of those laws. In the Lloyd’s of London cases,\(^5\) which consist of eight decisions of the United States Courts of Appeals, the courts upheld the parties’ designation of English law and English courts. By upholding this choice-of-law/forum-selection clause, the courts deprived the Lloyd’s investors of the protections of the federal securities laws as though the investors had expressly waived those protections. These opinions were, in this author’s view, plainly wrong.\(^6\) While the outcome of the Lloyd’s cases is defensible as a matter of policy—the investors should have been held to their contracts—that outcome is indefensible as a matter of statutory interpretation.

The presence of an antiwaiver section—as illustrated by the Lloyd’s cases—potentially has three harmful effects. First, to reach a just result, courts exercised legislative, not judicial, functions in rewriting a statute, never a happy prospect in a democracy. Second, the uncertain effect of the antiwaiver sections in the federal securities laws complicates business dealings. Finally, the antiwaiver sections of the federal securities laws have complicated the administration of those laws, even aside from the problems posed by the Lloyd’s cases. Each of these effects is discussed below.

The second portion of this article examines antiwaiver provisions in the context of the federal securities laws, and then more generally. The second portion concludes that the courts have moved away from a strict interpretation of antiwaiver sections, first by enforcing


\(^6\) This is also the view taken by the North American Securities Administrators Association (NASAA), which filed an amicus curiae brief with the Supreme Court, urging the Court to grant certiorari to the U.S. Court of Appeals for the Ninth Circuit in Richards v. Lloyd’s of London, 135 F.3d 1289 (9th Cir. 1998). NASAA argued that the Ninth Circuit misapplied the antiwaiver sections of the federal securities laws when it held enforceable the choice-of-law/forum-selection clause of the agreement in question.
arbitration provisions that deprived securities law claimants of a judicial remedy and then by enforcing choice-of-law/forum-selection clauses that deprived those claimants of the substantive protections of the statutes. The third part of this essay looks at judicial interpretation of statutes that are silent on the question of waiver; that is, statutes that neither permit nor prohibit waiver. A review of the civil rights and antitrust law cases discussed in the third part suggests that statutes reflecting an important public interest are construed as though they contain antiwaiver sections. As the federal securities laws reflect important public interests, merely excising the antiwaiver sections from the federal securities laws may not solve the problem posed by the Lloyd’s cases. Part four of this article explores briefly the complicating effect of the antiwaiver sections in the administration of the federal securities laws, and proposes a revised provision. This article concludes that Congress should amend the federal securities laws to allow contractual waiver, at least under circumstances such as those presented in the Lloyd’s cases.

Statutory Antiwaiver Provisions

The Antiwaiver Sections of the Federal Securities Laws

Waivers in Settlements

Each of the five statutes that comprise the federal securities laws contains a section, in substantially similar language, prohibiting waiver of its provisions. The antiwaiver section of the Securities Act is typical:

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

These antiwaiver sections generally arise in three different circumstances:


contexts: settlements, arbitration or choice-of-forum clauses, and choice-of-law clauses. The starting point for the analysis of any waiver issue is whether the "condition, stipulation, or provision" in question prospectively waives "compliance" with any provision of the law. If so, the waiver is invalid; if not, the waiver is likely valid. Read literally, the antiwaiver section seems inapplicable to releases of past noncompliance, because the section appears to be forward-looking. It protects a person "acquiring any security," not a person who has acquired a security and subsequently released someone who failed to comply. Nevertheless, the courts have applied the section to releases, holding, for instance, that a broad general release covers only those securities claims that the releasor knew of or had reason to know of.

An expansive reading of the antiwaiver section can even void a release of a known claim, as Pearlstein v. Scudder & German demonstrates. Pearlstein involved an extension of credit by a registered broker/dealer to a customer in violation of Section 7(c) of the Securities Exchange Act of 1934 (the Exchange Act) and Regulation T of the Federal Reserve System. Together, these provisions prohibited a registered broker/dealer from extending credit


12Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970).

1312 C.F.R. § 220.4(c) (2) promulgated pursuant to 15 U.S.C. § 78(a).
to a customer beyond seven days from the date the customer purchased a security. At the time of the decision, the Second Circuit recognized a private cause of action for violation of Section 7(c) and Regulation T. In *Pearlstein*, the defendant-broker/dealer violated these provisions when, at the plaintiff-customer’s request, it extended the period of time for payment for two unrelated securities transactions beyond the prescribed seven days. When the customer failed to pay under the extension agreements, the broker/dealer sued with respect to one transaction and threatened suit in the other. Both matters were settled: in one, the customer signed a stipulation of settlement; in the other, a confession of judgment. After the customer repaid the broker/dealer, the customer commenced this action claiming damages resulting from the broker/dealer’s unlawful extension of credit.

The broker/dealer argued that the stipulation of settlement and confession of judgment settled any claims that the customer might have under the statute. The court did not agree, instead ruling that each of these settlements resulted in a continuing violation of the statute, since each gave the customer additional time to pay. The antiwaiver section then operated to void the settlements because they contemplated a further violation of the statute. In effect, then, the court characterized the settlement as an impermissible prospective waiver of the statute. While the court’s characterization might be questioned, the result is troubling even if the settlements were, indeed, prospective waivers of Section 7(c). The case demonstrates the harsh operation of the antiwaiver section, because it is doubtful that Congress intended Section 7(c) to protect purchasers of securities. Even if that were the purpose, moreover, should not the customer, who was an attorney and a sophisticated investor, be free

14. Consistent with the trend in the Supreme Court to avoid recognizing implied private rights of action under federal statutes, the Second Circuit has since held that no private right of action exists. *Bennett v. United States Trust Co.*, 770 F.2d 308, 313 (2nd Cir. 1985); *Dillon v. Militano*, 731 F. Supp. 634 (S.D.N.Y. 1990).

15. *Pearlstein*, 429 F.2d at 1143 (the waiver would “serve only to legalize the very extension of credit which the margin requirements seek to prevent and which suits such as this one serve to discipline.”).

16. See Judge Friendly’s dissenting opinion, id. at 1149. See also, supra, note 14.

17. Id. Judge Friendly argues, with persuasive sources, that the purpose of the margin rules was to control credit in the securities markets so as to limit speculation and assure the availability of credit in other markets.
to make this payment arrangement if the broker/dealer agreed? As Judge Friendly noted in dissent:

[The customer] bought the bonds against defendant’s advice, refused to sell them on its urging, remained silent when the defendant was pressing for payment, and settled his liability after having had legal advice. Equity would leave the loss where it was.\footnote{Id.}

Judge Friendly argued that Congress intended the antiwaiver sections to overcome what was then a tendency of the courts to limit the doctrine of illegal contracts. For Judge Friendly, however, the court in \textit{Pearlstein} had gone too far, applying the antiwaiver section to a situation that did not call for its application.\footnote{Judge Friendly cited a 1915 Supreme Court case, D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S.165 (1915) as an example of the sort of jurisprudence Congress sought to avoid with the antiwaiver sections. In that case, the parties entered into an agreement that violated the Sherman Act, but the party that imposed the unlawful trade restraint was successful in persuading the Court that the contract should nonetheless be enforced against the plaintiff. Presumably, a more modern view of illegality would have denied the plaintiff the ability to rely on the illegal condition in the contract. Put differently, an antiwaiver section would void defendant’s consent to an illegal condition as an ineffectual waiver. Under this line of reasoning, Congress included the antiwaiver section to achieve this result, not protect a person in the position of the customer in \textit{Pearlstein}, who was not disadvantaged by the agreement that included the “objectionable” extension of credit. Indeed, unlike the illegal condition in \textit{D. R. Wilder}, which operated to the disadvantage of the party pleading illegality, the illegal condition in \textit{Pearlstein} operated to that party’s advantage.}

Judge Friendly’s call for a narrower reading of the antiwaiver sections was soon heeded.

\textit{The Arbitration Exception}

In \textit{Wilko v. Swan},\footnote{Wilko v. Swan, 346 U.S. 427 (1953).} a case decided in 1953, the United States Supreme Court established a bright line rule regarding prospective waivers of the Securities Act. In holding invalid a contract provision that would have required a buyer of common stock to arbitrate any future disputes that he had with a securities brokerage firm, the Court jealously guarded the judicial prerogative. The pro-arbitration
policy reflected in the Federal Arbitration Act\textsuperscript{21} could not overcome the requirement of the Securities Act that the courts "exercise judicial direction to fairly assure [the] effectiveness" of the "protective provisions of the Securities Act."\textsuperscript{22}

In a pair of decisions in 1987 and 1989, \textit{Shearson/American Express v. McMahon}\textsuperscript{23} and \textit{Rodriguez v. Shearson/American Express, Inc.},\textsuperscript{24} however, the Court reversed itself, upholding contracts that required arbitration of claims under the federal securities laws. This reversal reflected a growing judicial acceptance of the efficacy of arbitration as a dispute resolution mechanism,\textsuperscript{25} and represented the first departure from the strict approach of \textit{Wilko v. Swan}. Of equal importance, the Court signaled that the anti waiver section has some interpretative leeway: "[T]he right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions. \textit{Nor are they so critical} that they cannot be waived. . . . "\textsuperscript{26} This flexibility provides support for the more aggressive rulings of the Circuit courts in the Lloyd's cases, discussed below.

\textit{Widening the Exception: Honoring Foreign Choice-of-Law/Forum-Selection Clauses}

The Lloyd's of London litigation provided the courts with a challenge to the antiwaiver provisions of the federal securities laws that was not present in the arbitration cases. The plaintiffs in the arbitration cases retained their substantive rights under the federal securities laws; only their choice of forum was limited. In the Lloyd's cases, however, the plaintiffs relinquished any claims under the

\textsuperscript{22}346 U.S. at 437.
\textsuperscript{25}The Court acknowledged the difference in the way at least it perceived arbitration: "To the extent that \textit{Wilko} rested on a suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." For a brief history of the evolving view of arbitration in the courts, see Kenneth R. Davis, "The Arbitration Claws: Unconscionability in the Securities Industry," 78 B.U. L. Rev. 255, 261–78 (1998).
\textsuperscript{26}Rodriguez, 490 U.S. at 481 (emphasis added).
federal securities laws by agreeing, at the time they made their investments, that any disputes would be resolved in England under English law. The central legal questions in the Lloyd’s litigation were whether this agreement amounted to a waiver under the federal securities laws and, if so, whether the court should enforce the waiver. While the plaintiffs had some minor victories along the way, in the end all eight circuits ruled in favor of the defendants, enforcing the contractual choice-of-law/forum-selection clauses.

Interestingly, the courts seemed to assume, without so stating, that the choice-of-law/forum-selection clauses did amount to a waiver of the protections of the federal securities laws, so the opinions focused primarily on whether the “waiver” would be enforced.

The Lloyd’s plaintiffs were several hundred American “Names,”

27 E.g., the plaintiffs prevailed before a panel of the ninth circuit, Richards v. Lloyd’s of London, 107 F.2d 1422 (9th Cir. 1997), but lost when the circuit court ruled en banc to reverse the panel. 135 F.3d 1289 (9th Cir. 1998), cert. denied, 1998 WL 221301 (1998). Plaintiffs also prevailed before the district court in Leslie v. Lloyd’s of London, 1995 WL 661090 (S.D. Tex. 1995), which was reversed in Hansworth v. The Corporation, 121 F.3d 614 (5th Cir. 1997), cert. denied, 118 S.Ct. 1513 (1998).

28 See supra note 3.

29 In deciding that the choice-of-law/forum-selection clauses were valid under the anti-waiver sections, the courts implicitly decided that the federal securities laws applied to the transactions. However, the applicability of the federal securities laws would be debatable even in the absence of the choice-of-law/forum-selection clauses. As an initial matter, the defendants could argue that the investment in Lloyd’s did not involve the sale of a security. If this argument proved accurate, the courts would not have jurisdiction under the federal securities laws. Moreover, even if the investment in Lloyd’s were a security, there is a question of whether U.S. law would reach the sale of a security that took place abroad, as was the case here.

Under the liberal definition of a security generally employed by U.S. courts, the Lloyd’s investment would likely, though not certainly, be characterized as an “investment contract,” which satisfies the definition of a security. Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293 (1946). See, generally, Marc I. Steinberg, Securities Regulation 35–111 (3d Ed. 1998). Whether U.S. law reaches the alleged fraud, however, is a closer question. While the issue is not free from doubt, case law suggests that U.S. courts would exercise jurisdiction under the “conduct test.” Under this test, the courts look to see if substantial fraudulent activity occurred in the United States, even if the security was sold abroad. As plaintiffs alleged that fraudulent statements were made to them in the United States and caused them to make the ill-fated investments, this test would likely be satisfied. See, SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (jurisdiction lies if “some activity to further a fraudulent scheme occurs within this country”). Compare, however,
who agreed to underwrite insurance risks through Lloyd’s of London. Lloyd’s is actually a market in which underwriting syndicates, consisting of one or more Names, compete for business. The syndicates are managed by Managing Agents, who deal with the Names through Members’ Agents. To join a syndicate, a Name must travel to London and sign a series of documents. The principal document is the General Undertaking, which includes the choice-of-forum/forum-selection clauses at issue in the cases.

Upon executing a General Undertaking, a Name joins an underwriting syndicate and provides underwriting capital. When a syndicate underwrites a risk, each Name is responsible only for his share of any loss; however, liability is unlimited for that share. Names within a syndicate are thus severally liable for the risks undertaken. In light of this financial risk, Names must provide proof of financial strength, and an irrevocable letter of credit in favor of Lloyd’s.

The litigation arose because several of the syndicates suffered heavy unanticipated losses in the late 1980s and early 1990s due to asbestos-related litigation and catastrophic events such as Hurricane Hugo and the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. These losses caused intra-market disputes, with Names accusing Managing Agents and others connected with Lloyd’s of fraud and mismanagement. Some Names instituted litigation and withheld payments due on the liabilities, while others were unable to meet their obligations. With the integrity of the entire Lloyd’s market in jeopardy, Lloyd’s proposed a reorganization that


Those clauses provided:

2.1 The rights and obligations of the parties arising out of or relating to the Member’s membership of, and/or underwriting of insurance business at, Lloyd’s and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member’s membership of, and/or underwriting of insurance business at Lloyd’s...

Quoted in Richard’s, 135 F.3d at 1292.
would limit the Names' liability, but require them to furnish additional capital.

This plan of reorganization was at issue in the Fourth Circuit litigation, where the plaintiffs sued to enjoin Lloyd's solicitation for approval of the plan, alleging violations of the federal proxy rules.\(^{31}\) In the other cases, the plaintiffs alleged that Lloyd's representatives procured their investments fraudulently (in violation of Rule 10(b)-5 and the common law) and in violation of the registration provisions of the Securities Act.\(^{32}\) The Fourth Circuit ruled that the proxy rules did not apply to Lloyd's solicitation,\(^{33}\) and all the courts held that the choice-of-law/forum-selection clauses were valid and enforceable. Thus, the courts dismissed all of the cases for lack of jurisdiction.

On the critical choice-of-law/forum-selection clauses, the courts relied heavily on a 1972 U.S. Supreme Court case, \textit{M/S Bremen v. Zapata Off-Shore Co.}.\(^{34}\) \textit{Bremen} involved the enforceability of a forum-selection clause in a contract between an American barge owner and a German towing company. The contract included clauses relieving the towing company from liability for its negligence and designating the High Court of Justice in London as the forum for the resolution of disputes. The towing company never completed its contract, as a severe storm damaged the barge, and the towing company towed the damaged barge to Tampa, Florida, the nearest point of refuge. The barge owner sued the German company in federal district court in Tampa, alleging negligence and breach of contract. The District Court refused the defendant's motion to dismiss, virtually ignoring the parties' forum-selection clause. The Court of Appeals affirmed, ruling that the forum-selection clause is not enforceable unless the designated forum is more convenient than the forum in which the suit was brought. Based on several factors, the appellate court decided that London was a less convenient forum than Tampa. Further, since English courts would likely honor the agreement's exculpatory clause, contrary to the likely result in U.S. courts, enforcing the forum-selection clause would violate American public policy.

\(^{31}\)Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996).

\(^{32}\)Thus, the plaintiffs sought damages under Sections 12(1) and (2) of the Securities Act. In addition, several of the cases included claims under RICO.

\(^{33}\)See Allen, supra note 31.

The United States Supreme Court reversed the lower courts, holding that while forum-selection clauses historically have not been favored by American courts, "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." The opinion gives guidance on what factors would render enforcement unreasonable: (1) if the clause was included as the result of fraud, undue influence, or overweening bargaining power; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the designated forum; (3) if a strong public policy of the forum state would be violated by adherence to the forum selection. The Court grounded its decision on the realities of international trade: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." International trade is facilitated, the Court noted, if the parties can agree in advance on a forum for resolving disputes.

The Circuit courts in the Lloyd's cases relied on *Bremen* because they characterized their cases as international in character, that is, *Bremen* in a different context. Several of the courts added that international comity—respect for the integrity and competence of foreign tribunals—provides another reason why the courts should enforce choice-of-law/forum-selection clauses in an international agreement. The analysis then shifted to the whether the clauses were unreasonable under *Bremen*'s guidelines. In this regard, all of the cases focused on the third factor, public policy, because of the antiwaiver sections of the federal securities laws. Do the antiwaiver sections demonstrate a strong public policy that the federal securities laws should apply to this controversy notwithstanding the parties' agreement to the contrary? The courts answered this question

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35 Id. at 13.
36 Id. at 12.
37 Id. at 18.
38 Id. at 15.
39 Id. at 9.
40 Id. at 13.
41 E.g., Riley, 969 F.2d at 957 ("[w]hen an agreement is truly international, as here, . . . "); Bonny, 3 F.3d at 159, n.3 ("[t]here is no question that the transaction involved here is truly international.").
42 E.g., Roby, 996 F.2d at 1363.
in the negative, instead finding that the remedies under British law were adequate. In this view, the federal securities laws reflect "policies of insuring full and fair disclosure by issuers and deterring the exploitation of U.S. investors," and British law will not interfere with that policy. While British law may be less advantageous to investors in some respects, it is, the courts concluded, "adequate."

Doctrinally, the Circuit courts faced two problems. The first was posed by dictum in an earlier Supreme Court case, Mitsubishi Motors v. Soler Chrysler-Plymouth. In Mitsubishi, a private antitrust action, the Court said in a footnote that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." The Circuits had to determine whether this dictum controlled the Lloyd's cases. The second doctrinal problem was whether Bremen should be distinguished because the federal securities laws, unlike the law in Bremen, include antiwaiver sections.

Obviously, none of the courts felt constrained by the Mitsubishi dictum. While noting the Mitsubishi dictum, the courts generally responded that the choice-of-law/forum-selection clause was problematic only if English law did not provide adequate remedies to the plaintiffs. Essentially, the courts read the Mitsubishi dictum functionally, implicitly assuming that the Supreme Court was more concerned with assuring a fair remedy for the plaintiff than with assuring the availability of the congressionally-designated remedy.

The Fifth Circuit noted that Mitsubishi was an antitrust case and

43Bonny, 3 F.3d at 161.
44Bonny, 3 F.3d at 161; Roby, 996 F.2d at 1365.
45Roby, 996 F.2d at 1366 (U.S. law provides plaintiffs with "a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements. . . .")
48Id.
49E.g., Shell, 55 F.3d at 1229; Bonny, 3 F.3d at 161; Riley, 996 F.2d at 957.
thus distinguishable on that basis. The court reasoned that the special nature of the antitrust laws, assuring vindication of the national policy against monopoly, encourages "the bringing of private claims in American courts."50 This reasoning is questionable, however, because in the Mitsubishi case itself the Supreme Court enforced a forum-selection clause that designated Japanese arbitration of an American automobile dealer's antitrust claim. The issue was whether arbitration of an antitrust claim in Japan was contrary to the public policy reflected in the antitrust statutes. The Court said that it was not, because the claim was not extinguished; rather, "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum. . . ."51 In the Lloyd's cases, by contrast, the federal securities laws were extinguished, or waived, by the choice-of-law/forum-selection clauses.

In overcoming the Mitsubishi dictum, all of the Circuits relied,52 to a greater or lesser extent, on a 1974 Supreme Court decision, Scherk v. Alberto-Culver Co.53 This reliance seems misplaced, however, because in Scherk the Court simply enforced a foreign forum-selection clause in a securities law case where the agreement provided that Illinois law would apply. The case was similar to the arbitration cases in which the Court overruled Wilko, because the question was whether securities laws claims could be resolved, under the antiwaiver sections, in a forum other than U.S. courts. Presaging its decisions overruling Wilko, the Court enforced the foreign forum-selection clause in Scherk. In neither the arbitration cases nor in Scherk, however, did the Court suggest that parties could also contract out of the application of U.S. law. Indeed, the point of the Mitsubishi dictum is that they cannot.

The Mitsubishi dictum should be particularly persuasive in the context of the Lloyd's cases because the Lloyd's cases involved statutes that expressly prohibited waiver of the statutory remedies. The antitrust statute, at issue in Mitsubishi, does not contain an antiwaiver section. As the panel in the Ninth Circuit reasoned, "a fortis--

50Haynsworth, 121 F.3d at 968, quoting from Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138, 1142-43 (5th Cir. 1989).
51473 U.S. 614, 637.
52E.g., Richards, 135 F.3d at 1295
the Supreme Court would condemn the choice-of-law/forum-selection clauses in the General Undertaking.54

While each of the circuit court opinions noted that the antiwaiver sections posed an issue, each treated the question quite abruptly. Indeed, the courts did not recognize the antiwaiver sections as changing the legal issue before them. As with the Mitsubishi dictum, the courts characterized the issue as relating to the adequacy of English law. Under this view, the antiwaiver sections did not, themselves, reflect any public policy different from the underlying policy of the securities laws. Thus, it was sensible for the courts to consider whether English law was consistent with that policy. The courts could have characterized the antiwaiver sections somewhat stronger, however, as reflecting a policy that parties cannot contract to replace the substantive protections of the securities laws with other laws. Failing to interpret the antiwaiver sections in this manner essentially eliminates any content in them. Put differently, the analysis in the Lloyd’s cases would have been identical if the federal securities laws did not include antiwaiver sections. Only a panel of the Ninth Circuit—in a decision that the Circuit, sitting en banc, withdrew—saw the law differently.

In its decision, the panel reasoned that the policy-based approach of the other circuit courts was inappropriate in light of the antiwaiver sections; consequently, the “reasonableness of the [clauses] is not determinative of their enforceability.”55 Rather, in the panel’s view, Congress had already determined, in adopting antiwaiver sections, that the law of the United States would apply to solicitations in the United States of investments in securities by residents of the United States.56 The panel decision suggests that the arbitration cases do not reflect a fundamental shift in the interpretation of the antiwaiver sections, but a reasonable outcome in the clash between the federal arbitration statute and the federal securities laws. The

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54 Richards v. Lloyd’s of London, 107 F.3d 1422 (9th Cir. 1997), withdrawn, 135 F.3d 1289 (9th Cir. 1998) (en banc).
55 Id.
56 Id. None of the courts dealt directly with two important underlying issues. The first was a question of jurisdiction: did the plaintiffs’ investment in Lloyd’s constitute the purchase of securities so that the federal securities laws were even implicated? The second was a choice-of-law question: assuming that the investments involved the purchase of a security, was there a sufficient nexus to the United States so that in the absence of the choice-of-law/forum-selection clauses U.S. law would apply? See supra note 29.
former favors arbitration, while latter does not. There is no similar clash in the Lloyd’s cases: on one hand is a public policy favoring choice-of-law/forum-selection clauses, and on the other is a federal statute that does not. In this face-off, the statute must prevail over a policy not reflected in a statute. Similarly, *Bremen* does not support the circuit court decisions in the Lloyd’s cases. It did not involve the application of a federal statute, much less one with an antiwaiver section.

The panel’s decision seems to make intuitive sense. The courts that ruled against the plaintiffs read into the antiwaiver sections a qualification that is simply not present. As the courts read the section, a purchaser of securities can agree to waive the protections of the law, provided the parties agree on an adequate substitute to those provisions. In other contexts, courts generally give antiwaiver statutes a broad reading, but notable exceptions do exist, as the next section demonstrates.

**Antiwaiver Provisions in other Statutes**

Antiwaiver sections are present in various consumer protection statutes, such as consumer credit codes,\(^57\) consumer protection acts,\(^58\) and deceptive trade practices acts,\(^59\) in franchising acts,\(^60\) and in some federal statutes.\(^61\) In general, the courts have taken a broad view of antiwaiver sections. They have refused to enforce general releases of claims, for instance, unless the release was specific as to the claims covered, or other agreements that limit statutory protections.\(^62\)

The high water mark among these many cases may be a 1949

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\(^{57}\) See, e.g., Uniform Consumer Credit Code § 1.107(1) (“Except as otherwise provided in this Act, a buyer, lessee, or debtor may not waive or agree to forego rights or benefits under the Act.”).


\(^{62}\) E.g., Wicker v. Consolidated Rail Corp., 142 F.3d 690 (3rd Cir. 1998); Babbitt v. Norfolk & Western Rwy. Co., 104 F.3d 89 (6th Cir. 1997).
U.S. Supreme Court case, *Boyd v. Grand Trunk Western R. Co.*, interpreting the Federal Employers' Liability Act. This act provides a federal cause of action for railroad workers injured as a result of a common carrier's negligence. The act provides that venue is proper where the defendant resides, where the defendant is doing business when the cause of action arose, or where the defendant will be doing business at the time of commencing such action. The act also includes an antiwaiver section that voids "[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act." In *Boyd*, the injured employee agreed, in exchange for payments made by the defendant carrier before its liability was established, to bring suit under the act where he lived or where he was injured. The Court held that the agreement was void, because it limited the plaintiff's choice of venue in conflict with the venue provisions of the act. The venue provision, the Court said, was a "right of sufficient substantiability to be included within the mandate" of the antiwaiver section.

*Boyd* is important because it demonstrates the Court's protective attitude toward an antiwaiver section in several different ways. First, the antiwaiver section arguably only limited contracts that affected a common carrier's liability, while the contract in question left the carrier's liability unaffected. Second, even if the contract were characterized as affecting the carrier's liability, the contract was executed after the liability arose, and could then fall within the settlement exception to an antiwaiver section. The agreement limiting venue was arguably in partial settlement of the claim. The Court did not address this issue in the opinion. Third, the agreement seemed to advantage the plaintiff more than it disadvantaged the defendant.

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67 338 U.S. at 265.
68 *Boyd* is not inconsistent, however, with the arbitration cases, because there the Court resolved a conflict between an antiwaiver section and a second federal statute that favored the enforceability of the contract's arbitration provision. In *Boyd* there was no such conflict to resolve.
69 In a footnote, the Court made an oblique reference to the settlement issue. The Court cited a court of appeals decision, on similar facts, holding that since the statute allowed a carrier a credit for presuit payments made, there was no
The Court made no mention of this issue either. In short, *Boyd* is a case that would support a result contrary to the appellate courts’ decisions in the Lloyd’s cases.

The enforceability of a choice-of-law clause in light of an antiwaiver section has been an issue under state franchise statutes. These cases provide a situation parallel to the Lloyd’s cases, but unlike the circuit decisions in Lloyd’s, the courts in the franchising cases are not unanimous and provide a rare example of state court failing to give a broad reading to antiwaiver sections. The First Circuit, construing a Maine statute, held that the plaintiff distributor was protected by the statute from termination without cause, and the choice-of-law provision designating California law was not only unenforceable, but counsel’s argument to the contrary was frivolous.

By contrast, on similar facts, the Eighth Circuit, construing the Minnesota statute, upheld a choice-of-law clause that designated consideration for the agreement to limit venue. Implicitly, the Court may be saying that to the extent an argument may be made that the agreement was a partial settlement, it was unenforceable for a lack of consideration. Id. at 264.

Under modern views of consideration, however, the agreement between the carrier and the injured employee did not lack consideration. The carrier was under no obligation to make advance payments, and its agreement to do so would clearly be consideration for the employee’s agreement to limit the choice of venue.

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Nebraska law. 72 Unlike the First Circuit, which would not even consider enforcing the choice-of-law clause, the Eighth Circuit used a balancing test, weighing the parties' contacts with each state and the transaction, and the relative bargaining power of the parties. The statutory antiwaiver section was not a factor in this analysis. While it evidenced a policy in favor of protecting franchisees, the enforcement of a choice-of-law clause—that is, recognizing freedom of contract—was a "powerful countervailing policy." 73 These two policies neutralized one another, allowing the court to consider the normal factors for enforcement of a choice-of-law clause. 74 Not surprisingly, the Eighth Circuit view is a clear minority view. 75

**Statutes that Permit or Are Silent on the Question of Waiver**

There are, as one might expect, a large number of cases construing statutes that permit or are silent on the issue of waiver. While it is difficult to summarize such a large body of case law, it seems fair to say that courts impose exacting standards before finding a waiver under statutes that permit waiver, 76 and are quite reluctant to recognize a waiver when the statute neither permits nor prohibits waiver.

73 Id. at 740.
74 Restatement (Second) of Conflicts of Laws § 187(2) (1969).
The former category, statutes that permit waiver, is by far the smaller one. Of greater interest for present purposes is the latter group—statutes that are silent on the question of waiver.

Within this group, the courts have decided many cases under the civil rights laws, particularly Title VII of the Civil Rights Act of 1964, and the parallel to the federal securities laws is striking. The courts have struggled with the appropriateness of contractual arbitration provisions and general releases of claims under the civil rights statutes, just as they have under the federal securities laws, despite the absence of an antiwaiver section in the civil rights statutes. In 1973, the U.S. Supreme Court decided that a union employee, who lost a claim of discrimination in an arbitration proceeding, could maintain a suit for discrimination under Title VII on the same facts.77 As to the employer’s claim that the employee waived his Title VII claim by agreeing to arbitration, the Court replied that “an employee’s rights under Title VII are not susceptible of prospective waiver.”78 The Court cited its 1953 decision of Wilko v. Swan in support.

By 1991, however, the status of contractual arbitration provisions was much higher. Just as the Court had overruled Wilko and approved arbitration under the securities acts in Rodriguez and McMahon, it enforced arbitration provisions under a federal civil rights statute. In Gilmer v. Interstate/Johnson Land Corp.,79 the Court held that a claimant was bound to his agreement to arbitrate his Age Discrimination in Employment Act claim, where the agreement covered statutory as well as contractual claims. The Supreme Court has not yet decided whether Gilmer applies to Title VII claims, but most lower courts that have passed on the question have ruled that it does.80

Another instructive set of cases is in the antitrust area. Like the

78 Id. at 51.
federal securities laws, the federal antitrust statutes reflect a strong public policy. Where the securities laws relate to the capital markets, the antitrust laws relate to competition in the marketplace, including the capital markets. Unlike the securities laws, however, Congress did not include an antiwaiver section in the antitrust laws. Nevertheless, judicial interpretation of the antitrust statutes has infused those laws with a judicially-created antiwaiver section. In *Redel's Inc. v. General Electric Co.*, for instance, the defendant in a Clayton Act action sought to defend on the basis of a general release executed by the plaintiff. The court disposed of the argument that the release could have a prospective effect:

The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy. A right conferred on a private party by a federal statute, but granted in the public interest to effectuate legislative policy, may not be released if the legislative policy would be contravened thereby.

Later in the opinion the court said, by way of dictum, that a general release would not dispose of a preexisting antitrust claim if the releasing party was unaware of the "factual predicate" for the antitrust claim. This combination—no prospective release of claims and scrutiny of releases of past claims—describes the operation of a typical antiwaiver section. The federal courts have treated the federal labor laws in a similar fashion. In light of this substantial

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82 Redel's Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974).

83 Id. at 99.

84 Id. at 100.

85 See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) (waiver of right to liquidated damages under Fair Labor Standards Act held invalid); NLRB v. Stockpole Carbon Co., 128 F.2d 188, 190 (3rd Cir. 1942) (employees could not assign claim for back wages ordered by NLRB); NLRB v. American Potash & Chemical Corp., 113 F.2d 232 (9th Cir. 1940) (employees could not waive statutory right to reinstatement); Waterman S.S. Corp. v. NLRB, 119
body of case law, one wonders what, if anything, an antiwaiver section adds to a statute infused with a public interest.

**The Antiwaiver Sections and the Administration of the Securities Laws**

**The Administration Problem**

Allowing contractual waiver of the regulatory aspects of the securities laws would simplify the administration of those statutes. The "private offering" exemption of the Securities Act of 1933 (the Securities Act) provides a nice illustration of the operative effect of its antiwaiver section. Set forth in Section 4(2) of the Securities Act, the exemption provides that "transactions by an issuer not involving any public offering" are exempt from the Act’s registration requirements.\(^\text{86}\) The language of this exemption seems to focus on the size and nature of the offering, not on the sophistication (or lack thereof) of the offerees. However, the courts have not interpreted the exemption consistent with this common sense reading. Rather, recognizing that the purpose of the Securities Act was to protect investors, the courts have read Section 4(2) so as to limit the exemption to offerings in which the offerees did not need the protections of the act, **regardless** of the number of offerees.\(^\text{87}\) Thus, a large offering, to many sophisticated investors, would be within this exemption, while an offering to one unsophisticated investor would not be.\(^\text{88}\) This result was necessary, however, both to protect unsophisticated investors and to avoid protecting sophisticated investors who acknowledged that they had received adequate disclosure. If the act permitted waiver, the courts could have arrived at the same place directly, holding that sophisticated investors may waive the registration provisions, irrespective of the nature or size of the offering. This common sense result took years to reach, requiring amend-

\(^\text{88}\) Doron v. Petroleum Mgmt. Corp., 545 F.2d 893 (5th Cir. 1977).
ments to the act and considerable rulemaking by the Securities and Exchange Commission. The resulting "private offering" exemption today is neither as certain, nor as simple, as waiver would be.

The uncertainty of the private offering exemption is symptomatic of larger problems with the federal securities laws. Those laws are under scrutiny, as commentators, lawmakers and market professionals examine the continued efficacy of the federal regulatory regime. In a recent thoughtful article, for instance, Professor Romano has argued for a "market-oriented approach of competitive federalism that would expand . . . the role of states in securities regulation." This view competes with others, which seek to expand the federal role, virtually eliminating the role of the states in securities regulation. Both views, and those in between, share a common goal of seeking to improve the efficiency of our capital markets. It seems clear that the antiwaiver sections are an obstacle to efficiency, and the Lloyd’s cases recognize that in an international context. Unfortunately, the Lloyd’s cases make bad law, as they avoid the application of the antiwaiver sections by ignoring the language of those sections.

Redrafting the Antiwaiver Sections

To achieve a measure of reality in the interpretation of the federal securities laws, Congress should expressly permit waiver under certain circumstances. This was the approach adopted by the drafters of the American Law Institute’s proposed Federal Securities Code. While the Code carried forward the antiwaiver concept of the

93 See, Steven M.H. Wallman, "Competition, Innovation, and Regulation in the Securities Market," 53 Bus. Law. 341 (1998) (arguing that the SEC should abandon its practice of "incremental and command and control regulation" in favor of one "articulating broader regulatory goals" and allowing markets to satisfy them).
federal securities laws in Section 1725(a), it suggested an exception in Section 1725(b) (3) (C):

Section 1725(a) [the antiwaiver section] does not effect . . . an advanced agreement . . . between any persons if a court determines, on consideration of their financial and legal sophistication and the relationship between them, that the purposes of this Code do not require the application of section 1725(a). 94

Read literally, this provision would permit waiver of any provision of the proposed Code. However, § 1725(b) included the heading "Arbitration" and subsections (A) and (B) of § 1725(b) (3) expressly dealt with agreements to arbitrate. 95 The comments suggest that the drafters were concerned with limiting Wilko v. Swan, which was then good precedent, and permitting arbitration, at least under the circumstances indicated. The formulation, as written, is a good one, however, and one Congress might consider. Such a formulation makes clear that, generally, the provisions of the law cannot be waived. It is also clear, however, that where the waiver does not interfere with the purposes of the law, the waiver is enforceable.

A more comprehensive provision permitting waiver is included in the Texas Deceptive Trade Practices and Consumer Protection Act. It provides, among other things, that the waiver must be in writing, that the consumer not be in a significantly disparate bargaining position, and that the consumer be represented by counsel. 96 Any formulation along these lines would provide the necessary as-

95 These subsections permit "an advance agreement—
(A) by a member of or participant in a self-regulatory organization to arbitrate any dispute;
(B) by any person to arbitrate a dispute arising under a rule of a self-regulatory organization . . . unless a violation of the rule is (i) a violation of this Code, or (ii) actionable under section 1721(a).
(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:
(1) the waiver is in writing and is signed by the consumer;
(2) the consumer is not in a significantly disparate bargaining position; and
(3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.
surance that a waiver would not be inconsistent with the purposes of the act.

One obvious objection to a section permitting waiver is that it would generate unnecessary litigation as parties who have executed waivers seek to void the waivers. The absence of an antiwaiver section, however, has contributed to a good deal of litigation, as sophisticated investors have sought to invoke the protections of the Securities Act by avoiding the choice-of-law/forum-selection clauses they have signed. Moreover, the antiwaiver sections have added to the cost of raising capital with a doubtful corresponding benefit. As thought is given in Congress to the efficiency of the federal securities laws, attention should be given to the antiwaiver sections. Although not a central element in the securities laws, the antiwaiver sections are material, and worthy of further consideration.

**Conclusion**

One might argue that, even if an anti waiver section adds little, its presence is not harmful, and an antiwaiver section emphasizes the importance that the legislature attaches to the protective provisions it has enacted, not a bad thing. As noted above, however, antiwaiver sections are paternalistic and undiscriminating, protecting the sophisticated and unsophisticated alike. A proper interpretation of the antiwaiver section in the federal securities laws would have invali-

(b) A waiver under Subsection (a) is not effective if the consumer’s legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

(c) A waiver under this section must be:

(1) conspicuous and in bold-face type of at least 10 points in size;
(2) identified by the heading “Waiver of Consumer Rights,” or words of similar meaning; and
(3) in substantially the following form:

“I waive my rights under the Deceptive Trade Practices Act-Consumer Protection Act, Section 17.41 et. seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consulting with an attorney of my own selection, I voluntarily consent to this waiver.”

(d) The waiver required by Subsection (c) may be modified to waive only specified rights under this subchapter.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section 17.47.
dated the choice-of-law provisions in the General Undertaking. The investors in Lloyd's likely understood the risks they were assuming. They clearly understood that the promoters with whom they dealt insisted on the applicability of English law; indeed, the investors traveled to London and signed an agreement to that effect. Such a waiver, by such investors, in such a transaction, should be enforced, and U.S. law should so provide. Unfortunately, it does not. Permitting waiver would solve the Lloyd's of London problem. The issue in the Lloyd's cases would then be cast as whether the demands of international trade (for certainty in the choice of law and forum) and international comity outweigh the public policy that underpins the federal securities laws. Instead, properly cast, the issue in the Lloyd's cases was whether the courts should carve out an exception to the congressionally-mandated antiwaiver sections. To reach a more "just" result, the courts did so act.

Permitting waiver would add a sense of reality to the federal securities laws. As noted above, the private offering exemption has been a quagmire for lawyers and their clients, in part because of the presence of the antiwaiver sections. If there were no such section, sophisticated investors and businesses seeking capital, not Congress or the SEC, could determine what disclosures, if any, were necessary. What is argued here is that the regulatory aspects of the securities laws, specifying what documents must be delivered to investors, and when, should be interpreted with some flexibility, a flexibility that is precluded by the antiwaiver sections. On the other hand, the antifraud provisions, which are the heart of the laws, should continue to be unwaivable. This result would obtain even in the absence of an antiwaiver section.