No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN S. ROBY, *et al.*,
Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 30, 1993

QUESTIONS PRESENTED

1. Are the anti-waiver provisions of the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") violated when American investors in foreign issuers (who have solicited the investors in the United States) are relegated by the enforcement of forum selection clauses in the foreign sponsor's documentation to a foreign forum and foreign substantive law that (a) requires no registration statements (or comparable affirmative pre-investment decision disclosures); (b) clothes the issuers and the sponsor with full immunity from suit; (c) protects from any liability the individual persons owning, controlling, and managing other sponsor-controlled entities that function as broker-dealers and underwriters; and (d) imposes liability upon those entities (all corporate entities with limited liability) only upon proof of fraudulent intent, reliance, and causation, proof not required for claims under Sections 12(1) and 12(2) of the 1933 Act or Rule 10b-5?

2. May the anti-waiver provisions of the 1933 and 1934 Acts, which contain no exceptions for foreign sponsors, issuers, underwriters, broker-dealers, and their respective controlling persons, be construed to allow an implied exemption under which such foreign parties—but not their domestic counterparts—can by contract exempt themselves from compliance with the substantive regulatory and remedial provisions of the 1933 and 1934 Acts?

3. Does the resulting loss of remedial opportunities under the Acts constitute a waiver of "essential features" of private damage remedies under the Acts, thereby violating the anti-waiver provisions in the terms contemplated by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989)?

LIST OF PARTIES

1)	Petitioners (Plaintiff-Appellants below):	Listed in Appendix A
2)	Respondents (Defendant-Appellees below):	Listed in Appendix B
3)	Plaintiffs below not seeking review:	Richard J. Kissel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John S. Roby and the 109 other appellants (listed in Appendix A) petition for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the Second Circuit. In the face of the anti-waiver provisions of the 1933 and 1934 Acts, that decision enforces pre-dispute forum selection and choice-of-law clauses that relegate American investors' claims to English tribunals to be adjudicated under English substantive law, thereby depriving the investors of all their rights under the 1933 and 1934 Acts. The practical consequence of the Court of Appeals' application of the anti-waiver provisions is to permit foreign companies that raise capital from American investors through direct solicitations in the United States to escape, by the terms of standard form contracts, all civil damage liability under the Acts.

OPINIONS BELOW

The decision of the Court of Appeals affirming the judgment and orders of the District Court on the basis of the forum selection clauses is reported at [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,458 at 96,555 (2d Cir. June 2, 1993) (Appendix C). The decision of the District Court dismissing the complaints against the syndicate defendants is reported at 796 F. Supp. 103 (S.D.N.Y. 1992) (Appendix D), and its decision dismissing the complaint as to the remaining defendants on the basis of the forum selection clauses is reported at [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,971 at 94,164 (S.D.N.Y. Aug. 18, 1992) (Appendix E).

JURISDICTION

The judgment of the Court of Appeals (Appendix F) was entered on June 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on Section 22 of the 1933 Act (15 U.S.C. §77v), Section 27 of the 1934 Act (15 U.S.C. §78aa), and Section 1964(c) of the Racketeer Influenced Corrupt Organizations provisions of the Organized Crime Control Act of 1970 (18 U.S.C. §1964(c)) ("RICO"), which separately confer federal jurisdiction over suits brought to enforce liabilities arising under these respective statutes. Jurisdiction in the Court of Appeals was based on 28 U.S.C. §1291.

STATUTES AND REGULATIONS INVOLVED

1933 Act, §14 (15 U.S.C. §77n):

§77n. Contrary stipulations void

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.

1934 Act, §29(a) (15 U.S.C. §78cc(a)):

§78cc. Validity of contracts

(a) Waiver provisions. 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 an exchange required thereby shall be void.

1933 Act, §12(1) and §12(2) (15 U.S.C.§77*l*(1)-(2)):

§77*l* Civil Liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title [Section 5 of the 1933 Act prohibiting the offering and sales of non-exempt unregistered securities in non-exempt transactions], or

(2) offers or sells a security (whether or not exempted by the provisions of 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate

commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. §240.10b-5):

Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

A. The Parties

Petitioners, the plaintiffs below, are known as Names at respondent The Corporation of Lloyd's ("Lloyd's"). They sued Lloyd's, its governing boards (the Committee and the Council), 328 Lloyd's-sponsored insurance syndicates (identified by their respective syndicate numbers at Lloyd's), the Member's Agents that were responsible for representing petitioners' interests in connection with their investments in the syndicates, the Managing Agents that managed the affairs of the syndicates, and the Member's and Managing Agents' respective controlling persons, for violations of Sections 12(1), 12(2) and 15 of the 1933 Act, Rule 10b-5 promulgated under the 1934 Act, Section 20(a) of the 1934 Act, and the civil liability provisions of RICO.

B. Petitioners' Claims

Petitioners allege that their investments in Lloyd's-sponsored syndicates constituted the purchases of "securities" within the meaning of the 1933 and 1934 Acts and that the syndicates were suable under those acts as "issuers" of the securities. For purposes of its decision, the Court of Appeals adopted petitioners' contentions (Appendix C, 7c, 10c).

Specifically, petitioners allege that respondents raised over $1 billion in American capital for the syndicates through systematic solicitations of American investors in the United States.[1] Petitioners allege that the solicitations and sales of interests in Lloyd's-sponsored syndicates occurred without the required registration of these

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[1] The respondent syndicates (and many other Lloyd's-sponsored syndicates) have carried on substantial insurance business in the United States. At the time petitioners' complaint was filed, the Lloyd's American Trust Fund held more than $9 billion for the syndicates' accounts at Citibank, N.A. in New York City (Appendix D, 19-20d). These funds are subject to Lloyd's control.

offerings or other adequate pre-investment decision disclosures to prospective investors.

Actionable misrepresentations and nondisclosures alleged by petitioners include the syndicates' material undisclosed liabilities for "long-tail" asbestos, pollution, and professional liability risks undertaken in syndicate years of account[2] long before the years for which petitioners were investors. These undisclosed liabilities arose from "reinsurance to close" transactions by which the syndicates assumed one or more previous years' liabilities. The inadequacies of the "reinsurance to close" premium payments assured that investors in the same syndicate for succeeding years would incur substantial losses from these transactions.

Petitioners also allege that there was no disclosure of the huge liabilities that some syndicates assumed by taking on reinsurance risks generated by the recently well-publicized "LMX spiral." The "LMX spiral" refers to the practice by which a group of London-based insurance brokers (and Managing Agents) would pass responsibility for reinsuring catastrophic risks (such as damage from hurricanes and earthquakes) from syndicate to syndicate, until the risks were finally lodged back with the syndicates that had ostensibly obtained reinsurance for the risks they had originally accepted. In this manner, the "LMX spiral" concealed from investors in these syndicates the failure of the Managing Agents to spread risk through bonafide reinsurance. Each time the "reinsurance" was passed from

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[2] Lloyd's syndicates operate on separate calendar years of account. For each year, with the advice of their respective Member's Agents, Names make annual investment decisions about the syndicates in which they will invest, and to what extent. Names' investments are represented in part by deposits in the form of cash, securities, or letters of credit held by Lloyd's for the syndicates. Names also assume unlimited personal liability for their pro rata share of all syndicate losses for each year in which they are investors. As a result, Names are exposed to losses far in excess of the amounts of their original deposits.

syndicate to syndicate, the brokers and Managing Agents collected substantial commissions.

Petitioners allege that collectively they sustained millions of dollars of losses[3] as a result of respondents' violations of the federal securities laws. Lloyd's has publicly reported aggregate losses of more than $9.1 billion for its last three reported years of account (1988, 1989 and 1990).[4]

C. Proceedings in the District Court

The District Court dismissed petitioners' consolidated amended complaint without ruling on the merits of their claims under the federal securities laws.

The District Court first ruled that the syndicates—concededly not jural entities suable under English law—were by virtue of that fact

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[3] Petitioners' losses include seizure of their deposits by Lloyd's, as well as Lloyd's demands that they pay uncollateralized losses and, in some cases, make working capital advances. Lloyd's has demanded payments from most petitioners that are multiples of their original deposits. Some petitioners and other American Names have been sued in London for those demands.

Most petitioners (like other American Names) have no assets in the United Kingdom and, therefore, once American Names' deposits are seized, Lloyd's must seek to enforce any English judgments that it obtains against the Names by separate enforcement proceedings in the United States. Lloyd's need for ultimate recourse to American courts to enforce English judgments makes all the clearer that application of the forum selection and choice-of-law clauses results in a prohibited waiver of petitioners' rights under the 1933 and 1934 Acts. For, in those enforcement proceedings, Lloyd's will assert that the American Names' defenses and counterclaims under the 1933 and 1934 Acts are barred by those clauses.

[4] Lloyd's syndicates report three years in arrears for a given year of account. Thus, 1989 results were not announced until 1992, and 1990 results were not announced until 1993. Similarly, 1991 and 1992 results are as yet not publicly disclosed.

alone not suable as "issuers" under the 1933 or 1934 Act (Appendix D).

The District Court later ruled that the forum selection clauses in Lloyd's standard documentation (Lloyd's General Undertaking with each of the Names, as well as the Lloyd's-mandated forms of agreement between Names and their Member's Agents and between the Member's Agents and the Managing Agents of the syndicates) should be specifically enforced to effect a dismissal of this action (Appendix E). The dismissal forces petitioners to forgo their claims or litigate them against respondents, to the limited extent possible under English law, in such judicial and arbitral forums of England as are appropriate under English rules and under English substantive law.

The District Court dismissed petitioners' complaint even though it was undisputed that English choice-of-law rules preclude recognition of any foreign tort claims, whether common law or statutory. English substantive law provides remedies against only some classes of respondents (others being subject to immunities or unchallengeable legal defenses). Even as to those suable classes of respondents, English law imposes liability only under theories that are fault- and causation-based and therefore more difficult and expensive to establish than claims under the federal securities laws. The District Court rejected petitioners' contention that enforcement of the forum selection clauses, in tandem with the choice-of-law clauses, violates the anti-waiver provisions of Sections 14 of the 1933 Act and 29(a) of the 1934 Act. It reasoned that no prohibited waiver exists so long as *some* remedies against *some* respondents are theoretically available in England under English law.

The District Court based enforcement of the forum selection clauses on the belief that this Court's opinion in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) "controlled" and required, in virtually any case involving a "truly international" transaction, that forum selection clauses be rigorously enforced. The District Court found further support for its conclusion by reference to the *United*

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (as adopted and codified, 9 U.S.C. §§201-208) ("the UN Convention"), which it believed to be applicable.

D. Proceedings in the Court of Appeals

Although it affirmed the District Court's judgment insofar as it enforced the forum selection clauses, the Court of Appeals disavowed the District Court's reasoning and spotlighted the important issues raised by this petition.

The Court of Appeals did *not* apply the UN Convention, declaring that its application to securities transactions was uncertain, presumably because four Justices dissenting in *Scherk* found the Convention inapplicable (417 U.S. at 526-527), while the five-Justice majority declined to decide its applicability (417 U.S. at 520, n.15) (Appendix C, 19-20c, n.2).[5] The Court of Appeals stated that neither *Scherk* nor any other decision of this Court was controlling

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[5] The UN Convention, although adopted by 25 nations on June 7, 1959, was not acceded to by the United States until September 30, 1970 and then with the express reservation that it applied only to "commercial relationships" (9 U.S.C. §202). It is most unlikely that Congress intended to make private damages claims under the 1933 and 1934 Acts arbitrable under the UN Convention. In 1958 (at the time of the Convention's promulgation) and in 1970 (at the time of American accession), *Wilko v. Swan*, 346 U.S. 427 (1953), and Court of Appeals decisions after *Wilko*, applied the anti-waiver provisions to bar any arbitration of these claims. The conclusion that sales of securities are not "commercial" within the meaning of the UN Convention or the American accession legislation is reinforced by the *United Nations Convention on Contracts for the International Sale of Goods*, 19 I.L.M. 671, 672 (April 11, 1980). Article 2(d) of Part I of that convention provides that it "does not apply to sales: * * (d) of stocks, shares, investment securities, negotiable instruments or money * *."

and rejected the District Court's and the Tenth Circuit's[6] use of the shibboleth "truly international" as a litmus test for enforcing the forum selection clauses (Appendix C, 18-19c). Instead, referring to policies reflected in the anti-waiver provisions, the Court of Appeals found that "there [was] a serious question whether United States public policy has been subverted by the Lloyd's clauses." (Appendix C, 21c)

Although clearly in error on some important specifics of English law, the Court of Appeals nonetheless correctly concluded that "the United States securities laws would provide the [petitioners] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements * *" as compared to their chance of success under relevant English law (Appendix C, 27c).

The Court of Appeals then proceeded to adopt a novel standard for enforcing the anti-waiver provisions. In its view, the impairment of petitioners' substantial rights and remedies, in itself, was not sufficient to violate the anti-waiver provisions. It held that petitioners bore the burden of showing that the foreign remedies available to them were "insufficient to deter [foreign] issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure * *" (Appendix C, 24c). The Court of Appeals found that petitioners failed to meet its newly announced standard.[7]

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[6] See *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992).

[7] That standard is essentially impossible to satisfy. How could private plaintiffs realistically be expected to gather data showing that any defendants were influenced to make more or less pre-investment financial disclosure by differences in the liability standards of American and English law? And what group of potential defendants would be targeted for such an inquiry—those with immunity or equivalent defenses

(continued...)

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' application of the anti-waiver provisions of the 1933 and 1934 Acts, even accepting its inaccurate conclusions about the nature and extent of petitioners' rights and remedies under English law, creates a significant loophole in the protection afforded to American investors in securities offered and sold by foreign issuers and their agents. That loophole violates the plain meaning of the anti-waiver provisions.

A. The decision creates an implied exception to the anti-waiver provisions in favor of foreign-based sellers of securities, when in fact Congress has provided no such exception.[8]

B. The decision creates that exception at a time when more than 890 foreign public companies have listed American Depositary Receipts (ADR's) for trading their securities on American stock exchanges and over-the-counter markets, and foreign issuers are seeking direct listings of their securities on American stock exchanges. See Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?*,

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[7](...continued)
under English law, those with potential exposure, or both, and with what relative weight given to each group? In the light of these inquiries made relevant by its test, the Court of Appeals' test can be fairly said to require undisciplined speculation about potential defendants' behavioral propensities.

[8] Presumably, for example, that the Court of Appeals would not permit a domestic issuer to enforce a provision in its stock subscription agreements that requires the purchasers to sue only under some state law that provides a higher threshold for issuer liability or a lesser measure of damages than those provided by the 1933 and 1934 Acts. See, *e.g.*, *Special Trans. Serv., Inc. v. Balto*, 325 F. Supp. 1185, 1187 (D. Minn. 1971) (limitation of liability provision unenforceable under §29(a) of the 1934 Act); see also the cases cited in subsection II(B) below.

INVESTMENT DEALERS' DIGEST, Nov. 9, 1992, at 16 (Appendix I).[9] The Court of Appeals' ruling removes policy decisions regarding disclosure requirements for foreign issuers from the SEC. It allows foreign issuers to create their own disclosure rules through standard form contracts by which American investors waive their rights under the 1933 and 1934 Acts.

C. This discrimination in favor of foreign issuers and promoters places American issuers at severe competitive disadvantages. American issuers remain subject to risks for non-compliance with registration and disclosure requirements, and must incur the expense of compliance. By contrast, their foreign counterparts may eliminate both the risk of non-compliance and compliance expense, simply by using standard form contracts that purport to comply with the Court of Appeals' new standard for escaping the anti-waiver provisions. Congress has not authorized such an uneven playing field to the great detriment of American business.

D. By promoting full and fair disclosure, the federal securities laws were intended to protect American capital resources, irrespective of the nationality of the parties seeking to raise capital in

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[9] For example, New York Stock Exchange Chairman William Donaldson has been vigorously advocating direct listings of foreign issuers under financial disclosure rules less stringent than those imposed on domestic issuers, despite the opposition of former SEC Chairman Richard C. Breeden. *Ibid.* Before his resignation, Mr. Breeden attempted to negotiate conditions for compliance with SEC disclosure rules that would apply to a direct listing of the German automobile manufacturer Daimler-Benz, A.G. on the New York Stock Exchange. See Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*, THE NEW YORK TIMES, March 25, 1993, §D, at 1, col. 3 (Appendix J). Unlike former Chairman Breeden, SEC Commissioner Richard Roberts has urged a mechanism for listing securities of foreign issuers that would dilute for these foreign issuers the disclosure requirements applicable to American issuers. See Hal Lux, *SEC Commissioner Prepares Foreign Listing Mechanism*, INVESTMENT DEALER'S DIGEST, May 24, 1993, at 12 (Appendix K).

the United States, from exploitation and misallocation. By creating for foreign issuers a judicial exception to that policy, the Court of Appeals has frustrated the flow of that necessary investment information.

E. The Court of Appeals' decision has ratified Lloyd's policy of refusing to make disclosure to American Names of material information regarding the secretive operations of Lloyd's syndicates.[10] Moreover, the Court of Appeals has created such a special Lloyd's exemption based on a misunderstanding of English law (see footnotes 11 and 16), and on the speculative and unsupportable assertion that English law creates adequate incentives for disclosure and deterrents against investor exploitation. In fact, the inadequacy of any such incentives is demonstrated by the fact that the American Names were not given the disclosures to which they would have been entitled under American law. The speculation that such incentives might exist cannot be credited where English law provides Lloyd's and its governing councils with statutory immunity, holds the syndicates not to be suable as jural entities (despite their economic and operational separateness and the fact that they hold most of Lloyd's total capital),[11] effectively denies "controlling person"

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[10] This policy includes providing, as the principal form of pre-investment decision disclosure, the uninformative, one-page "syndicate lists," which disclose only the extent of the Names' projected participation in specified syndicates. The syndicate lists do not disclose such material risks as the syndicates' massive "long-tail liabilities" for previous years of account or the syndicates' involvement in the "LMX spiral."

[11] The Court of Appeals' treatment of the syndicates assumes that the syndicates are suable as "issuers" under the federal securities laws (Appendix C, 7c), but fails to note that they are not suable under English law (Appendix C, 24-27c). Thus, the Court of Appeals' analysis skips over pertinent questions raised by its own novel analysis: Under English law, what incentive for issuer-based disclosure can there be when the issuers, as the principal repositories of Lloyd's capital, are themselves not suable? Is there incentive for disclosure when substantial

(continued...)

liability, and limits petitioners to fault- and causation-based remedies against certain limited liability entities.

II. The Court of Appeals' construction of the anti-waiver provisions of the 1933 and 1934 Acts is inconsistent with this Court's analysis of those provisions in *Rodriguez* and with other decisions from the lower courts.

A. In *Rodriguez*, Justice Kennedy, speaking for a five-judge majority, wrote that the anti-waiver provisions did *not* invalidate arbitration clauses in agreements between registered broker-dealers and their customers because, among other things, the customers retained in arbitration their substantive rights and remedies under the Act, and because the Act's choice-of-forum (venue) provisions did not constitute "essential features" of either Act (490 U.S. at 481). He stated that the impairment of an "essential feature" would be "bar[red]" by the anti-waiver provisions "properly construed * *" (*Ibid.*). He identified one such "essential feature" as "the provision [in Section 12(2) of the 1933 Act] placing on the seller the burden of proving lack of scienter when a buyer alleges fraud * *" (*Ibid.*).[12]

The impairment of petitioners' remedial opportunities caused by their relegation to English law and English tribunals is far greater than a shift in the burden of proof on a single element of a claim under Section 12(2) of the 1933 Act. Here, (i) central defendants — Lloyd's and its governing bodies — are not subject to liability at all; (ii) the syndicates are not suable, and judgments cannot be enforced

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[11](...continued)
syndicate assets are maintained in the $9 billion Lloyd's American Trust Fund located in the United States, but suit can only be brought in England, where Lloyd's trust funds are not subject to legal process?

[12] Presumably, the four dissenting Justices, who would have invalidated the arbitration clauses under the anti-waiver provisions, would have accepted the majority's view on this narrow point.

against syndicate assets; (iii) failure to register claims under Section 12(1) of the 1933 Act are not recognized; (iv) "controlling person" liability does not exist; and (v) liability against the limited liability entities (Member's Agents and Managing Agents) is fault-based and requires proof of fraudulent intent, together with reliance and causation, or at least the latter two elements.

B. The Court of Appeals' analysis and conclusion are inconsistent with lower court decisions that have found impermissible waivers of "compliance with *any* provision" or "*any* rule and regulation" of the SEC under the anti-waiver provisions, by reason of the contractual impairment of investor rights or remedies available under the 1933 and 1934 Acts. (Emphasis added.) *See, e.g., Pryor v. United States Steel Corp.*, 794 F.2d 52, 56 (2d Cir.), *cert. denied*, 479 U.S. 954 (1986) (contractual waiver of proration rights under Section 14(d)(6) of the 1934 Act is invalid); *Special Transp. Serv., Inc.*, 325 F. Supp. at 1187 (contractual limitations on damage remedy is void); *Allied Artists Pictures Corp. v. Giroux*, 312 F. Supp. 450, 451 (S.D.N.Y. 1970) (director may not limit, by a release instrument, his prospective liability for short-swing profits under Section 16(b) of the 1934 Act); *Schine v. Schine*, 254 F. Supp. 986, 988 (S.D.N.Y. 1966) (prospective release of claims arising under the 1934 Act would be void); *cf. Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1034 (5th Cir. 1990) (anti-waiver provisions "void waivers of rights * * ").

C. As explained further in subsections II(D)-(F), the Court of Appeals' construction of the phrase "waive compliance" in the anti-waiver provisions is inherently unreasonable and self-contradictory. Its construction is based upon the implicit assumption that "waive compliance" means that the challenged contracts expressly authorize non-conformity with the transactional conduct mandated by the Acts (in this case, registration and other pre-investment decision disclosure), irrespective of the degree to which investor rights and remedies under the Acts are actually impaired by application of choice of forum and choice of law clauses in those contracts. But, as stated

in the *Rodriguez* dictum (subsection II(A)) and as the lower court cases applying the anti-waiver provisions illustrate (subsection II(B)), the anti-waiver provisions outlaw *any* material dilution of investors' substantive rights or remedies arising under the Acts—without imposing upon investor plaintiffs undue burdens of proof or persuasion.[13]

D. As applied to petitioners' claims under Section 12(1) of the 1933 Act, the Court of Appeals' construction of the phrase "waive compliance" stands the anti-waiver provisions on their heads: it approves routine enforcement of clauses in foreign issuers' contracts that purport to waive all investor rights under that "provision."[14] The transactional conduct (as opposed to the remedial obligations) mandated by Section 12(1) of the 1933 Act are the filing of registration statements and the delivery of the required prospectuses to investors in advance of their purchases of securities, all in conformity with Sections 5(a) and (b) of the 1933 Act (15 U.S.C. §77e(a),(b)). It is undisputed that English courts categorically refuse to recognize any Section 12(1) claims, and English law provides no equivalent registration obligation or remedy for failure to register.

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[13] The cases cited above require an objective test for ascertaining whether there has been a prohibited waiver. This Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) assumed as much when it stated:

> The voluntariness of the agreement is irrelevant to [the] inquiry: if a stipulation waives compliance with a statutory duty, it is void under §29(a) [of the 1934 Act], whether voluntary or not.

The Court of Appeals' decision here, while positing an apparently objective test, in practice would require a highly speculative and wide-ranging empirical inquiry. The virtual impossibility of satisfying the test effectively repeals the anti-waiver provisions. See footnote 7.

[14] This Court has recognized that the "registration requirements are at the heart of the [1933] Act, and §12(1) imposes strict liability for violating those requirements," which it described as "a particularly important enforcement tool . . ." *Pinter v. Dahl*, 486 U.S. 622, 636 (1988).

Thus, the relegation to English tribunals and English law resulting from enforcement of Lloyd's forum selection clauses removes any inducement to comply with Section 12(1)'s requirements.[15]

E. The Court of Appeals' construction of the "waive compliance" phrase is equally wrong with regard to petitioners' claims under Section 12(2) of the 1933 Act and Rule 10b-5. The Court of Appeals found that enforcement of Lloyd's forum selection clauses materially impaired petitioners' "chance of success" on these claims (Appendix C, 27c), because certain classes of "deep-pocket" defendants were not suable under English Law (Lloyd's, its governing bodies, the syndicates, and the controlling persons of the Member's Agents and Managing Agents) and because only the fault- and causation-based liability standards were applicable to those limited-

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[15] The Court of Appeals' rejection of the Section 12(1) claims is not supported by its own test for applying the phrase "waive compliance" (Appendix, 26c). Instead, the Court of Appeals suggested that there were substantive flaws in petitioners' Section 12(1) claims. It observed that the SEC had not required Lloyd's syndicates to file registration statements under Section 5 of the 1933 Act, based on the exemption provided by the SEC's Regulation D (17 C.F.R. §§230.501-508) (Appendix, 26c). The Court of Appeals was procedurally wrong in treating this issue on the merits without a full record and prior notice to petitioners. It was substantively wrong as well, ignoring that the Regulation D limits the exemption by several tests that Lloyd's fails to meet: by limiting the permitted number of "unaccredited investors" participating in the "offering" (17 C.F.R. §230.501(a)); by requiring "unaccredited investors" to be furnished with adequate pre-investment decision information (17 C.F.R. §230.502(b)); by denying exemption to an "offering" that is "integrated" with related "offerings" (*e.g.*, offerings by the same Lloyd's syndicates through different Member's Agents that, when evaluated on an "integrated" basis, fail to comply with Regulation D) (17 C.F.R. §230.502(a)); and by denying exemption where there has been a "general solicitation" (17 C.F.R. §230.502(c)). The Court of Appeals recognized that Lloyd's minimum net worth and earning-power requirements for most investors do not conform to the SEC minimum requirements for "accredited investor" status under Regulation D (Appendix C, 9c).

liability entities that remained suable under English law (Member's Agents and Managing Agents). That finding, without more, should have triggered the anti-waiver provisions to make the Lloyd's forum selection clauses unenforceable. By contrast, the Court of Appeals' test allows routine enforcement of foreign selection clauses merely if the investor *may* have *some* remedy against *some* defendant in the foreign tribunal under the foreign law, irrespective of the diminution of the investors' practical ability to obtain meaningful redress.[16]

F. The Court of Appeals' test violates the plain meaning of Section 12 of the 1933 Act, the "provision" that affords express remedies to aggrieved purchasers of securities. Section 12 provides for statutorily-mandated consequences when "sellers" of securities, as defined in the broad sense contemplated by the statute (*see, e.g., Pinter v. Dahl*, 486 U.S. 622 (1988)), violate either subsection 1 or 2. Those subsections state that such "sellers" "shall be liable" to the aggrieved purchasers. The Court of Appeals has substituted the phrase "may or may not be liable under foreign law prescribed by the seller's contract" for the phrase "shall be liable." In relieving the respondent "sellers" of their statutorily-mandated obligations, the

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[16] In attempting to identify applicable English substantive rules, the Court of Appeals failed to understand the proper "pecking order" at Lloyd's. It fastened on the contractual disclosure obligations of the Member's Agents to the Names as the linchpin for its finding that there was an adequate foreign remedy and inducement to comply with the disclosure mandates of the 1933 and 1934 Acts (Appendix C, 26c). However, the Member's Agents are in reality brokers matching Names with syndicates. They do not have the control over the issuers—here the syndicates, which are managed and controlled by their respective Managing Agents—to command disclosure of negative information. Insofar as the Court of Appeals intimated that the Managing Agents had direct disclosure obligations to Names, it misread §4.2(j) of the Managing Agent's Agreement. That provision calls for direct disclosure only if the Name's interests in a particular syndicate are not represented by a Member's Agent.

Court of Appeals has enabled respondents to "waive compliance" with their obligations to petitioners under Section 12.[17]

III. Issues raised by other cases involving American Names would be resolved by granting of the writ in this case.

A. The Tenth Circuit's decision in *Riley*, 969 F.2d at 953, was the first of the recent cases involving American Names. The Name's petition for review was rejected by this Court (113 S.Ct. at 658).[18] However, the arguments made here about the effect of the anti-waiver provisions and the inadequacies of English law were not made there. In addition, the Court of Appeals here expressly "depart[ed]" (Appendix C, 21c) from *Riley*, finding its analysis unsatisfactory.

B. In *Leslie v. Lloyd's of London*, No. H-90-1907, slip op. (S.D. Tex. Sept. 4, 1991) (Appendix G), the District Court refused to enforce Lloyd's forum selection clauses. It reasoned that there was

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[17] Differences in the texts of Rule 10b-5 and Section 12 are not material. First, Rule 10b-5 is formulated in almost identical terms to Section 5 of the 1933 Act ("It shall be unlawful * *."), which in turn is incorporated into Section 12(1) of the 1933 Act. Second, since this Court has consistently construed Rule 10b-5 and Section 12(2) of the 1933 Act *in pari materia* to harmonize the panoply of private remedies available under the federal securities laws, differences in form, as opposed to substance, are treated as irrelevant. See *Rodriguez*, 490 U.S. at 484-85. Third, the interests of judicial economy would be disserved if only some, but not all, of petitioners' securities act claims were assertable in the United States.

[18] *Riley's* reasoning was criticized, and review of the issues raised there was urged, in a recent law review note. See Kristine Paden, Note, *Choice of Forum, Choice of Law, and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, 6 TRANSNAT'L LAW. 431, 450-460 (1993).

no controlling decision of this Court and that therefore the four-Justice dissent in *Scherk* provided the soundest approach to the issue.

C. In *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992), the District Court overruled a magistrate judge's recommendation that the Lloyd's forum selection clauses be held unenforceable under footnote 19 of this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). There, this Court stated that, if "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies [there, for antitrust violations], we would have little hesitation in condemning the agreement as against public policy" (784 F. Supp. 1354-60). In *Bonny*, the District Court, like the District Court here, believed *Scherk* to be controlling and found the footnote 19 test inapplicable, for the question-begging reason that enforcement of the forum selection clause resolves potential conflicts-of-law problems[19] (784 F. Supp. at 1353-54). On August 5, 1993, the Seventh Circuit affirmed the District Court's judgment, adopting a combination of the District Court's reasoning in that case and the Second Circuit's reasoning in this case. *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 2771, 1993 U.S. App. LEXIS 20145, at *15-21 (7th Cir.

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[19] Although the desire for predictability in international transactions (and particularly the wish to eliminate conflict-of-law issues) is a relevant consideration in some cases, this desire is a neutral factor when the anti-waiver provisions are considered. If the anti-waiver provisions are enforced, the forum selection and choice-of-law clauses must be invalidated. The result leads to a state of predictability: foreign issuers soliciting American investors are subject to the requirements of, and are subject to suit for failure to comply with their obligations under, the 1933 and 1934 Acts. Thus, the policy choice is not between upholding or defeating predictability in international transactions, but simply whether American investors will or will not retain their rights and remedies under the federal securities laws.

August 5, 1993).[20] Counsel for the *Bonny* plaintiffs has advised us that they will file a petition seeking review by this Court of the Seventh Circuit's decision.

IV. The SEC, the agency charged with enforcement of the federal securities laws, has not acted to protect American Names or to address any of the larger issues raised by the Court of Appeals' decision. Its default in this regard warrants the granting of the writ and plenary consideration by this Court of the issues presented by this petition.

A. While discreetly criticizing the SEC for providing "little guidance", at least on some aspects of the case, (Appendix C, 11c), the Court of Appeals implied that the SEC's default weighs against petitioners' efforts to vindicate their rights to sue under the federal securities laws in the United States. However, in the absence of a publicly disclosed, principled position from the SEC, this Court's policy of according deference to the enforcement agency has no place, because the agency has offered nothing to which any court might defer.

B. The SEC's default in seeking broad enforcement of the anti-waiver provisions is puzzling. It is particularly so in the light of SEC opposition to relaxed disclosure requirements for foreign issuers that seek listings on American stock exchanges, especially since the SEC's ability to regulate these standards may require vigorous enforcement of the anti-waiver provisions (see subsection I(B)). The

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[20] The Seventh Circuit also relied on its recent decision in *Hugel v. Corporation of Lloyd's*, No. 92-2240, 1993 U.S. App. LEXIS 17106 (7th Cir. July 8, 1993), where the plaintiffs sued only on common law contract and tort claims. The Seventh Circuit's parity of treatment of those common law claims and claims under the 1933 and 1934 Acts deprives the anti-waiver provisions of any meaningful effect.

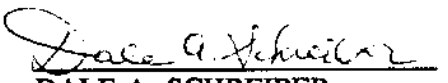
apparent inconsistency in the SEC's approach[21] should be regarded as another compelling factor favoring review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 30, 1993

Respectfully submitted,



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[21] The SEC began a private investigation of Lloyd's in 1991, and abruptly halted the investigation in June 1992, shortly after a visit to the United States by British Prime Minister Major. A recent article appearing in a British publication, *Lloydy Luck*, PRIVATE EYE, July 2, 1993, at 28 (Appendix H), asserts that the SEC investigation was halted by Mr. Major's intervention.