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Securities Law Update – October 2007

WHEN DO STATUTES OF LIMITATION APPLY IN ARBITRATION?

Disputes between stockbrokers and their clients are hardly the only types of disputes being resolved in arbitration. Whether statute of limitations defenses are available in arbitration can be a critical issue. It is critical to both the litigator and the drafter of the contract. My article on this topic appears in this month's Florida Bar Journal. The article can be found online at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/6bf69830a26b1a01852573630053b020?OpenDocument>

MORE ON STATUTES OF LIMITATION IN ARBITRATION

On October 2, 2007, the 6th Circuit held in the *United Steelworkers* case that decisions regarding the interpretation of time limitations provisions are to be decided by arbitrators, and not the courts. The dissenting opinion is worth the read. A copy is provided below.

HIGH-LOW AGREEMENTS AND ETHICS

A High-Low agreement is a form of insurance. Occasionally used in securities arbitrations, a high-low agreement provides that upon the occurrence of an event, often a trial verdict, a case will settle on pre-determined terms. As an example, an agreement may provide that if there is a verdict between \$100,000.00 and \$500,000.00, the plaintiff will recover the amount of the verdict. If the verdict is in excess of \$500,000.00, the case will be deemed settled for \$500,000.00. If the verdict is less than \$100,000.00, the case will be deemed settled for \$100,000.00. An important ethical issue arises where there are multiple defendants. Are the parties who are participating in the high-low agreement obligated to disclose the existence of the agreement to the non-participating parties? In the *Reynolds* decision, a copy of which is provided below, the New York Court of Appeals held that "whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the non-agreeing defendant(s)."

WHISTLEBLOWING AND PROMISSORY ESTOPPEL

The *Bones v. Prudential Financial* decision, provided below, involves a former insurance sales director suing his former employer for promissory estoppel and violation of New York's whistleblower statute. In the Amended Complaint, the plaintiff withdrew his whistleblowing claim. Prudential's Motion to Dismiss was based in part upon a provision in the whistleblower statute providing that "[t]he institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract...law...or under the common law." The Court denied Prudential's Motion, holding that the voluntary amendment of the Complaint rendered the initial complaint a nullity – as if the whistleblowing claim had never been brought. Accordingly, the quoted statute was irrelevant to the remaining claim for promissory estoppel.

**UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff-Appellant, v. SAINT GOBAIN CERAMICS & PLASTICS,
INC., Defendant-Appellee.**

No. 05-6851

**UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

**07a0404p.06; 2007 U.S. App. LEXIS 23048; 2007 FED App.
0404P (6th Cir.)**

**June 6, 2007, Argued
October 2, 2007, Decided
October 2, 2007, Filed**

PRIOR HISTORY:

Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 04-00603--Charles R. Simpson III, District Judge.

CORE TERMS: arbitration, arbitrator, grievance, bargaining agreement, arbitrability, arbitrate, time-limitation, arbitration agreements, arbitrable, timeliness, time limit, time limitation, arbitration clause, language contained, condition precedent, untimely, grievance procedure, plain language, threshold, notice, agreed to arbitrate, presumptively, contractually, contractual, eligible, gateway, compel arbitration, judicial determination, quotation marks omitted, prerequisite

COUNSEL: ARGUED: David R. Jury, UNITED STEELWORKERS OF AMERICA, Pittsburgh, Pennsylvania, for Appellant.

John W. Woodard, Jr., WYATT, TARRANT & COMBS, LLP, Louisville, Kentucky, for Appellee.

ON BRIEF: David R. Jury, Richard J. Brean, UNITED STEELWORKERS OF AMERICA, Pittsburgh, Pennsylvania, for Appellant.

John W. Woodard, Jr., Edwin S. Hopson, WYATT, TARRANT & COMBS, LLP, Louisville, Kentucky, for Appellee.

James B. Coppess, Washington, D.C., for Amicus Curiae.

JUDGES: Before: BOGGS, Chief Judge; MARTIN, GUY, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges. SUTTON, J., delivered the opinion of the court, in which BOGGS, C. J., GUY, BATCHELDER, DAUGHTREY, GILMAN, GIBBONS, ROGERS, COOK, McKEAGUE, and GRIFFIN, JJ., joined. CLAY, J. (pp. 8-18), delivered a separate dissenting opinion, in which MARTIN, MOORE, and COLE, JJ., joined.

OPINION BY: SUTTON

OPINION

SUTTON, Circuit Judge. Does a dispute over the meaning of a time-limitation bar in a collective bargaining agreement present a threshold question for an arbitrator to resolve or for a judge to resolve? Under *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), "a time limit rule is a matter presumptively for the arbitrator, not for the judge," *Howsam*, 537 U.S. at 85. Because neither the terms of this time-limitation provision nor the terms of the collective bargaining agreement rebut that presumption, we hold that the parties' dispute over the meaning of the provision should be resolved by an arbitrator.

I.

Saint Gobain Ceramics makes refractory products for a variety of industrial clients. The United Steelworkers of America represents the Louisville-based workers of the company. The two parties signed a collective bargaining agreement that governed their relationship from February 14, 2002, to February 13, 2005.

On March 2, 2004, the company fired two union members for insubordination. The union immediately filed grievances over both discharges.

The collective bargaining agreement contains a four-step process for resolving grievances. The union's grievances proceeded without complication through steps one, two and three. On March 29, 2004, the company issued a written denial of both step-3 grievances, which the union received on April 8, 2004. The agreement gave the union 30 days, excluding weekends and holidays, to appeal the company's decision to step 4--arbitration. If the union failed to appeal within the time limit, the agreement provided that the union forfeited its right to arbitrate the grievance. The union appealed the denials by letter dated May 19, 2004, and the company received the appeals on May 24, 2004. The company informed the union that the appeals could not proceed to arbitration (step 4) because it had received them after the 30-day deadline.

The union filed an action in federal district court under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to compel arbitration of the two grievances under the collective bargaining agreement. Faced with cross-motions for summary judgment, the district court (1) held that *General Drivers, Warehousemen & Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988), required a federal judge, not an arbitrator, to determine whether the time-limitation bar applied to the two grievances, (2) concluded that the union failed to satisfy the time requirement and (3) dismissed the two grievances.

Bound by *Moog*, a panel of this court affirmed. *United Steelworkers v. Saint Gobain Ceramics & Plastics, Inc.*, 467 F.3d 540, 545 (6th Cir. 2006). The union sought en banc review, and we granted the petition. See No. 05-6851, 2007 U.S. App. LEXIS 12224 (6th Cir. Feb. 7, 2007).

II.

A.

When an employer and a union agree to submit grievances arising from a collective bargaining agreement to arbitration, the "limited" function of the federal courts is "to ascertain[] whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960). Whether a collective bargaining agreement commits a dispute to arbitration, the Supreme Court has held, is a question of arbitrability for the courts to decide. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964). Whether the parties have complied with the procedural requirements for arbitrating the case, by contrast, is generally a question

for the arbitrator to decide. *Howsam*, 537 U.S. at 85; *John Wiley & Sons*, 376 U.S. at 556-57. If doubt exists over whether a dispute falls on one side or the other of this line, the presumption in favor of arbitrability makes the question one for the arbitrator. *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 650-51 (1986); see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (recognizing a "liberal federal policy favoring arbitration agreements").

Two Supreme Court cases illustrate this dichotomy and show how it should be applied to debates about the application of a time-limitation provision. The "threshold question" in *John Wiley & Sons*, as in today's case, was "who shall decide" a series of disputes arising under a collective bargaining agreement--an arbitrator or a judge? 376 U.S. at 547. The first dispute dealt with whether a collective bargaining agreement applied to a company (Wiley) that had not signed the agreement but had merged with a company that had signed it. Because this dispute asked whether Wiley was "bound to arbitrate, as well as what issues it must arbitrate," the Court determined that it was one for judicial determination. *Id.* (internal quotation marks omitted). "The duty to arbitrate being of contractual origin," the Court reasoned, "a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.*

The Court reached a different conclusion about two other disputes presented in the case--(1) whether the union had satisfied steps 1 and 2 of the agreement's multi-step grievance procedure, which preceded the company's "duty to arbitrate" in step 3, and (2) whether the union had complied with a time-limitation bar. *Id.* at 556 & n.11.

"Notice of any grievance," the time rule said, "must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance." *Id.* (quoting the rule). "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration," as it had been in that case, the Court reasoned that "'procedural' questions which grow out of the dispute and bear on its final disposition"--such as questions about the application of a time-limitation bar--"should be left to the arbitrator." *Id.* at 557. A different interpretation, the Court feared, "would produce . . . delay attendant upon judicial proceedings preliminary to arbitration," and, what is more, the "[r]eservation of 'procedural' issues for the courts" would "not only create the difficult task of separating related issues, but would also produce frequent duplication of effort." *Id.* at 558. In the end, the Court explained, "it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the dispute which called the grievance procedures into play." *Id.* at 558-59. The Court accordingly ordered the company to comply with its duty to arbitrate, leaving it to the arbitrator to decide whether the time-limitation and step-grievance requirements had been satisfied.

Nearly 40 years later, the Court addressed a similar issue and followed a similar path. The question at hand in *Howsam* was whether a judge or an arbitrator should apply a time-limitation rule of the National Association of Securities Dealers (NASD). No dispute, the rule said, "shall be eligible for submission to

arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute." 537 U.S. at 81 (quoting NASD Code of Arbitration Procedure § 10304 (1984)). The company opposed arbitration on the ground that application of the time-limitation rule presented a threshold question of arbitrability for a court to decide because a dispute that was more than six years old was "ineligible for arbitration." *Id.* at 82.

"Linguistically speaking," the Court began, "one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." *Id.* at 83. But the "Court's case law . . . makes clear that . . . the phrase 'question of arbitrability' has a far more limited scope." *Id.* It instead refers to "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and . . . where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84.

Giving content to this distinction, the Court gave two examples of threshold questions of arbitrability that courts should decide--"whether the parties are bound by a given arbitration clause" and "whether an arbitration clause . . . applies to a particular type of controversy." *Id.* at 84. "[T]he phrase 'question of arbitrability,'" by contrast, is " *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter," *id.*--namely "'procedural' questions which grow out of the dispute and bear on its final

disposition," *id.* (quoting *John Wiley & Sons*, 376 U.S. at 557), and which "are presumptively *not* for the judge, but for an arbitrator, to decide," *id.* This latter category, the Court noted, included debates relating to whether the prerequisite steps of a grievance procedure have been followed, *id.* (citing *John Wiley & Sons*, 376 U.S. at 557), relating to "waiver, delay, or a like defense to arbitrability," *id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25), and relating more generally to "whether a condition precedent to arbitrability has been fulfilled," *id.* at 85 (quoting the Revised Uniform Arbitration Act of 2000 (RUAA) § 6(c) & cmt. 2, 7 U.L.A. 12-13 (Supp. 2002)); see also *id.* ("[I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.") (quoting RUAA § 6, cmt. 2, 7 U.L.A. at 13) (emphasis added by *Howsam*); cf. *Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 492 (1972) (concluding that whether "particular grievances are barred by laches is an arbitrable question").

Consistent with this reasoning, the Court held that "the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge." *Howsam*, 537 U.S. at 85. And because nothing in the arbitration agreement or the NASD rules rebutted that presumption, the Court held that the application of the time-limitation rule was for the arbitrator to decide.

What emerges from *John Wiley & Sons* and *Howsam* is a fairly straightforward rule:

A time-limitation provision involves a matter of procedure; it is a "condition precedent" to arbitration, *id.* (internal quotation marks omitted); and it thus is "presumptively" a matter for an arbitrator to decide, *id.* In the absence of an agreement to the contrary, in the absence in other words of language in the agreement rebutting the presumption, arbitrators rather than judges should resolve disputes over time-limitation provisions.

B.

Under this rule, the time-limitation bar in this collective bargaining agreement should be resolved by the arbitrator. Here is what the provision says:

Both parties mutually agree that grievances to be considered must be filed promptly as set forth above after the occurrence thereof. *Grievances not appealed within the time limits set forth in Steps 1,2,3, or 4 shall be considered settled on the basis of the decision last made and shall not be eligible for further discussion or appeal.* Grievances not answered by the Company within the time limits specified in any step of this procedure shall be allowed without precedent.

JA 20 (emphasis added). The highlighted language plainly amounts to a time-limitation bar, and there is no "statement to the contrary in the arbitration agreement," *Howsam*, 537 U.S. at 85, that rebuts the presumption that disputes over the meaning of these types of "condition[s] precedent to arbitrability" should be

resolved by the arbitrator, *id.* (internal quotation marks omitted).

That a party's failure to satisfy the time-limitation requirement means that the grievance "shall not be *eligible* for further discussion or appeal," JA 20 (emphasis added), does not alter this conclusion. The same could have been said in *John Wiley & Sons* and in *Howsam*. In *John Wiley & Sons*, the language was to the same effect, as it said that failure to satisfy the time limitation "shall . . . be deemed to be an abandonment of the grievance." 376 U.S. at 556 n.11. In *Howsam*, the language was not only to the same effect but indeed used the same root word, as it said that failure to satisfy the time limitation made the dispute "[in]eligible for submission to arbitration." 537 U.S. at 81.

Far from rebutting the presumption that this time-limitation provision should be decided by an arbitrator, other provisions of the collective bargaining agreement support it. The introductory sentence to all of the alternative-dispute-resolution provisions in Article 28 of the collective bargaining agreement, including the time-limitation provision, says: "Should disagreements arise as to the meaning and application of or compliance with the provisions of this agreement, there shall be no cessation of work at any time but the matter shall be settled promptly in the following manner" JA 19. This language is quite consistent with the underlying assumption of *John Wiley & Sons* and *Howsam* that parties to collective bargaining agreements would anticipate that disputes over conditions precedent to arbitration, like disputes over the merits of a grievance, would be resolved by the arbitrator. Instead of rebutting the presumption that an arbitrator should decide the meaning of a time-limitation provision, in short, this language in the

collective bargaining agreement strengthens it.

What gave the district court and the original panel pause about this case was not the meaning of the Supreme Court's decisions in this area, and it was not the language of the collective bargaining agreement. It was the existence of our 1988 decision in *Moog* and the question whether it could co-exist with *John Wiley & Sons* and *Howsam*. Since *Moog*, the Supreme Court has decided *Howsam*, which reinforces the presumption that questions about the meaning of a time-limitation bar are for arbitrators to decide. And since *Moog*, two panels of this court, one of them the panel that heard this case, have expressly concluded that *Moog* was wrongly decided, see *Raceway Park, Inc. v. Local 47, Serv. Employees Int'l Union*, 167 F.3d 953, 954 (6th Cir. 1999) ("*Moog* represents a grave departure from Supreme Court doctrine mandating that issues of procedural arbitrability be determined by arbitrators not judges."); *United Steelworkers v. Saint Gobain Ceramics & Plastics, Inc.*, 467 F.3d 540, 545 (6th Cir. 2006) ("[W]e would prefer to take a path not open to us--ignore or overrule *Moog*."), while another panel has expressed doubt about *Moog's* validity, see *Armco Employees Indep. Fed'n v. AK Steel Corp.*, 252 F.3d 854, 860 n.2 (6th Cir. 2001) (observing that *Raceway Park* "offers a thoughtful critique of *Moog*" and noting that, "regardless of what we may think of the *Moog* exception to *Wiley*, this panel cannot overturn a published decision of a previous panel") .

A brief description of *Moog* shows why the criticism of these two prior panels and the skepticism of the third panel are on the mark. After the employer discharged one of its workers, it refused the union's demand to submit the matter to arbitration under the

collective bargaining agreement because the union had not filed the arbitration request within the 15-day period provided in the agreement. "[I]f," the time-limitation rule said, "the Union fails to notify the Company . . . within 15 calendar days after the Company gives its answer in writing to a grievance at Step (b) of the grievance procedure, . . . then the Union shall be conclusively presumed to have accepted the Company's answer thereto and said grievance shall not thereafter be arbitrable." 852 F.2d at 873 (emphasis added). Because this "contractual language" in the court's eyes "clearly indicate[d] that the particular grievance in dispute [was] excluded from arbitration," the court held that it had the duty "first" to decide whether "the union met the conditions precedent to arbitration"--that the application of this timeliness provision in other words presented a question of arbitrability for the court to decide. *Id.* at 875.

There is no difference, however, between the clarity of the consequences of failing to file the grievance on time in *Moog* on the one hand and *John Wiley & Sons* and *Howsam* on the other. All three provisions came to the same clear end: In *Moog*, the "grievance shall not thereafter be arbitrable," *id.* at 873; in the other two cases, the dispute shall not "be eligible for submission to arbitration," *Howsam*, 537 U.S. at 81, and "shall . . . be deemed to be an abandonment of the grievance," *John Wiley & Sons*, 376 U.S. at 556 n.11. There thus is no basis for saying that the language at issue in *Moog* somehow rebuts the presumption that the matter should be resolved by an arbitrator while the language at issue in these other cases does not.

Also unavailing is Saint Gobain's related attempt to distinguish Article 28

from the clauses at issue in *John Wiley & Sons* and *Howsam*. Article 28, the company says, supplies a "narrow agreement[]" to use a multi-step grievance resolution procedure culminating in arbitration if . . . there has been a timely appeal to arbitration, and the grievance has not been otherwise settled," Supp'l Br. at 17-18, while the clauses in the other two cases "involved broad, catch-all agreement[s]" to arbitrate all disputes, *id.* at 17, 21. But neither *John Wiley & Sons* nor *Howsam* draws any such distinction, nor do they limit the presumptive arbitrability of time-limitation provisions to situations in which the parties agreed to catch-all arbitration clauses. And even if they did, it is far from clear why the introductory sentence of Article 28 does not satisfy this proposed requirement: "Should disagreements arise as to the meaning and application of or compliance with the provisions of this agreement, there shall be no cessation of work at any time but the matter shall be settled promptly in the following manner," which culminates in "arbitration." JA 19.

The problem with *Moog* is not the existence of some unusual feature of the collective bargaining agreement or of the time-bar provision in that case but that *Moog* turned on its head the presumption that time-limitation disputes should be resolved by an arbitrator. Instead of treating a dispute over the meaning of a time-limitation rule as a "condition precedent to arbitrability" that is "presumptively for the arbitrator, not the judge," to decide, *Howsam*, 537 U.S. at 85 (internal quotation marks omitted), *Moog* does the opposite--treating it as a "condition[] precedent" to arbitration that the judge must decide, 852 F.2d at 875. Whether *Moog* should have appreciated the point after *John Wiley & Sons* makes no difference; the fact remains that

Howsam, decided fourteen years after *Moog*, leaves no doubt about the presumption and its applicability here. *Moog* is overruled.

There is more common ground between the dissent and our opinion than the dissent suggests. We do not establish a bright-line rule that timeliness questions must inexorably go to the arbitrator. As with all arbitration matters, the matter is one of contract: Just as two parties need not enter an arbitration contract in the first place, they need not enter an arbitration agreement that submits questions of timeliness to arbitration. Parties who wish to steer timeliness disputes to the courts remain free to do so, and nothing in this opinion is to the contrary.

The problem here is what happens when the parties are silent on the point--when they set up an arbitration procedure to resolve their grievances, as was true here, but when they do not indicate a preference for judicial or arbitral resolution of a dispute over the meaning of a timeliness provision in the collective bargaining agreement, as was also true here. In that setting, there is nothing unusual about courts establishing default rules or presumptions about the meaning of such silence for the purposes of the case before them and for the purposes of future cases. That is all we have done.

In embracing a presumption that disputes over a timeliness provision are for an arbitrator to decide, we take some comfort from the following: (1) that is what *John Wiley & Sons* and *Howsam* did; (2) that is what the Supreme Court has said we should do, see *Howsam*, 537 U.S. at 85 ("[I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice,

laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.") (quoting RUAA § 6, cmt. 2, 7 U.L.A. at 13) (emphasis added by *Howsam*); (3) that is what makes sense in light of the background general presumption in favor of resolving collective bargaining and other disputes through arbitration, see *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *AT&T Techs.*, 475 U.S. at 650; and (4) that is what every other court of appeals in the country has done, see *Local 285, Serv. Employees Int'l Union, AFL-CIO v. Nonotuck Res. Assocs., Inc.*, 64 F.3d 735, 739-40 (1st Cir. 1995); *Rochester Tel. Corp. v. Commc'n Workers*, 340 F.2d 237, 238-39 (2d Cir. 1965); *Chauffers, Teamsters & Helpers, Local Union No. 765 v. Stroehmann Bros. Co.*, 625 F.2d 1092, 1093-94 (3d Cir. 1980); *Local 1422, Int'l Longshoremens Ass'n v. S.C. Stevedores Ass'n*, 170 F.3d 407, 410 (4th Cir. 1999); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 753-54 (5th Cir. 1995); *Beer Sales Drivers, Local Union No. 744 v. Metro. Distribs.*, 763 F.2d 300, 303 (7th Cir. 1985); *Auto., Petroleum & Allied Indus. Employees Union, Local No. 618 v. Town & Country Ford, Inc.*, 709 F.2d 509, 511-14 (8th Cir. 1983); *Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095*, 834 F.2d 751, 754 (9th Cir. 1987); *Denhardt v. Trailways, Inc.*, 767 F.2d 687, 689-90 (10th Cir. 1985); *Aluminum, Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp.*, 991 F.2d 1545, 1548 n.1, 1550 (11th Cir. 1993); *Wash. Hosp. Ctr. v. Serv. Employees Int'l Union, Local 722*, 746 F.2d 1503, 1506-08 (D.C. Cir. 1984).

Nor do the two cases cited by the dissent--*Philadelphia Printing Pressmen's Union No. 16 v. International Paper Co.*,

648 F.2d 900 (3d Cir. 1981), and *United Steelworkers v. Cherokee Electric Cooperative*, No. 86-AR-2163-M, 1987 WL 17056 (N.D. Ala. Feb. 19, 1987), *aff'd*, 829 F.2d 1131 (11th Cir. 1987)--say otherwise. In *Philadelphia Printing*, the Third Circuit distinguished between procedural default issues, including "delay" in filing a grievance, and the "total" failure to file a grievance at all. 648 F.2d at 904 n.7 (internal quotation marks omitted). Disputes arising from the former were for the arbitrator, and disputes arising from the latter were for the courts. *Id.* Today's case involves a dispute about "delay" and is therefore for the arbitrator, says *Philadelphia Printing*. *Cherokee Electric* is no more helpful, for there the union conceded that it did not comply with the collective bargaining agreement's timeliness provision--leaving no dispute to submit to arbitration. See *Cherokee Elec.*, 1987 WL 17056, at *3-4. Under that court's reasoning as well, today's dispute would be for the arbitrator. *Id.* at *4 ("[I]n order to be entitled to present the issue of the timeliness of a grievance to an arbitrator, the issue must have been legitimately raised by the Union so that there is a bona fide procedural timeliness question to be determined by the arbitrator.").

III.

For these reasons, we reverse and remand the case to the district court to enter an order referring the grievance to arbitration.

DISSENT BY: CLAY

DISSENT

CLAY, Circuit Judge, dissenting. The majority unjustifiably attempts to reduce the dissent to a concern about questions of timeliness, but the legal and factual issues

addressed here cannot be so narrowly confined. Instead of improperly reframing the issues in an attempt to diminish the dissent, the majority should have meaningfully engaged the merits of the arguments presented by this opinion. The majority insists on imposing an obligation to arbitrate disputes even where parties never agreed to submit a particular dispute to arbitration. The general presumption in favor of arbitration cannot be interpreted so broadly. In this case, the majority violates the express terms of the parties' collective bargaining agreement inasmuch as the parties simply did not contemplate that questions of timeliness would be submitted to an arbitrator. Instead of effectuating the parties' collective bargaining agreement, the majority blithely ignores the express intent and understanding of the parties, and the plain language of the parties' agreement.

The principal difficulty with the majority opinion is that it wrongfully insulates decisions regarding arbitrability from judicial adjudication even when there is no basis for believing that the parties have contractually agreed to submit the subject matter of a particular dispute to arbitration. In addition to being unrestrained and overbroad in its implications, the majority opinion is problematical on two levels--namely, it improperly determines when a matter should be subject to arbitration, and whether the parties have agreed that there should be a judicial or arbitrable decision to adjudicate the dispute.

BACKGROUND

The facts of this case are relatively simple. Plaintiff United Steelworkers of America, AFL-CIO-CLC, is a union which represents employees of Defendant Saint Gobain Ceramics & Plastics, Inc. The parties entered into a collective bargaining

agreement which sets forth a four-step grievance appeal process. In pertinent part, the collective bargaining agreement contains a thirty-day period to appeal a grievance decision from step 3 to arbitration:

Article 28

Adjustment of Grievances

1. Should disagreements arise as to the meaning and application of or compliance with the provisions of this agreement . . . the matter shall be settled promptly in the following manner:

. . .

STEP 4:

It is agreed that the Union shall have thirty (30) days from the time of the written Step 3 decision to notify the Company in writing that it is appealing a grievance to arbitration.

(J.A. 19) (formatting added). The thirty-day period excludes "Saturdays, Sundays, [h]olidays and off days (including vacations [or] [s]hutdown for repairs)." (J.A. 20) Article 28 of the collective bargaining agreement limits the authority of the arbitrator:

An arbitrator to whom any grievance shall be submitted shall be authorized only to interpret and apply the

provisions of the agreement insofar as shall be necessary to the determining of such grievances, but he shall not have authority to alter in any way the provisions of this agreement.

(J.A. 19) The parties also conditioned the right to arbitrate a grievance decision on strict compliance with the time limits set forth in the collective bargaining agreement:

Article 28

Adjustment of Grievances

4. Both parties mutually agree that grievances to be considered must be filed promptly as set forth above after the occurrence thereof. *Grievances not appealed within the time limits set forth in Steps 1, 2, 3, or 4 shall be considered settled on the basis of the decision last made and shall not be eligible for further discussion or appeal.*

(J.A. 20) (emphasis added). Notably, the collective bargaining agreement contains no provision for the determination of arbitrability. Nothing in the collective bargaining agreement indicates that a dispute concerning timeliness should be submitted to arbitration. Indeed, the express terms of the collective bargaining agreement indicate that the parties simply did not contemplate submitting such disputes to arbitration; rather, the plain language of the collective bargaining agreement shows that the parties contractually agreed that the failure to

pursue a timely appeal constitutes a substantive bar to arbitration.

On March 2, 2004, the Defendant employer terminated two employees "for multiple, severe and willful violations of Company Work Rules in disregard of the Company's business interest." (J.A. 42; see also J.A. 43 (same)). Plaintiff filed grievances alleging that the employees were subject to "unjust suspension [and] discharge [] for a verbal altercation" with a supervisor. (J.A. 37; see also J.A. 38 (same)). On March 29, 2004, Defendant issued a written step 3 decision denying Plaintiff's "grievance[s] and request[s] for reinstatement and back pay." (J.A. 42; see also J.A. 43 (same)). Plaintiff received the employer's decision on April 8, 2004, and appealed the decision on May 19, 2004. Defendant received notice of Plaintiff's appeal on May 24, 2004, and denied the request to refer the grievances to arbitration because the thirty day period to request an appeal had expired. In turn, Plaintiff filed an action to compel arbitration of the grievances under the collective bargaining agreement in the Western District of Kentucky. The district court, applying *Gen. Drivers, Warehousemen and Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988), granted summary judgment in favor of Defendant, finding that under the provisions of the collective bargaining agreement the grievances were not arbitrable because Plaintiff failed to timely file an appeal. The district court concluded that the limitations period set forth in the collective bargaining agreement barred Plaintiff's grievances from proceeding to arbitration.¹

1 The district court properly found that Plaintiff's appeal to arbitration was untimely. The plain language of the contract indicates that the clock

begins to run on the date of the written Step 3 decision. See J.A. 19 (The parties "agreed that the Union shall have *thirty (30) days from the time of the written Step 3 decision to notify the Company in writing* that it is appealing a grievance to arbitration.") (emphasis added). Defendant had to receive notice of Plaintiff's appeal to arbitration within thirty days. The step 3 decision for Plaintiff's grievances was issued on March 29, 2004. Defendant received the notice of appeal to arbitration on May 24, 2004. As the district court aptly noted, "[e]xcluding holidays and weekends, there were 39 business days between these two dates." *United Steelworkers of America, AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics Inc.*, No. 304CV603S, 2005 WL 3088550, at *5-6 (W.D. Ky. Nov. 14, 2005) (unpublished case). Therefore, Plaintiff's notice of appeal to arbitration was untimely under the terms of the parties' collective bargaining agreement.

DISCUSSION

I. Legal Framework

In this case, the district court's summary judgment decision is reviewed *de novo*, "as is the district court's decision to [deny Plaintiff's] motion to compel arbitration." *McMullen v. Meijer, Inc.*, 355 F.3d 485, 489 (6th Cir. 2004) (citing *Wiepking v. Prudential-Bache Sec., Inc.*, 940 F.2d 996, 998 (6th Cir. 1991)). "Similarly, the district court's decisions regarding the existence of a valid arbitration agreement and the arbitrability of a particular dispute are reviewed *de novo*." *Id.* (citing *Floss v. Ryan's Family*

Steak Houses, Inc., 211 F.3d 306, 311 (6th Cir. 2000)).

The Supreme Court has clearly established that "[a]rbitration . . . is a matter of consent, not coercion." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (internal quotation marks and citation omitted). "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). The Federal Arbitration Act ("the Act"), 9 U.S.C. § 1 *et seq.*, "directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *Waffle House*, 534 U.S. at 293 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Although "ambiguities in the language of [an arbitration] agreement should be resolved in favor of arbitration," courts cannot "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id.* (citing *Volt*, 489 U.S. at 476); *see also Int'l Union, United Auto., Aerospace, and Agr. Implement Workers of Am.(UAW), and Local 134, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983) (noting that a "collective bargaining agreement should [not] be construed to affirmatively promote any particular policy"). Simply put, the Act "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Generally, under the presumption of arbitrability, "a court, not an arbitrator, will ordinarily decide an 'arbitrability' question," *Howsam v. Dean Witter Reynolds, Inc.*,

537 U.S. 79, 82 (2002) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)), and "the arbitrator [] decide[s] 'allegation[s] of waiver, delay, or a like defense to arbitrability,'" *id.* at 84 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S.1, 24-25 (1983)). Notably, the Supreme Court has found that "labor disputes . . . cannot be broken down so easily into their 'substantive' and 'procedural' aspects" because "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-57 (1964).

The rationale that underlines the presumption of arbitrability is that arbitrators are "well situated to answer [] question[s]" related to "contract interpretation and arbitration procedures," *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003), and "in a better position than courts to interpret the terms of a [collective bargaining agreement]," *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 (1998) (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)) (emphasis omitted). Nevertheless, the presumption of arbitrability is rebuttable. "[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T*, 475 U.S. at 650 (quoting *Warrior*, 363 U.S. at 582-83) (alteration in original). "[W]hen courts decide whether a party has agreed that arbitrators should decide arbitrability[,] [c]ourts should not assume that the parties

agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T*, 475 U.S. at 649). Courts are also charged with determining whether the parties "intended to have a court, rather than an arbitrator, interpret and apply" an arbitration provision. *Howsam*, 537 U.S. at 86.

The Supreme Court has recognized that whether a court or an arbitrator "has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration." *First Options*, 514 U.S. at 942. Indeed, "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945 (citations omitted). "[T]he question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination." *AT&T*, 475 U.S. at 649.

II. Analysis

Essentially, the issue in this case is whether, under the collective bargaining agreement, the thirty day period to refer a grievance to arbitration begins to run as of the date of receipt of Defendant's written decision--as Plaintiff contends, thus, making the grievance timely and therefore arbitrable--or the date of its issuance, as Defendant argues, thereby rendering the grievance untimely and therefore not arbitrable. The facts in this case are analogous to the facts in *Moog*. The defendant in *Moog*

discharged a member of the plaintiff union who protested his discharge through the procedurally defined grievance steps up to the final stage of arbitration. [Defendant] refused the demand for arbitration, contending that the request made was untimely and therefore rendered the grievance not arbitrable. The union brought [an] action to compel [defendant] to arbitrate.

852 F.2d at 872. The language of the collective bargaining agreement in *Moog* provided that

if the Union fails to notify the Company . . . within 15 calendar days after the Company gives its answer [to the grievance] . . ., then *the Union shall be conclusively presumed to have accepted the Company's answer thereto and said grievance shall not thereafter be arbitrable.*

Id. at 873 (emphasis added). The collective bargaining agreement in *Moog* stipulated that an untimely grievance was not arbitrable. The plain language of the agreement shows that submitting disputes concerning timeliness to arbitration was simply never contemplated by the parties.

In light of the language contained in the collective bargaining agreement, "*Moog* held that a grievance was not properly arbitrable because the union had not submitted its grievance within the time frame dictated in the collective bargaining agreement." *Armco Employees Indep. Fed'n v. AK Steel Corp.*, 252 F.3d 854, 860

(6th Cir. 2001). Indeed, *Moog* found that, under the parties' collective bargaining agreement, timeliness was a question of substantive arbitrability that should be presented to a court and not an arbitrator. See *Id.* at 860 (noting that "*Moog* concluded that th[e] [collective bargaining agreement] language indicated *substantive not procedural* arbitrability.") (emphasis in original). The holding in *Moog* is clearly fact specific; the Court simply interpreted and applied the language contained in the parties' collective bargaining agreement.

Under *Moog*, courts are charged with reviewing the collective bargaining agreement to determine whether the time limitations are procedural or substantive provisions based on the language contained therein. *Moog*, 852 F.2d at 872. Simply put, the language set forth in the parties' agreement is dispositive and must be used to determine whether a particular dispute was intended by the parties to be arbitrable. Express contractual provisions, to the extent that they are available, must be consulted to determine whether the failure to follow the procedures outlined in the agreement constitutes a procedural issue that may be presented to an arbitrator or a substantive issue that precludes arbitrability. *Id.* (expressly holding that this Court "examine[s], therefore, the agreement that sets out the mutual understanding of the parties"). In short, contractual provisions and the parties' express intent are the guiding principles in this inquiry. This approach presumably makes sense because parties may negotiate different collective bargaining agreement provisions and may contractually decide whether to treat time limitations as procedural or substantive matters.

In *Green Tree Fin. Corp. v. Bazzle*, a "case concern[ing] contracts between a

commercial lender and its customers, each of which contain[ed] a clause providing for arbitration of all contract-related disputes," the parties disputed whether the contracts "forbid class arbitration." 539 U.S. at 447. The Supreme Court held that "[i]n certain limited circumstances" it is appropriate for "courts [to] assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary)." *Id.* at 452 (citing *AT&T*, 475 U.S. at 649). The Court explained that

[t]hese limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. See generally *Howsam, supra*. See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (whether an arbitration agreement survives a corporate merger); *AT&T, supra*, at 651-52 (whether a labor-management layoff controversy falls within the scope of an arbitration clause).

Id. The Court found that

[t]he question here--whether the contracts forbid class arbitration--does not fall into this narrow exception. It

concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. 514 U.S., at 942-945. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to.

Id. at 452-53 (emphasis in original). Although the Court found that "th[e] matter of contract interpretation should be for the arbitrator, not the courts, to decide," this outcome was clearly based on "the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration." *Id.* at 453. As in *Moog*, the Supreme Court determined whether the dispute should be presented to an arbitrator or to a court based on the underlying facts and the language contained in the parties' agreements.

The majority cites a plethora of cases in support of its position in this case. However, the cases are plainly distinguishable from this matter. See, e.g., *Local 285, Serv. Employees Int'l Union, AFL-CIO v. Nonotuck Res. Assocs., Inc.*, 64 F.3d 735, 741-42 (1st Cir. 1995) (Court found that the language in the collective bargaining agreement was almost identical to the arbitration agreement in *Wiley*); *Chauffeurs, Teamsters and Helpers, Local Union No. 765 v. Stroehmann Bros. Co.*, 625 F.2d 1092, 1094 (3d Cir. 1980) (parties selected an arbitrator "to fill in the interstices of the written text. The arbitration clause refers, after all, to 'any difference in opinion . . . regarding the

interpretation or application of any provision of this Agreement"); *Rochester Tel. Corp. v. Commc'n Workers of Am.*, 340 F.2d 237, 238 (2d Cir. 1965) (finding that the parties' collective bargaining agreement included "broad provisions for the arbitration of disputes"); *Local 1422, Int'l Longshoremen's Ass'n v. S.C. Stevedores Ass'n*, 170 F.3d 407, 408 (4th Cir. 1999) (employer made no effort to factually distinguish the parties' collective bargaining agreement from the arbitration agreement in *Wiley*); *Toyota of Berkeley v. Auto. Salesman's Union, Local 1095, United Food and Commercial Workers Union*, 834 F.2d 751, 754 (9th Cir. 1987) (the principal issue was not "whether [the arbitrator] had jurisdiction over the dispute, but rather whether he could proceed without [a party] present."); *Denhardt v. Trailways, Inc.*, 767 F.2d 687, 689 (10th Cir. 1985) (the parties' collective bargaining agreement expressly "state[d] that arbitration is the exclusive means for resolving grievances"); *Aluminum Brick and Glass Workers Int'l Union v. AAA Plumbing Pottery Corp.*, 991 F.2d 1545, 1547 (11th Cir. 1993) (employer made no effort to factually distinguish the parties' collective bargaining agreement from the arbitration agreement in *Wiley*); *Washington Hosp. Ctr. v. Serv. Employees Int'l Union Local 722, AFL-CIO*, 746 F.2d 1503, 1507 (D.C. Cir. 1984) (finding that the employer "has not even attempted to distinguish *Wiley* " and that " *Wiley* is indistinguishable").

Notably, cases the majority purportedly relies on clearly support a finding that not all disputes should be submitted to arbitration. See *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 753 (5th Cir. 1995) (plainly holding that the district court must determine "whether the subject matter of the dispute was subject to arbitration under the parties' agreement"

and interpreting the express language in the parties collective bargaining agreement to determine whether the grievance was arbitrable); *Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Helpers, Inside Workers, Bottlers, Warehousemen Sch. Sightseeing, Charter Bus Drivers, Gen. Promotional Employees of Affiliated Indus., Local Union No. 744 v. Metro. Distributions, Inc.*, 763 F.2d 300, 304 n.4 (7th Cir. 1985) (noting that it may be "proper for a court to determine whether one party to a collective bargaining agreement has waived its right to arbitration because it has pursued its dispute in administrative or judicial proceedings rather than in arbitration"); *Auto., Petroleum and Allied Indus. Employees Union, Local No. 618 v. Town and Country Ford, Inc.*, 709 F.2d 509, 511 (8th Cir. 1983) (discussing *Wiley* and *Philadelphia Printing* and finding that "[t]he essential inquiry when determining the arbitrability of an issue should be the intent of the parties to the contract").

Contrary to the majority's averments, as illustrated in the cases cited above, the circuit courts of appeals are divided on the question of whether a union may compel a company, or vice versa, to arbitrate a grievance appeal filed after the time period set forth in the collective bargaining agreement. It is clear, however, that at least two courts have found that disputes concerning the interpretation of collective bargaining agreement provision may be properly presented to a court. See, e.g., *Philadelphia Printing Pressmen's Union No. 16 v. Int'l Paper Co.*, 648 F.2d 900, 904 (3d Cir. 1981); see also *United Steelworkers of Am., AFL-CIO-CLC v. Cherokee Elec. Co-op.*, No. 86-AR-2163-M, 1987 WL 17056, at *2 (N.D. Ala. Feb. 19, 1987), *aff'd*, 829 F.2d 1131 (11th Cir. 1987).

In *Philadelphia Printing*, a case where a union waited for approximately ten months to submit a written grievance challenging the termination of an employee, the parties were not in agreement that the underlying dispute was arbitrable. When the employer denied the grievance, the union sued to compel arbitration. The Third Circuit found that in order to rule on whether "the parties [] are obligated to submit the [] matter to arbitration," it must first determine "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate." *Philadelphia Printing*, 648 F.2d at 903 (quoting *Atkinson v. Sinclair Refining Corp.*, 370 U.S. 238, 241 (1962)). The Court noted that "[a]lthough the parties could have provided that any dispute over whether there is an arbitrable dispute would be for the arbitrator, this was not done." *Id.* (footnote omitted). The Court found that under the parties' collective bargaining agreement, the "grievance-arbitration procedure" was not a "'mere procedural formality' to be dispensed with unilaterally." *Id.* at 904. The Third Circuit held that the failure to proceed with the grievance procedures, as required by the collective bargaining agreement, substantively precluded an order to arbitrate. *Id.* As the Court aptly stated:

[w]hat the Union seeks is to skip the entire grievance machinery established by the collective bargaining agreement and to proceed directly to arbitration of a controversy that has not ripened into a grievance. This it may not do.

Id. at 904 (footnote omitted). Contrary to the majority's averments, the Court simply did not base its decision on the timeliness of the grievance; rather, the Court found

that the parties never agreed to arbitrate the underlying dispute. *Id.* at 904 n.7.

In *Cherokee*, a case where a grievance was not filed within the time frame stipulated in a collective bargaining agreement, the Eleventh Circuit affirmed the district court's finding that a dispute concerning the timeliness of a grievance was not arbitrable. Contrary to the majority's arguments, timeliness was not the principal issue in *Cherokee*; rather, "[t]he issue before th[e] court [wa]s whether the parties to the Collective Bargaining Agreement intended to arbitrate all grievances or whether, because of an express exclusion or other 'forceful evidence,' [the employer] intended to exclude from arbitration those grievances that are untimely filed." *Cherokee*, 1987 WL 17056, at *2.

The parties' collective bargaining agreement stipulated that "[a]ny grievance not reported within five (5) working days of first knowledge of the occurrence causing the grievance shall be deemed waived [sic] and non-existent." *Id.* at *1. As in the instant case, "[t]he contract [in *Cherokee*] clearly state[d] that if the time limitations are not complied with, the grievance is deemed waived, non-existent, and a settlement of the grievance in favor of the party to whom the default runs" is required. *Id.* at *4. Since the time limitation provision substantively barred the grievance from being referred to arbitration, "the Collective Bargaining Agreement expressly exclude[d] [untimely arbitration grievances] from arbitration." *Id.* In *Cherokee*, whether the time limitation provision was a substantive bar to arbitrability was determined based on the parties' intent and the language contained in the parties' contractual agreement. The district court aptly recognized that "the question of arbitrability--whether a collective

bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination." *Id.* at *2 (quoting *AT&T*, 475 U.S. at 649). *Cherokee*, like *Philadelphia Printing*, supports an affirmance of the district court's decision in this case. In the instant case, the parties never agreed to submit the underlying dispute to arbitration, *Philadelphia Printing*, 648 F.2d at 903, and the time limitation provision at issue in this case is a substantive bar to arbitrability, *Cherokee*, 1987 WL 17056, at *2.

Contrary to the majority's contention, *Moog* can be reconciled with *Wiley*. In *Wiley*, a union sued to compel a company to arbitrate pursuant to a "collective bargaining agreement [that] provides for arbitration as the final stage of *grievance procedures which are stated to be the 'sole means of obtaining adjustment' of 'any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement.*" 376 U.S. at 553 (citation omitted) (emphasis added). The company argued that the union failed to follow the procedural steps set forth in the collective bargaining agreement to commence an arbitration, and that a court should determine whether the failure to adhere to the procedural requirements precluded arbitration. The company urged the Supreme Court to find "that the question whether 'procedural' conditions to arbitration have been met must be decided by the court and not the arbitrator." *Id.* at 556. Based on the express provisions of the parties' collective bargaining agreement, the Supreme Court declined to adopt the company's position. Rather, the Court found that

labor disputes of the kind involved here *cannot be broken down so easily into their 'substantive' and 'procedural' aspects*. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.

Id. at 556-57 (emphasis added). Contrary to the majority's argument, *Wiley* expressly left open the possibility that, depending on the facts, the intent and understanding of the parties, and the language contained in the collective bargaining agreement, procedural issues and disputes may be properly presented to a court rather than an arbitrator. *Id.* at 546-47 ("[W]hether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962))). Indeed, the Supreme Court bluntly discouraged the compartmentalization of disputes and issues as procedural or substantive. This approach is compatible with *Moog* because a distinction between procedural and substantive issues must be grounded in the facts surrounding the dispute and the language contained in the parties' collective bargaining agreement. The outcome in *Wiley* makes sense because the broad language in the parties' arbitration agreement made all disputes under the agreement in that case arbitrable.

In *Howsam*, a case concerning whether a court or an arbitrator of the National Association of Securities Dealers ("NASD")

should enforce a NASD time limit rule for the submission of arbitration claims, the Supreme Court found that

the applicability of the NASD [arbitration] time limit rule is a matter presumptively for the arbitrator, not for the judge. The time limit rule closely resembles the gateway questions that this Court has found not to be "questions of arbitrability." *E.g.*, *Moses H. Cone Memorial Hospital, supra*, at 24-25, (referring to "waiver, delay, or a like defense"). Such a dispute seems an "aspect[t] of the [controversy] which called the grievance procedures into play." *John Wiley, supra*, at 559.

537 U.S. at 85. Notably, *Howsam* is distinguishable from this case and *Moog*, in part, because it did not involve a labor arbitration matter and did not concern the interpretation of a collective bargaining agreement. Furthermore, the majority misconstrues the holding in *Howsam*.

Admittedly, the Supreme Court expressly held that the NASD time limit rule is a procedural inquiry that is properly presented to an arbitrator. However, nothing in *Howsam* supports the majority's proposition that all time limit rules--regardless of parties' intent and the language contained in the parties' collective bargaining agreement--are procedural issues. As in *Moog*, the holding in *Howsam* is fact specific. Unlike this case, in *Howsam* the parties expressly agreed to submit all disputes to arbitration:

[A]ll controversies . . . concerning or arising from . . .

any account . . . , any transaction . . . , or . . . the construction, performance or breach of . . . any . . . agreement between us . . . shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member.

Id. at 81 (citation omitted) (alterations in original). Since the language in the parties' arbitration agreement was extraordinarily broad, the Supreme Court simply could not "conclude that the parties intended to have a court, rather than an arbitrator, interpret and apply the NASD time limit rule." *Id.* at 86.

The majority is wrongfully attempting to expand *Howsam* to this case. The Supreme Court's guidance with respect to NASD time limit rules simply cannot be imposed and grafted onto this case because there are special policy considerations that apply in NASD arbitrations. See, e.g., *Howsam*, 537 U.S. at 85 (finding that "the NASD arbitrators[] [are] comparatively more expert about their own [time limitation] rule, [and are] comparatively better able to interpret and to apply it"). Concededly, this Court has found that *Howsam* governs the issue of the timeliness of submission of claims for a NASD arbitration. See *Smith v. Dean Witter Reynolds, Inc.*, No. 02-6158, 2004 WL 1859623 (6th Cir. 2004) (per curiam) (unpublished case) (applying *Howsam* and noting that *Howsam* "made it clear that the validity of the defense raised in [a NASD arbitration case] was a matter for the arbitrator to determine"). This Court should continue to confine the application of *Howsam* to NASD arbitration cases because nothing in *Howsam* stands for the proposition that the arbitrability of disputes

concerning time limitation provisions in collective bargaining agreements is governed by that case. Consequently, there is no legal or factual basis for extending and imposing the holding in *Howsam* to the instant case.

The majority misconstrues *Wiley* and *Howsam* to improperly create an across-the-board rule to govern the arbitrability of time limitation provisions in labor arbitration cases. As explained above, this approach is misplaced. Unless the parties have clearly and unmistakably agreed that an arbitrator is to determine issues of arbitrability, courts should be able to determine whether a dispute is subject to arbitration. See, e.g., *Warrior*, 363 U.S. at 582-83 (Arbitration is favored "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"). A determination with respect to whether a time limitation provision constitutes a procedural or substantive issue should be based on the facts underlying the claim and the language contained in the collective bargaining agreement. See, e.g., *Wiley*, 376 U.S. at 546-47 ("[W]hether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.") (internal quotation marks and citations omitted). As the Supreme Court has aptly stated, "the question of arbitrability--whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination." *AT&T*, 475 U.S. at 649.

Contrary to the majority's holding, this Court is charged with giving effect to the parties' intent as reflected by the language in the parties' collective bargaining

agreement. In this case, the plain language of the collective bargaining agreement stipulates that the union's failure to adhere to the time limit provisions constitutes forfeiture of the right to arbitrate the grievance decisions. The parties simply did not agree to submit disputes surrounding timeliness to an arbitrator. Based on the express terms of the collective bargaining agreement, the parties contractually agreed that failure to pursue a timely appeal constitutes a substantive bar to proceeding to arbitration. Based upon the plain language in the parties' agreement, the district court in the instant case correctly found that the parties never contemplated presenting to an arbitrator an untimely request for arbitration.

The majority's holding in this case is anything but narrow and is not limited in any principled way. Because the holding could be logically extended to any threshold or procedural issue, the majority's holding presents the threat of sweeping within its ambit matters that the parties intended to reserve for the court. More specifically, the majority's holding is fundamentally flawed because it opens the door to having nonarbitrable disputes improperly resolved by an arbitrator from the inception of an arbitration demand. This holding would extend Congress' policy in favor of arbitration where the parties have agreed to arbitrate beyond anything Congress reasonably intended, and would impose an obligation on parties to arbitrate disputes where the parties have not agreed to arbitrate. See, e.g., *Waffle House*, 534 U.S. at 293-94; see also *Volt*, 489 U.S. at 478. Because the majority installs arbitration as the inevitable and unavoidable first step in resolving disputes, even when arbitration is not contractually required, the majority violates federal policy which prohibits the imposition of compulsory arbitration upon parties except

when they are bound by an arbitration agreement. Cf. *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 209 (1991) (holding that "we refuse to apply th[e] presumption [of arbitrability] wholesale in the context of an expired bargaining agreement, for to do so would make limitless the contractual obligation to arbitrate"). The majority's conclusion will undoubtedly encompass situations and cases where the issue of arbitrability should properly be decided by the district court rather than an arbitrator based on the parties' express intent and the plain language in the parties' arbitration agreement.

In other words, the majority opinion as written, and certainly by implication, will compel arbitration, including the decision whether a matter is arbitrable, even where the parties have not contractually agreed to resolve a dispute in an arbitral forum. Furthermore, under the majority's approach, since arbitrators will be asked to resolve threshold and procedural issues, arbitrators will be able to define and determine the scope of their own jurisdiction even with respect to matters that are not arbitrable. The majority would require matters of contract interpretation intended for the court to be reduced to substantive law governing the arbitrator, which he can ignore or not as he pleases, subject only to this Court's review of the arbitrator's final award. This approach is fundamentally at odds with Supreme Court precedent, *First Options*, 514 U.S. at 945 (recognizing that parties "often might not focus . . . upon the significance of having arbitrators decide the scope of their own powers"), and is particularly problematic because once a matter is submitted to an arbitrator, the standard of review is highly deferential, *Mich. Family Res., Inc. v. Serv. Employees Int'l Union*, 475 F.3d 746, 748 (6th Cir. 2007) (en banc) (establishing that

the review of an arbitration decision is so extremely deferential, at least in the Sixth Circuit, that such review is virtually meaningless and tantamount to rubber-stamping the arbitrator's decision).

As a result of the majority opinion herein, the precarious future of labor arbitration cases in this Circuit is predictable: because of the holding in this case, district courts will send matters to the arbitrator from the onset; the arbitrator will interpret the collective bargaining agreement and render a decision; the decision may be appealed by a party; but the courts, instead of performing an independent review of the arbitrator's decision even where circumstances warrant, will affirm the arbitrator's decision. Essentially, there will be no independent or meaningful review of an arbitrator's jurisdictional determination. This is particularly problematic to the extent that courts have an incentive to minimize judicial review of arbitration decisions in order to conserve judicial resources and avoid delaying or complicating a case, and that this same motivation exists to close the courthouse doors to litigants and deprive them of their rights.

This case creates a thinly-veiled conduit to divert matters to arbitration notwithstanding that the parties have never expressed an intent to arbitrate. This outcome has a strong potential to substantially erode--and ultimately eliminate--appropriate judicial adjudication in arbitration cases. The majority essentially deprives parties of their right to have their disputes settled by a court, even though the parties have not waived that right. This is simply not what the Supreme Court envisioned in *Howsam* or *Wiley*; the Supreme Court clearly did not intend for the courthouse doors to be slammed shut, in such a wholesale fashion, with respect

to determining arbitrability. Indeed, this Court cannot create artificial jurisdictional limitations. *Cf. Jones v. Bock*, 127 S. Ct. 910, 919 (2007) (bluntly reminding this Court that we cannot depart from usual practice on the basis of "perceived policy concerns").

The issue of arbitrability simply cannot be insulated from judicial review where not justified by the law, the particular circumstances of the dispute, or the parties' arbitration agreement. Again, the outcome of this case broadly insulates arbitration decisions from judicial adjudication even in the absence of any appropriate legal justification. This outcome is particularly troublesome because this Court has so sweepingly overruled *Moog* that parties' express intent with respect to arbitration will often be rendered meaningless. Under the majority's formulation, arbitration will be ordered so long as a party to the dispute can point to the existence of an arbitration agreement and demand arbitration even though the dispute at issue is not remotely covered by the express terms of the arbitration provision in the parties' contract. Furthermore, under the majority's approach, the arbitrator himself gets to decide the issue of arbitrability as a threshold matter--with little or no likelihood of judicial review or correction -- even when the parties' dispute is not one which is even arguably covered by the arbitration agreement.

CONCLUSION

The parties in this case did not agree to submit a dispute concerning timeliness to an arbitrator. The majority improperly compels the Defendant company to arbitrate where nothing in the collective bargaining agreement suggests that the parties intended an arbitrator to determine

the arbitrability of the underlying dispute. For the foregoing reasons, I would affirm the district court's decision. I therefore respectfully dissent.

[*1] In the Matter of Eighth Judicial District Asbestos Litigation. Nancy A. Reynolds, & c., Respondent, Amchem Products Inc., et al., Defendants, Garlock Sealing Technologies LLC, Appellant.

No. 89

COURT OF APPEALS OF NEW YORK

2007 NY Slip Op 5579; 8 N.Y.3d 717; 872 N.E.2d 232; 840 N.Y.S.2d 546; 2007 N.Y. LEXIS 1616

June 27, 2007, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

PRIOR HISTORY: Reynolds v. Amchem Prods., Inc., 32 A.D.3d 1268, 822 N.Y.S.2d 216, 2006 N.Y. App. Div. LEXIS 11592 (N.Y. App. Div. 4th Dep't, 2006)

DISPOSITION: Order reversed, with costs, and a new trial ordered.

COUNSEL: Michael J. Hutter, for appellant.

John Ned Lipsitz, for respondent.

JUDGES: Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

OPINION BY: PIGOTT

OPINION

[**547] [**719] PIGOTT, J.:

In this multi-defendant action, Supreme Court erred in failing to disclose to all of [*2] the parties the existence of a high-low agreement between the plaintiffs and one of the

defendants. Because this error prejudiced the determination of the rights and liabilities of the non-agreeing defendant at trial, a new trial on liability and damages is warranted. I.

Plaintiff Donald H. Reynolds ¹ worked at the Ashland Oil Refinery in Tonawanda, [**548] New York from 1942 through 1987, and purportedly contracted mesothelioma from his exposure to asbestos while employed at that facility. Reynolds and his wife [**720] commenced this products liability/negligence action against various manufacturers and distributors of alleged asbestos-containing products used at the refinery. At the time of trial, only two defendants remained in the action: Garlock Sealing Technologies LLC, a manufacturer of gaskets and packaging, and Niagara Insulations, Inc., a distributor and installer of pipe covering insulation. It is alleged that Reynolds's exposure to asbestos in these defendants' products caused his disease.

¹ Reynolds died after the entry of judgment. His wife, Nancy H. Reynolds, responds to this appeal both individually and as the executrix of his estate.

Unbeknownst to Garlock, plaintiffs and Niagara entered into a high-low agreement two weeks before trial whereby it was agreed that Niagara's total liability would fall into a predetermined range. Specifically, if the jury's damage award against Niagara was \$ 155,000 or less, Niagara would pay plaintiffs a minimum of \$ 155,000, even if Niagara was found to be without fault; if the damage award against Niagara was more than \$ 185,000, Niagara's liability would be capped at \$ 185,000; if the damage award fell within the \$ 155,000 - \$ 185,000 range, Niagara would pay plaintiffs the designated amount within that range. Thus, the high-low agreement differed in its effect from a settlement agreement in that Niagara had only \$ 30,000 at stake and its continued participation at trial might have tactical importance for plaintiffs' claims against Garlock. ²

² We note that the \$ 30,000 range here, although not negligible, was certainly quite narrow. Indeed, the narrower the range, the more likely it seems that the parties' true motive for entering into a high-low agreement is to gain a tactical advantage at the expense of the non-agreeing defendant.

Although Supreme Court was cognizant that plaintiffs and Niagara had entered into a high-low agreement, it was unaware of its terms or the amounts involved. Neither Supreme Court nor the agreeing parties advised Garlock of the agreement, and the matter proceeded to trial with Garlock and the jury unaware of its existence. The jury apportioned liability against Garlock and Niagara at 60% and 40%, respectively, and awarded plaintiffs [*3] damages in the amount of \$ 3,750,000.

Having learned of the high-low agreement just days after the jury's verdict, Garlock moved to set aside the verdict and requested a new trial on various grounds. Relevant to this appeal, Garlock asserted that Niagara's continued participation in the trial after entering into the high-low agreement with plaintiffs was inherently unfair and prejudicial, and that Supreme Court's failure to disclose the existence of the agreement prejudiced Garlock and constituted reversible error. Supreme Court disagreed and entered judgment accordingly.

[**721] The Appellate Division, with one dissent, affirmed the judgment, holding that Supreme Court's failure to disclose the high-low agreement did not warrant reversal absent evidence of collusion between plaintiffs and Niagara to the detriment of Garlock, noting that Niagara never lost its incentive to magnify Garlock's liability or minimize its own

(32 AD3d 1268, 1270, 822 N.Y.S.2d 216 [4th Dept. 2006]). We granted leave and now reverse. II.

At the outset, it should be noted that Supreme Court did an admirable job of brokering pre-trial settlements of many claims in this complex litigation involving numerous defendants. That only two defendants remained in the litigation at the time of trial is a testament to Supreme [***549] Court's effectiveness in that regard. Nonetheless, we are constrained to agree with Garlock that the court's failure to disclose the existence of the high-low agreement rendered impossible a fair determination of Garlock's rights and liabilities.

A high-low agreement is a tool commonly used in litigation that guarantees the plaintiff a minimal recovery while concomitantly capping a defendant's potential exposure (see Faley, *High-Low Agreements: Misunderstood Litigation Technique*, NYLJ, March 27, 1998, at 1, col 1). Because the amount of damages a plaintiff is entitled to recover under a high-low agreement is usually fixed by the liability and damage determinations made by the factfinder, cases involving such agreements routinely go to trial. Unlike a typical settlement situation where the settling defendant is dismissed from the action, having "bought its peace," the defendant entering into a high-low agreement routinely remains in the action until its ultimate liability has been ascertained.

When entered into between a plaintiff and a defendant in a single-defendant trial, the high-low agreement affords the parties a means of tempering the significant risks associated with proceeding to trial. In a multi-defendant litigation, however, a high-low agreement between a plaintiff and fewer than all defendants has the potential of prejudicing the rights of the non-agreeing defendant if all parties are not apprised of the agreement's existence. Indeed, courts and commentators alike have acknowledged that secretive agreements may result in prejudice to the non-agreeing defendant at trial, distort the true adversarial nature of the litigation process, and cast a cloud over the judicial system (see generally *Slusher v Ospital*, 777 P.2d 437, 440-441, 444 [**722] [*4] [Utah 1989]; *Ratterree v Bartlett*, 238 Kan. 11, 707 P.2d 1063, 1076 [Kan 1985]; *General Motors Corp. v Lahocki*, 286 Md. 714, 410 A.2d 1039, 1044-1048 [Md 1980]; *Ward v Ochoa*, 284 So. 2d 385, 387-388, [Fla 1973]; Hoenig, *Products Liability, Experts, Privileged Info.; Secret 'High-Low' Agreements*, NYLJ, Oct. 11, 2006, at 3, col 1; Kaufman, *Outside Counsel, Risk Reduction Strategies in Personal Injury Litigation*, NYLJ, Jan. 21, 2000, at 1, col 1; Benedict, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum L Rev 368 [1987]). The resulting prejudice warrants a new trial (see *Ratterree*, 707 P.2d at 1075-1076; *General Motors Corp.*, 410 A.2d at 1046).

Here, Garlock was deprived of its right to a fair trial by Supreme Court's failure to disclose the existence of the high-low agreement. The agreement furnished plaintiffs with an incentive to maximize Garlock's liability while minimizing Niagara's, because the potential amount of damages plaintiffs could recover from Niagara was capped at \$ 185,000. While it is not uncommon for a plaintiff to have a financial incentive to maximize the liability of one particular defendant in a multi-defendant action, Garlock was entitled to disclosure of the existence of the high-low agreement so it knew the true posture of the case. Had the agreement been disclosed, Garlock could have adjusted its trial strategy accordingly and evaluated the risks of going to trial with the knowledge that plaintiffs had an added incentive of making Garlock the target defendant.

Non-disclosure also deprived Garlock of the opportunity to, among other things, seek

appropriate procedural and evidentiary rulings from the trial court and argue the significance of the high-low agreement to the jury. For instance, Garlock may have conducted its jury selection in a different manner, argued that it should not [***550] have been required to share peremptory challenges with Niagara, or brought *in limine* motions concerning the admissibility of the agreement and to what extent, if any, Garlock would be permitted to cross-examine witnesses concerning the contents of the agreement. Instead, Garlock was compelled to proceed blindly to trial without any meaningful opportunity to defend itself from the deleterious effects that the secret agreement may have had on Garlock's defense.

To ensure that all parties to a litigation are treated fairly, we hold that whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the [**723] parties must disclose the existence of that agreement and its terms to the court and the non-agreeing defendant(s). This result strikes a proper balance between this State's public policy of encouraging the expeditious settlement of claims, and the need to ensure that all parties to a litigation are apprised of the true posture of the litigation so they may tailor their strategy accordingly. Disclosure provides a non-agreeing defendant a meaningful opportunity to place on the record how it intends to use the agreement at trial, if at all, and affords the trial court an opportunity to weigh the interests of all the parties in considering the extent to which an agreement may be utilized in that forum. Of [*5] course, the determinations as to what effect, if any, the existence of the agreement will have at trial, including whether such an agreement should be disclosed to the jury, are matters that lie within the sound discretion of the trial court.

Because Garlock is entitled to a new trial, we do not address Garlock's remaining arguments.

Accordingly, the order of the Appellate Division should be reversed, with costs, and a new trial ordered.

Order reversed, with costs, and a new trial ordered. Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided June 27, 2007

Bones v. Prudential Financial Inc.

102396/07

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2007 N.Y. Misc. LEXIS 6399; 238 N.Y.L.J. 46

August 20, 2007, Decided

CORE TERMS: whistleblower, promissory estoppel, cause of action, terminated, breach of contract, cognizable, premised, bonus, moot, suspension, amend, brokers, fails to state, foreseeable, responding, asserting, promised, withdraw, assured, joined, corners, vest, internal investigation, stock options, cross-subsidization, purportedly, cooperated, forfeited, withdrew, vested

JUDGES: Justice Lowe

OPINION BY: Lowe

OPINION

In the instant action, Plaintiff Brian D. Bones ("Bones") brings a cause of action for promissory estoppel against Defendants Prudential Financial, Inc ("Prudential Financial") and Prudential Insurance Company of America (collectively, "the Defendants"). In the instant motion, the Defendants seek to dismiss this claim pursuant to CPLR 3211(a)(7).

BACKGROUND

Bones is a New Jersey resident. In June 1997, he joined Prudential Financial as a Director of Group Life Insurance Sales; his employment was at-will. Prudential Financial is a New-Jersey corporation, with its principal place of

operations in Newark, New Jersey. It is in the mutual-insurance business. Prudential Life Insurance Company of America is Prudential Financial's subsidiary. Its primary place of business is also in New Jersey.

During Bones' tenure at Prudential, he alleges that he was responsible for developing life-insurance-sales business plans. (See, Original Complaint at page 4, P14) He further avers that among his achievements was a new business initiative where awards were given to brokers who brought business to Prudential. (Id at pages 4-5, P18-22) Moreover, he purportedly had signatory authority to award special compensation to brokers, but needed to report to his supervisors and Prudential's Legal Department on his activities. (Id at page 4, P15 & 17) Everything he did allegedly met with their approval.

In his original complaint, Bones alleged that in 2004, based upon information and belief, the New York State Attorney General began to investigate the Defendants regarding illegal kickbacks and commissions, bid rigging, price fixing, and cross-subsidization. (See, Id at page 2, P4) At the same time, the California Insurance Department filed an action against Prudential and others in California state court for making undisclosed payments to

brokers in order to induce the latter to steer clients towards the former. (Id at page 7, P35) In response to these investigations, a derivative action was filed against Prudential. (Id at page 8, P37) Bones pleads that he conducted an internal investigation concerning the pricing differentials and cross-subsidization as well, and reported his findings to Prudential's Legal Department and management. (Id at page 14, P87-88)

On January 23, 2005, after Bones made his internal inquiry known, he was suspended for an unspecified amount of time. (Id, P89) The Defendants aver that the reason for the suspension was his involvement in the firm's broker-compensation program. (See, Memo in Opp'n at page 3) During the suspension, Bones alleges that Prudential assured him that he would get paid his 2004 performance-based bonus, and that his employee options would continue to vest. (See Original Complaint at page 9, P46-48) However, he could not exercise his options at that time. (Id.) On December 3, 2005, Bones was terminated as a result of the investigation. Prudential forfeited Bones' vested stock options.

On June 7, 2006, after Prudential terminated him, Bones testified before the New York AG. (Id at page 10, P52) In December 2006, Prudential settled with the New York AG's office with a \$ 19 million-dollar payout. (Id at page 8, P39)

Bones commenced the instant action on February 20, 2007, asserting claims for breach of contract, wrongful termination in violation of New York's Labor Law § 215 and 740 (the New York whistleblower statute), and promissory estoppel. On April 16, 2007, prior to answering the complaint, the Defendants filed the instant motion to dismiss pursuant to CPLR 3211(a)(7).

The Defendants moved to dismiss the whistleblower cause of action on the grounds that it fails to state a claim, is barred by the statute of limitations, and New York County is not the proper venue for it. Moreover, they moved to dismiss the breach of contract and promissory estoppel claims premised on their argument that the whistleblower claim-assertion bars these since all originate from the same factual background. They also argue that Bones fails to plead a cognizable claim for breach of contract and promissory estoppel, irrespective of the whistleblower claim.

Subsequent to the instant motion's service, Bones filed an amended complaint as of right pursuant to CPLR 3025(a), which reads

a party may amend [her/his] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it

Bones was in accordance with this CPLR provision to file his first amended complaint because it was within the time frame allotted for him to respond to the instant motion.

In his amended complaint, Bones withdrew the whistleblower cause of action, with only those for breach of contract and promissory estoppel remaining. In their reply brief, the Defendants argue that since Bones initially asserted a whistleblower cause of action that bars other claims arising from the same Facts, the former's withdrawal still does not permit the latter two.

In a letter dated August 1, 2007, Bones notified the Court that he withdrew his breach of contract claim with the Defendants' consent, leaving only that for promissory estoppel. Accordingly, only two issues will be discussed: whether Bones adequately pleads promissory estoppel and whether the now-withdraw whistleblower claim bars it.

DISCUSSION

I. The Promissory Estoppel Claim

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action..." (CPLR 3211(a)(7)) In a motion to dismiss, the court takes the Facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (see *AG Capital Funding Partners, LP v. State Street Bank and Trust Co*, 5 NY 3d 582, 842 N.E.2d 471, 808 N.Y.S.2d 573 [2005]). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." (*Ackerman v. 204 East 40th Owners Corp.*, 189 AD 2d 665, 592 N.Y.S.2d 365 [1st Dept 1993].) "To avoid dismissal of a promissory estoppel claim, a plaintiff must allege (i) an unambiguous promise; (ii) reasonable and foreseeable reliance on the promise; (iii) and injury as a result of that reliance." (*Urban Holding Corp v. Haberman*, 162 AD 2d 230, 556 N.Y.S.2d 337 [1st Dept 1990].)

As to the promise, Bones alleges that he was assured, unambiguously, that his 2004 bonus was being held in abeyance pending the suspension, and that his options would continue to vest. (See, Amended Complaint at page 6, P31; at

page 9, P54-55) The pleading satisfies the first element because Bones identifies a specific promise made by individuals who were in the position to carry out said promise's terms. (See, *Urban*, supra)

Next, Bones pleads that he "acted in accordance with any and all requests made to him by Prudential" and that he "relied on Prudential's conditions that he would be required to cooperate fully with all [their] instruction." (Id at page 6, P32; at page 9-10, P57) Moreover, "[i]n reasonable and foreseeable reliance on Prudential's promise, [he] did not seek alternative employment for the 2005 year." (Id at page 10, P58) Affording Bones' allegations the requisite liberal construction, he adequately pleads that he reasonably relied on the alleged promise. Indeed, in anticipation of his compensation, he purports that he complied with all of Prudential's directives and did not seek employment.

Finally, he pleads that he "suffered a substantial change in position, causing unconscionable injury." (Id at page 10, P58) This change of position is that of employment. He did not seek employment, relying on Prudential's promise. The alleged sustained injury is that of monetary loss, due to his reliance on the promise.

In reviewing a defendant's motion to dismiss pursuant to CPLR 3211(a)(7), a court need not look to see if the plaintiff proves the claim in the pleadings; rather it will look only at this stage to see if he states a cognizable cause of action despite how poorly drafted it may be. (See *Mandelblatt v. Devon Stores*, 132 AD 2d 162, 521 N.Y.S.2d 672 [1st Dept 1987].) From the four corners of its complaint, Bones pleads such a claim for promissory estoppel. But before a decision can be rendered on the instant motion, this Court

must determine whether Bones can indeed maintain this claim.

II. New York's Whistleblower Statute and Other Factually-Identical Claims

Under New York's Whistleblower statute, "an employee who has been the subject of a retaliatory personnel action... may institute a civil action in a court of competent jurisdiction..." (NY Labor Law § 740(4)(a)) Furthermore, "[t]he institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract...law...or under the common law." (Id, § 740(7)) The waiver occurs when the other claims arise out of the same alleged wrongful discharge. (See, *Hayes v. Staten Island University Hospital*, 39 AD 3d 593, 834 N.Y.S.2d 274 [2nd Dept 2007])

In his original complaint, Bones' whistleblower claim is premised on his contention that he was "wrongfully terminat[ed]...due to his cooperation in the investigations of Prudential..." (Original Complaint at page 15, P91) Summarily, this claim arose from the factual background whereby the government commenced an investigation into Prudential's alleged illegal practices, Bones conducted the internal investigation, he cooperated with the government, and Prudential purportedly terminated him as a result of said inquiry. The promissory estoppel claim is based on Bones' allegation that Prudential promised to pay him the bonus and stock options allegedly due, he was eventually terminated, Prudential forfeited said options and awards despite the fact that he fully cooperated with all their instructions and directions, and he relied detrimentally on this promise that he would get paid a bonus and vested options. (Id at pages 15-16, P96-103) To be sure, these two claims

in the original complaint derive from the same factual background: Bones assisted the New York AG's office with their inquiry, and as a result he was terminated and the compensation due was extinguished.

The amended complaint pertains to "the Defendants' failure to pay Mr. Bones amounts owed to him..." (Amended Complaint at page 1, P1) Accordingly, the promissory estoppel claim is void of any reference to the governmental investigation, and is premised solely on Bones' assertion that he was promised certain financial awards that he ultimately did not receive. (See, Id at pages 9-10, P53-60) "The issues involving the original complaint are moot when [either by right or with the court's leave]" the plaintiff amends her/his complaint. (*Chalasan v. Neuman*, 64 NY 2d 879, 476 N.E.2d 1001, 487 N.Y.S.2d 556 [1985].) Therefore, in general, the whistleblower's claim is no longer applicable to the instant action.

The Defendants, however, argue that the New York courts have carved an exception to this general rule when the Plaintiff's amended complaint, as here, withdraws a whistleblower claim. The basis for their argument is case law holding that a plaintiff cannot preserve claims derived from the same Facts as the now-removed whistleblower cause of action. (See, *Hayes*, supra; *Rotwein v. Sunharbor Manor Residential Health Care Facility*, 181 Misc 2d 847, 695 N.Y.S.2d 477 [Nassau County 1999]; *Owitz v. Beth Israel Medical Center*, 1 Misc. 3d 912(A), 781 N.Y.S.2d 626 [New York County 2004].) The Facts contained therein, however, are distinct from those in the instant action.

In all of the cases cited, the issue had been joined, unlike the instant action. There, as is here, the Defendants moved to dismiss and cited, as one of their reasons, the whistleblower statute's waiver

provision. In response, the plaintiffs cross-moved, and sought the court's leave to amend their complaint pursuant to CPLR 3217(b) to withdraw the whistleblower claim; they could not move as of right under CPLR 3025(a). The respective court, in its discretion, denied the cross-motion finding that the plaintiffs' request was a not-so-subtle attempt to circumvent the motion's likely granting.

The facts in the instant motion warrant a different outcome. Bones amended his complaint as of right; this Court has no discretion in permitting or denying said amendment when it is done within the statutorily-prescribed time-frame and manner. What remains therefore is a complaint asserting a promissory estoppel cause of action. To be sure, those who are familiar with the original complaint are aware that the previously-asserted whistleblower claim and the present promissory estoppel cause of action relate

to the same background Facts. But that prior complaint is now moot. (See, Chalasani, supra) ¹ Accordingly, Bones asserts a cognizable claim for promissory estoppel in a properly commenced complaint. The Defendants' motion to dismiss is denied.

1 Since the whistleblower cause of action is moot, the Defendants' claim for attorney's fees premised on the New York Labor Law § 740(6) is also rendered moot.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Defendants' motion for dismissal pursuant to CPLR 3211(a)(7) is denied.

This shall constitute this Court's decision and order.