S.E.C. V. MEDICAL COMMITTEE FOR HUMAN RIGHTS 1971 Term 70-61

Cert to CA DC McGowan, Tamm & Robinson
Opposition & Reply

This case raises the reviewability as an "order" under § 25(a) of the Exchange Act, of S.E.C. "no-action" letters issued in connection with corporate determinations to omit from proxy solicitation material, pursuant to § 14 (a) and Rule 14a-8, shareholder proposals submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" (Rule 14a-8 (c) (2)), and those involving "a matter relating to the conduct of the ordinary business operations of the issuer." (Rule 14a-8 (c) (5)).

The shareholder proposal in question was that Dow stop making apalm. Resp protested Dow's decision to omit the proposal to the SEC. The Division of Corporate Finance issued a no-action letter to Dow. Resp appealed to the Commission, which by minute order upheld the action of its staff. Resp then sought review in CA DC. That court held that "the Comm'ns proxy procedures are possessed of sufficient 'adversariness' and 'formality' to render its final proxy determinations amenable to judicial review." It remanded to the Comm'n for an articulatic of its reasons, and for a reconsideration of resp's claims.

The SEC presents primarily policy arguments in favor of non-reviewability. (1) the resulting formalization of the comm'ns proxy review procedures will impede the use of § 14 (a) to further 'corporate democracy' (2) time is of the essence in reviewing proxy materials; (3) the decision will cause unnecessary appellate litigation; (4) an enforcement action in the DC affords the shareholders greater and more effective relief.

The SEC also makes a legal argument for non-reviewability; while the staff decided on the merits that Dow need not include the proposal, the Comm'ns minute order is silent as to its reasoning. The SEC's brief suggests that procedural or strategic considerations might have dictated its result.

Resp argues that the practical effect of the decision below will be minimal -- it cites figures that in 1969, only 137 companies received shareholder proposals, and in only 19 cases were these proposals omitted (and some of these were voluntarily w/drawn).

Resp also argues that the SEC itself characterizes its proxy review procedures as "formal" and mandatory where shareholder proposals are rejected by the company.

Resp argues that the action of the full Comm'n upheld its staff on the merits, and represents a purely legal question -- the proper interpretation of the Proxy rules.

Resp next argues that only one or two appellate proceedings will flow from the decision below each year, because under that decision, it is only when the full Comm'n acts on a no-action letter that a reviewable order exists under § 25(a), and this happens only 3 or 4 times out of the 10 cases or so which reach it presenting this question.

Resp finally suggests, by analogy to other admin. agencies, that review of orders of this kind has "been repeatedly sustained by the Supreme Court." (citing McGrath v. Kristensen, 340 U.S. 162, 169 and Perkins v. Elg, 307 U.S. 325, 349-50).

In reply, the SEC argues that the rationale of the court below would extend to Comm'n procedures other than those relating to stockholder proposals, and that the court's rationale "suggests" that direct review would also apply where the Comm'n exercised its discretion to decline to review a staff decision.

The SEC also suggests that resp's figures are misleading. While only 137 companies received proposals, 221 proposals were submitted, and 48 of these were omitted, each being treated separately by the Comm'n. The SEC also suggests that "in light of present social and political trends," this number is likely to increase in future years, of which an increasingly large proportion will result in deadlocks requiring Comm'n action.

11/10/71 RLJ