UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30501

NORMAN L. HARWELL, et al.,

Plaintiff-Appellants,

v.

GROWTH PROGRAMS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas

STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF PETITION OF NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., FOR REHEARING

DAVID FERBER
Solicitor

PAUL GONSON
Assistant General Counsel

MARTIN MOSKOWITZ
Special Counsel

DAVID J. ROMANSKI
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30501

NORMAN L. HARWELL, et al.,

Plaintiff-Appellants,

v.

GROWTH PROGRAMS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas

STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF PETITION OF NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., FOR REHEARING

On October 15, 1971, this Court reversed motions for summary judgment which had been granted by the district court in favor of the defendants, including the National Association of Securities Dealers, Inc. ("NASD"), and remanded the proceeding for a trial on the merits. We are informed by the NASD that today it is mailing to this Court a petition requesting rehearing and suggesting rehearing in banc and, should rehearing be denied, requesting that the Court modify its opinion by the deletion therefrom of that portion dealing with the effects of the antitrust laws on the activities of the NASD. The Commission supports the relief requested therein for the reasons which follow.

may well have led this Court to believe that it was being asked to weigh the antitrust issue on the basis only of the statutory scheme of self-regulation by national securities associations under Commission oversight provided by the Maloney Act. While the statutory pattern of regulation by the Commission over the NASD is somewhat more pervasive, in respects which we believe to be material here, than the analogous form of regulation over national securities exchanges provided in Section 6 of the Securities Exchange Act, 15 U.S.C. 78f[8/] (and for that reason alone this case is readily distinguishable from both Thill Securities Corporation v. New York Stock Exchange, 433 F. 2d 264 (C.A. 7, 1970), certiorari denied, 401 U.S. 994 (1971), and Silver v. New York Stock Exchange, 373 U.S. 341 (1963)), it is what the Commission did here--not what it could have done--which is critically important. It is in that respect that this Court's rejection of an argument that this case is different from Silver and Thill, with the statement that the extent of the Commission's supervision "is not readily apparent from the record" (Slip Op. 14), requires rehearing.

2. The presence of active Commission oversight here makes it unnecessary to determine in this case whether the mere possibility of

---

8/ As discussed in the NASD's rehearing petition, the NASD's proposed rules must be reviewed by the Commission prior to their becoming effective and the Commission may disapprove them, in which case they cannot become effective. On the other hand, while an exchange must file rules with the Commission prior to the time they are to become effective, the Commission has no statutory power to disapprove them, although the Commission has authority to require changes in existing exchange rules respecting certain subjects. Nor is there any provision relating to exchanges comparable to Section 15A(n) of the Maloney Act, 15 U.S.C. 78o-3(n), which states that provisions of the Maloney Act shall prevail if in conflict with any provision of law in force on the date of enactment of the Maloney Act, June 25, 1938.

Commission review under the Maloney Act of the NASD's actions will clothe those actions with antitrust immunity--the question comparable to that presented to the Court of Appeals for the Seventh Circuit in Thill.[9/] We submit that the NASD could be under no liability in this case, whatever standard would be applicable to resolve the question in the absence of active and close Commission oversight.

3. While the complaint contains general antitrust allegations, the real dispute is essentially between 1300 shareholders constituting the class of plaintiffs who have purchased contractual plans from the appellee Growth Programs, Inc., and the approximately 110,000 other shareholders of the mutual funds involved whose shares were being diluted by the activities of some of the plaintiffs. There is nothing alleged in any way comparable to the situation in Silver, where stock exchange members were directed by the exchange not to continue their direct wire connections with another broker who was not a stock exchange member--a direction that tended to promote the monopoly of stock exchange firms and for which no reason had been given by the exchange. Nor is there any allegation remotely comparable to the allegations of adverse economic effect on business competitors in the Thill case, which challenges a stock exchange rule that precluded members from paying

---

9/ Judge Campbell, in his opinion for the court of appeals (which remanded the case for full proceedings to determine whether the New York Stock Exchange's anti-rebate rule was necessary to make the Securities Exchange Act work), noted that there was no evidence in the record ". . . as to the extent to which the challenged rule is subject to actual review by the SEC; there is no evidence as to what in the regulatory scheme 'performs the antitrust function'; and, most notably, there is no evidence as to why the anti-rebate rule must be preserved as 'necessary to make the Securities Exchange Act work'." 433 F. 2d at 270.

rebates to non-exchange members. The interpretation involved in the instant case, as was fully explained, was clearly designed solely to ensure fair dealing to public investors and is thus entirely in accord with the purpose of the Securities Exchange Act. Accordingly, it is not surprising that the NASD, in the explanation contained in its interpretation, discussed at some length the injury to public shareholders that the interpretation was intended to prevent and that neither it, nor the Commission, in approving that interpretation or in its Mutual Fund Report to the Congress, made any specific reference to whatever minor antitrust effect could have resulted from the interpretation. It could always be argued that the issuance of a rule of fair conduct designed to curb harmful activities could be deemed to have some anticompetitive effect on those engaged in such activities.

4. This Court recognized that, in applying the antitrust laws to actions of the NASD, "the path to a correct decision is lined with deep-rooted public policy considerations" (Slip Op. 8). Not the least of these is the importance that Congress placed upon self-regulation by brokers and dealers under Commission supervision in the interests of public investors. The NASD may be reluctant to provide necessary protections for such investors through adoption of rules or interpretations, even where, as here, the NASD and the Commission have agreed on the need for such protections, if there is the possibility

that in such a situation the NASD might be subject to treble damages in an antitrust suit.

Respectfully submitted,

DAVID FERBER
Solicitor

PAUL GONSON
Assistant General Counsel

MARTIN MOSKOWITZ
Special Counsel

DAVID J. ROMANSKI
Attorney

Securities and Exchange
Commission
Washington, D.C. 20549

DATED: November 15, 1971