BENCH MEMORANDUM

No. 73-2055-CFX

Securities Investor Protection Corp. v. Barbour

Cert to CA6 (Phillips, Celebrezze, Miller)

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Karen Nelson Moore, 3/6/75

Discussion

This case presents a very discrete question which does not appear very difficult to resolve: does the SEC have the exclusive right to initiate an action in USDC to compel the Securities Investor Protection Corporation (SIPC) to discharge its obligations under the Securities Investor Protection Act, or may such action be initiated by customers of a member broker-dealer? CA6 answered this question in favor of the customers, as represented by the receiver in bankruptcy of the member. Both the SEC and the SIPC contend otherwise, stating that the remedy is exclusive with the SEC. I believe that the SEC view is absolutely correct. This view is clearly expressed in the SG's brief for the SEC, and this memo will highlight the SG's rationale only briefly.

The basic question is whether §7(b) of SIPA gives the SEC exclusive powers to require SIPC to act, or whether §3(b)(1), which provides SIPC with the power to sue or be sued, provides a right of action to private parties. The SEC brief suggests three good reasons for its view in favor of SEC exclusivity:

(1) SIPA does not provide standards of conduct for its members, and thus, unlike many other areas of securities law, a private right of action would not serve to encourage compliance with the statutory standard. This distinguishes JI Case Co v. Borak, 377 U.S. 426, where the Court recognized an implied private right of action to enforce proxy rules. Further, the SEC notes that it undertakes an active inspection program concerning financial difficulties of member broker-dealers.

(2) Implication of a private right of action may frustrate the public interest and indeed the purposes of the Act. The SEC is the appropriate organ to determine whether SIPC is fulfilling the intent of the Act.

(3) Just as in the case of National R.R. Passenger Corp. v. National Ass'n of RR Passengers, 414 U.S. 453, nothing in the legislative history or other provisions of the Act suggests an intent of Congress to permit private suits.

Finally, the SEC brief concludes with the observation that in case of abuse of discretion, the SEC's decision not to sue SIPC could be judicially reviewable, as in the Amtrak case supra. Thus, there is no substantial fear of utterly capricious action.

Recommendation: Go with the SEC. I think the particularly persuasive point lies in the second aspect, that of ensuring the public interest. The SIPA provides carefully for procedures to aid in the orderly liquidation of failing members, under the guidance of the SIPC, and subject to review by the SEC. To allow private parties to intervene on the basis of their own interests would seem to conflict with the congressional intent of leaving some discretion to the SIPC and the SEC.

If the SEC view is adopted, there is no need to consider the other issue on which cert was granted, i.e., whether the receiver can assert the private right of action of the customers. SIPC contends that the receiver stands in the shoes of the debtor, i.e., the member, and thus cannot assert the rights of the customer. I tend to think that this view is unduly restrictive, and not required by the precedents of the Court cited by SIPC. Given

the fact that this issue will be reached only if the Court adopts the implied private right of action, it would seem almost inconsistent to require each customer to sue individuall rather than to allow the receiver to sue on behalf of the whole group.