In the

Supreme Court of the United States

SECURITIES INVESTOR PROTECTION CORPORATION,

Petitioner,

v.

JAMES C. BARBOUR ET AL

No. 73-2055

Washington, D. C.
March 17, 1975
March 18, 1975

Pages 1 thru 34

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - x

SECURITIES INVESTOR PROTECTION CORPORATION, :

Petitioner, :

v. : No. 73-2055

JAMES C. BARBOUR ET AL :

- - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, March 17, 1975
Tuesday, March 18, 1975

The above-entitled matter came on for argument at 2:47 o'clock p.m. on Monday, March 17, 1975 and was adjourned at 3:00 o'clock p.m to be resumed the following morning, Tuesday, March 18, 1975, at 10:10 o'clock a.m. The argument was concluded at 10:46 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILFRED R. CARON, ESQ., Associate General Counsel, Securities Investor Protection Corporation, 900 Seventeenth Street, N.W., Washington, D. C. 20006
For Petitioner

W. OVID COLLINS, JR., ESQ., Cornelius, Higgins and White,

[continued]

[Continued]

Third National Bank Building, Nashville, Tennessee 37219
For Respondent

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 73-2055, Securities Investor Protection Corporation versus James C. Barbour et al.

I think you may proceed now, Mr. Caron.

ORAL ARGUMENT OF WILFRED R. CARON, ESQ.

ON BEHALF OF PETITIONER

MR. CARON: One would think I would be happy to wait awhile, but in any event, I am sorry for the interruption.

MR. CHIEF JUSTICE BURGER: Not at all. Go ahead.

MR. CARON: May it please the Court, I would state at the outset that this particular case presents for review for the first time the Securities Investment Protection Act of 1970 which created the Petitioner, the Securities Investment Protection Corporation.

I will probably slip into certain jargon because of our familiarity with the Act, so I would like to point out that I will refer to that legislation as the 1970 Act.

I would be referring to the Petitioner as SIPC, by which it has come to be called, and I would be referring to brokers and dealers who are required to be members of SIPC as -- simply as members.

As I view the issues in the case, the particular circumstances out of which these issues arise are not particularly important or material.

For the purpose of context, however, I would summarize them in this fashion: The controversy does arise out of a liquidating receivership of a Tennessee broker-dealer and several affiliated companies who are not broker-dealers.

Soon after the receivership commenced, there was an order made requiring persons who claimed ownership of certain securities to make a deposit of five percent of the principal amount as a reserve to cover administrative expenses and fees.

Since that time, about 5 percent -- three and a half percent has been returned.

Approximately four months after the commencing of the receivership, when it had been, in fact, substantially completed, SIPC was notified by counsel for the receiver that there appeared to be some risk that those persons who made those deposits may be exposed to some loss and therefore requested certain advances of funds in order to make up the difference.

For various reasons which we felt were good and sufficient which are not before this Court, after consideration of the available information and the status of the proceedings, SIPC determined that it would not be appropriate to intervene in those circumstances and following that, of course, the receiver five months later commenced a proceeding in the District Court in Nashville, the object and purpose of which was to compel SIPC to provide whatever the benefits are under the '70 Act to these persons who are still owed that one and a half percent deposit.

That is the thrust of the proceeding and it is, in our judgment, a proceeding which seeks relief precisely of the kind which the 1970 Act expressly granted to the Securities Exchange Commission.

In consequence, the issues which this Court has agreed to hear and review are these:

Firstly, whether or not members of the investing public who are customers of a failed member have a right to invoke this extraordinary remedy to review a determination by SIPC and compel certain mandatory relief and,

Secondly, if, indeed, such a right exists, or can be implied from the statute, whether or not this receiver has the standing to maintain such an action.

Our position essentially is that the grant to the SEC of this extraordinary remedy of enforcement over SIPC in order to compel it to perform its statutory responsibilities is clearly an exclusive grant of a very extraordinary power and an extraordinary remedy.

Our position is that there is nothing in the legislative history or in the statute itself to suggest to the contrary.

Indeed, our position is that an analysis of the statute and its purpose and its legislative history would clearly indicate that Congress, indeed, fashioned and created a special supervisory tool, placed it in the hands of the Commission and that it indeed expected that no member of the general public would simultaneously enjoy that considerable power.

We depend on the statutory analysis. We, of course, look to certain maxims of construction but in my opinion, to the extent we look to the principles of construction, they are only really assistance to what I would regard as an ineluctable conclusion.

Because the job of analysis is far better done in writing and in briefs, I would not attempt to detail too much the contents of the brief we filed. I would like, however, to focus on three aspects of the statute which I consider to be most helpful and most critical.

Firstly, I would like to mention briefly the purpose of the legislation. It was enacted effective December, 1970 in the wake of a considerable number of broker-dealer failures in the bad years of 1967, 8 and 9, '70.

The thrust and purpose was to bolster investor confidence in the securities markets and by this 1970 Act, Congress attacked the problem in a number of ways. Some were affirmative and some were negative.

It certainly enhanced the Commission's power to promulgate and enforce financial responsibility roles for brokers and dealers, gave the Commission the power to impose on self-regulatory organizations the duty to adopt additional rules of that kind.

It looked to the improvement of the examination and inspection procedures for the self-regulatory organizations to assure compliance with rules affecting financial responsibility and to detect as early as possible approaching financial difficulties.

It directed the Commission to conduct a study of unsafe and unsound practices, which it did and finally, part and parcel of this attack on the problem of investor confidence, it did create SIPC.

It created it as a non-industry -- or, rather, a nonprofit industry-funded membership corporation. It provided specifically it would not be a government agency. It created it so that in the event these attempts to avoid failures were not successful in certain cases, public confidence could be bolstered by the notion that there is an organization, after all, which stands behind the failure of that type with its funds.

They created an organization funded by the industry with only the possibility of a call on federal money and they created a corporation with a board of directors which is prescribed by statute -- a responsible one in my opinion -- a balanced one. There is not federal dominance. There is not industry dominance. There is not public dominance.

They are men of considerable reputation and the brief will indicate how they are selected.

The second point that I would like to emphasize is the means by which public customers are protected when brokers and dealers do fail who are members of SIPC.

There is a dependence on the part of SIPC on the information and cooperation of the self-regulatory organizations and the SEC.

They are the ones with the examining authority. They are the ones who receive the reports. We do not.

However, under our statute, they have the obligation, when they learn of facts that leave them to believe that perhaps a firm is approaching difficulty, to report those facts to us and as that is done, if the situation appears to warrant the critical analysis on the basis of the available facts, we do that and we look to our statute which authorizes us to do the following:

If one of five statutory conditions exists -- and they are spelled out in the statute, for example, insolvency, to some extent, noncompliance with applicable regulations of the Commission and if the firm has failed or is in danger of failing to meet its obligations to customers, SIPC is vested with the discretion to make an application to the District Court in the appropriate jurisdiction seeking an adjudication that customers require protection, seeking the appointment of a trustee in liquidation and thereby providing the protection contemplated by the statute.

It is not a ministerial act that the statute talks about. It doesn't amount to a Congressional direction that it doesn't so exist, you must, but allows some flexibility, the parameters of which I don't think are involved today and have not been determined in any event.

The proceeding that is brought is essentially an involuntary bankruptcy proceedings.

The statute expands on the powers of a court of bankruptcy by allowing certain Chapter X powers and provisions to become operative through an incorporation by reference but essentially, reorganization is prohibited.

It is truly a straight involuntary bankruptcy proceeding based to some extent insofar as customers' substantive rights are concerned on Section 60-E of the Bankruptcy Act and I don't feel it is appropriate to get into that detail at the moment.

I think what is really new about this particular proceedings --- at least, two of the more important aspects, would be this:

Because the Congress was concerned about a possible domino effect on the industry by the failure of one firm, it did authorize / the completion of open contractual commitments between the firm in liquidation and another broker-dealer.

More important and most germane here, by the statute, the funds of the member in liquidation, you state, is no longer the only source from which a customer's claim in bankruptcy may be satisfied.

Under this statute, civic funds now, under certain prescribed limits, will augment the estate.

There is, if you will, a method of collection but insofar as substantive rights are concerned, not that much difference between Section 60 of the Bankruptcy Act and our statute. There are differences, however.

So this is the proceeding; this is the relief that it is alleged and claimed here by Receiver SIPC should, by reason of its obligations, have initiated and commenced.

The third aspect I would look to on oral argument is the Commission's supervision under the statute. In some respects, the SEC is a --

MR. CHIEF JUSTICE BURGER: We'll resume there at 10:00 o'clock tomorrow morning.

MR. CARON: Thank you very much, Mr. Chief Justice.