[Whereupon, at 3:00 o'clock p.m., the Court was recessed until 10:00 o'clock a.m. the following morning, Tuesday, March 18, 1975.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in Number 73-2055.

Mr. Caron, you may proceed. You have 17 minutes remaining.

MR. CARON: Mr. Chief Justice, and may it please the Court, at the close of yesterday's argument, I was at the point of discussing briefly the supervisory powers of the Commission and its Section 7(b) enforcement remedy, which is so directly involved in this particular case and from that point, to discuss the cases which are cited by the Respondent in support of his position.

We have emphasized in the brief the overall supervisory responsibilities of the Commission over SIPC. They are extensive and they are detailed -- at least 10 specifications -- at pages 10 to 12 of our brief and I would not burden the Court with a repetition of those items.

I would illustrate one, though, to indicate the sweep. The Commission does have the power, under this statute, to disapprove any by-law or any rule or regulation which SIPC might adopt and more than that, it has the power to compel SIPC to adopt the by-law it desires to be

adopted and the same applies to roles.

It has the power to require SIPC to repeal or amend any existing by-laws.

So that is one illustration of the pervasive control which the Congress has sought to lodge and properly so, in the Commission.

And there are other examples. And we find that Section 7(b), which relates to the enforcement of SIPC's statutory responsibilities to the investing public -- we find that that provision is part and parcel of the package of supervision.

It is clear from the remarks of the members of Congress -- or at least some of them -- and we refer to some of those at footnote 30 at page 11 of our brief that they well understood and intended that the Commission assume on an exclusive basis responsibility to see that the purposes of the Act were carried out in every respect.

I would point to one just to illustrate. One Congressman, in these words, "The Bill gives to the Securities and Exchange Commission continuing oversight and rule-making authority over the affairs of the corporation to insure that the public interest is served."

In light of the receiver's authorities cited in support of an implied right of action, I would focus just for a moment on the extraordinary character of the remedy and

enforcement power which the Commission has.

Section 7(b) in the first instance would authorize the Commission to substitute its judgment for that of the SIPC board-of-directors in the event that it disagreed and on the basis of that difference of view, authorizes the Commission to go to the Federal District Court, where our principal office is located, and commence an action, perhaps describable as in the nature of mandamus or mandatory injunction but not quite either one, I don't believe and it authorizes the Court, after reviewing the positions of SIPC and the Commission, to determine within some parameters not yet established that either the Commission is correct and that SIPC should be compelled to do something under the Act, namely, commence a liquidation proceeding or otherwise.

And if the relief is granted, what is happening, as I indicated yesterday, is the compulsion of a proceeding on an involuntary basis to liquidate a broker-dealer with all the impact that has and in the process triggering the release of the funds of SIPC for the purposes of the proceeding and in the event that its own funds should prove inadequate, either by reason of that case or a combination of circumstances, triggering a call by way of a borrowing on the U. S. Treasury.

Those are the dimensions of the remedy which the Commission enjoyed by express grant.

The Receiver's position, if I understand it correctly, is that by reason of the broad purposes of the '70 Act, an equivalent and duplicate remedy for precisely the same purposes should be implied -- and that is the term, I believe, should be implied in favor of the customers of a firm which may in their judgment feel that the firm is in certain dire circumstances and that SIPC should commence their liquidation proceedings.

It brings to bear two principal cases, really, one on which we rely, namely, the National Railroad Passenger Corporation case, which I refer to in the brief as the AMTRAK case.

On the other hand, the Receiver would focus on J. I. Case against Borak, reported at 377 U.S..

Borak is one of a line of cases. The Receiver also cites Allen against Board of Education. We, in turn, supply, on that line of cases, Wyandot Transportation Co. against the United States, Bivin against Six Unknown Named Agents, Texas Pacific against Rigsby, Fleischmann Distilling and we do that for the purpose of attempting an analysis of what these cases really mean.

So far as I can determine, analysis indicates that they involve a determination of whether a remedy traditionally recognized by the judiciary should be denied a particular litigant who is aggrieved by the act of another in violation

of his statutory duties, a wrong in the traditional sense of tort.

Allen, for example, involved a deprivation of a voting right; Bivens, the violation of the Fourth Amendment right against search and seizure; Borak, a violation of the proxy requirements of Section 14-A of the '34 Act; Fleischmann, a violation of the provisions of the Lanham Act, which prohibits infringements on trademarks; Rigsby, a violation of the Federal Safety Appliance Act and Wyandot, a violation by reason of the negligent sinking of a vessel -- a violation of Section 15 of the Rivers and Harbors Act.

So in all these cases, and I am certain there are others, essentially what is involved is a wrong in the classic sense of tort committed against one in violation of law and the search in the cases has been whether it be a constitutional provision, as in Bivens, or a statutory provision as in the other cases.

The inquiry has been, has Congress -- except for Bivens -- has Congress, by presecribing particular remedies, foreclosed available traditional remedies? For example, damages, recision, injunction.

Now, in Bivens, it was, in my opinion, easy because there was a right and no particular remedy prescribed. Hence, on -- I think traditional bases -- a cause

of action for damages for an injury committed.

In all the other cases I have cited except Fleischmann, while there were certain remedies of a penal or civil nature, the fact was, as this Court found, that the prescription of certain remedies was not a sufficient indication of a Congressional intent to foreclose existing traditichal remedies.

In Fleischmann, the cause of what this Court described as the prescription of intricate remedies -- it felt that Congress had, indeed, intended to foreclose the possibility of considering an award for Attorney's fees in an action under that statute so that we have this discernible thread of rationale.

I would refer to some language in Bivens and Wyandot. For example, in Bivens, the Court stated, "Historically, damages have been regarded as the ordinary remedy for invasion of personal interests in liberty," citing cases.

And elsewhere, it was said in Bivens, the question is merely whether Petitioner is entitled to redress his injuries through a particular remedial mechanism normally available in the Federal courts.

And for that proposition, citing Borak.

Wyandot, much the same gist. Thus the Court said, referring to the Borak case -- or the Rigsby case which,

incidentally, I believe is the first case in this Court to hold the existence of a private right of action within the framework of the Safety Appliance Act -- the Court stated --

QUESTION: That was the --

MR. CARON: Sir?

QUESTION: That was the Texas Railroad case?

MR. CARON: Texas and Pacific, yes, sir.

QUESTION: Back in the twenties, wasn't it?

MR. CARON: Thereabouts. I have the date in here somewhere. It is a very early case. It may be earlier than that, as a matter of fact. But this language I find relevant.

Again, referring to Borak and Rigsby, the Court in Wyandot said, that conclusion was in accordance with the general rule of the law of torts and elsewhere stated denial of such a remedy to the United States would permit the result of extraordinary odd jurisprudence of a wrongdoer shifting responsibility for the consequences of his negligence onto to his victim.

I would submit to the Court that the analysis of Justice Harlan in his concurring opinion in Bivens represents a very sound and correct analysis.

He said, and we quote in our reply brief, "The notion of implying a remedy therefore, as applied to cases like Borak, can only refer to a process whereby the federal

judiciary exercises a choice among traditionally-available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law."

There is an article which I found of interest in preparation which is not cited in our brief. It is "Historical Development," at 117 Pennsylvania Law Review, page 1, which was written in the wake of Bell v. Hood and it does, in my opinion, a good job of exploring the common law back in the 13th and 14th century England and reaching the conclusion, I believe, that remedies recognized which are traditional are really the old form of action -- or, rather, two, one action on the statute, the other trespass on the case and I think that this is really what is going on in the Borak line of cases.

Rigsby itself refers to actions on the statute under old English common law.

We believe that the AMTRAK case represents sound jurisprudence as, of course, this Court believes. It involves a different proposition, a different problem.

It relates to a remedy entrusted to a particular federal agency to exercise supervision and control over a quasi-public corporation.

There are many implications and we believe that Congressional choice is clear and ought to be given deference under accepted principles of statutory construction.

The test in AMTRAK, as I read it, was that given the exclusive grant of such authority, absent any clear contrary evidence of legislative intent that a private remedy coexists thereby placing supervision in the general public, the statute must be deemed as granting an exclusive remedy.

Now, we think the principle applies here a fortiorari for reasons we indicate in the brief, one of which is that the Commission, by reason of its expertise and working with SIPC under the '33 - '34 Act and the '70 Act, is most competent, most aware of situations.

Congress reposes trust in the Commission and we therefore think that, guided by the authority in the AMTRAK case -- but, more important, on a commonsense appraisal of the '70 Act and what it attempts to do, the Act itself, the legislative history, the effectuation of the plan of Congress, the recognition of the differences in the legislative and judicial branches and taking into account all the available precedents, we do believe that the Court of Appeals committed error, that a right may not be implied in the circumstances of this case.

On the second point concerning the Receiver's standing, I would not develop that on oral argument. I think that the concessions in the Receiver's brief, too -- one, that if he were successful, there would be no benefit to

the estate of Guarantee Bond and, secondly, Guarantee Bond had no right of action in its own right.

I think they make the Caplin case, which we rely upon, perfectly applicable and sound. I would only add that we believe that it is for customers to decide whether, in a situation where both SIPC and the Commission feel that the statute should not be applied, it is for those individuals who decide what are their rights.

We think the receiver has obligations to an estate. He has duties to marshal and collect assets. He has other creditors to be concerned about. The chance of victory probably is not that great.

We do believe that it is the customer's right -- if it exists and that is the assumption for the second point -- and that the receiver should be denied standing in any event.

I'd like to reserve whatever time I have for rebuttal, your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Caron.

Mr. Collins.

ORAL ARGUMENT OF W. OVID COLLINS, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. COLLINS: Mr. Chief Justice, and may it please the Court:

The two issues upon which certiorari was granted in this case were, briefly, first, whether or not customers

of a member of SIPC have an implied right of action to require SIPC to discharge its obligations under the Act in spite of the provisions of Section 7(b) which extends that right to the SEC.

Briefly, the receiver's position on the first issue is that it is both necessary and appropriate under the facts of this case to imply such a right of action in order for the customers of Guarantee Bond and Securities Corporation to receive any benefits from the Act and in order for the stated and designated purpose of the Act to be effectuated.

In that instance, we rely upon the case of J. I. Case against Borak. We also rely upon the doctrine of common law which is quoted in the Rigsby case which has been referred to, to the effect that in every case where a statute enacts -- now, this is the pertinent part -- enacts a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage.

It is our position that in this instance unless the customers through their representative, the receiver, are accorded some remedy, they will not receive any benefits under the Act and the manifest legislative purpose will be frustrated.

As to the right of the SEC to do this same thing,

I call attention to the fact that 7(b) is a part of a section listing the functions of the SEC. The legislative history of the Act indicates that the Commission had a hand in the drafting and the sponsoring of the legislation.

I suggest that that section was put in there to make certain that the SEC did have the right to take such action if it chose but the Court will note that 7(b) does not require the SEC to do this.

If the SEC finds that SIPC has not met its obligations, the statute does not say it shall seek an order of the Court but it may seek an order of the Court.

So that it seems to me --

QUESTION: Does that not contemplate that there are other steps that could be taken preliminarily? Would that explain the substance of mandatory language?

MR. COLLINS: Does your Honor mean pursuing other remedies to --

QUESTION: To correct the situation.

MR. COLLINS: -- to protect the client?

QUESTION: To protect the client, yes.

MR. COLLINS: Yes, sir. I think that is always available to both the SIPC and the SEC.

QUESTION: But if the language of the statute was mandatory, to take your suggestion on the absence of

"shall," would that leave very much flexibility?

MR. COLLINS: Well, I'm not suggesting that it should have been "shall." I am saying that the way it is now worded, the customers, the investors, are left with nothing but a hope for an act of grace on the part of SIPC with the concurrence of the Commission, unless the customers have some remedy in the event that both the SIPC and the Commission elect not to take any action and I submit that this Act was never passed by Congress to vest in SIPC and the Commission a discretion as to whether or not they would protect customers but rather, a discretion, as your Honor suggests, as to the means by which they will protect customers, so that there is the flexibility.

But now, the facts of the case before this Court are such that they have done nothing and we have gotten no cooperation or assistance or protection from SIPC and no enforcement from the Commission and we have no prospects in this case unless the Court finds that when this splendid supervisory procedure breaks down -- for whatever reason -- the customers can do something.

Now, this Act was passed in lieu of an insurance act in the nature of the FDIC and it appeared that Congress was concerned that the investors would get the return of their securities and their money that was on deposit with a failed broker-dealer.

There is no suggestion that Congress meant this to be a discretionary matter with SIPC and the Commission but rather that if they could protect those customers in some other way, if they could effect an infusion of additional capital or a merger or anything else, they didn't have to put the borker-dealer into receivership.

QUESTION: Well, you are not suggesting that the language of the Act can be fairly read as insuring the customers, are you?

MR. COLLINS: It doesn't say that, your Honor. I have to simply argue that this was the intent of Congress that Congress could have gone the insurance route but that it chose to require the industry to accept responsibility which had already been attempted and made them self-insurors, so to speak.

But your Honor is correct, the statute does not, in so many words, insure customers that they will be protected up to a certain level as the FDIC Act does but I say, as a matter of argument, I think this was the intent and the flexibility was written in there to give the Commission and the SIPC the opportunity to effect it some other way but under the facts of this case, they have done nothing and we tried for months to even get an indication as to whether or not they would intervene in this case and then finally we found that they would not.

Now, as to the standing of the receiver, of course he has no standing except as a representative of the customers and I must concede that in the ordinary --

QUESTION: Mr. Collins, when you said they would not, do you mean "they" being the SEC would not intervene?

MR. COLLINS: The SIPC would not intervene and the SEC would not compel them to intervene by a --

QUESTION: I take it you take no comfort from the suggestion of the reply brief of SEC that if you have no standing, that they will forthwith afford the receiver and the SIPC a hearing --

MR. COLLINS: Yes.

QUESTION: -- to decide whether they ought to bring a 7(b) suit.

MR. COLLINS: I do take some comfort from that. I received that Saturday before I left Nashville and it was the first --

QUESTION: But not enough comfort.

MR. COLLINS: I would like not to be dependent upon the goodwill of the Commission. We have been in this matter for four years and this is the first indication that they have given us that they would give us a hearing or any opportunity. We have been completely shut out.

QUESTION: Well, you have won, then. You have won the lawsuit, almost.

MR. COLLINS: Almost. Thank you.

As to the standing of --

QUESTION: Mr. Collins, could you explain to me, what is the Commission's position here? Is it a Respondent or a --

MR. COLLINS: Technically, it is a Respondent, but they support the position of the SIPC. They say that the receiver has no standing and the customers have no implied causes of action.

QUESTION: Well, now, in the District Court, it was -- you sued both --

MR. COLLINS: I brought both in because I, frankly, I didn't know what to do.

QUESTION: You sued them both, so they were on the other side from you.

MR. COLLINS: Correct.

QUESTION: How did they get on the Respondent's side here?

MR. COLLINS: Well, now, the Commission agreed with the receiver as to the applicability of the Act. This was really the question on the merits and the --

QUESTION: That is the issue we didn't take.

MR. COLLINS: That is correct, sir.

And they agreed with the receiver on that and, of course, the District Court decided against the receiver.

The 6th Circuit decided for the receiver.

QUESTION: If we agreed with you on the private action matter, we would have to reach the standing of the receiver?

MR. COLLINS: Yes.

QUESTION: And did the Commission take a position on that in the Court of Appeals?

MR. COLLINS: My recollection is that they sided with SIPC and said that the --

QUESTION: No standing.

MR. COLLINS: -- the receiver had no standing.

QUESTION: Even if there was a private right of action?

MR. COLLINS: I believe that is correct, if your Honor please. Here they have not argued it because they say we won't get to that point.

Now, as to the standing of the receiver, I have not been able to furnish the Court with much authority. In the ordinary liquidation procedures, the receiver does represent the failed corporation and it is his obligation to marshal assets and he passes on claims and that sort of thing.

I submit that this is not the ordinary liquidation and that the truth of the matter is that this proceeding was very similar to an SIPC liquidation. Although, when we

started into it, we didn't even know about the Act, but the first thing we did under the emphatic instruction of the Court was try to devise a plan to get back to the customers their bonds -- that is what we are dealing with, their church bonds and their net cash balances, which is precisely what an SIPC trustee would have had to do and certainly, an SIPC trustee would have had an obligation to those customers and a duty to protect them and to get their property, not just the property of the failed broker-dealer and this is what we have undertaken to do.

Now, it is somewhat embarrassing to be cast in the role of an interloper here but we sincerely believed -- and the District Court certainly agreed with us that we had an obligation to seek the benefits of this Act for the customers and we could be wrong.

It just seemed to us that -- that we had not succeeded in doing what the Court had instructed us to do and that was to get all those bonds back and all those funds back. We had to create an SIPC fund. We didn't have an SIPC fund. We adopted a mechanism of a five percent assessment to create a fund.

At that time, we didn't have enough money to pay all the net cash balances.

The First American National Bank there in Nashville had set off over $250,000 of the funds of this broker-dealer

which we convinced them were actually trust funds, much of which were these net cash balances so that when we went into this plan of five percent, we didn't know whether we were going to get that money back or not.

Some people had net cash balances, some had deficits, some had large balances and so on. In order to equalize them all, we adopted this mechanism but it seems to me that, having pursued this plan, the receiver has an obligation to pursue whatever remedy the customers have under this act.

Now, it is also true that the cases that the SIPC has analyzed to your Honors involved prohibitive acts and tortous-type of conduct, and that is not what we have here and I have not been able to cite your Honors a case which is precisely like this, but I say that we are not here seeking damages because somebody violated an Act.

We are here because we understand that Congress set up a plan to protect people just like those that the receiver represents here and we have been frustrated and so we are not seeking damages, as in these other cases. We are simply seeking some methods, either through the Commission or the SIPC -- we are no respecter of persons -- to get the benefits of the Act to these customers.

QUESTION: Being what? Precisely what?

MR. COLLINS: The return of their money. That is

all they are entitled to. The general creditors are not in it. They are not going to get a dime.

We grabbed everything in sight in order to be able to pay these people their money and the general creditors are going to get nothing.

It is also true, I think, as is pointed out in the Commission's brief and in the brief of SIPC that perhaps this won't happen again. There was a breakdown, as your Honors know, if you have read the briefs, and perhaps this won't happen again. I am sure that the system is perfected now but where does that leave the people that we are representing?

This is the only chance they have got and the fact that it may not happen again is small comfort to them, plus the fact that it seems to me that it could happen again if the Commission and the SEC were to take the same position they have taken here. You see, when the SEC came in and we filed this petition, they said, well, you may not sustain a loss. You can sue the principals and you can get money from them and you may not have a loss.

Well, they could say that the next time a proceeding like this comes on.

You can sue the president. You can get money back then and customers won't have any loss.

The trouble with that is, that if this is upheld and the receiver prior to any SIPC liquidation sues the

president and fails or gets a judgment and doesn't collect it and the customers do sustain a loss, then the customers come back to SIPC and say, now, we have got a loss, how about coming on in?

They say, oh, no, it is too late now. You have gone way down the road with your receivership. You have returned bonds. You have done this and you have done that. Too late now. We can't come in now.

All of that is precisely what has happened here, the only difference being that there would not be this confusion about the original notice and the issue as to the retroactivity of the Act so that it does seem to me that it is important that customers have some remedy if everything else breaks down.

Now, I can understand that it would certainly make the administration of the Act more difficult if every customer along the line was bringing a lawsuit.

But in any event, a court has got to make an adjudication as to whether it is a proper case, whether the SIPC goes in or a customer or somebody else.

The court has got to decide whether it is a proper case.

If the SIPC comes in and says, we don't want to liquidate this broker-dealer now. We think we can get somebody to put some money in it or we think we can work out a

new merger, then the court can exercise its right then to hold off a receivership and the flexibility of the Act is sufficient for that purpose so that we don't see that granting to the customers a day in court, when the facts justify it, will embarrass the administration of the Act and that in this case, it is necessary and it could be important in some future case.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Collins.

You have three minutes left, Mr. Caron.

REBUTTAL ARGUMENT OF WILFRED R. CARON, ESQ.

ON BEHALF OF PETITIONER

MR. CARON: Thank you, your Honor.

I think our brief -- our reply brief -- sufficiently responds to the fabric of equitable coloration which seems to be the emphasis of the receiver's argument.

I daresay that an objective view of the few facts which the pleadings disclose will not support the sorts of breakdowns and cut-outs and everything else we discussed here today.

QUESTION: Do you know, Mr. Caron --

MR. CARON: Yes, sir.

QUESTION: -- whether the SEC contemplates, as suggested at page 3 of their reply brief, some formal procedure for hearing or some formal -- something formal

about this when they suggest that they will forthwith afford both receiver and SIPC an opportunity and so forth -- if you prevail?

MR. CARON: It is difficult for me to answer, your Honor. I had only brief discussion with the Commission on this point.

I really couldn't respond as to the detail of procedure. There was discussion both about informal and formal. I myself have a question as to whether or not formal procedures are appropriate in a situation where you have the sort of discretion lodged in the Commission which is intended to be exercised in its supervision over us.

So I am afraid that I quite honestly could not be definite on that point. I think, if we must get into the equities, there is a fair enough indication in the record that part of the problem here was the dormancy of the receiver in communicating with SIPC for four months after he knew we existed.

The fact that he carried the liquidation through to completion practically and then decided to write a letter and ask for the remainder to pay the fees involved.

I think, though, that discussion of this sort is not appropriate for the purpose of the important question of legislative intent and the construction that ought to be brought to bear on this statute.

I simply suggest to the Court that that issue ought to be answered in such way as to hold that the '70 remedy accorded to the Commission was meant to be exclusive and that was a proper exercise of Congressional judgment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:46 o'clock a.m., the case was submitted.]