No. 59 - National Association of Securities Dealers, Inc. v. SEC

No. 61 - Investment Company Institute v. Camp

These cases together present the issue of the validity of a national bank's operation of a commingled investment fund. The fund evidently is open not only to trust funds, which the bank already holds as fiduciary, but also to non-trust funds submitted by a customer.

The SEC exempted the First National City Bank's investment fund from the requirements of the Investment Company Act of 1940. The effect of this permitted a majority of the directors of the fund to be officers or directors of the bank. The propriety of that exemption is at issue in No. 59. At issue in No. 61 are (a) the question of standing of the petitioner Investment Company Institute, which apparently consists of a number of mutual funds, and (b) whether the operation of an agency commingled investment account is within the fiduciary powers granted national banks and, if so, is consistent with the prohibition of the Glass-Steagall Act proscribing bank involvement in the securities business. The CADC, not without some doubt, resolved the standing issue in favor of the challengers but then decided the issued on the merits in favor of the bank.

I am definitely inclined to affirm, and I am somewhat surprised that the Court has allowed a total of three hours for these two cases.

It seems to me that in No. 59 the real issue is the propriety of the SEC's granting of the exemption. Certainly this is the agency which has expertise in this field. Certainly it has a vast amount of discretion. I see nothing ~~apparent~~ obvious about the exercise of that discretion in favor of the bank here. What the statute

requires is that the exemption be "necessary or appropriate in the public interest" and consistent with the protection of investors. I see nothing particularly offensive in what the Commission did. The effect of it was to shore up the operating power of a national bank in a bank-related field. For many years national banks have been permitted to establish common trust funds so long as, I believe, they did not offend state law. The addition of the agency feature is just an addition, and little more. An agency, while not a strict trust, certainly has fiduciary characteristics. Of course, banks have had agency powers for many years. I could go along with Judge Bazelon's consideration of what he felt were potential problems and their resolution. Perhaps there are others. I certainly do not find them very different from the type of problems attendant upon the national banking operation. Further, with the vast amount of regulation which we have of national banks, the possibility of abuse is kept at a minimum, although not entirely eliminated.

In the other case, I am, first of all, convinced that the Glass-Steagall Act is directed at something very different than what is before us here. Prior to the Depression, there was a good bit of interlocking between banks and brokerage houses. This resulted in abuses such as self-dealing and the imposing upon trust funds of securities or stock in companies in which the bank itself was overly interested. The Comptroller of the Currency, once he assumed power from the Federal Reserve Board, issued Regulation 9 and granted authority to national banks to establish the managing agent commingled investment funds.

A red herring is thrown across the path of this case by the refusal of the new members of the SEC to commit themselves to the issue. I think this is not

very important because the decision stands as a Commission decision. Only two commissioners remain of the group which issued the decision, and those two are divided, for the present chairman was the sole dissenter at the time. It is, therefore, entirely proper, it seems to me, for the SG to file a brief on behalf of the comptroller and not allow the defense of the case to remain entirely with the one bank.

Then, of course, we have the basic question of standing in No. 61, and perhaps also in No. 59. At this point in the development of the law I am somewhat impatient with the standing issues. It seems to me that the Court has gone far to permit standing in many cases. A good many of these, of course, are the civil rights cases. Here, certainly, the data processing decision of last year stands as flat authority. I think we could cite that case on the standing issue and let it go at that. We can do it gently if we do not wish to be too positive about it, and then proceed to the merits.

On the merits, I see very little difference, as I have indicated above, between the bank's posture as trustee and as agent so far as the commingled fund is concerned. And the great concern about an interlocking directorship between the fund and the bank has little substance here. This is because the fund is not separately incorporated in the first place, and, secondly, because it's a banking operation and not at all an investment company. Of course, the fund has some resemblance to a mutual fund and in many respects it closely resembles a mutual fund. But a bank is not prohibited from competing with a mutual fund. I can almost be pragmatic and say that it would be good for a lot of mutual funds if banks were able to compete with them.