10-1974

Securities Investor Protection Corporation v. Barbour

Lewis F. Powell Jr.

DB/gg 9-18-74

CA6 held that S.I.P. Act impliedly grants a right to private parties to compel S.I.P. Corp to take action under Act

Await Discuss CA6 probably wrong but ne[illegible] complex & the Act is new

Pett. is the non-profit Corp. set up by the Securities Investor Protection Act.

That Act was enacted to protect customers of securities brokers & dealers who are in financial difficulty.

Pet. Corp. has authority to petition a court for appointment of a trustee to liquidate a member firm's business.

Deny or Join Three

The SEC petitioned a court to app't a liquidating trustee of Guarantee Bond (a brokerage firm), & Resp. Barbour was app'td

Relist for C.J. [illegible]

Pett's principal argument is that under the Act it alone has authority to determine whether & when to take action authorized by Act, that no 3rd parties may institute suits to compel it to act. The Act does provide that SEC may override SIPA's judgment & bring suit to compel SIPA to act

PRELIMINARY MEMORANDUM

Await Discussion, Prob. Grant DB

Summer List 18, Sheet 1 Cert CA 6

No. 73-2055 (Phillips, Celebrezze, Miller)

SECURITIES INVESTOR PROTECTION CORPORATION Federal Civil

v.

BARBOUR, Receiver for Guaranty Bond and Securities Corp and SECURITIES AND EXCHANGE COMMISSION Timely

I'm pretty certain that CA6 was wrong. I'm somewhat puzzled by the SG's reticence. It seems to me that this ruling would have a significant impact on administration of SIPA. I'd at least join 3 and prob. push for grant DB

1. The most important question presented by petitioner is whether the SEC's statutory right to institute action to compel the Securities Investor Protection Corporation to discharge its obligations under the Securities Investor Protection Act is the exclusive means for compelling SIPC

SG concedes CA6 in error.

action. Petitioner SIPC asserts that it is.

CA 6 implied a congressional intent to provide for private enforcement of the SIPC obligation from the SIPC right to sue and be sued in its own name. The Solicitor General has filed a memorandum on behalf of the Securities and Exchange Commission, a named respondent, in which he concedes that the CA 6 ruling is erroneous but states that the SEC's experience with the Act is insufficient to enable it to express an opinion whether the error is sufficiently important to the administration of the Act to warrant the grant of certiorari.

SEC does not ask us to review.

2. Facts: The Security Investor Protection Act, 15 U.S.C. §§ 78 aaa et seq. was enacted to protect customers of securities brokers and dealers. The Act reflected congressional fears that the certain brokers and dealers might fail and thereby jeopardize the cash and securities their customers had left in their charge. The Act established the Security Investor Protection Corporation (SIPC), a non-profit corporation with a membership consisting of brokers, dealers, and members of the national exchanges.

In addition to consulting and counseling responsibilities, the Act charges SIPC with the responsibility of acting to save customer's assets in cases in which a member's insolvency appears imminent. Section 78 eee(a) (1) of the Act requires that the Securities and Exchange Commission or any self-regulatory organization [1] report to SIPC whenever it believes that an SIPC member is in financial difficulty or is approaching that state. The Act authorizes SIPC to seek a judicial decree that the customers of its members are in need of the Act's protection and empowers the court, upon a proper finding, to appoint a trustee for liquidation of the member's business and distribution of its assets. See id. §78 eee(b). Finally, if liquidation is ordered the Act provides that SIPC must advance to the trustee sufficient sums to enable him to satisfy customers' claims not exceeding $50,000. Id. § 78 fff(f).

The Act vests initial responsibility for seeking liquidation in the SIPC. Upon a determination of the existence of certain specified conditions and an SIPC finding that the member "has failed or is in danger of failing to meet its obligations to its customers" the SIPC "may" commence liquidation proceedings. This broad discretion is limited by Section 78 ggg, which authorizes the Securities

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1. Self-regulatory organizations presently include the national securities exchanges and the National Ass'n. of Securities Dealers.

and Exchange Commission to apply to the district court for an order requiring the SIPC to discharge its obligations under the Act.

Respondent Barbour is the trustee for Guarantee Bond and Securities Corporation (Guarantee Bond), a broker-dealer registered with the SEC. In December of 1970, only a few days before the effective date of the Securities Investor Protection Act, the SEC filed a complaint alleging substantial violations of the SEC net capital rule and requesting a preliminary injunction against further violations. In January of the following year, a few days after the effective date of the Act, the district court found Guarantee Bond to have been in violation of Commission rule and issued a preliminary injunction against further violations. On motion of the SEC, the court appointed a receiver for Guarantee Bond.

The appointed receiver, after having completed part of the liquidation, filed a petition in the district court asking that SIPC and the SEC be ordered to show cause why the SIPC should not be required to extend the protections of the Act to the customers of the insolvent firm. The court issued the requested order.

The district court concluded that it had *in personam* and subject matter jurisdiction and that respondent had standing to institute an action to compel the SIPC to discharge its statutory obligations in this case. The Court concluded, however, that application of the Act to this case would amount to retroactive extension of an Act designed to apply only prospectively.

CA 6 affirmed the district court's rulings on standing and jurisdiction, but reversed the determination that the Act could not be applied to the facts of this case. While conceding that applying the Act to bankruptcies occurring prior to its effective date would violate the clear congressional intent only to offer the Act's protections prospectively, CA 6 concluded that the facts of this case indicated that the Act should apply. CA 6 noted that the SEC's initial complaint against Guarantee Bond, which preceded the effective date of the Act, did not include a request that Guarantee be forced into receivership. Thus, the original SEC action did not prevent Guarantee from operating and conducting normal business after the effective date of the Act. In the opinion of CA 6, the conduct of business after the effective date of the Act made Guarantee Bond a "broker" within the meaning of the Act. Thus, the customers of Guarantee were covered by the SIPA.

3. Contentions: Although SIPC raises five questions for this Court's consideration, it only argues three. The remaining two are stated for the purpose of saving them in

the event the writ is granted.[2]

The first point raised and discussed is that CA 6 misconstrued Section 7(b) of SIPA when it determined that it grants a private cause of action to compel SIPC to discharge its obligations under the Act. This is the point that petitioner advances most forcefully.

Petitioner additionally asserts that the lower courts erred in determining that SIPC should be compelled to initiate liquidation proceedings under the Act in an instance in which the broker-dealer already has been substantially liquidated; where there is no demonstration that the customers will suffer any loss; and where it is impossible to implement the Act in the manner intended by Congress.

Petitioner's third major point is that the courts erred in concluding that the Tennessee long arm statute authorized the assertion of _in personam_ jurisdiction over the SIPC. Petitioner asserts that this application of the statute violates the due process "minimum contacts" requirement established by a number of decisions of this

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2. The points raised but not discussed are whether, assuming a private right to action can be implied under the statute, a Receiver in Bankruptcy has standing to protect the interests of the customers, and a retroactivity point that a dealer hopelessly insolvent prior to the effective date of the Act is not covered by its provisions. As part of this latter point, petitioner asserts that it was denied due process when CA 6 held that the Act applies without requiring a hearing on the evidentiary question of whether Guarantee conducted normal business after the effective date of the Act.

Court. See e.g., Hanson v. Kenckla, 357 U.S. 235 (1958); Intnl. Shoe, 326 U.S. 310. Petitioner indicates that its sole offices are in Washington, D. C. and that it does not engage in activities, substantial or otherwise in the forum state.

4. Discussion: Standing alone, two of petitioners' three major points are not certworthy. The question of in personam jurisdiction is largely a factual determination. The district court ruling, affirmed without discussion by CA 6, was that SIPC had established a continuing relationship with members and customers in the State of Tennessee. The court concluded that the Act plainly provides that the SIPC will impose assessments on members, collect those assessments through a collection agent, and extend protection to customers and members within the State. That provided the continuing relationship with the forum state. This determination does not appear certworthy.[3] I agree

3. Respondent Barbour, the Receiver in Bankruptcy, has asserted that petitioner waived objection to the Court's in personam jurisdiction. That appears to represent a misinterpretation of the record. The district court considered the request to require SIPC to discharge its statutory obligations to be an ancillary question to the administration of the receivership. This apparently created some confusion about whether the Federal Rules of Civil Procedure would apply. Petitioner, more concerned with other matters, offered to submit itself to the court's jurisdiction if the court would agree to conduct all proceedings in accordance with the Federal Rules. Petitioner's offer, contained in its reply brief, was clearly conditional in nature. See n. 2 of Petitioner's reply brief. More important, the offer was rejected; the district court ignored petitioner's conditional offer and considered the in personam jurisdiction question on the merits. CA 6 affirmed on the merits, not mentioning waiver.

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Petitioner's point that application of the Act to a liquidation that was substantially completed at the time of interjection of the SIPC is an isolated ruling that is not likely to have major importance to the administration of the Act. Essentially, petitioner urges that the facts of this case were such that the statutory purpose could not be achieved by extending SIPC protection to these customers. This point is not certworthy by itself.

The point most stressed by petitioner, that the Act does not afford a private cause of action to compel SIPC to discharge its statutory obligations, is an issue that appears to have more significant implications to the administration of the SIPA. The Act specifies certain conditions that SIPC must find before deciding to request that a court decree that the member's customers are in need of the Act's protections. Even when the conditions are satisfied, the Act vests discretion in SIPC to determine whether to request that the court adjudicate the customers in need of the Act's protections, and thus force liquidation. The Act provides that the SIPC discretion can be policed by the SEC. It affords the SEC the right to override the SIPC judgment by bringing an injunction action to compel the SIPC to commence a liquidation proceeding.

Only Q of imp.

The Act thus contemplates ~~a~~ dual exercise of discretion. First, the SIPC has discretion to decide whether to seek to have a court initiate a liquidation proceeding and extend the protections of the Act to a broker-dealer's customers. Second, assuming an SIPC decision not to extend coverage in a given case, the Act provides the SEC the power to initiate proceedings to compel the SIPC to act. The SIPA is silent on the question of a private right of action on this question. U

The CA 6 decision that a private right of action does exist to compel SIPC action rests on two factors: (1) that the Act recognizes that the SIPC can sue and be sued in its own name; and (2) that the Act does not specifically prohibit a private suit to compel SIPC action on this matter. These factors persuaded CA 6 that the Act should not be construed to foreclose private litigation on the question of the SIPC's discharge of its statutory obligation to customers in a particular instance.

Petitioner primarily relies on the recent decision in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) to establish that the CA 6 statutory interpretation is erroneous. In National RR Passenger Corp. the Court refused to imply a general private right of action in the Amtrak Act, concluding that the broad provisions of the statute created a "public cause of action" that could only be enforced by the Attorney General. Id. at 457.

National Passenger is largely a question of interpretation of the Amtrack Act. However, the case does indicate on a more general level that courts should be reluctant to imply private causes of action in some complex federal regulatory matters where the existence of such an action would seriously disrupt the balance between the regulatee and the federal agency charged with an oversight function. The general structure of the SIPA strongly suggests the correctness of the SIPC assertion that the decision whether to force liquidation and extend the Act's protections to a group of customers is one committed to the pyramided discretions of the SIPC and the SEC. It is hard to determine exactly how a private cause of action would fit into this scheme.

The SG, on behalf of respondent SEC, has conceded that CA 6 erred on this point. The SG asserts, however, that the Act is too new to enable him or the SEC to express an opinion whether the error below is of sufficient importance to merit the grant of certiorari.

Yes

The SG's timidity is somewhat surprising. If followed in other courts, the CA 6 ruling would appear to have significant consequences on the overall administration of SIPA. And, as the SIPC has pointed out, the present market situation is sufficiently gloomy to suggest that actions of this kind might recur with some frequency.

There are responses by both respondents and petitioner has filed a reply.

September 18, 1974 Boyd CA and dist ct. op. in app. as are relevant portions of SIPA

Conference 10-7-74

Court CA - 6 .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 73-2055

Submitted ...., 19... Announced ...., 19...

SECURITIES INVESTOR PROTECTION CORPORATION, Petitioner

vs.

JAMES C. BARBOUR, ET AL.

7/20/74 Cert. filed.

Relist for CJ to study further.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING	
Rehnquist, J.		✓												
Powell, J.					Join Three - limit to principal issue - private party.									
Blackmun, J.			✓											
Marshall, J.			✓											
White, J.		✓			~~[illegible]~~									
Stewart, J.					Join Three on Q									
Brennan, J.			✓											
Douglas, J.			✓											
Burger, Ch. J.			Passed											

BOBTAIL MEMORANDUM

To: Justice Powell

From: David

Re: No.73-2055 Securities Investor Protection Corp. v. Barbour, et. al

In my view, this is a rather easy case. I think that a private cause of action is inconsistent with the framework of the Securities Investor Protection Act. I therefore recommend that you vote to reverse the decision of the Sixth Circuit authorizing such an action. This disposition makes it unnecessary to reach the standing issue on which certiorari also was granted.

If nothing else, the law governing the question of determining whether a private cause of action should be implied is extremely pragmatic. As Justice Stewart wrote in National R.R. Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974):

> [T]he inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.

Thus, the basic analysis required is a careful examination of the statute allegedly sought to be enforced to determine whether private enforcement via judicial action would serve to further the legislative purpose in enacting the statute. Thus, for example, in J.I. Case Co. v. Borak, 377 U.S. 426, the opinion generally considered to be the father of the notion of an implied private cause of action to enforce a regulatory statute, the

Court premised the implied cause of action on the determination that such an action would provide a "necessary supplement" to SEC action and that judicial provision of a private action would afford a "most effective weapon" for enforcing the Securities and Exchange Act's proxy requirements. Id., at 432. In the Amtrak case (National R.R. Passenger Corp.), on the other hand, a determination that a private action would disrupt rather than promote the Act's implementation dictated a conclusion that such an action would not be provided.

In this case it appears that an implied private right of action would be inconsistent with the careful balance of discretion established by the relationship between the Securities Investor Protection Corp. and the SEC. Obviously Congress did not contemplate that the protections of the Act would automatically be extended to every group of investors that might suffer losses resulting from insolvency of a member of the securities industry. Thus, the Act vests significant discretion in the Securities Investor Protection Corporation, stating that "[i]f SIPC determines"that the statutory conditions are satisfied it "may apply ... for a decree adjudicating that customers of such member are in need of the protection provided by this chapter." 15 U.S.C. § 78ggg(b). Moreover, the Act establishes the SEC as the regulatory body responsible for assuring that SIPC exercises its discretion in a responsible manner. Not only does the Act provide that the SEC should inform SIPC of facts indicating that a member is approaching financial difficulty, id., it authorizes the SEC to apply to the district court for a decree requiring SIPC to extend the protections of the Act to cover a particular situation. Significantly, however, the Act again vests discretion in the SEC, stating that "[i]n the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers ... the Commission may apply to the district court...."

Thus, the Act carefully constructs a two-tiered level of discretionary authority, vested in organizations possessing substantial expertise. Implication of a private cause of action in individuals probably lacking that expertise seems inconsistent with this scheme. Decisions of whether to extend the Act's protections in a given situation invariably will require a rather sophistocated financial judgment. Additionally, it would appear that "inside information" of the kind the SEC and the SIPC might normally obtain through their capacities as regulatory bodies would be important in reaching a decision. Those organizations might, for example, know that a firm was about to enter into a merger, obtain a significant financial boost through loan or divestiture, or take any number of actions to improve the financial picture. Not only would premature intervention be unnecessary, in some cases it might frustrate the very ameliorative processes that are at work. And allowing a private party to institute suit and force SIPC to justify its decision not to act might prove even more disasterous, requiring in some instances that SIPC reveal sensitive information at a critical time in order to justify its decision to the courts.

The other arguments are plentiful, and need not be elaborated here. I think this is a clear case, and that the decision below should be reversed.

David

Conference 10-18-74

Court ....
Argued ...., 19...
Submitted ...., 19...

Voted on..................., 19...
Assigned ...., 19...
Announced ...., 19...

No. 73-2055

SECURITIES INVESTOR PROTECTION CORP.

vs.

BARBOUR

RELIST

Grant
& limit to
issue as to
suit by
private party.
(Q 1 & Q 2)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.			✓										
Marshall, J.			✓										
White, J.		✓											
Stewart, J.		✓											
Brennan, J.			✓										
Douglas, J.			✓										
Burger, Ch. J.		✓											

Reverse

73-2055 SECURITIES INVESTOR PROTECTION CORP. v. BARBOUR

Argued 3/17/75

Petr., is a non-profit membership (broker-dealers) corp. ~~orde~~ organized under Securities Investor Protection Act.

Under Act, SIPC may apply to court for liquidation of a member which can't meet its obligations. SEC, if SIPC does not act, may seek court order requiring SIPC to discharge its obligation under Act.

Here, Receiver of a broker-dealer, brought this suit to compel SIPC to act.

I agree with Petr. & SEC that statutory procedure is exclusive, & suit by private party not allowed

Caron (for Petr.

Case arose out of receivership of a Tenn. broker-dealer.

73-2055 SECURITIES INVESTOR v. BARBOUR Conf. 3/19/75

The Chief Justice Reverse	Douglas, J. Reverse 8-0 Out
Brennan, J. Reverse	Stewart, J. Reverse Amtrak controls

Reverse

Reverse

Blackmun, J.

Reverse

Powell, J.

Reverse

Rehnquist, J.

Reverse

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Circulated: MAY 9 1975

Recirculated: ______

Reviewed
LFP
5/11/75

Join.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2055

Securities Investor Protection Corporation, Petitioner, v. James C. Barbour et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1975]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Securities Investor Protection Corporation (SIPC) was established by Congress as a nonprofit membership corporation for the purpose, *inter alia*, of providing financial relief to the customers of failing broker-dealers with whom they had left cash or securities on deposit. The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act of 1970 (SIPA), 15 U. S. C. § 78aaa *et seq.*, to compel SIPC to exercise its statutory authority for their benefit.

I

In December 1970 the Securities and Exchange Commission (SEC) filed a complaint in District Court against Guaranty Bond and Securities Corporation, a registered broker-dealer, to enjoin continued violation of the Commission's net capital and other rules. On January 6, 1971, the District Court issued a preliminary injunction, and on January 29 it granted the Commission's motion for appointment of a receiver to wind up the affairs of Guaranty Bond. Respondent James C. Barbour was appointed receiver.

On April 6 respondent, alleging that customers of Guaranty Bond would sustain a loss at least equal to the costs of administering the receivership, obtained from the court an order directing the SEC and SIPC to show cause "why the remedies afforded by the [SIPA] should not be made available in this proceeding." In its answer the SEC took the position that respondent had not demonstrated that Guaranty's customers would in fact sustain any loss since it appeared that the receiver would have a cause of action for damages or restitution against Guaranty's parent company and principals. SIPC, on the other hand, challenged the receiver's standing to maintain an action to compel its intervention and, in direct opposition to the position of the SEC, argued that Guaranty's insolvency prior to the December 30, 1970, date on which the SIPA took effect meant that application of the Act to this case would give it an unlawful retroactive effect.

The District Court upheld the receiver's right of action, but denied relief on the ground that Guaranty's hopeless insolvency prior to the effective date of the SIPA rendered the Act inapplicable. The Court of Appeals for the Sixth Circuit reversed. Since Guaranty had conducted 101 transactions after December 30, and the SEC did not move to prevent its carrying on business as a broker-dealer until January 6, it held that Guaranty qualified as a broker-dealer on the effective date of the Act. The court then rejected SIPC's argument that the provision for SEC enforcement actions to compel SIPC to perform its functions was meant to be exclusive of such actions by protected customers or their representative, and remanded the case for further proceedings. We granted certiorari, limited to the questions whether customers have an implied right of action to compel SIPC to act and, if so, whether a receiver has standing to maintain it. — U. S. — (1974). Since we now reverse the Court of Appeals on the ground that no implied right of action exists, we do not address the second question.

II

Following a period of great expansion in the 1960s, the securities industry experienced a business contraction that led to the failure or instability of a significant number of brokerage firms. Customers of failed firms found their cash and securities on deposit, either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a "domino effect" involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers. S. Rep. No. 91-1218, 91st Cong., 2d Sess., 2-4 (1970); H. R. Rep. No. 91-1613, 91st Cong., 2d Sess., 2-4 (1970).

The Act apportions responsibility for these tasks among the SEC, the securities industry self-regulatory organizations, and SIPC, a nonprofit, private membership corporation to which most registered brokers and dealers are required to belong. 15 U. S. C. § 78ccc. Most important for present purposes, the Act creates a new form of liquidation proceeding, applicable only to member firms, designed to accomplish the completion of open transactions and the speedy return of most customer property.

To this end, SIPC is required to establish and maintain a fund for customer protection by laying assessments on the annual gross revenues of its members. The SEC and the securities industry self-regulatory organizations are required to notify SIPC whenever it appears that a member is in or approaching financial difficulty. If SIPC determines that a member has failed or is in danger of failing to meet its obligations to customers, and finds any one of five specified conditions suggestive of financial irresponsibility, then it "may apply to any court of competent jurisdiction . . . for a decree adjudicating that customers of such member are in need of the protection provided by [the Act]." 15 U. S. C. § 78eee (2).

The mere filing of an SIPC application gives the court in which it is filed exclusive jurisdiction over the member and its property, wherever located, and requires the court to stay "any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the [member] or its property and any other suit against any receiver, conservator, or trustee of the [member] or its property." 15 U. S. C. § 78eee (b)(2). If the SEC has pending any action against the member, it may, with the Commission's consent, be combined with the SIPC proceeding. If no such action is pending, the SEC may intervene as a party to the SIPC proceeding.

If the court finds any of the five conditions on which a SIPC application may be based, it must grant the application and issue the decree, and appoint as trustee for the liquidation of the business and as attorney for the trustee, "such persons as SIPC shall specify." 15 U. S. C. § 78eee (b)(1), (3).

The trustee is empowered and directed by the Act to return customer property, complete open transactions, enforce rights of subrogation, and liquidate the business of the member, 15 U. S. C. § 78fff (a); he is not empowered to reorganize or rehabilitate the business. SIPC is required to advance to him such sums as are necessary to complete open transactions, and to accomplish the return of customer property up to a value of $50,000. *Id.*, § 78fff (f).

The role of the SEC in this scheme, insofar as relevant to the present case, is one of "plenary authority" to supervise SIPC. S. Rep., *supra*, at 1; see H. R. Rep., *supra*, at 12. For example, it may disapprove in whole or in part any bylaw or rule adopted by the Board of Directors of SIPC, or require the adoption of any rule it deems appropriate, in order to promote the public interest and the purposes of the Act. 15 U. S. C. § 78ccc (e). It may inspect and examine SIPC's records and require that any information it deems appropriate be furnished to it, and it receives the corporation's annual report for inspection and transmission, with its comments, to the President and Congress. 15 U. S. C. § 78ggg (c). It may participate in any liquidation proceeding initiated by SIPC, but even more important, § 7 (b) of the Act, 15 U. S. C. § 78ggg (b), provides:

> "Enforcement of actions.—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under [the Act] and for such other relief as the court may deem appropriate to carry out the purposes of [the Act]."

It is against this background relationship between SIPC and the SEC that we must approach the question whether, in addition to the Commission, a member's customers or their representative may seek in District Court to compel SIPC "to commit its funds or otherwise to act for the protection" of such customers.

III

The respondent contends that since the SIPA does not in terms preclude a private cause of action at the instance of a member broker's customers, and since such customers are the intended beneficiaries of the Act, the Court should imply a right of action by which customers can compel SIPC to discharge its obligations to them. As we said only last Term in analyzing a similar contention, "It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453 (1974) (hereinafter *Amtrak*).

In *Amtrak* itself the petitioner was a corporation created by Congress to assume from private railroads certain intercity rail passenger service responsibilities. The respondent passenger association brought an action to enjoin the discontinuance of a particular service as announced by the corporation pursuant to its authority under the Rail Passenger Service (Amtrak) Act, 45 U. S. C. § 564 (b)(2). That Act made express provision for suits against Amtrak to enforce its duties and obligations only "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected" by the agreement. 45 U. S. C. § 547 (a). There, as here, the plaintiff-respondent argued that statutory authorization for one type of action against the congressionally created corporation did not preclude another at the instance of the intended beneficiaries of the law.

The Court's analysis of the claim in *Amtrak* began with the observation that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature. That implication would yield, however, to "clear contrary evidence of legislative intent," for which we turned to the legislative history and the overall structure of the Amtrak Act.

Inspection revealed that the legislative history of the Amtrak Act was entirely consonant with the implication of the statutory language that no private right of action was intended.[1] The general strructure and purpose of the Act, gave further support to that conclusion. Congress had expected that, in creating an economically viable rail passenger system, some rail service would have to be discontinued by Amtrak; it had provided an efficient and expeditious means to that end, which seemed incompatible with an intent to allow a private action by any passenger affected by a discontinuance decision.[2] Nor would the absence of a private right of action leave Amtrak free to disregard the public interest in its decisionmaking. In addition to investing the Attorney General with "authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act" by court action, Congress provided for "substantial scrutiny" over Amtrak's operations by requiring it to make periodic reports to Congress and the President and to open its books to the Comptroller General for auditing. 414 U. S., at 464.

[1] Both the Secretary of Transportation, who was given prim ary responsibility for implementing the law, and spokesmen for organized labor had interpreted the bill as enact ed to preclude private actions other than those specifically authorized. The drafting subcommittee to which these views had been expressed found nothing in them to correct.

[2] See 414 U. S., at 462:

"If, however, [the Act] were to be interpreted as permitting private lawsuits to prevent the discontinuance of passenger trains, then the only effect of the Act in this regard would have been to substitute the federal district courts for the state or federal administrative bodies formerly required to pass upon proposed discontinuances."

The similarities between the present case and *Amtrak* are undeniable and for the respondent, we think, insurmountable. As with Amtrak, so with SIPC, Congress has created a corporate entity to solve a public problem; it has provided for substantial supervision of its operations by an agency charged with protection of the public interest—here the SEC—and for enforcement by that agency in court of the obligations imposed upon the corporation. The corporation is required to report to Congress and the President, and to open its books and records to the SEC and the Comptroller General. Further, Congress has chartered SIPC, unlike Amtrak, as a nonprofit corporation, and it has put its direction in the hands of a publicly chosen board of directors.

Beyond the inference to be drawn from the structure of SIPC, there is no extrinsic evidence that Congress intended to allow an action such as that before us.[5] As the respondent concedes, there is no indication in the legislative history of the SIPA that Congress ever contemplated a private right of action parallel to that expressly given to the SEC. Additionally, as in *Amtrak*, it is clear that the overall structure and purpose of the

[5] Respondent argues that because Congress provided that SIPC can "sue and be sued, complain and defend, in its corporate name and through its own counsel in any court, State, or Federal," 15 U. S. C. § 78ccc (b)(1), it must have contemplated occasions when an aggrieved customer of a member firm would be able to sue. In light of the specific terms of the more relevant section governing suits to compel SIPC to act for the benefit of investors, that conclusion is unwarranted. It is also incompatible with the limitation of SEC actions "to the district court of the United States in which the principal office of SIPC is located." 15 U. S. C. § 78ggg (b). It would be anomolous for Congress to have centralized SEC suits for the apparent convenience of SIPC while exposing the corporation to substantively identical suits by investors "in any court, State or Federal."

SIPC scheme are incompatible with such an implied right.

Congress' primary purpose in enacting the SIPA and creating SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose.

SIPC properly treats an application for the appointment of a receiver and liquidation of a brokerage firm as a last resort. It maintains an early warning system and monitors the affairs of any firm that it is given reason to believe may be in danger of failure. Its experience to date demonstrates that more often than not an endangered firm will avoid collapse by infusion of new capital or merger with a stronger firm.[4] Even failing those alternatives, a firm may be able to liquidate under the supervision of one of the self-regulatory organizations, or the District Court, without danger of loss to customers. SIPC's policy, therefore, is to defer intervention "until there appear[s] to be no reasonable doubt that customers would need the protection of the Act." SIPC 1973 Annual Report 7 (1974). By this policy, SIPC avoids unnecessarily engendering the costs of precipitious liquidations—the costs not only of administering the liquidation, but also of customer illiquidity and additional loss of confidence in the capital markets—without sacrifice of any customer protection that may

[4] Of the 266 firms brought to the attention of the SIPC by the exchanges, self-regulatory organizations, and the SEC between the effective date of the SIPA and the end of 1973, only 32 were subjected to SIPC liquidation as of December 31, 1973. Sixty-six withdrew from the business of carrying customer accounts, 26 self-liquidated and 20 became inactive without customer loss, 11 merged with other firms, 62 corrected their problems, and 49 remained under surveillance. SIPC 1973 Annual Report 17.

ultimately prove necessary. A customer, by contrast, cannot be expected to consider, or have adequate information to consider, these public interests in timing his decision to apply to the courts.

The respondent in this case does not, of course, claim any right to make the decision that a firm should be liquidated; the Act makes that a judicial decision. He seeks only the right to ask the District Court to make that decision when both SIPC and the SEC have refused or simply failed to do so. In practical effect, however, the difference is slight. Except with respect to the solidest of houses, the mere filing of an action predicated upon allegations of financial insecurity might often prove fatal.[5] Other customers could not be expected to leave their cash and securities on deposit, nor other brokers to initiate new transactions that the firm might not be able to cover when due if a receiver is appointed, nor would suppliers be likely to continue dealing with such a firm. These consequences are too grave, and when unnecessary, too inimical to the purposes of the Act, for the Court to impute to Congress an intent to grant to every member of the investing public control over their occurrence. On the contrary, they seem to be the very sorts of considerations that motivated Congress to put SIPC in the hands of a public board of directors, respon-

Yes

[5] See Freeman, Administrative Procedures, 22 Bus. Law. 891, 897 (1967): "The moment you bring a public proceeding against a broker-dealer who depends upon confidence in his reputation, he is to all intents and purposes out of business." See sources collected at Freeman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1, 33 n. 162 (1972), and Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380, 1394–1397 (1973). There may, of course, be less reason for public reaction to a private, as opposed to SEC, suit to compel SIPC's protective measures, but there is little reason to think that the investing public, with its assets at risk, would be interested in the distinction.

sible to an agency experienced in regulation of the securities markets.[8]

We need not pause long over the distinctions between this case and those, such as *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), and *Allen* v. *Board of Elections*, 393 U. S. 544 (1969), in which the Court held that an implied private cause of action was maintainable.

In *J. I. Case* a stockholder sought damages against his corporation for its alleged misrepresentations, violative of § 14 (a) of the Securities Exchange Act of 1934, in soliciting proxy votes for the approval of a merger. In light of the "broad remedial purposes" of the Act and the SEC's representation that private enforcement was necessary to effectuate the purposes of the Act, the Court held that the action for damages could be maintained.

The Court first concluded that it was "clear that private parties have a right under § 27 [of the Act] to bring suit for violation of § 14 (a)," since § 27 specifically granted the district courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act. 377 U. S., at 431. The more difficult question was whether the private parties, once in court, could seek damages as well as equitable relief. On this point, the Court agreed with the SEC that private enforcement of the proxy rules was a necessary supplement to SEC enforcement. Since there was

[8] The sequence of events giving rise to this case provided no opportunity for a run on Guaranty because the attempt to compel SIPC's intervention occurred after the firm had ceased doing business and come within the jurisdiction of the District Court for liquidation, at the instance of the SEC. In these limited circumstances Congress could reasonably have provided for a private action by a receiver against SIPC, but it did not and we are not at liberty to do so. There is, after all, a real difference between a court's implying a right of action to effectuate the purposes of a statute and its cutting a code of procedure out of whole cloth.

no contrary indication from Congress, the Court so held, relying on the statement from *Bell* v. *Hood,* 327 U. S. 678, 684 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Unlike the Securities Exchange Act, the SIPA contains no standards of conduct that a private action could help to enforce, and it contains no general grant of jurisdiction to the district courts. As in *Amtrak*, a private right of action under the Act would be consistent neither with the legislative intent, nor with the effectuation of the purposes it is intended to serve.

The *Allen* case arose under the Voting Rights Act of 1965. The question there was whether a private citizen could sue to set aside a state or local election law on the ground of its repugnancy to the Act. The federal statute provided that the Attorney General may bring such suits, but was silent as to the rights of others. It was clear to the Court—and to the Attorney General—that the Act would be practically unenforceable against the many local governments subject to its strictures if only the Attorney General were authorized to sue. We thus found it "consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with" its requirements. 393 U. S., at 557.

There is not the slightest reason to think that the SIPA, in contrast to the Voting Rights Act, imposes such burdens on the parties charged with its administration that Congress must either have intended their efforts to be supplemented by those of private investors or enacted a statute incapable of achieving its purpose. Instead of enlisting the aid of investors in achieving that purpose, Congress imposed upon the SEC, the exchange and the self-regulatory organizations the obligation to report to SIPC any situation that might call for its intervention.

For these reasons we are unable to agree with the proposition that the customers of a member broker may sue to compel SIPC to perform its statutory functions.[7] The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with instructions that it be dismissed.

It is so ordered.

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[7] The SEC suggests in its brief that a determination by it not to proceed against SIPC with respect to a member broker-dealer whose customers have incurred a loss of the type against which the SIPA is directed might be reviewable under the Administrative Procedure Act for an abuse of discretion. We need express no opinion on that matter today.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 12, 1975

No. 73-2055 - Securities Investor
Protection v. Barbour

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

May 12, 1975

No. 73-2055 Securities Investor Protection Corp. v. Barbour

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 12, 1975

Re: No. 73-2055 - Securities Investor Protection Corp. v. Barbour

Dear Thurgood:

Please join me.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1975

Re: No. 73-2055 - Securities Investor
Protection Corp. v. Barbour

Dear Thurgood:

I agree.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1975

Re: 73-2055 - Securities Investor Protection Corp. v. Barbour

Dear Thurgood:

Please join me.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 15, 1975

RE: No. 73-2055 Securities Investor Protection Corporation v. James C. Barbour, et al.

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 15, 1975

Re: No. 73-2055 - Securities Investor Protection Corp. v. Barbour

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
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73-2055 Securities Investor Protection Corp. v. Barbour