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of negotiated rates,[29] the *Gordon* and *Fredrickson* opinions reflect the basic conflict in most cases involving allegedly monopolistic exchange action.[30] Thus the Supreme Court's review of the *Gordon* decision[31] could indicate whether exchange action other than rate fixing, which is closely regulated by the SEC, is immune from antitrust scrutiny. In comparing the lower courts' resolutions in *Gordon* and *Fredrickson*, the *Gordon* approach seems the sounder. To apply the *Silver* test properly, a court must determine whether "subjecting [the allegedly monopolistic action] to antitrust attack would frustrate the purposes of the Securities Exchange Act."[32] The preferable solution, therefore, would permit SEC evaluation of the antitrust implications of the exchange rules in a unified examination of the problem, rather than adopt a case by case approach in the courts with the substantial possibility of conflicting results.

X. THE SECURITIES INVESTOR PROTECTION ACT OF 1970 (SIPA)

During the late 1960's, the securities market was plagued with growing investor disillusionment as a result of the financial difficulties suffered by broker-dealers.[1] To bolster investor confidence and to remove the uncertainty in the securities industry, Congress enacted the Securities Investor Protection Act of 1970.[2] The SIPA provides for

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[29] The SEC's adoption of Rule 19b-3 makes illegal fixed rate systems after May 1, 1975, except that floor brokerage rates may remain fixed until May 1, 1976. SEC Exchange Act Release No. 11203 (Jan. 23, 1975) (Rule 19b-3 reprinted at CCH FED. SEC. L. REP. ¶ 26,284, Commission's comments reprinted at CCH FED. SEC. L. REP. ¶ 80,067). For a review of some of the implications of the new rate system, see CALVERT, *From Auction Markets to a Central Market System: A New York Stock Exchange Perspective*, 35 OHIO ST. L. J. 295 (1974).

[30] Not all antitrust cases involving the securities exchanges involve fixed rate systems. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963) (involving denial of direct wire telephone connections to non-Exchange members). Thus the new negotiable rate system will not end antitrust problems in the securities exchange field.

[31] ___ U.S. ___, 94 S. Ct. 491 (1974). *See also* United States v. Nat'l Ass'n of Sec. Dealers, Inc., 374 F. Supp. 95 (D.D.C. 1974), *cert. granted*, ___ U.S. ___, 95 S. Ct. 37 (1974).

[32] Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 270 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

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[1] From 1967 to 1970 the securities industry experienced its most severe crisis since the stock market crash of 1929. In these four years, "many firms failed, and customer losses exceeded $130 million." SEC Securities Exchange Act Release No. 9622, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,801, at 81,716 (May 31, 1972).

[2] 15 U.S.C. §§78*o*(c)(3), 78aaa-*lll* (1970) [hereinafter cited as SIPA].

the orderly liquidation of a failing broker-dealer[3] and establishes a limited insurance fund[4] to protect investors from the financial failure of their broker-dealers.[5] To administer the fund and to carry out the provisions of the Act, the SIPA established the Securities Investor Protection Corporation (SIPC), comprised of "members" who are "persons registered as brokers or dealers,"[6] and "all persons who are members of a national securities exchange."[7]

Under the procedure set out in the SIPA, once the SIPC is notified[8] of the "approaching financial difficulty"[9] of any member firm, it may[10] request a federal district court to appoint a trustee.[11] The

[3] 15 U.S.C. §78fff(a)(4) (1970).

[4] 15 U.S.C. §78ddd (1970). This fund was to be established by the Securities Investor Protection Corporation [hereinafter cited as SIPC], a non-profit organization which shall "not be an agency or establishment of the United States Government." 15 U.S.C. §78ccc(a)(1) (1970). The fund is supplied from annual assessments on the various members of the SIPC (15 U.S.C. §78ccc(a)(2) (1970)) based primarily upon those gross revenues attributable to the securities business of the member firms. 15 U.S.C. §78ddd(c) (1970).

[5] H.R. Rep. No. 91-1613, 3 U.S. Code Cong. & Ad. News 5254, 5255 (1970). The motivation for this legislation was similar to that which prompted establishment of the Federal Deposit Insurance Corporation (FDIC) and the Federal Savings and Loan Insurance Corporation (FSLIC). *Id.*

[6] 15 U.S.C. §78ccc(a)(2)(A) (1970).

[7] 15 U.S.C. §78ccc(a)(2)(B) (1970).

SIPC has a relatively restricted role in that it "is not a federal agency, has no power to examine or regulate its members, and is subject to intensive SEC supervision." Note, *The Securities Investor Protection Act of 1970: An Early Assessment*, 73 Colum. L. Rev. 802, 807 (1973) [hereinafter cited as *SIPA Assessment*]. The SEC can veto any bylaw or rule adopted by the SIPC, and can require SIPC to adopt any bylaw or rule. 15 U.S.C. §78ccc(e)(3) (1970). The SEC also has supervisory control over the operations of the SIPC. 15 U.S.C. §78ggg(c) (1970).

[8] Under the SIPA, the SEC is required to notify the SIPC immediately if financial difficulties of any SIPC member firm are brought to its attention. 15 U.S.C. §78eee(a)(1) (1970).

[9] 15 U.S.C. §78eee(a)(1) (1970). Section 78eee(a)(1) demonstrates the SIPC's reliance on the SEC for identification of failing firms and operation of the program. Under §78eee(a)(2), however, the SIPC makes the final determination of whether "any member firm has failed or is in danger of failing to meet its obligations to customers." 15 U.S.C. §78eee(a)(2) (1970). While the phrase "financial difficulty" is not defined, one commentator has suggested that it means something less than present or approaching danger of a member's failing to meet its customer obligations. *SIPA Assessment, supra* note 52, at 803. This seems consistent with the legislative purpose of the Act to scrutinize closely the activities of member firms in the hope of avoiding financial crisis in the securities industry. *See* text accompanying note 2 *supra.*

[10] 15 U.S.C. §78eee(a)(2) (1970).

[11] 15 U.S.C. §78eee(b)(3) (1970). Under this section the SIPC recommends a trustee to the court, and an attorney for such a trustee. The court must accept the SIPC's

SIPC trustee is given various powers and duties similar to those of a trustee in bankruptcy.[12] The statutorily enumerated duties of the SIPC trustee include:[13] (1) continuing the operation of the debtor's[14] business in order to complete any "open contractual commitments;"[15] (2) distributing the "single and separate fund,"[16] returning "specifically identifiable property,"[17] and paying customers those monies which the SIPC has advanced;[18] (3) enforcing any subrogation rights; and, (4) liquidating completely the business of the member involved.[19]

During a SIPC proceeding, the district court generally assumes the duties of a bankruptcy court[20] although the discretion concerning trustee appointment and supervision which the court would exercise in a bankruptcy proceeding is modified.[21] The SIPA provides that the provisions of Chapter X of the Bankruptcy Act shall apply in any SIPC proceeding to the extent that the acts are consistent.[22] However,

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recommendations subject to the condition that they be "disinterested" persons. 15 U.S.C. §78eee(b)(3) (1970). For purposes of the Act a "disinterested" person is defined by §558 of Title 11 of the United States Code. In deciding the question of disinterest, the courts have considered two factors: (1) "whether the trustee was employed by a creditor of the debtor whose claim against the estate is in dispute;" and (2) "the nature of the proceedings wherein the services of the trustee are to be performed." SEC v. Schreiber Bosse & Co., 368 F. Supp. 24, 26 (N.D. Ohio 1973). Thus, a law firm which was the chief outside counsel for one of the creditors of the debtor could not act as attorney in a SIPC proceeding and none of the firm's attorneys could be trustees. *Id.* at 27. If the SIPC fails to apply for the appointment of a trustee in an appropriate case, the SEC may seek an order from a district court compelling such application. 15 U.S.C. §78ggg(b) (1970).

[12] 15 U.S.C. §78fff(b)(1) (1970).

[13] The trustee also has authority to hire and fix the compensation for all personnel and other persons necessary for the liquidation proceeding. 15 U.S.C. §78fff(b)(1)(A) (1970).

[14] 15 U.S.C. §78eee(b)(4)(A) (1970). The "debtor" is the SIPC member being liquidated because of financial difficulties. *Id.*

[15] 15 U.S.C. §§78fff(b)(1)(B), 78 fff(d) (1970).

[16] The "single and separate fund" consists of all property held by the debtor for customers, and any proceeds resulting from any transfers of this property, which are not otherwise distributable under the SIPA. 15 U.S.C. §78fff(c)(2)(B) (1970).

[17] 15 U.S.C. §78fff(c)(2)(C) (1970).

[18] 15 U.S.C. §78fff(f)(1) (1970). *See* SEC v. Guaranty Bond & Sec. Corp., 496 F.2d 145 (6th Cir. 1974).

[19] 15 U.S.C. §78fff(a)(4) (1970).

[20] 15 U.S.C. §78eee(b)(2) (1970).

[21] Courts have nevertheless exercised indirect control over SIPC trustees through review of the awarding of attorneys' and trustees' fees. *See* text accompanying notes 55-62 *infra*.

[22] 15 U.S.C. §78fff(c)(1) (1970).

no guidelines are provided to aid in the integration of the two statutory schemes; and therefore, the courts have been dealing with the question of integration on a case-by-case basis. In addition, numerous interpretative difficulties have arisen with regard to application of the SIPA. While courts have dealt with the problem of defining such terms as "open contractual commitments" and "specifically identifiable property," no clear definitions have yet been formulated.

Litigation under the SIPA was not extensive in 1974, but a number of cases significantly clarified the operation of the Act. These cases involved issues in three general areas: (1) qualification as a "customer"[23] for coverage under the Act, (2) protection of customers' claims, and (3) compensation of attorneys and trustees in SIPC liquidations. As in all securities litigation, the courts decided these issues by examining the intent and purpose of the relevant legislation.

A. *"Customers" under the SIPA*

To qualify as a "customer" and become entitled to the satisfaction of claims arising from the failure of a broker-dealer,[24] a person must have *entrusted* his securities to the debtor.[25] The Second Circuit in *SEC v. F.O. Baroff Co.*,[26] recently stated that entrusting securities to the debtor entails more than mere physical delivery; the securities must have been delivered to the debtor for investment or trading purposes. In *Baroff*, the appellant Lubin had delivered 7,000 shares of stock to F.O. Baroff Co. to be used as collateral for loans which Baroff had secured from third parties.[27] This transaction placed Lubin literally within the SIPA §6(c)(2)(A)(ii) which defines "cus-

[23] The term "customer" is defined in general terms in the statute. 15 U.S.C. §78fff(c)(2)(A)(ii) (1970).

[24] *See* text accompanying note 32 *infra*.

[25] 15 U.S.C. §78fff(c)(2)(A)(ii) (1970). *See, e.g.*, SEC v. Kelly, Andrews & Bradley, Inc., 385 F. Supp. 948 (S.D.N.Y. 1974); SEC v. Kenneth Bove & Co., 378 F. Supp. 697 (S.D.N.Y. 1974). Courts have required that the securities be physically delivered to the debtor sometime prior to the SIPC liquidation proceeding.

In *Kenneth Bove & Co.*, the plaintiffs had agreed to deliver stock to the debtor but had never made the delivery and were therefore not considered customers within the meaning of the SIPA. The plaintiffs argued, however, that since the debtor had instructed them to deliver the securities to another broker-dealer, there had been a "constructive delivery" to the debtor. The court rejected this contention by requiring actual possession by the debtor. *Id.* at 700.

[26] 497 F.2d 280 (2d Cir. 1974).

[27] There was no evidence in the record of Lubin's motive, but a letter from Lubin's attorney indicated that the securities loan was to assist Baroff in getting out of a cash bind. *Id.* at 281.

tomer" as a person with "claims on account of securities received, acquired or held by the debtor from or for the account of such persons . . . (VI) by way of loans of securities by such persons to the debtor . . . ."[28] However, the Second Circuit stated that this fact was not dispositive of whether the claimant in the proceeding was a customer under the SIPA.

After reviewing the legislative history, the Second Circuit concluded that the provisions of the Act should not be applied literally. The court noted that the SIPA was intended to protect investors[29] and stated "that the 1970 Act was not designed to protect a lender in appellant's class."[30] Thus, the Second Circuit held that to qualify as a "customer" and become entitled to the protection of the SIPA, a person must have entrusted his securities to the actual possession of the debtor with the intention that they be used for investment or trading purposes.[31]

B. Claims of Customers

The SIPA provides four methods by which customers' claims may be satisfied: (1) by the completion of "open contractual commitments;" (2) by the return of "specifically identifiable property" possessed by the debtor; (3) by the distribution of the "single and separate fund," which consists of all property possessed by the debtor which is not specifically identifiable to the customers; and (4) by advancing funds from the SIPC.[32]

When faced with financial ruin in the period between 1967 and 1970, many brokers misappropriated customers' securities and squandered free credit balances to keep their businesses afloat.[33] In administering the SIPA, trustees and courts were faced with two considerations: use of the Act to regulate practices among customers and broker-dealers thus preventing a recurrence of the prior fraudu-

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[28] 15 U.S.C. §78fff(c)(2)(A)(ii) (1970).

[29] *See* H.R. Rep. No. 91-1613, 3 U.S. Code Cong. & Ad. News 5254, 5255 (1970).

[30] 497 F.2d at 282. The court considered Lubin's position the same as that of a "commercial bank, trade creditor, landlord, equipment lessor, or any other party who relies on the ability of a business enterprise to repay a business loan." *Id.* at 284.

[31] The definition of a customer in §6(c)(2)(A)(ii) of the SIPA, however, is still applicable to the extent that no other definitional provision of "customer" are found in the Act. Section 6(d) of the Act contains a separate definition of a customer applicable only to that section. *See* SEC v. Kelly, Andrews & Bradley, Inc., 385 F. Supp. 948 (S.D.N.Y. 1974).

[32] *See* SEC v. S.J. Salmon & Co., 375 F. Supp. 867 (S.D.N.Y. 1974); notes 16-18 *supra*.

[33] *See* H.R. Rep. No. 91-1613, 3 U.S. Code Cong. & Ad. News 5254, 5255 (1970).

lent activities, and implementation to provide a limited insurance measure promoting financial stability in the securities industry. In light of these considerations, courts have concluded that the SIPA was not intended to protect those customers who themselves engaged in fraudulent activity, and those courts have thus developed the "innocent investors" doctrine.[34] This doctrine is premised upon the rationale that: "To allow [a customer] to obtain reimbursement from [the SIPC fund] for a transaction which was part and parcel of his manipulative and fraudulent activities . . . would be a gross perversion of a statute intended to protect the victims, not benefit the perpetrators, of such frauds."[35]

However, difficulties may arise in applying the innocent investors doctrine to the SIPA provision which authorizes the SIPC trustee to complete all open contractual commitments, in which a customer has an interest, between the debtor and other broker-dealers.[36] This provision of the Act was intended not only to protect customers, but also to prevent the "domino effect" which may occur when one broker-dealer's financial failure causes the failure of other broker-dealers with which the debtor has open contractual commitments.[37] Thus, a potential conflict may exist between the purpose of the innocent investors doctrine and the rationale for completing open contractual commitments. Whereas the innocent investors doctrine would preclude recovery because of a fraudulent activity by the claiming customer, prevention of the domino effect would mandate recovery even under such circumstances.

The Second Circuit, in *SEC v. Packer, Wilbur & Co.*,[38] was recently forced to reconcile these conflicting purposes. That case involved a broker-dealer which traded securities with a debtor on behalf of an investor, Arenstein. Arenstein purchased 2,000 shares of Syntex common stock through his broker Coggeshall for a total price of $90,933.82. Shortly thereafter Arenstein instructed Packer, Wilbur & Co., his other broker, to sell the same number of Syntex shares for a price of $94,203.10. At Arenstein's direction Coggeshall delivered the recently purchased shares to Packer, Wilbur in exchange for two

[34] In SEC v. Kelley, Andrews & Bradley, Inc., 385 F. Supp. 948 (S.D.N.Y. 1974) the court applied the innocent investors doctrine to deny a claim when the claimant had engaged in a conspiracy to manipulate the price of a particular stock, enabling him to sell to the public at inflated prices.

[35] *Id.* at 955.

[36] 15 U.S.C. §78fff(d) (1970). *See* SEC v. North Am. Planning Corp., CCH FED. SEC. L. REP. ¶ 94,957 (S.D.N.Y. Jan. 24, 1975).

[37] H.R. REP. No. 91-1613, 3 U.S. CODE CONG. & AD. NEWS 5254, 5263 (1970).

[38] 498 F.2d 978 (2d Cir. 1974).

faulty checks. Packer, Wilbur failed, and both Coggeshall and Arenstein lodged separate claims in the ensuing liquidation. Arenstein argued that since he conducted his transaction with Packer, Wilbur through an agent Coggeshall,[39] he was a "customer" of the bankrupt broker under the Act. The district court[40] denied both Arenstein's and Coggeshall's claims on the basis that Arenstein was not an innocent investor,[41] and because Coggeshall had contributed to the violation.[42] To recover on the two faulty checks, Coggeshall appealed the district court's decision contending that Packer, Wilbur had an open contractual commitment to Coggeshall which the trustee was obligated to complete.

Although the Second Circuit found that Arenstein had engaged in a fraudulent practice known as "free-riding,"[43] it indicated that Coggeshall had not committed any violations and had acted in good faith. The court, however, affirmed the district court's decision on two independent bases. First, the court reasoned that "[i]f Arenstein is to be denied the protection of the SIPC in his own right because of his misdeeds, it would hardly serve the cause of statutory consistency to allow Coggeshall to recover on his behalf under another section."[44] Emphasizing that recovery on the basis of an open contractual commitment requires that a customer have an interest in the transaction, the Second Circuit concluded that since Arenstein had been denied status as a customer because of his fraudulent activity, Coggeshall could no longer claim to have acted on behalf of a customer. Thus, the innocent investors doctrine, as applied to Arenstein, indirectly denied relief to Coggeshall.[45]

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[39] *See* note 31 *supra.*

[40] 362 F. Supp. 510 (S.D.N.Y. 1974).

[41] *See* text accompanying note 34 *supra.*

[42] The district court found that Coggeshall had also violated Regulation T, *see* note 42 *infra,* since it assisted Arenstein in the transaction with constructive notice of Arenstein's violation. 362 F. Supp. at 516.

[43] "Free-riding" involves buying securities through one broker-dealer at a low price, then selling the same securities through another broker at a higher price using the proceeds to pay for the initial purchase and retaining the difference as profit. 498 F.2d at 981. Such a practice violates "Regulation T," 12 C.F.R. §220.4(c)(1)(i) (1974).

[44] 498 F.2d at 984.

[45] The decision by the Second Circuit closely follows the statutory language of the open contractual commitment provision of the SIPA, and therefore, the provision itself presents the problem of competing purposes considered by the court. *See* text accompanying notes 36-37 *supra.* Although application of the innocent investors doctrine rightly precluded Arenstein from recovery, it indirectly forced Coggeshall to seek other tenuous remedies which required extended litigation. *See* note 48 *infra.* The $100,000 loss suffered by Coggeshall placed the broker in a precarious position which might have

Although the innocent investors doctrine serves a useful purpose when the customer has dealt directly with the debtor,[46] as applied in this case the doctrine apparently nullifies the primary purpose of the open contractual commitment provision, which is to prevent financial havoc in the securities industry due to the failure of one broker-dealer.[47] Arguably, the result of the Second Circuit's decision presented just that potential for financial distress which the SIPA was partially designed to prevent.[48] As an alternative basis for its decision, however, the court suggested that no open contractual commitment existed between Packer, Wilbur & Co. and Coggeshall. The Second Circuit stated that Coggeshall's claim could be dismissed because the legislative history of the open contractual commitment provision indicated an intention to encompass only wholly executory contracts.[49] In expressly recognizing an alternative ground for its decision, the court implied that application of the innocent investors doctrine might not be entirely appropriate in every case.

During 1974, courts also considered claims under other SIPA provisions, and attempted to clarify further the phrase "specifically identifiable property," which is one source from which SIPA claims may be satisfied. Various courts held that for claims to qualify under

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resulted in a "domino effect." *See* note 37 *supra* and accompanying text. However, such a situation would have been avoided if the Second Circuit had restricted application of the innocent investors doctrine to situations in which the customer claims direct reimbursement from the debtor rather than through another broker-dealer. This differentiation can be made since the open contractual commitment provision of the SIPA provides its own definition of a "customer," which is less detailed than the general definition in §6(c)(2)(A)(ii). *See* note 31 *supra*.

[46] The customer can be found to have acquiesced in a fraudulent practice by the debtor in a purchase of shares, if the customer's experience in securities should have made him aware of the fraudulent nature of the practice. After such a finding, the innocent investors doctrine would prevent the customer from claiming relief. *See* SEC v. North Am. Planning Corp., CCH FED. SEC. L. REP. ¶ 94,957 (S.D.N.Y. Jan. 24, 1975).

[47] *See* note 37 *supra* and accompanying text.

[48] Coggeshall sustained a loss of $90,933.82 in the purchase of the 2,000 Syntex shares. Since the checks from Packer, Wilbur were faulty, Coggeshall's only alternatives were a civil suit against Arenstein, or the tenuous procedure of claiming—as a customer in its own right—payment out of the single and separate fund from Packer, Wilbur. *See* Note, 43 FORDHAM L. REV. 136, 145-46 n.69 (1974).

[49] 498 F.2d at 985. The court concluded that allowing the completion of partially executed contracts would subject the trustee to "unlimited obligations." One commentator has suggested that the Second Circuit has misinterpreted §6(d), stating that the history of the Act does not substantiate the court's conclusion. *See* Note, 43 FORDHAM L. REV. 136, 149 (1974). *But see* Rule 56d-1, 17 C.F.R. §240.206d-1 (1974). The Rule was amended in 1974 by Release No. SIPA-5A, 39 Fed. Reg. 15402 (May 3, 1974).

this provision the investments held by the broker must be directly identifiable as belonging to the customer.[50] Futhermore, the investments must be separated from the other assets of the broker by being clearly marked and placed in the investors' own accounts.[51] All investments which cannot be thus identified are placed in a "single and separate fund," which is then distributed pro rata to the customers of the debtor.[52]

C. *Attorneys and Trustees in SIPC Liquidations*

Although little litigation has occurred in this area, 1974 decisions have reaffirmed two points: (1) the SIPA must be read in conjunction with Chapter X of the Bankruptcy Act,[53] and (2) the courts retain

[50] In Seidman v. Weis Sec., Inc., CCH FED. SEC. L. REP. ¶ 94,757 (S.D.N.Y. Aug. 8, 1974), the plaintiff maintained a margin account with Weis including 5,500 shares of American Home Products (AHP) stock and a debit balance of $350,000. AHP announced a three-for-one stock split, with delivery of the additional shares to be made at a future date. Weis threatened to sell plaintiff's shares to cover the debit balance unless plaintiff transferred his account to another broker. Merrill Lynch purchased the account and received a due-bill for the additional 11,000 shares resulting from the stock split. This due-bill was never delivered by Merrill Lynch to Weis for the purpose of receiving the additional shares. Weis failed, and the plaintiff applied for the return of the 11,000 shares as "specifically identifiable property " The court rejected this claim by stating that because the due-bill was never delivered, "Weis never had anything more than a credit for 11,000 shares of stock due Merrill on its books. In short Weis never held shares particularly identifiable to plaintiff." *Id.* at 96,491-96,492.

See In re Weis Sec., Inc., CCH FED. SEC. L. REP. ¶ 94,979 (S.D.N.Y. Feb. 3, 1975) which held that bonds must be in the possession of the debtor at the time the SIPC liquidation proceedings commence to be specifically identifiable property. Furthermore, the court stated that the uncashed check which the customer had received from the debtor as payment for the bonds, was not specifically identifiable property since the check did not represent a "free credit balance" as required by Rule 15c3-3(j), 17 C.F.R. §240.15c3(j) (1974). The rule states that cash can be considered specifically identifiable property only with respect to those customers of the debtor who maintain free credit balances.

[51] *See In re* Weis Sec., Inc., CCH FED. SEC. L. REP. ¶ 94,780 (S.D.N.Y. Aug. 27, 1974). The statutory guidelines for determining whether property is specifically identifiable include the concept of "bulk segregation." 15 U.S.C. §78fff(c)(2)(C) (1970). One court has stated that bulk segregation "pertains to securities which have been received or acquired for the accounts of customers who have an immediate right to receive such securities from the broker." SEC v. Albert & Maguire Sec. Co., 378 F. Supp. 906, 910 (E.D. Pa. 1974). In *Albert & Maguire*, the customers had not paid the full purchase price of the securities, and the debtor, which had partially paid the purchase price, retained control over the securities and could pledge them on any debt it owed. *Id.* The court concluded that the securities did not come within the definition of bulk segregation.

[52] 15 U.S.C. §78fff(c)(2)(B) (1970).

[53] 11 U.S.C. §§501 *et seq.* (1970).

ultimate discretion over the awarding of attorneys' fees.

In *SEC v. Aberdeen Securities Co.*,[54] the Delaware District Court concluded that the attorney for a SIPC liquidation proceeding could be paid fees from the debtor's estate only if his services were " 'beneficial in the administration of the estate.' "[55] In that case, one of the claimants, Raizes, was represented by counsel, Bogutz. Although Raizes' claim was originally denied by the trustee, Bogutz secured a remand of the claims on appeal. After reconsideration, the trustee reinstated some of the previously rejected claims and sustained rejection of others. The court concluded that the attorney's services resulted in a beneficial administration of the debtor's estate as to those claims which were recovered, since without the attorney's efforts on appeal those claims would have been denied. Therefore, the court permitted the attorney to recover the expenses incurred from efforts connected solely with the appeals which resulted in favorable reconsiderations. Thus, the case apparently held that only expenses incurred by an attorney in efforts which favorably affect the outcome of a SIPC proceeding can be recovered.

In *SIPC v. Charisma Securities Corp.*,[56] the Second Circuit demonstrated that the judiciary intends to retain ultimate discretion concerning the awarding of attorneys' and trustees' fees. That case also considered the applicability to the SIPA of §241[57] of Chapter X of the Bankruptcy Act, which states that the judge shall allow "reasonable compensation for services rendered."[58] The SIPC maintained that this section did not apply to so-called "no-asset" cases, in which the SIPC pays the fee.[59] The SIPC contended that the purpose of judicial scrutiny under §241 is twofold—"the protection of creditors and the reorganized corporation from the award of excessive fees, and the prevention of the abuse of the judicial system that award of such fees would imply."[60] Since no creditors are affected by the award of attorney's fees in no-asset cases, the SIPC maintained that only the second consideration applied. The SIPC thus argued that "the district courts should not disapprove SIPC-recommended fee awards in 'no-asset' cases unless they are so excessive and outrageous that the

[54] 381 F. Supp. 614 (D. Del. 1974).

[55] 381 F. Supp. at 617 *citing* 11 U.S.C. §643 (1970).

[56] 506 F.2d 1191 (2d Cir. 1974).

[57] 11 U.S.C. §641 (1970).

[58] 11 U.S.C. §641 (1970).

[59] Where there are assets in a liquidated corporation, the attorney's fees will normally be paid out of the estate; however, where there are no assets, these fees will be paid from the SIPC fund. 506 F.2d at 1194.

[60] *Id.*

integrity of the judicial system is at stake."[61] Realizing that such a decision would result in higher fees in no-asset cases than in liquidation proceedings which involve substantial assets, the Second Circuit concluded that §241 was equally applicable to SIPA no-asset liquidations.

D. Conclusion

The SIPA has been in effect for almost five years, yet litigation involving the Act has been sparse. Thus, many difficulties still exist with regard to application of the Act's provisions, and further judicial interpretation will be required before many of these problems are resolved. However, numerous trends can be discerned which should provide guidance for the future.

Courts have continued to effectuate the policy underlying the securities acts, holding that the remedial provisions of the SIPA apply only to *investors*, and not to persons engaged in *purely commercial transactions* with the debtor. Development of the innocent investors doctrine has prevented use of the SIPA as a per se insurance measure, and has provided an opportunity for judicial supervision of the securities industry.[62] Furthermore, flexibility in the SIPA permits greater judicial control over SIPC proceedings through integration of the numerous provisions of Chapter X of the Bankruptcy Act and the

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[61] *Id.*

[62] To insure maximum effectuation of this regulatory policy, one court recently permitted private parties to compel action under the SIPA. In SEC v. Guaranty Bond & Sec. Corp., 496 F.2d 145 (6th Cir. 1974), the court held that since the customers of a broker-dealer had a definite interest in the application of the SIPA, the receiver, as their representative had standing to compel action under the Act. The United States Supreme Court, however, on review of the case, declared "that the overall structure and purpose of the SIPC scheme are incompatible with such an implied right" of private action, and therefore reversed the Sixth Circuit decision. *See* SIPC v. Barbour, CCH FED. SEC. L. REP. ¶ 95,093, at 97,873 (May 19, 1975). In a footnote, the Court summarized an SEC suggestion, that the SEC decision not to proceed against the SIPC may be reviewable under the Administrative Procedure Act, without expressing an opinion thereon. *See generally* Sowards & Mofsky, *The Securities Investor Protection Act of 1970*, 26 BUS. LAW 1271 (1971); *SIPA Assessment, supra* note 7; Note, *The Securities Investor Protection Act of 1970: A New Federal Role in Investor Protection*, 24 VAND. L. REV. 586 (1971).

On October 8, 1974, the SEC issued SEC Securities Exchange Act Release No. 11042, CCH FED. SEC. L. REP. ¶ 79,974, announcing the adoption of Rule 15b5-1 under the Exchange Act, and corresponding amendments to Rule 15b6-1 and related Form BDW. The new rule provides that, although a broker-dealer's registration is cancelled by the SEC, its registration as a member firm under the SIPA is extended for a six-month period after that cancellation by the SEC.

SIPA. Courts will continue to coordinate the two acts, thereby restricting the discretion of the SIPC trustee, and concurrently increasing the judicial discretion in SIPA proceedings.

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