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CASES NOTED

ADMINISTRATIVE LAW — CORPORATIONS — POWER OF SEC TO PROHIBIT SOLICITATION OF FUNDS BY STOCKHOLDERS' PROTECTIVE COMMITTEES

Petitioner and others, as a protective committee previously authorized by the SEC to represent certain stockholders in reorganization proceedings before the Commission, applied for permission to solicit all stockholders for a voluntary contribution of five cents per share to help defray committee expenses and attorneys' fees. *Held*, on a petition requesting review of the SEC's order denying them this permission, that the SEC in refusing to allow such solicitation was acting reasonably under powers granted it by the Public Utility Holding Co. Act of 1935.¹ *Halsted v. SEC*, 182 F.2d 660 (D.C. Cir. 1950).

Abuses, by stockholders' protective committees in reorganization proceedings, of the fiduciary relationship² existing between them and the corporations' security holders were notorious and widespread prior to the enactment of the Public Utility Holding Co. Act of 1935.³ The powers granted the SEC under that act⁴ reflected Congressional recognition of the urgent need for responsible control over the expenses, fees and authority requested by and granted to such committees⁵ and their legal counsel.⁶ As the responsible controlling agency for achieving the desired result, the SEC has, in determining allowable fees and expenses to protective committees, undertaken to follow the standards set up in Chapter X of the National Bankruptcy Act.⁷ Generally, these are that the right to such

1. 49 STAT. 838 (1935), 15 U.S.C. §§ 791(e), 79k(f) (1946). Section 791(e) (Section 12(e) of the Public Utility Holding Co. Act) grants the SEC the power to regulate solicitations of "any proxy, power of attorney, consent or authorization regarding any security of a registered holding company." § 79k(f) (§ 11(5) of the Public Utility Holding Co. Act) allows SEC to require that all fees and expenses in connection with reorganization proceedings "to whomsoever paid" be subject to its approval.

2. 52 STAT. 840 (1938), 11 U.S.C. § 649 (1946); See *Woods v. City Nat. Bank & Trust Co. of Chicago*, 312 U.S. 262, 269 (1941); *In re Mountain States Power Co. of Chicago*, 118 F.2d 405, 408 (3d Cir. 1941).

3. SEC, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, pt. I, 652; pt. II, 351-352, 356, 647 (1927); *In re Paramount-Publix Corp.*, 85 F.2d 588 (2d Cir. 1936).

4. See note 1 *supra*.

5. SEC, *Report on Protective Committees*, pt. I, 905 (1937).

6. *Id.* pt. I at 213, "In its avarice for reorganization fees the legal profession by and large has forsaken the tradition of officers of the court and has become highly entrepreneurial in nature; . . . members of the reorganization bar have not been reluctant to occupy inconsistent positions, and, under guise of disinterested service to the estate, to act as faithful servants of interests hostile to the investors."

7. 52 STAT. 840 (1938), 11 U.S.C. §§ 241, 242 (1946); *York Ry.*, 12 S.E.C. 348 (1942); *United Tel. & Elec. Co.*, 7 S.E.C. 809 (1940).

allowances is based on the benefits conferred by the activities of the committee on the reorganized corporation,⁸ the burden of proof of such benefits being on the claimants.⁹ The usual procedure of the SEC is to wait until the services in question are substantially completed and can be evaluated in light of the results they have achieved before granting allowances for expenses and fees.¹⁰

It is apparent that both the courts and the SEC look upon the solicitation of funds as camouflage for a device either intended to defeat or capable of defeating a basic need in reorganization proceedings—the effective control of reorganization fees and expenses.¹¹ The decisions have favored the view that the SEC may and should take into account the more subtle factors affecting security holders in such situations.¹² Where a literal interpretation of a statute might result, as here, in a substantial variance from legislative intent, the courts follow the legislative intent.¹³ While Section 11(e) of the Public Utility Holding Co. Act¹⁴ does not specifically cover the solicitation of funds, strict confinement of SEC's control power over solicitation to that relating to authority might invalidate the power granted it to regulate fees and expenses.¹⁵ A rigid construction of this section of the Public Utility Holding Co. Act would sharply curtail SEC's power to correct the aforementioned abuses¹⁶ and frustrate the intention of Congress¹⁷ in passing the pertinent legislation.

Ostensibly, SEC's refusal in the instant case was based on (a) possible retention by the committee of amounts from the solicited funds in

8. 52 STAT. 840 (1938), 11 U.S.C. § 649 (1946); *Dickinson Industrial Site v. Cowan*, 309 U.S. 382, 389 (1940), "... fee claimants are either officers of the court or fiduciaries, such as members of committees, whose claims for allowance from the estate are based only on services rendered to and benefit received by the estate."; *In re Mt. Forest Fur Farms of America*, 157 F.2d 640 (6th Cir. 1946) (claims not allowed for services primarily beneficial to stockholders; *In re Standard Gas & Elec. Co.*, 106 F.2d 215 (3d Cir. 1939); *In re Mayfair Building Corp.*, 97 F.2d 826 (7th Cir. 1938); *In re Tower Building Corp.*, 88 F.2d 347 (7th Cir. 1937); *In re Star Elec. Motor Co.*, 67 F. Supp. 58 (D. N.J. 1946); *Watters v. Hamilton Gas Co.*, 29 F. Supp. 436 (D. W.Va. 1949); *United Tel. & Elec. Co.*, 7 S.E.C. 809 (1940).

9. See *Woods v. City Nat. Bank & Trust Co. of Chicago*, *supra* note 2 at 268.

10. *York Ry.*, *supra* note 7; *Community Power & Light Co.*, 11 S.E.C. 817 (1942); *Great Lakes Utilities Co.*, 11 S.E.C. 1134 (1942); *Federal Water Service Corp.*, 10 S.E.C. 200 (1941); *Utilities Power & Light Corp.*, 4 S.E.C. 914 (1939) (request for interim allowances payable out of estate of debtor dismissed as premature); *but cf. Midland Utilities Co.*, 4 S.E.C. 598 (1939) (request for interim allowance approved subject to conditions).

11. *Cf. Leiman v. Guttman*, 336 U.S. 1, 8 (1948); *Brown v. Gerdes*, 321 U.S. 178, 181 (1944); *Dickinson Industrial Site v. Cowan*, *supra* note 8 at 388; *Callaghan v. Reconstruction Finance Corp.*, 297 U.S. 464, 469 (1936); see note 5 *supra*.

12. See *SEC v. Chenery Corp.*, 318 U.S. 80, 92 (1943); *Morgan, Stanley & Co. v. SEC*, 126 F.2d 325, 331 (2d Cir. 1942).

13. See, e.g., *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542-544 (1940); *Foster v. United States*, 303 U.S. 118, 120 (1938); *Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936); *North Am. Utility Securities Corp. v. Posen*, 176 F.2d 194, 197 (2d Cir. 1949).

14. 49 STAT. 838 (1935), 15 U.S.C. § 791(e) (1946); see note 1 *supra*.

15. 49 STAT. 838 (1935), 15 U.S.C. § 791(f) (1946); see note 1 *supra*.

16. See note 2 *supra*.

17. See note 11 *supra*.

excess of those subsequently allowed and (b) possible difficulties in the equitable return of such excess amounts to the proper persons.¹⁸ These objections seem to lack substance in view of the minute nature of the amount to be solicited. The decision reflects the basic reluctance of the courts to substitute their judgment for that of specialized administrative bodies¹⁹ or to interfere with the exercise of reasonable administrative discretion.²⁰ It provides support for the well-established doctrine that the SEC's interpretation of its enabling legislation should control unless plainly erroneous.²¹ Thus, it tends to establish the theory that the SEC is required merely to conform with the statutory policy of Congress in exercising the authority granted it by the Public Utility Holding Co. Act rather than being required to set up arbitrary standards to be applied inflexibly to all situations.²²

Representation in reorganization proceedings is, therefore, apparently dependent upon the ability of stockholders to provide support for their representatives pending the granting of allowance for expenses. The fact that the type of solicitation desired in the instant case was not permitted might indicate that the SEC's methods do not accomplish the equality of protection of all stockholders contemplated by Congress in enacting the Public Utility Holding Co. Act. The wealthy stockholder can protect his interests without difficulty, but for the stockholder whose shares represent his life's savings the holding in this case offers no protection.

INTERNATIONAL LAW—EFFECTIVENESS OF ADMINISTRATIVE ACT OF UNRECOGNIZED FOREIGN GOVERNMENT

Plaintiffs, the Communist management of a Chinese banking corporation, sought to recover its deposits in an American bank. After motion for summary judgment by plaintiff's attorneys, a second group of attorneys, representing the ousted Nationalist management of the Chinese bank and claiming to be the only attorneys empowered to represent that bank, filed

18. *Halsted v. SEC*, 182 F.2d 660, 666 (D.C. Cir. 1950).

19. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 161, 165 (1941); *NLRB v. Del.-N.J. Ferry Co.*, 128 F.2d 130, 136 (3d Cir. 1942); *Campbell v. Devinney*, 81 F. Supp. 657, 659 (D. C.C. 1939).

20. See, e.g., *American Power & Light Co. v. SEC*, 329 U.S. 90, 118 (1946); *Greenwood County v. Duke Power Co.*, 81 F.2d 986, 991 (4th Cir. 1936); *Kaunle v. Haynes*, 64 F. Supp. 153 (N.D. Cal. 1946); *Midwest Farmers v. United States*, 64 F. Supp. 91, 101 (D. Minn. 1945); *Frahn v. TVA*, 41 F. Supp. 83, 85 (N.D. Ala. 1941); *Application of Texas Co.*, 27 F. Supp. 847, 850 (E.D. Ill. 1939).

21. In *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947), Mr. Justice Murphy speaking of the Public Utility Holding Co. Act of 1935 said, "The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters"; see *SEC v. Associated Gas & Elec. Co.*, 99 F.2d 795, 798 (2d Cir. 1938); *North Am. Utility Securities Corp. v. Posen*, 82 F. Supp. 16, 18 (S.D.N.Y. 1948), *aff'd*, 176 F.2d 194 (2d Cir. 1949).

22. See *American Power & Light Co. v. SEC*, *supra* note 20, at 104; *SEC v. Chenery Corp.*, *supra* note 21, at 207.