

MEMO TO: Paul Gonson
FROM: Batya Roth
RE: Notes of Judge Gesell's ruling from the bench; October 30, 1985

Judge Gesell stated that his view of the case differed from those of either of the parties.

Regarding the definitions, there is no certainty in the statute because of the qualification "unless the context otherwise requires...."

* But for that phrase, it is clear that bank not within definitions of broker & dealer

The court's function is to analyze the statute and see what it commands.

Two conclusions can be drawn:

- 1 - the statutory provisions are not specific--they are uncertain;
- 2 - the intent of Congress cannot be clearly and convincingly determined from the material before the court. The committee reports don't even definitively discuss what "unless the context otherwise requires" means

The fact that the statute is uncertain in meaning and legislative history is illuminated by the VALIC case itself.

The court will proceed where the statutory question is without clear statement of intent-- *i.e., the court will proceed without a clear idea of the statute's meaning

The court has nothing to do with policy--that is the function of others--and the policy argument is not significant here. (*thus, the court has not accepted any policy argument presented)

(See Micro (?) case, 742 F.2d ___)

Re: Congress's failure to act – inaction by Congress cannot be given weight.

The reasons for inaction are too diffuse, and are of no consequence.

So, the question arises: - Statute not precise
 - intent of Congress not clear

(See Chevron and Chemical Manufacturers (?) cases – 2/85); see also Redding, 744 F.2d ____)
 (6/22/84)

What is the judge's role? He is bound...

Where an administrative agency (e.g., SEC) has been delegated legislative authority by rule-making it should be permitted to exercise its rule-making authority if action is within intent of Congress re: the area sought to be regulated.

If the action is rational and unless Congress withdraws that grant of delegated legislative authority, the Commission has the power to exercise that authority. Here it is clear. *Section 3(b) of the 1934 Act*: The Commission and the Federal Reserve System have powers within their respective jurisdictions to define terms consistent with the statute. Nothing in the statutes prohibit dual regulation. This rule provides that banks no longer are within the exclusion if [they engage in the activities outlined in the rule]. This is certainly within what Congress desired.

The SEC in its expertise has found that the public is being solicited; services by banks are functionally indistinguishable from the services provided by brokers.

SEC proceeded via the APA: comments were received, and some resulted in changes. The rule was carefully developed. There is a continuing willingness by the Commission to accommodate [the banks] (*consider exemptions) and adopt [changes if necessary]. We MUST leave the statutes where they are . . . to delegated authority. The parties are authorized to say this warrants expedited treatment in the appellate court for the benefit of the public.

The SEC's motion is granted!