

July 21, 1972

Institutional Membership

Judge Brieant's opinion in the Stark - Kansas City Securities case, S.D.N.Y. 72 Civ. 2528, handed down yesterday, will probably have considerable impact on the current debate over regulation of institutional membership. The opinion strengthens greatly the position of the SEC and the NYSE.

Judge Brieant holds:

(1) Section 6(d) and 19(b) of the 1934 Act empower the SEC to effectuate rules as to institutional membership and access.

(2) Present NYSE Rule 318, including the "parent test", when considered in light of the Stark recapture scheme (95% profit participation by the institution), is not a per se antitrust violation.

(3) The question of institutional membership and access should be left to the SEC and, until it has achieved effectuation of its current proposals, Rule 318 should continue to control NYSE membership. The opinion is a very strong statement in support of primary SEC jurisdiction in this area.

(4) By implication, the current SEC principal purpose (80/20) rule is reasonable and, if effectuated with SEC approval, would be immune from antitrust attack under the Silver case rationale.

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