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No. 70-61 - SEC v. Medical Committee for Human Rights

This case presents an interesting question and perhaps a difficult one. Unfortunately, it is rather tainted, in my mind, because the issue of SEC proxy review has Vietnam war overtones. We are concerned here with a very small institutional shareholder desiring to make a corporate issue of the manufacture of napalm by Dow Chemical. I wish that this were out of the case. Everyone could then view the issue much more dispassionately.

What we are concerned with here is the SEC's review, with action or no action, of a corporate shareholder's request for submission of a proposition at a corporate meeting. Immediately involved is SEC Reg. 14 A, which requires management to include shareholder proposals in its proxy solicitation materials. There are, however, certain exceptions set forth in 14(a)-8(c). These are specifically proposals primarily for the purpose of promoting political or similar causes and proposals that request management to take action with respect to a matter relating to the ordinary business operation of the company. Secondly involved is 15 U.S.C. § 78(y)(a). This provides for review by the court of appeals when a person is aggrieved by an order issued by the Commission in a proceeding under the chapter to which that person is a party.

In the present case MCHR requested an amendment to Dow's by-laws to the effect that napalm would no longer be manufactured. Dow refused on the ground that it fell within the exclusions of the rule. MCHR objected and sent copies of its correspondence to the SEC, and requested SEC staff review. Dow submitted its position to the SEC. The chief counsel of an SEC division stated that he agreed with Dow and that no recommendation for any action would be made. MCHR

requested full Commission review. It got it, and the Commission approved the recommendation of the division. MCHR then sought review in the CA DC.

Somewhat to my surprise, Judge Tamm, on behalf of the panel, held that the matter was reviewable and remanded the case to the SEC for more formal and informative determinations. The CA DC held that the matter was reviewable and went into discussion of concepts of finality, formality and practicality. On the latter it felt that the conceded rights of the shareholder to seek an injunction in the federal District Court would be inconvenient, expensive and was not a real remedy. The court then confronted the inevitable claim that the agency's determination not to seek enforcement was a matter committed to agency discretion within the APA. The court rejected this approach. It recognized the force of a discretionary area, but reasoned that this was a particular situation between two parties and that a decision had been made. With this accomplished, the court turned to the merits. It seems to me that its remand really attests to the informality of the Commission procedure. It then held that this case was not within the exclusions ( I find it hard to agree with that).

George sets forth the opposing arguments in detail. There are strong considerations each way.

My own offhand reaction is that this is the very kind of thing which is committed to agency discretion under the Administrative Procedure Act. It seems to me that it is almost a classic example of that kind of thing. A complaint or proposal is made, the SEC takes a position so far as the company is concerned, and that is it. It is true that a third party, the shareholder, is interested here,

but the decision made by the SEC is one which affects, really, only it and the company. So far as the SEC is concerned, the individual shareholder is not a participant before it. Its concern is with management.

There are other reasons why I think the CA DC may have been in error here:

1. While the Commission's determination was formal and final, in a sense, it is hardly the kind of order that is ordinarily regarded as subject to review. It is its determination not to act. It smacks of the old negative order kind of thing. It is a determination on a low scale in the order of corporate affairs.
2. The particular issue here smacks, to me, of the kind of thing to which the exclusions apply, namely, a political issue and an issue affecting corporate management, to wit, the determination of what products to manufacture. Surely, if Dow tomorrow decided to make traveling bags, we could hardly expect formal court review of the SEC's decision not to force that kind of proposition into a proxy statement.
3. To call for a review here would be to force rigid formality on to a minor SEC function.
4. The shareholder does have a possible relief by way of an injunctive action in a federal district court. Everyone concedes this, but argues as to its efficacy. They claim that a district court is inclined to follow an SEC determination. I have known instances where this just is not true. One must concede, of course, that this will probably be a more expensive and time-consuming proceeding for there in another litigation level at the district court. The CA DC determination takes the