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COMMODITIES LAW: INVESTOR PROTECTION OR ABANDONMENT?

DONALD C. SHINE*

Chicago has long been the center of the multibillion dollar commodity futures trading industry.¹ It is not surprising then that the United States Court of Appeals for the Seventh Circuit has consistently served as a major source of decisional law on the subject. The 1977-78 term,² in which five significant commodities law decisions were announced, was no exception. While the court decided distinct, if not narrow issues in each case, two general judicial viewpoints emerged. First, commodity futures trading accounts, even those where discretion to trade the account is given to the broker or his representative, are not cognizable as "securities" under securities laws. Consequently, relief under the securities laws will be denied.³ Second, federal courts, particularly those within the Seventh Circuit, will accord great deference to the Commodity Futures Trading Commission⁴ on matters within the ambit of CFTC action.⁵ This article will discuss the Seventh Circuit's commodities decisions by focusing on the court's reasoning and analyzing the results.

DISCRETIONARY COMMODITY FUTURES TRADING ACCOUNTS ARE NOT SECURITIES

Perhaps of most significance to the commodity law practitioner is *Hirk v. Agri-Research Council, Inc.*⁶ In *Hirk*, the United States Court of Appeals for the Seventh Circuit faced the issue of whether a discre-

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1. Three of the nation's four volume-leading futures exchanges are located in Chicago: The Board of Trade of the City of Chicago; The Chicago Mercantile Exchange; and The Mid-America Commodity Exchange.

2. The scope of this article will be limited to cases decided by the United States Court of Appeals for the Seventh Circuit between September 1977 and August 1978.

3. *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977).

4. Hereinafter referred to as CFTC.

5. *Rosenthal & Co. v. Bagley*, 581 F.2d 1258 (7th Cir. 1978); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978); *Silverman v. CFTC*, 562 F.2d 432 (7th Cir. 1977).

6. 561 F.2d 96 (7th Cir. 1977). *Agri-Research Council, Inc.* will hereinafter be referred to as ARCO.

tionary commodity futures trading account can ever fall within the United States Supreme Court's definition of an investment contract as a species of securities under the federal securities laws.

Since the early seventies there has been substantial authority on both sides of this issue. The Seventh Circuit⁷ and district courts in the Third⁸ and Ninth⁹ Circuits have held that such accounts are not securities. The courts' rationale is that these accounts lack the element of "common enterprise" required by *SEC v. W.J. Howey Co.*,¹⁰ because they do not involve a pooling of investors' funds. In contrast, the Fifth,¹¹ Eighth,¹² and Tenth¹³ Circuits, as well as a district court in the Second Circuit¹⁴ have held that such accounts are securities. After carefully reconsidering the question in *Hirk*, the Seventh Circuit delivered the clear message that neither a discretionary commodity account nor trading therein is cognizable as a "security" under federal securities laws.¹⁵

The original complaint in *Hirk* was filed in May 1974.¹⁶ The five-count amended complaint was conscientiously drafted with an eye to-

7. *See* Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 276 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972).

8. *See* Arnold v. Bache & Co., 377 F. Supp. 61, 64-65 (M.D. Pa. 1973); Wasnowic v. Chicago Board of Trade, 352 F. Supp. 1066, 1069 (M.D. Pa. 1972), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973).

9. *See* Stuckey v. du Pont Glore Forgan, Inc., 59 F.R.D. 129, 131-32 (N.D. Cal. 1973).
10. 328 U.S. 293 (1946).

11. *See* SEC v. Continental Commodities Corp., 497 F.2d 561, 520-21 (5th Cir. 1974).

12. *See* Booth v. Peavey Co. Commodity Servs., 430 F.2d 132, 133 (8th Cir. 1970).

13. *See* Commercial Iron & Metal Co. v. Bache & Co., 478 F.2d 39, 42 (10th Cir. 1973).

14. *See* Berman v. Orimex Trading, Inc., 291 F. Supp. 701, 702 (S.D.N.Y. 1968).

15. In the past, complaints brought by disappointed commodities futures account holders customarily alleged violations of the federal securities laws in addition to claims under the Commodity Exchange Act, 7 U.S.C. §§ 1-17 (1970) (amended 1974). *See, e.g.*, Frashilla v. James T. McKerr & Co., No. 75C 1927 (N.D. Ill. Nov. 5, 1975); Stevens v. Woodstock, Inc., 372 F. Supp. 654 (N.D. Ill. 1974); Milnarik v. M-S Commodities, Inc., 320 F. Supp. 1149 (N.D. Ill. 1970), *aff'd*, 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972). This practice was prompted in part by the absence of an express provision in the Commodity Exchange Act, 7 U.S.C. §§ 1-17 (1970) (amended 1974), authorizing private civil actions for damages. In addition, not all commodities, *e.g.*, silver, were covered by the Act. While courts generally found an implied federal action if a particular commodity was regulated by the Act, the "loophole" for non-regulated commodities remained. *See, e.g.*, Arnold v. Bache & Co., 377 F. Supp. 61 (M.D. Pa. 1973); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967) and cases cited therein. The amendment of the Commodity Exchange Act by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified in scattered sections of 7 U.S.C.), still does not give an express right of private action, but it does bring all commodities traded on commodity futures exchanges within the Act's jurisdiction. Thus, while the securities law aspects of *Hirk* should be of substantial interest to the commodities law practitioner, it should be anticipated that as long as there remains the least doubt as to the Act's jurisdiction, attorneys are likely to include securities law claims in their complaints, particularly in other circuits. For an insightful discussion of the securities claims in *Hirk* see Roche & Zwirner, *Securities Law: Seventh Circuit Review of Remedies, Definitions, Standing, and Sanctions Under the Securities Laws*, 55 CHL-KENT L. REV. 203, 210-17 (1978).

16. *Hirk v. Agri-Research Council, Inc.*, [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,738 (N.D. Ill. June 24, 1974), *aff'd in part, rev'd in part*, 561 F.2d 96 (7th Cir. 1977).

ward earlier case law on the subject. The first count alleged violations of the Securities Act of 1933,¹⁷ and the Securities Exchange Act of 1934.¹⁸

Hirk alleged that pursuant to a written agreement he opened a discretionary commodity futures trading account with ARCO, that he deposited margin funds and that thereafter commodity futures trades were executed for him by ARCO's vice-president under a written power of attorney. Hirk also alleged and detailed various misrepresentations made by the defendants during the solicitation of the account.¹⁹ It was Hirk's contention that his discretionary account agreement and the power of attorney together constituted an "investment contract" or "a certificate of interest or participation in [a] profit sharing agreement" and, thus, constituted a "security" within the meaning of the federal securities laws.²⁰

The defendants moved to dismiss the complaint for failure to state a claim upon which relief may be granted.²¹ The motion asserted: (1) that discretionary commodity trading accounts were not securities within the meaning of federal securities laws; (2) that the alleged conduct was not subject to the provisions of the Commodity Exchange Act; and, (3) that assuming dismissal of the federal claims, pendent state claims should be dismissed as there would be no basis for jurisdiction over the state law claims in the absence of diversity.

The district court dismissed the complaint with leave to amend. In reaching his decision on the securities laws claims,²² Judge Decker placed principal reliance on the Seventh Circuit's decision in *Milnarik v. M-S Commodities, Inc.*,²³ a factually similar case in which Judge Stevens²⁴ had carefully considered related issues.²⁵ Judge Decker then found that "the touchstone of an investment contract"—the element of

17. 15 U.S.C. § 77a (1976).

18. 15 U.S.C. §§ 78b(1), c(10) (1976). The complaint also alleged violations of the Commodity Exchange Act, 7 U.S.C. § 6b (1970) (amended 1974), the Illinois Securities Act, ILL. REV. STAT. ch. 121 1/2, § 137, 2-1 (1977), and state laws proscribing fraud and breach of fiduciary duty. 561 F.2d at 98 n.1.

19. 561 F.2d at 98.

20. *Id.* at 99.

21. See FED. R. CIV. P. 12(b)(6).

22. For a discussion of the commodities law claims see text accompanying notes 45-54 *infra*.

23. 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972).

24. Now Justice Stevens.

25. Judge Decker also adopted the position taken by most courts and found that "there is no real distinction between investment contracts and profit-sharing plans." He thus decided that a finding as to the existence of an investment contract would control a finding regarding the existence of a profit sharing plan. [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,738 at 96,453.

“common enterprise”—was absent in *Hirk*.²⁶ The court’s analysis is concisely stated:

There is no claim that defendants pooled the funds of the separate investors. The contractual agreement between the parties makes no reference to any proposed commingling of funds or a joint account with other investors, but speaks solely in terms of a single account, limited to plaintiff’s investment. Further, although defendants may have entered into similar discretionary arrangements with other investors, there is no suggestion that the success or failure of those other contracts directly affected the profitability of plaintiff’s investment. . . . Nor are there sufficient allegations that plaintiff and the other customers were “joint participants in the same investment enterprise.” . . . The pleadings here simply do not suggest any relevant distinction between this case and *Milnarik* pointing to the existence of a “common enterprise” here that did not exist in *Milnarik*.²⁷

Granted leave to amend, *Hirk* amplified the allegations concerning the pooling of investors’ funds. However, the district court again dismissed the complaint in June 1976, apparently without further opinion.²⁸

On appeal *Hirk* reasserted that his arrangement with the defendants constituted an “investment contract” and thus qualified as a security. He contended that the “touchstone” element of “common enterprise” found lacking in his original complaint was sufficiently alleged in his amended complaint. Specifically, he pointed out that the amended complaint alleged that the defendants treated all the discretionary accounts carried by them in the same manner and consequently he shared pro rata with the other accounts “as if” all the funds had been commingled. He further claimed that his investment monies were misused by the defendants to finance ARCO’s operating expenses and attract other investors to their scheme.²⁹

The Seventh Circuit and the parties in *Hirk* agreed that the court’s earlier decision in *Milnarik v. M-S Commodities, Inc.*³⁰ was of extreme precedential value and would control unless overturned or distinguished. Accordingly, the court undertook a rather thorough re-examination of *Milnarik* and its genesis, *SEC v. W.J. Howey Co.*³¹

In *Howey* the United States Supreme Court provided what has become the traditional definition of an investment contract. Briefly, the Court dealt with the question of whether the sale of land in a citrus

26. *Id.*

27. *Id.* (footnote by the court and citations omitted).

28. *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 98 (7th Cir. 1977).

29. *Id.* at 99.

30. 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972).

31. 328 U.S. 293 (1946).

grove, with a lease-back to the developer, constituted the sale of an investment contract. The Court held that it did. Speaking through Justice Murphy, the Court stated, “[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . .”³²

It is the common enterprise element of this test which has provoked the greatest degree of controversy among the lower courts in subsequent decisions.³³ While the term “common enterprise” has been reiterated by the Supreme Court as a criterion of investment contract in subsequent cases,³⁴ the Court has not provided further insight into the concept of common enterprise or its components.

Unfortunately, *Hirk* does not prescribe definitive elements of common enterprise either. Instead, it provides a re-assessment of the Seventh Circuit’s earlier position in *Milnarik v. M-S Commodities, Inc.*,³⁵ in the wake of other circuits’ subsequent decisions to the contrary.

In *Milnarik*, the Seventh Circuit concluded that discretionary commodity trading accounts were not investment contracts under *Howey*. The court reasoned that the investors did not expect profits from the operation of all the discretionary accounts managed by their common broker but rather from their individual trading accounts without reference to the others. Thus, the *Howey* “common enterprise” test was not met.³⁶ *Milnarik* was thereafter construed by the United States Court of Appeals for the Fifth Circuit in *SEC v. Continental Commodities Corp.*,³⁷ to require a pooling of investors’ funds. In the Fifth Circuit’s view the critical factor is whether or not “the fortunes of all investors are inextricably tied” to the success of the investment enterprise.³⁸ By the same token the Fifth Circuit expressly rejected what it concluded to be the Seventh Circuit’s criterion, *i.e.*, a pooling of investors’ funds or pro rata distribution of profits.³⁹

Rejecting the view espoused by the Fifth Circuit and the line of cases it represents,⁴⁰ and subsuming that Judge Stevens had read *Howey* as requiring a pooling of investors’ funds, the *Hirk* court re-

32. *Id.* at 298-99.

33. See text accompanying notes 7-14 *supra*.

34. See, *e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 72 n.13 (1959).

35. 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972).

36. *Id.* at 276-78.

37. 497 F.2d 516 (5th Cir. 1974).

38. *Id.* at 522 (quoting *SEC v. Kosco Interplanetary, Inc.*, 497 F.2d 473, 499 (5th Cir. 1974)).

39. 497 F.2d 516, 522 (5th Cir. 1974).

40. See text accompanying notes 11-14 *supra*.

fused to overturn *Milnarik* or to distinguish the facts presented in *Hirk* from the dictates of *Milnarik*.⁴¹ Having reached these conclusions the *Hirk* court quickly dispatched the plaintiff's contentions by stating:

It is obvious that the amended complaint is insufficient on its face to satisfy the pooling requirements. "As if commingled" is not the same as commingled. Furthermore, each discretionary trading account is unitary in nature; each account has a success or failure rate without regard to the others. *Hirk's* effort to sidestep this fact by stressing in paragraph 6 that substantially similar transactions were made in all accounts and that profits or losses ebbed or flowed uniformly also fails because the necessary pooling remains unshown.⁴²

The court also declined to accept *Hirk's* invitation to "re-examine *Milnarik* in terms of the remedial purpose of the [securities] Acts . . ." since in its estimation the *Milnarik* court had already done so.⁴³

Superficially, *Hirk*, in reaffirming the Seventh Circuit's earlier decision in *Milnarik*, ripens the issue of whether discretionary commodity futures trading accounts qualify as securities for Supreme Court review.⁴⁴ Short of a Supreme Court pronouncement on the subject, a conflict among the circuits will continue to exist. However, it must be noted that the other principal aspect of the *Hirk* decision may well obviate any otherwise compelling need for the Supreme Court to review the securities law question.

The district court dismissed *Hirk's* commodities law count as well as the securities law count. Fundamentally, the district court based its dismissal on a distinction between fraud in the inducement in establishing the account and fraud attending the trading of the account. Judge Decker held that fraud in the inducement was not actionable. The court interpreted section 4(b) of the Commodity Exchange Act,⁴⁵ as proscribing only conduct related to the purchase of a commodity fu-

41. 561 F.2d at 101.

42. *Id.*

43. *Id.* at 101-02.

44. See SUP. CT. R. 19(b) which sets forth considerations governing review on certiorari. Conflict among the courts of appeals on the same matter is one such consideration.

45. 7 U.S.C. § 6b (1976) provides in pertinent part:

It shall be unlawful (1) for any member of a contract market, or . . . agent, . . . of any member, *in or in connection with* any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made . . . for or on behalf of any other person, or (2) for any person, *in or in connection with* any order to make, or the making of, any contract of sale of any commodity for future delivery, made . . . for or on behalf of any other person . . .

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person . . . (Emphasis added.)

tures contract or in reporting to a customer the status of the contract or trading.⁴⁶ The district court then construed the complaint as alleging fraudulent conduct in connection with the solicitation of the account rather than fraud in trading the account and held that no claim was stated under the Act.⁴⁷

It should have come as no surprise to the district court that the Seventh Circuit branded its interpretation of the Act as “narrow.”⁴⁸ On review, the court of appeals cited the Act’s pertinent provisions,⁴⁹ related provisions,⁵⁰ and legislative history.⁵¹ After making special note of the “or in connection with” language of the Act, the Seventh Circuit stated that “[t]he plain meaning of such broad language [in the Act] cannot be ignored.”⁵²

The Seventh Circuit’s resounding reversal on the commodities law count can and perhaps should be construed not as a reproval of a highly respected district court judge, but rather a tacit endorsement of basing commodities claims on the commodities laws. Certainly, the characterization of the Act’s “in connection with” language as “broad” coupled with the finding that the Act was designed “to eliminate [c]ertain trade practices involving the cheating of customers . . .”⁵³ is a broad interpretation of the Act, at least with regard to “investor”⁵⁴ protection.

GREAT DEFERENCE IS ACCORDED THE CFTC BY THE COURTS

Registration Revocation

In *Silverman v. CFTC*,⁵⁵ the United States Court of Appeals for the Seventh Circuit reviewed the CFTC’s revocation of Silverman’s li-

46. [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,738 at 96,454.

47. *Id.*

48. 561 F.2d at 104. In his June 1974 opinion, which was the basis for the ultimate dismissal by the district court on June 28, 1976, Judge Decker acknowledged that the complaint alleged fraud concerning the handling of the account and trading therein but found that the allegations were not set forth with sufficient particularity and were otherwise infirm. [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,738 at 96,455. Apparently, at least according to the Seventh Circuit, the defects were cured by amendment; however, the district court unaccountably failed to reconsider the amended version. *See* 561 F.2d at 103.

49. *Id.* at 103-04.

50. *Id.* at 104.

51. *Id.*

52. *Id.*

53. *Id.* (citing S. REP. NO. 1431, 74th Cong., 1st Sess. 3 (1935)).

54. The term “investor” may be a misnomer since trading in commodity futures is universally regarded as highly speculative. *See* 7 U.S.C. § 5 (1976).

55. 562 F.2d 432 (7th Cir. 1977).

cense to do business on commodity futures markets. The opinion represents an instructive description of the CFTC's jurisdictional base, regulatory mission and broad authority. It also provides a painstaking rendition of the procedural framework and development of the case at bar. However, the most noteworthy aspect of the case is not what it says, but what it does not say. In the last analysis, doubt remains as to whether Silverman was accorded fundamentally fair treatment by the CFTC, for, as will be shown, Silverman was twice punished by the CFTC for the same conduct.

Silverman was an "associated person" by regulatory definition⁵⁶ and an account executive or "customers' man" for a futures commission merchant (commodity futures broker) by description. On March 13, 1973, the United States Secretary of Agriculture⁵⁷ charged Silverman with unauthorized and fraudulent trading of customers' accounts on specified occasions during September and October 1970 and in March 1972. On May 5, 1976, the CFTC⁵⁸ found Silverman guilty as charged and issued its order prohibiting him from trading his account or anyone else's account on any exchange for a period of two years.⁵⁹ In addition, Silverman was ordered to permanently cease and desist from placing unauthorized or fraudulent customer orders.⁶⁰

It must also be noted that the CFTC's "Final Order" reduced the administrative law judge's recommended five-year suspension period to a period of two years. In doing so the CFTC stated:

In view of the registration requirements of the Act which will require the respondent to file an application for registration as an associated person of a futures commission merchant under Section 4k of the Act, 7 U.S.C. § 6k, in order to be employed as an account executive with a futures commission merchant, the Commission believes that a five-year sanction prohibiting the respondent from trading on any contract market, is excessive on the facts of this case.⁶¹

On appeal the Seventh Circuit, on February 16, 1977, affirmed the

56. 7 U.S.C. § 6k (1976) requires registration of an "associated person" who is "any person . . . associated with any futures commission merchant or with any agent of a futures commission merchant as a partner, officer, or employee . . . in any capacity which involves (i) the solicitation or acceptance of customers' orders . . . or (ii) the supervision of any person or persons so engaged. . . ."

57. The Secretary of Agriculture was the CFTC's regulatory predecessor.

58. The CFTC was established pursuant to an amendment to the Commodity Exchange Act. Under this amendment, all then pending cases, including Silverman's, were transferred to the CFTC. See 7 U.S.C. § 4a, note (1976).

59. *In re Silverman*, [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,159 (CFTC No. 75-6 May 5, 1976), *aff'd sub. nom.* *Silverman v. CFTC*, 549 F.2d 28 (7th Cir. 1977).

60. *Id.*

61. *Id.* at 20,974.

CFTC's order suspending Silverman.⁶² Silverman apparently complied with the suspension order and normally it could be expected that his troubles with the CFTC would end here. However, from his standpoint the worst was yet to come.

Two days after the commencement of the suspension period the CFTC, on May 27, 1976, issued a rule to show cause why his registration as an associated person ought not be revoked. The grounds asserted in the rule were the same as those charged in the first case along with the recital that Silverman had been found guilty in the first case. Moreover, in the second case the CFTC again proceeded against Silverman pursuant to the provisions of section 4b of the Act,⁶³ as it had done in the first action. The only discernible difference between the two cases is that the CFTC was seeking revocation of Silverman's registration in the later case whereas it sought suspension of trading privileges in the earlier case.

Registered commodity representatives were not required to register with the federal government, at the time that charges were first lodged against Silverman. It was not until April 21, 1975, the effective date of the amended Commodity Exchange Act, that they were required to register.⁶⁴ Apparently, the CFTC relied on this factor as justification for doing what it did. Yet, it should be noted that Silverman did register as required, and in so doing specified the pendency of the CFTC's charges.⁶⁵ Further, the CFTC accepted his application and permitted Silverman's registration and its renewal without comment or qualification. And it is particularly significant that while the matter pended before the CFTC for one year, the CFTC never sought to amend the charges also pending in the first case to include a prayer for registration revocation. Further, because the first case resulted in a final valid judgment, the second action could have been barred by res judicata.⁶⁶

The CFTC's failure to amend its original charge is not justified or explained in the reported accounts of the second case.⁶⁷ Moreover, the

62. *Silverman v. CFTC*, 549 F.2d 28 (7th Cir. 1977), *aff'g* *In re Silverman*, [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,159 (CFTC No. 75-6 May 5, 1976).

63. 7 U.S.C. § 6b (1976).

64. *Id.* §§ 6f, 6k.

65. 562 F.2d at 433.

66. Under the doctrine of res judicata a final valid judgment on the merits precludes further litigation of the same cause of action between the same parties or those in privity with them. *See* *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955); 1B MOORE'S FEDERAL PRACTICE ¶ 0.401 at 11 (2d ed. 1974).

67. *See Silverman v. CFTC*, 562 F.2d 432 (7th Cir. 1977); *In re Silverman*, [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,410 (N.D. Ill. March 14, 1977); *In re Silverman*, [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,205 (CFTC No. 76-18 Aug. 24, 1976).

decision of the CFTC administrative law judge in the second case evinces that Silverman urged that the second action was barred. In the introductory clause to his Findings of Fact the administrative law judge observed:

The 1974 changes in the Act clearly show a change of legislative policy in policing commodity market practices and the fact, standing alone, that this proceeding involves a revised statute is a proper basis for rejecting a claim that the final order in No. 75-6 is a bar to this proceeding.⁶⁸

An accompanying footnote referred to two cases which purportedly supported the finding that the second action against Silverman was not barred. The two cases are *Pacific Seafarers v. Pacific Far East Line*,⁶⁹ and *Thompson v. Flemming*.⁷⁰ Neither case supports the thesis of the administrative law judge.

The *Pacific Seafarers* case concerned the applicability of sections 1 and 2 of the Sherman Act⁷¹ to an alleged conspiracy between defendant American shipping lines and two conferences to which they belonged. The complaint alleged that the defendants conspired to destroy the plaintiff's business of carrying certain cargoes. Unlike *Silverman*, *Pacific Seafarers* did not involve "a revised statute" as a proper basis for refusing to apply the doctrines of res judicata or collateral estoppel.⁷²

The only reference to collateral estoppel in *Pacific Seafarers* is inapposite to *Silverman*. The defendants in *Pacific Seafarers* pointed to an earlier determination by the Federal Maritime Commission in a case involving the same parties in a similar action under another federal statute. The defendants then urged that the prior determination ought to bar relitigation of whether "foreign commerce" cognizable under federal laws was present in the action. The Court of Appeals for the District of Columbia rejected the defendants' urging. After observing that the Commission action had been brought under the Shipping Act,⁷³ whereas the federal court action had been brought under the Sherman Act, the court found that "[t]he commission did not rule that there was no 'foreign commerce' as that term is used in the Sherman Act, nor did it rule that the standards under the two acts were the

68. [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,205 at 21,127-28.

69. 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1970).

70. 188 F. Supp. 123 (D. Or. 1960).

71. 15 U.S.C. §§ 1, 2 (1976).

72. Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit "precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955).

73. 46 U.S.C. §§ 814, 815 First, 817 (1970).

same.”⁷⁴

In contrast to *Pacific Seafarers*, *Silverman* did not invoke definitional differences between two acts or even within the same act. Rather it concerned two separate impositions of sanctions by an administrative agency for the same conduct. This matter simply was not addressed or even alluded to in *Pacific Seafarers*. Hence, *Pacific Seafarers* does not support the result in *Silverman*.

Similarly, *Thompson v. Flemming*,⁷⁵ the other case cited by the administrative law judge in *Silverman*, did not involve a “revised statute” or an attempt to bar a second action under the same Act. *Thompson* was a case involving the Social Security Administration’s denial of disability insurance benefits. The Social Security Administration had determined that Thompson did not have an irremediable impairment which would preclude all forms of substantial gainful activity; thus, he was not eligible for disability insurance benefits.⁷⁶ In the United States District Court for the District of Oregon, Thompson maintained that the Veterans’ Administration’s finding that his disability prevented him from engaging in substantial gainful employment ought to bind the federal government. The court rejected Thompson’s contention and in so doing adopted the language of the Court of Appeals for the Eighth Circuit in *NLRB v. Pacific Intermountain Express Co.*⁷⁷ The court found that “[e]ach fact-finding agency is entitled to make its own decision upon the evidence before it and the fact that another tribunal has reached a different conclusion upon the same issue . . . does not invalidate any decision which has proper evidentiary support.”⁷⁸

In contrast, *Silverman* involved only one “fact-finding agency,” the CFTC. Accordingly, it would again appear that the *Thompson* case is inapposite to *Silverman* and it may be that it was error not to bar the second administrative action in *Silverman*. It must be recalled that the CFTC’s first order suspended Silverman for two years from trading any accounts—both accounts in his own name and customers’ accounts—on any and all commodity exchanges. As a practical matter this first preclusion encompasses the registration revocation imposed in the second administrative action. And to permit a broader sanction,

74. 404 F.2d at 810.

75. 188 F. Supp. 123 (D. Or. 1960).

76. *Id.* at 125-26. See the Social Security Act, 42 U.S.C. § 416(i) (1976) for the current eligibility requirements for disability insurance benefits.

77. 228 F.2d 170 (8th Cir. 1955).

78. 188 F. Supp. at 126 (quoting *NLRB v. Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (8th Cir. 1955)).

viz., blanket registration revocation, in a second action could be construed as overreaching.

In summary, it appears that, notwithstanding the propriety of procedural technicalities and nuances, Silverman was substantially prejudiced by the second imposition of a harsher sanction for conduct for which sanctions had already been imposed. Principles of *res judicata* and collateral estoppel may properly be applied in administrative cases.⁷⁹ When an administrative agency is acting in a judicial capacity and resolves disputed factual issues which are properly before it and which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.⁸⁰ Moreover, the record in *Silverman* does not disclose a discernible reason for the Seventh Circuit's failure to consider *res judicata*, collateral estoppel or equitable estoppel in its decision.

ARBITRATION OF CUSTOMER-BROKER DISPUTES

The next two cases, *Tamari v. Bache & Co.*,⁸¹ and *Tamari v. Conrad*,⁸² are related. They concern the arbitration of customer-broker disputes arising out of the solicitation and handling of customers' commodity futures trading accounts.⁸³ The factual underpinnings of both cases are basically the same.

In May and again in September 1972, the Tamaris executed customer's agreements for the establishment of two commodity futures trading accounts with Bache & Co.⁸⁴ Thereafter, both accounts were traded in futures contracts. It was then that the underlying dispute arose.

On January 9, 1974, Bache Delaware served notarial notice upon the Tamaris in Lebanon demanding arbitration of a \$375,000 indebtedness caused by trading in the account. The arbitration demand was predicated on Bache Delaware's customer's agreement which required arbitration of all customer-broker disputes.⁸⁵

79. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940). See also 2 K. DAVIS, *ADMINISTRATIVE LAW* §§ 18.01-.10 (1958).

80. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966).

81. 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).

82. 552 F.2d 778 (7th Cir. 1977).

83. The author appeared as counsel in the *Tamari* cases and the underlying dispute is still pending in the United States District Court for the Northern District of Illinois in two other related cases. Accordingly, while an attempt has been made to avoid commentary, the author's view of these decisions must be read with this factor in mind.

84. Hereinafter referred to as Bache Delaware.

85. 552 F.2d at 779.

The Tamaris replied to the notarial notice, agreed to arbitration as required by the customer's agreement and also requested that the arbitration proceedings include the Tamaris' counterclaim for \$2,150,000 which they had paid to Bache Delaware and Bache & Co. (Lebanon) S.A.L.⁸⁶ As a result of this exchange, in April 1974 the Tamaris and Bache Delaware executed a submission agreement for arbitration of the dispute before a panel of the arbitration committee of the Chicago Board of Trade.⁸⁷

For a variety of reasons evidentiary hearings before the CBOT arbitration panel were not scheduled to begin until December 11, 1975. On December 10, 1975, the Tamaris filed an action in the United States District Court for the Northern District of Illinois against both Bache Lebanon and Bache Delaware, pursuant to the Commodity Exchange Act.⁸⁸ The complaint sought damages for various alleged wrongdoings in connection with the solicitation and handling of the accounts. On December 11, 1975, the arbitration panel met over the Tamaris' objections and, proceeding with the arbitration, began to receive evidence.⁸⁹ The arbitration panel then scheduled the next hearing for early January 1976.

Shortly prior to the next scheduled arbitration hearing the Tamaris filed an action in the district court, pursuant to the Federal Arbitration Act.⁹⁰ This action sought to prevent the CBOT and Bache Delaware from proceeding with the arbitration, pending disposition of their federal damage suit under the Commodity Exchange Act. The district court dismissed the injunction action on the ground that it failed to state a cause of action for which relief might be granted.⁹¹ On appeal, the judgment of the district court was affirmed by a divided court.⁹²

Several issues were raised on appeal. Most of the issues were unique to the facts of the case and are not likely to recur.⁹³ However, two issues of considerable potential significance were treated. The first issue has two prongs, *i.e.*, whether section 7a(11) of the Commodity Exchange Act,⁹⁴ operated to bar the arbitration and whether *Wilko v.*

86. Hereinafter referred to as Bache Lebanon.

87. 552 F.2d at 779-80; 565 F.2d at 1200, 1203. The Chicago Board of Trade will hereinafter be referred to as CBOT.

88. 7 U.S.C. §§ 1-17, 18-22 (1976).

89. 565 F.2d at 1203.

90. 9 U.S.C. §§ 1-14 (1976).

91. 565 F.2d at 1197.

92. *Id.* at 1194.

93. *Id.* at 1199.

94. 7 U.S.C. § 7a(11) (1976) provides that each commodities contract shall:

Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof; pro-

Swan,⁹⁵ a securities case, applied by analogy to commodities cases and thereby precluded arbitration.

With regard to the applicability of section 7a(11) of the Commodity Exchange Act, the Tamaris interpreted that section as prohibiting arbitration of claims exceeding \$15,000. Because Bache's claim and Tamari's counterclaim each exceeded that limit, Tamari contended that the dispute could not be arbitrated.⁹⁶ Conversely, Bache Delaware did not interpret section 7a(11) as prohibiting arbitration of claims exceeding \$15,000 or precluding contract markets⁹⁷ from providing other arbitration facilities. This was also the view of the CFTC.⁹⁸

The Seventh Circuit Court of Appeals adopted Bache Delaware's interpretation of section 7a(11). The court also found that because the arbitration proceedings were already pending on the effective date of section 7a(11), they were subject to the "broad saving provision" of section 4a, note.⁹⁹ Thus, the court held that the pending arbitration was not prohibited by the Act.¹⁰⁰

The other prong of the Tamaris' contention was that the teachings of the Supreme Court barring arbitration in *Wilko v. Swan*¹⁰¹ ought to be adopted by the Seventh Circuit. In *Wilko* the Court held that a customer-broker securities account agreement to arbitrate any dispute that may arise in the future is void under section 14 of the Securities Act of 1933,¹⁰² notwithstanding the provision of the Federal Arbitration Act¹⁰³ to the contrary. Section 14 of the Securities Act provides that "any condition, stipulation, or provision binding any person acquiring a security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."¹⁰⁴ Simply stated, the Court in *Wilko* construed section 14 in

vided, [t]hat (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of \$15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker

95. 346 U.S. 427 (1953).

96. 565 F.2d at 1199.

97. A contract market is an exchange or board of trade where futures contracts are traded. See 565 F.2d at 1200 n.7. See also 7 U.S.C. §§ 2, 8 (1976).

98. 565 F.2d at 1200.

99. *Id.* at 1201. The saving provision, section 4a, note, of the Commodity Futures Trading Commission Act, the amendatory act, provides: "Pending proceedings under existing law shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of this Act." 7 U.S.C. § 4a, note (1976).

100. 565 F.2d at 1201.

101. 346 U.S. 427 (1953).

102. 15 U.S.C. § 77n (1976).

103. 9 U.S.C. §§ 1-14 (1976).

104. 15 U.S.C. § 77n (1976).

light of the congressional policy to protect the public and found that the arbitration agreement was void.¹⁰⁵

The *Tamaris* asserted that by analogy *Wilko* applied to their case due to the similarity in congressional intent underlying the enactment of the federal securities laws and the commodities laws, *i.e.*, the protection of the investing public.¹⁰⁶ The Seventh Circuit simply declined to apply *Wilko*. It first noted that the Commodity Exchange Act contains no provision comparable to section 14. It then distinguished the only other then published opinion on the subject, *Milani v. Conti Commodity Services*.¹⁰⁷ Finally, the court stated, "In any event we decline to legislate a Section 14 provision into the Commodities Act."¹⁰⁸

It should be noted, however, that within two months of the decision in *Tamari v. Bache*, the Second Circuit decided *Ames v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*¹⁰⁹ which did bar arbitration in a similar situation. In *Ames* a commodity customer brought suit in the United States District Court for the Southern District of New York alleging violations of the Commodity Exchange Act. The defendant broker moved to stay the action pending arbitration pursuant to a predispute customer agreement between the parties. In reversing the district court's grant of an order compelling arbitration, the Second Circuit retroactively applied pertinent provisions of the Commodity Exchange Act¹¹⁰ and regulations promulgated thereunder by the CFTC. The court reasoned that "[a] court must apply the law as it exists at the time of its decision, even where the law has changed during the pendency of the action, unless the statute or legislative history reveals an intention of prospective application only, or retroactive application would lead to 'manifest injustice.'"¹¹¹ In view of *Ames* and a later decision¹¹² and because *Tamari v. Bache* was not a unanimous decision, it is possible that the Seventh Circuit may reexamine its position if the issue of retroactivity is again presented.¹¹³

The other significant aspect of *Tamari v. Bache* is treated in the dissent of Judge Swygert. He found that "[t]he crucial issue in this case

105. 346 U.S. at 435.

106. See also *Ames v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174 (2d Cir. 1977); *Rothberg v. Loeb, Rhoades & Co.*, 445 F. Supp. 1336 (S.D.N.Y. 1978).

107. [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,227 (N.D. Cal. Oct. 26, 1976).

108. 565 F.2d at 1200.

109. 567 F.2d 1174 (2d Cir. 1977).

110. 7 U.S.C. §§ 1-17, 18-22 (1976).

111. 567 F.2d at 1177 (citing *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)).

112. *Rothberg v. Loeb, Rhoades & Co.*, 445 F. Supp. 1336 (S.D.N.Y. 1978).

113. The likelihood that retroactive application of the amended Commodity Exchange Act, 7 U.S.C. §§ 1-17, 18-22 (1976) will be considered again is diminished with the passage of time since it is increasingly unlikely that pre-1975 claims will be presented.

is whether [Tamaris] should be compelled to comply with the agreement to arbitrate disputes which was part of the contracts [they] signed upon opening two accounts with Bache."¹¹⁴ The Tamaris had contended that the account agreements containing the provision to arbitrate all disputes amounted to contracts of adhesion and were thereby unenforceable.

Judge Swygert agreed. He found that one of the primary purposes behind the anti-fraud provisions of the Commodity Exchange Act¹¹⁵ was to protect the public from being cheated by "sophisticated insiders."¹¹⁶ Because of this legislative intent, Judge Swygert felt that the Tamaris' complaint charging Bache with fraud should not be dismissed on the basis of an adhesion contract drafted by Bache. To compel arbitration in such a case was to force individual investors like the Tamaris to take their grievances against a broker before a panel of other brokers. Judge Swygert eloquently argued against this practice, stating:

We can be confident that, if the commodities brokers as a class can compel the arbitration of anti-fraud claims rather than litigating them in court, they will do so. The arbitrators before whom the complaints would be filed would also be insiders in the commodities industry, and would tend to be more tolerant of questionable practices by brokers than would a judge who is an outsider to the field. But the individual investor is entitled to have his claim decided by an outsider. It contravenes the spirit of the Act and undermines its remedial purposes to remand the investor who contends a broker has committed fraud to a committee composed of other brokers on the basis of an arbitration clause in an adhesion contract.¹¹⁷

Judge Swygert also would have applied *Wilko v. Swan*¹¹⁸ to this case. Although *Wilko* was a securities case, Judge Swygert found that "a major underpinning of the Court's holding was . . . the vulnerability of an individual investor to being manipulated by insiders in the securities industry."¹¹⁹ Judge Swygert further thought that *Weissbuch v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*¹²⁰ controlled the case at bar. In *Weissbuch*, a securities fraud case, the Seventh Circuit refused to enforce an arbitration clause "because it was not the product of actual bargaining between the parties and enforcement would determine the policy contained in the Securities Exchange Act¹²¹ of protecting the

114. 565 F.2d at 1204 (Swygert, J., dissenting).

115. 7 U.S.C. §§ 6b, 6c (1976).

116. 565 F.2d at 1204 (Swygert, J., dissenting).

117. *Id.* at 1205-06.

118. 346 U.S. 427 (1953).

119. 565 F.2d at 1206 (Swygert, J., dissenting) (citing *Wilko v. Swan*, 346 U.S. 427, 435 (1953)).

120. 558 F.2d 831 (7th Cir. 1977).

121. 15 U.S.C. §§ 78a-kk (1976).

individual investor.”¹²² Judge Swygert saw no logical distinction between *Weissbuch* and *Tamari*. He would have applied *Weissbuch* to *Tamari*, stating:

There is no logical way to distinguish the plight of the individual securities investor and the individual commodities investor. Both are vulnerable to fraudulent schemes perpetrated by industry insiders. Congressional concern for the individual investor is no greater in the Securities Exchange Act than it is in the Commodity Exchange Act. Finally, the danger that arbitration will frustrate the intent of Congress is no greater in the securities industry than it is in the commodities industry.¹²³

Judge Swygert's dissent is even more compelling when one considers the CFTC's current policy regarding arbitration agreements. As early as 1975 the CFTC recognized the unfairness of allowing brokers to utilize adhesion contracts to compel arbitration of customer disputes.¹²⁴ The CFTC has since promulgated a rule which generally prohibits arbitration clauses in contracts to open accounts.¹²⁵ The tenor of the CFTC rule is exemplified by the requirement that the customer agreement must contain the following cautionary language printed in bold face type:

WHILE THE COMMODITY FUTURES TRADING COMMISSION (CFTC) RECOGNIZES THE BENEFITS OF SETTLING DISPUTES BY ARBITRATION, IT REQUIRES THAT YOUR CONSENT TO SUCH AN AGREEMENT BE VOLUNTARY. YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [name]. See 17 CFR 180.1-180.6.

BY SIGNING THIS AGREEMENT, YOU MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW, BUT YOU ARE NOT WAIVING YOUR RIGHT TO ELECT AT A LATER DATE TO PROCEED PURSUANT TO SECTION 14 OF THE COMMODITY EXCHANGE ACT TO SEEK DAMAGES SUSTAINED AS A RESULT OF A VIOLATION OF THE ACT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [name] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL STILL HAVE 45 DAYS IN WHICH TO MAKE THAT ELECTION.¹²⁶

In light of these regulatory changes vis-a-vis arbitration and the availability of a CFTC sponsored reparations forum, it would appear

122. 565 F.2d at 1206 (Swygert, J., dissenting) (citing *Weissbuch v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 835 (7th Cir. 1977)).

123. 565 F.2d at 1206 (Swygert, J., dissenting).

124. [1975-77 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,111 (Nov. 24, 1975).

125. Arbitration or Other Dispute Settlement Procedures, 17 C.F.R. § 180.3(a) (1977).

126. *Id.* § 180.3(b)(4).

that controversies such as *Tamari v. Bache* will not be so prevalent in the future.

The second case, *Tamari v. Conrad*,¹²⁷ arose from the continuation of the arbitration proceedings. During the course of the ensuing arbitration proceedings it appeared to the Tamaris that the arbitration panel had failed to abide by the submission agreement, the rules and regulations of the CBOT and the law with regard to the selection and empanelling of the arbitration panel. Upon the refusal of the panel to disqualify itself, the Tamaris filed the subject declaratory judgment action in the district court against the members of the CBOT arbitration committee seeking an injunction which would provide for their disqualification.¹²⁸ The district court dismissed the action, holding that the Tamaris had to proceed with the pending arbitration and exhaust all avenues of administrative appeal before they could return to the district court. On appeal, the United States Court of Appeals for the Seventh Circuit again affirmed the decision of the district court.¹²⁹

This suit against the arbitrators presented a case of first impression to the Seventh Circuit on the question of whether arbitrators can be sued with respect to their authority to resolve a dispute.¹³⁰ The Tamaris emphasized that their complaint did not challenge any of the arbitrators' actions in the conduct of the hearings, but rather their capacity to resolve the dispute. It was further contended that the defendant arbitrators could not rely on arbitral immunity¹³¹ if they had no right to arbitrate the dispute in the first place.

The decision defeating the Tamaris' contentions is straightforward and based on recognized tenets of public policy. In brief the court held that:

[A]rbitral immunity should be extended to cases where the authority of an arbitrator to resolve a dispute is challenged. Defendants are individuals who are familiar with the commodities futures business. They agreed to serve as arbitrators, at nominal pay, at the request of the Chicago Board of Trade. It is obviously in the best interests of both the brokers who utilize the Chicago Board of Trade and their customers to have arbitration facilities available. But individuals such as defendants cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit. Defendants have no interest in the outcome of the dispute between Tamari and

127. 552 F.2d 778 (7th Cir. 1977).

128. *Id.* at 780.

129. *Id.* at 781.

130. *Id.* at 780.

131. See *Cahn v. International Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962) (per curiam); *Hill v. Aro Corp.*, 263 F. Supp. 324 (N.D. Ohio 1967).

Bache, and they should not be compelled to become parties to that dispute.¹³²

Thus, it appears that unless it can be demonstrated that the arbitrators have an interest in the outcome of the dispute they are totally immune from suit.

EXHAUSTION DOCTRINE BARS COLLATERAL ATTACK ON REPARATIONS PROCEEDINGS

Collateral attacks, including those based on constitutional grounds, are barred almost without exception¹³³ by the requirement that the complaining party exhaust his administrative remedies.¹³⁴ The Seventh Circuit's most recent decision in *Rosenthal & Co. v. Bagley*,¹³⁵ certainly endorses application of the exhaustion doctrine even where approximately twenty-five suits might be avoided by permitting collateral consideration of the constitutional question. A concise opinion by Judge Tone sets forth the Seventh Circuit's adherence, if not commitment, to the doctrine and its liberal application.

The gravamen of the *Rosenthal* collateral attack challenged the constitutionality of section 14 of the Commodity Futures Trading Commission Act of 1974.¹³⁶ Section 14 confers on the CFTC the authority to establish a reparations forum in which to hear and adjudicate customer claims against futures commission merchants (*i.e.*, commodities brokers) and certain other registered persons. If, as a result of reparations proceedings,¹³⁷ the CFTC finds a violation of the Commodity Exchange Act,¹³⁸ the CFTC may award damages enforceable in a federal district court.¹³⁹ Direct review of the CFTC's order is available in the United States Court of Appeals.¹⁴⁰

Rosenthal & Company brought the injunction action because they were then defending approximately twenty-five of these reparation proceedings. They sought to enjoin the CFTC and the five members of the Commission from hearing the claims. The complaint alleged that the statutory scheme concerning reparations violated the seventh amend-

132. 552 F.2d at 780, 781.

133. There are exceptions. *See, e.g.*, *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 89 (1958); *Public Utils. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958).

134. This is commonly referred to as the exhaustion doctrine. *See Frey v. Commodity Exch. Auth.*, 547 F.2d 46, 49-50 (7th Cir. 1976).

135. 581 F.2d 1258 (7th Cir. 1978).

136. 7 U.S.C. § 18 (1976).

137. 17 C.F.R. §§ 12.1-12.102 (1977).

138. 7 U.S.C. §§ 1-22 (1976).

139. *Id.* § 18(f).

140. *Id.* § 18(g).

ment¹⁴¹ by denying the right to a jury trial in civil cases.

The United States Court of Appeals for the Seventh Circuit, relying largely upon two of its recent decisions, *Frey v. Commodity Exchange Authority*,¹⁴² and *Squillacote v. International Brotherhood of Teamsters*,¹⁴³ stated, "We find no principled basis for distinguishing *Teamsters I* or *Frey* from the case at bar. Essentially the same kind of ultimate review of a final agency order by the court of appeals is provided for in the basic statutes involved in the three cases. . . ." ¹⁴⁴

Frey was a collateral action seeking to stay administrative proceedings unless and until discovery was afforded. The Seventh Circuit Court of Appeals applied the exhaustion doctrine¹⁴⁵ and held that the district court erroneously enjoined the administrative proceeding pending discovery. The Seventh Circuit considered the injunction to be a premature interruption of the administrative process.¹⁴⁶ Speaking for the court, Chief Judge Fairchild found no due process violation in the CFTC action because the administrative proceedings had not yet advanced to the hearing stage when the injunction was issued.¹⁴⁷

Similarly, in *Teamsters I*, the court refused to collaterally consider the constitutionality of a provision of the underlying statute on which the legality of the Teamsters' conduct depended because the Teamsters "had not shown a clear violation of a constitutional right or that its constitutional claim could not be judicially determined if an exception to the exhaustion requirement were not allowed."¹⁴⁸

The *Rosenthal* court also weighed the efficiency of determining the constitutional question immediately against the countervailing consideration of not interfering with the agency's performance and the possibility that an agency determination in favor of *Rosenthal* would operate to moot the constitutional question. The court concluded that

141. The seventh amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

142. 547 F.2d 46, 49-50 (7th Cir. 1976).

143. 561 F.2d 31, 37-40 (7th Cir. 1977). This case will hereinafter be referred to as *Teamsters I*. In *International Bhd. of Teamsters v. NLRB*, 568 F.2d 12 (7th Cir. 1978) (*Teamsters II*), the United States Court of Appeals for the Seventh Circuit decided the constitutional question in a direct review of the NLRB's final order.

144. 581 F.2d 1258 (7th Cir. 1978).

145. For a definition of the exhaustion doctrine, see text accompanying note 134 *supra*.

146. 547 F.2d at 47.

147. *Id.* at 49.

148. 581 F.2d at 1260.

the latter considerations had greater weight.¹⁴⁹

Finally, the court observed that Rosenthal & Company had not demonstrated that it merited the "clear-right" exception to the application of the exhaustion doctrine.¹⁵⁰ The court viewed Rosenthal & Company's seventh amendment claim as "arguable but far from clear."¹⁵¹ In sum, it is clear from *Rosenthal, Frey*, and *Teamsters I* that the Seventh Circuit will not allow collateral attacks on CFTC proceedings unless a violation of a constitutional "clear right" can be established.

CONCLUSION

In rendering five significant commodities law decisions during the 1977-78 term, the United States Court of Appeals for the Seventh Circuit conveyed two distinct messages. First, the federal securities laws will not be considered a source of relief for disputes arising from commodity futures trading accounts. Second, the court will defer considerably to the Commodity Futures Trading Commission on matters within the Commission's jurisdiction.

In reviewing the court's decisions it becomes apparent that the court did not always further the policy behind the federal commodities laws, *i.e.*, protection of the investor.¹⁵² This is an unfortunate result, not only for the individual commodities investor but also for the commodities futures trading industry as a whole.

149. *Id.* at 1261.

150. *Id.* Under the "clear-right" exception doctrine, the court will intervene when necessary to avoid an agency violation of a clear statutory, constitutional, or regulatory right belonging to one of the parties. *Id.*

151. *Id.*

152. S. REP. NO. 93-1131, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5856.

