

I think it is rather heartening to see an administrative agency displaying such willingness to leave the decision to others. For my own part I would return the compliment by suggesting an amendment which would provide that in actions under section 15(d), the court either may or must call on the SEC for an advisory report. I would be quite content with the permissive form, since I am confident that at least in the early days of the statute, it would always be used. On the other hand, I would have no objection to a mandatory requirement.

With such reports available, I would suppose that the courts would develop intelligible guidelines within a relatively short time. That result would be aided by the fact that since actions to recover unreasonable fees are equitable in nature, they would be tried to judges and not to juries. Under the rule that prevails in our circuit and in most others, the conclusion of the trial judge would be freely reviewable on appeal, thereby insuring uniformity within each circuit and providing the possibility of ultimate reconciliation in the Supreme Court if, as I do not in fact anticipate, the circuits were to develop serious conflicts.

Since the claim would be Federal in character, actions could always be brought by plaintiffs in Federal courts or removed by defendants to them, regardless of the citizenship of the parties. However, as the bill stands, Federal jurisdiction would not be exclusive, and there would be nothing to prevent suits remaining in State courts, including continuation of the practice whereby identical suits have often been brought in both sets of courts, with the Federal court utilized for its generally more liberal procedures for discovery and the State court for its generally less rigorous investigation of settlements. At present, Federal jurisdiction under the Securities Exchange Act of 1934 is exclusive, whereas under the Securities Act of 1933 and the Investment Company Act, it is concurrent with the courts of the States. Although I am generally no friend of exclusive Federal jurisdiction, I would think Congress might wish to consider whether in this particular instance it might not be well to confine litigation to the Federal courts, as is done, for example, with respect to suits under the antitrust laws. This would be a step in the direction of uniformity, and the very fact that an action under section 15(d) substitutes for what might have been made an exclusive remedy before the Securities and Exchange Commission would be a sufficient justification.

What remains is the claim that section 15(d) would be a litigation breeder. To my mind, it is not a valid objection that a statute may lead to the bringing of lawsuits. What would matter would be if it lead to the bringing of unjustified lawsuits. While some derivative actions are brought simply for harassment, we have become increasingly aware over the years that others serve a useful purpose in policing directors and officers of companies who otherwise would be laws unto themselves. Indeed, we have the very highest authority for that proposition in the Supreme Court's statement in *J. I. Case Company against Borak*, dealing with the SEC's proxy rules, where the Court said that "Actions by stockholders provide the necessary supplement to Commission action, in view of the limited resources of time and money available to the Commission," and has analogized this to the role of the private treble damage suit in the enforcement of the antitrust laws.