

MEMO# 2122

August 16, 1990

SEVENTH CIRCUIT HOLDS NO RIGHT TO JURY TRIAL FOR SECTION 36(B) CLAIM

August 16, 1990 TO: SEC RULES MEMBERS NO. 60-90 RE: SEVENTH CIRCUIT HOLDS NO RIGHT TO JURY TRIAL FOR SECTION 36(b) CLAIM

The U.S. Court of Appeals for the Seventh Circuit has held that there is no right to a jury trial in a case brought under Section 36(b) of the Investment Company Act alleging excessive management fees. The case, *Kamen v. Kemper Financial Services, Inc.*, was on appeal from the District Court. The plaintiff, a shareholder in a money market fund, had filed a suit under Section 36(b) and also claimed that the fund's proxy statement was misleading. The court followed past decisions in the *Evangelist*, *Schuyt* and *Krinsk* cases in holding that suits under Section 36(b) were not "suits at common law" and thus not entitled to a jury trial under the Seventh Amendment. This affirmed the decision of the District Court. However, the court reversed the District Court's holding that the Section 36(b) claim was barred because the plaintiff was not an adequate representative of the other investors in the fund. The court found that the adequate representative requirement of Rule 23.1 of the Federal Rules of Civil Procedure is applicable only to derivative suits and that, in contrast, a claim under Section 36(b) is not one the fund itself could assert. The court also noted that, in any event, the plaintiff was "no less adequate a representative than most plaintiffs in class actions". The court affirmed the District Court's finding that the plaintiff's claim under Section 20(a), alleging that the fund's proxy statement was misleading, was barred because she was required, but failed, to make a demand on the fund's board of directors. (The court's decision abolished the "futility" exception to the demand requirement in the Seventh Circuit.) The court expressed no opinion on whether a claim under Section 20 was a derivative claim (since the plaintiff had conceded the point) nor on whether Section 20 creates a private right of action. A copy of the court's opinion is attached. Craig S. Tyle Associate General Counsel Attachment