

MEMO# 2648

March 27, 1991

COURT OF APPEALS AFFIRMS JUDGMENT IN KALISH V. FRANKLIN ADVISERS, INC.

March 27, 1991 TO: SEC RULES MEMBERS NO. 22-91 RE: COURT OF APPEALS AFFIRMS
JUDGMENT IN KALISH v. FRANKLIN ADVISERS, INC.

The U.S. Court of Appeals for the Second Circuit has affirmed the decision of the District Court in the case Kalish v. Franklin Advisers, Inc., which had dismissed a shareholders suit under Section 36(b) of the Investment Company Act alleging excessive advisory fees. (See Memorandum to SEC Rules Members No. 55-90, dated July 27, 1990.) In its ruling, the Court of Appeals discussed the lower court's decision striking the plaintiffs' demand for a jury trial (which was the subject of a separate unpublished memorandum). The court ruled that a recent U.S. Supreme Court decision that held that plaintiffs were entitled to a jury trial in a case involving a claim for back pay as a result of an alleged breach of a collective bargaining agreement was "plainly distinguishable" from a claim involving excessive fees under Section 36(b). The court noted that the relief sought in a Section 36(b) case is restitutionary and, therefore, "clearly equitable in nature", as opposed to the claim in the collective bargaining case, which involved an alleged breach of contract, resulting in legal damages. The Second Circuit cited the Seventh Circuit's recent decision in Kamen v. Kemper Financial Services, Inc., which also held that there is no right to a jury trial under Section 36(b), notwithstanding the Supreme Court's ruling in the collective bargaining case. (See Memorandum to SEC Rules Members No. 60-90 dated August 16, 1990.) A copy of the Second Circuit's decision is attached. Craig S. Tyle Associate General Counsel Attachment

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