

88-65



U. S. Securities and Exchange Commission
Washington, D. C. 20549 (202) 272-2650

**News
Release**

**SECURITIES AND EXCHANGE COMMISSION AMICUS
PARTICIPATION IN PRIVATE SECURITIES LITIGATION.**

By

Daniel L. Goelzer
General Counsel

November 19, 1988

1988 Annual Fall Meeting
American Bar Association
Federal Regulation of Securities Committee

Grand Hyatt Hotel
Washington, D.C.

The views expressed herein are those of the author and do not necessarily represent those of the Commission, the Commissioners, or Mr. Goelzer's colleagues on the staff. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees.

SUMMARY

In this speech, the Commission's General Counsel, Daniel L. Goelzer, describes the operation of the Commission's amicus curiae program. Mr. Goelzer outlines the process by which the Commission selects cases, how it decides on a position, and its relationship with the Solicitor General in Supreme Court litigation. Mr. Goelzer also suggests eight factors which could be used to test whether a case may be appropriate for Commission participation.

The appendix to this speech lists selected, significant amicus briefs that the Commission has filed during the past 3 years.

TABLE OF CONTENTS

I.	Introduction	1
A.	The Success of the Commission's Amicus Program . .	1
B.	Enlisting the Commission on Your Side	3
II.	The Amicus Process -- How Does the Commission Become Involved in Private Litigation?	3
A.	How Do We Identify Cases?	3
B.	How Does the Commission Decide on a Position? . .	5
C.	How Does the Justice Department Influence Commission Briefs?	6
III.	How Can the Commission be Persuaded to Enter a Case as Amicus Curiae?	7
A.	Policy Perspective	7
B.	The Litmus Tests	9
1.	Will the court's decision in this case have substantial precedential impact?	9
2.	Could the decision in the case have an impact on the Commission's enforcement program? . .	10
3.	Does the case put in issue the scope of the federal securities laws?	11
4.	Will the case depend upon an interpretation of a Commission rule or statement?	12
5.	Is the relationship between state and federal law at issue?	12
6.	Will the decision have substantial impact on private enforcement of the federal securities laws?	13
7.	Is the brief an opportunity to guide the court to a safe, narrow holding, instead of a broad, damaging one?	14
8.	Is the brief an opportunity for the Commission to make a needed policy statement?	14
IV.	Conclusion	15

I. Introduction

A. The Success of the Commission's Amicus Program

A core function of the Office of the General Counsel at the Securities and Exchange Commission is to represent the Commission before the appellate courts. Appellate litigation is one of the most challenging and stimulating aspects of the General Counsel's work because of the opportunity it affords to participate in the evolution of the federal securities laws in response to new developments in the securities markets and corporate world.

Increasingly, however, the Commission's cutting edge appellate litigation involves cases to which the Commission is not a party, but in which it appears, voluntarily, as amicus curiae. In the last term of the Supreme Court, for example, we did not appear as a party in any case. But, as an amicus curiae, we had two major victories. We persuaded the Court, in Basic v. Levinson, 1/ to adopt the probability/magnitude test, which the Commission had urged in several lower court briefs, and in its Carnation release, 2/ as the proper test of Rule 10b-5 materiality for preliminary merger negotiations. And, in Pinter v. Dahl, 3/ the Supreme Court substantially adopted our reasoning with respect to the scope of Section 12(1) liability under the Securities Act. Both decisions closely followed the Commission's briefs, and in Basic, the court observed, "The SEC's insights are helpful, and we accord them due deference." 4/

This compliment is all the more satisfying in light of the Court's prior attitude. In 1979, for example, in International Brotherhood of Teamsters v. Daniel, the Court noted drily, "On a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the securities acts." 5/ The Court then proceeded to cite 6 cases decided in the six years between 1972 and 1978, 5 of them in which the Commission was an amicus, where it had

1/ 108 S. Ct. 978 (1988).

2/ Securities Exchange Act Release No. 22214 (July 8, 1985), [1984-85] Fed. Sec. L. Rep. (CCH) ¶ 83,801 (1985).

3/ 108 S. Ct. 2063 (1988).

4/ Id. n.16.

5/ 439 U.S. 551, 556 n.20 (1979).

disagreed with the Commission's views. 6/ In contrast, an analysis of our Supreme Court amicus filings during the past 6 years would show that the Court has substantially agreed with us in a string of cases in which we have filed amicus briefs. We failed to persuade the Court in CTS, 7/ but have had our view adopted in a wide range of cases including, besides Basic and Pinter, Huddleston v. Herman & MacLean 8/ (the interplay between implied private rights of action under Rule 10b-5 and express rights), Gould v. Rufenacht 9/ and Landreth Timber Co. v. Landreth 10/ (the sale of business cases), Shearson/American Express v. McMahon 11/ (enforcibility of pre-dispute arbitration agreements), Bateman Eichler, Hill Richards, Inc. v. Berner 12/ (the in pari delicto defense), and Randall v. Loftsgaarden 13/ (the tax-offset rule).

In fact, a case could, I think, be made that, on a dollars-and-cents basis, the Commission's amicus curiae efforts are one of the most cost-effective tools it has for shaping the direction of the securities laws. I estimate that no more than one-half of one percent of the Commission staff's total time, and probably no more than 10 percent of the General Counsel's Office's time, is devoted to amicus curiae briefs. Yet, the impact of those briefs, both on the law and on the parties to the cases in which they are filed, can be far-reaching.

I've mentioned our success in the Supreme Court. But consider another perspective. In Texaco Inc. v. Pennzoil Co., 14/ on the day we filed our brief urging (unsuccessfully, as

6/ SEC v. Sloan, 436 U.S. 103, 117-119 (1978); Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n.27 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212-214 (1976); United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858 n.25; Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 759 n.4 (1975) (Powell, J., concurring); Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418, 425-427 (1972).

7/ CTS Corp. v. Dynamics Corp., 107 S. Ct. 1637 (1987).

8/ 459 U.S. 375 (1983).

9/ 471 U.S. 701 (1985).

10/ 471 U.S. 681 (1985).

11/ 107 S. Ct. 2332 (1987).

12/ 472 U.S. 299 (1985).

13/ 106 S. Ct. 3143 (1986).

14/ No. C-6432 (S. Ct. Texas, 1987).

it turned out) the Texas Supreme Court to review Pennzoil's \$11 billion judgment against Texaco, the market value of Texaco stock increased by nearly \$1 billion. We concluded that the Commission's 20-page brief was worth \$50 million a page, or about \$100,000 a word!

B. Enlisting the Commission on Your Side

Despite the profound impacts that the Commission's amicus filings can have on both the law and on the parties in private securities litigation, it seems that the process by which the Commission and its staff decide to file a brief is not well understood. The American Lawyer, for example, published a lengthy article trumpeting Texaco's success in persuading the Commission to file in its case, and implying that the task was roughly comparable to convincing the Wizard of Oz to return Dorothy to Kansas. ^{15/} And, given our success record, it seems to me that we receive remarkably few requests for amicus curiae participation. In fact, sometimes the parties inform us of important issues pending in the federal courts of appeal only after a decision has been rendered and the losing party has filed a petition for rehearing.

I'd like to take a few minutes today to eliminate some of the mystery about how our amicus program operates and then to offer 8 questions which, in my view at least, could serve as predictors for private counsel in determining whether or not he or she is likely to be successful in persuading the General Counsel's staff to recommend to the Commission that it participate on their client's side in private litigation. Of course, the opinions that I express here today are solely my own, and not necessarily those of the Commission or others on the staff. I hope, however, my factors will stimulate you to bring appropriate cases to our attention early in the appellate process.

II. The Amicus Process -- How Does the Commission Become Involved in Private Litigation?

A. How Do We Identify Cases?

I'd like to begin with an overview of how we identify potential amicus cases and how the decision is made to participate in a particular case. In the past few years, we have filed an average of 20 amicus briefs per year. The appellate litigation group in the Office of the General Counsel, consisting

^{15/} Adler, Has This Man Turned Around the Texaco Case? The American Lawyer 35 (November, 1987).

of approximately 20 attorneys, headed by Associate General Counsel Jacob Stillman, is responsible for the Commission's appellate litigation, including amicus curiae briefs. Paul Gonson, the Solicitor, supervises all of the Office's litigation, and he and I are involved in every significant amicus decision.

Potential amicus cases come to the Office's attention from three sources. First, the appellate staff monitors the docketing of securities cases in the courts of appeals, and the various securities law services, the newspapers, and the appellate slip opinions in private securities litigation raising issues of interest to us. A significant number of our cases originate in this fashion -- we simply locate them on our own and contact the parties in order to obtain copies of the relevant parts of the records.

Second, many cases come to our attention as a result of a party's request that the Commission participate. I estimate that we receive 25 or more requests each year; naturally, only a fraction actually lead to the filing of brief. The timeliness of these requests is often a problem. When we are notified of a case several days before the party the Commission might support files its brief -- and this happens surprisingly often -- the chances of our being able to participate fall.

Third, we receive requests from the courts themselves for the Commission views. This is occurring with increasing frequency at both the trial and appellate levels. The Supreme Court, for example, seems almost as a matter of routine to request the government's views --and, as a practical matter, that means the Commission's views -- with respect to whether or not to grant certiorari in important private securities cases.

At the other end of the spectrum, the district courts are increasingly seeking the Commission's help in sorting out securities law issues in pending cases. This is particularly true in fast-moving and sharply contested hostile takeover situations. During the past year, for example, we have filed briefs, at the request of district judges, concerning:

- whether a tender offer bidder that revised both the number of shares sought and the offer price had made an amended offer, or commenced an entirely new offer; we said no (R.H. Macy & Co. v. Campeau Corp.); 16/
- whether a bidder without firm financing has standing to

challenge a state takeover statute; we said yes (CRTF Corp. v. Federated Department Stores, Inc.); 17/ and

-- whether a bidder's investment banker has irreconcilable conflicts of interest under the federal securities laws as a result of its role as both a participant in the bid and a retail broker-dealer; we said no (Koppers v. American Express Co.). 18/

The Commission almost always honors these judicial requests for its views, even in cases in which it would not otherwise involve itself. There have, however, been exceptions. For example, the Commission is sometimes asked for its views on non-securities law issues; generally, it declines, citing lack of expertise. Occasionally, we have simply found it impossible to formulate a position in the time available.

B. How Does the Commission Decide on a Position?

Once a case comes to our attention, there are three steps which lead to the decision to file an amicus brief. First, unless time makes it impossible, we afford each side the opportunity to convince us whether we should recommend that the Commission participate and, if so, what position it should take. The Texaco litigation, for example, involved a series of meetings with both Pennzoil's representatives and Texaco's. Each made various written submissions to us setting forth their views. While most cases proceed much more informally, we are almost always willing to give a "hearing" to the parties before we make up our minds.

Second, we consult with the affected Commission division or office. In tender offer matters, for example, the Office of Tender Offers in the Division of Corporation Finance is the primary source of guidance.

Third, the filing of all amicus briefs must be approved by majority vote of the Commission. Once we have concluded to recommend participation in a case, the Office of the General Counsel prepares a memorandum describing the litigation and the position we propose to argue and circulates it to the Commission. Generally, the Commission considers these recommendations at closed meetings; sometimes, they are disposed of by seriatim vote of the Commissioners, without a meeting. Occasionally, a Commissioner will ask to review the brief itself after it is drafted. In any case, the Commission's approval is by no means

17/ Id.

18/ 689 F. Supp. 1413 (W.D. Pa. 1988).

pro forma. Amicus recommendations are often hotly debated; our recommendations are not infrequently modified by the Commission; and the votes are occasionally not unanimous.

C. How Does the Justice Department Influence Commission Briefs?

One misconception which sometimes surfaces about our amicus litigation is that the Department of Justice has a say in the formulation of Commission positions. Unlike the cabinet agencies, the Commission is, in its litigation activity, autonomous of the Department of Justice. In order to file an amicus brief, -- or any other brief, for that matter -- in a federal or state trial or appellate court, the Commission needs no approval from anyone at the Department.

In the U.S. Supreme Court, however, the situation is somewhat different. We work closely with the Solicitor General's Office and have not sought to file briefs in the Supreme Court without the Solicitor General's approval. In practice, however, the Solicitor General is almost invariably deferential to the Commission's views. It is extremely rare that the Solicitor General has flatly opposed the Commission's urging a position it wanted to take. Of course, we have had our differences of opinion:

- In International Brotherhood of Teamsters v. Daniel, 19/ the Solicitor General authorized the Commission to file a brief urging that a teamster's interest in an involuntary noncontributory pension plan was a security. But, the Solicitor General also filed a brief on behalf of the Department of Labor opposing the Commission's view.
- In Dirks v. SEC, 20/ the Solicitor General authorized the Commission to argue, as a party, to the Court that Ray Dirks was liable as a tipper for revealing the Equity Funding fraud to institutional investors who sold out before its collapse. But the Solicitor General filed his own amicus brief opposing the Commission's position.
- In CTS v. Dynamics, 21/ the Solicitor General and the Commission filed a joint brief urging that the Indiana

19/ 439 U.S. 551 (1979).

20/ 463 U.S. 646 (1983).

21/ 107 S. Ct. 1637 (1987).

Control Share Acquisition Act was invalid under the Commerce Clause. But, the brief states, the "United States" believed that the statute was "not pre-empted by the Williams Act." 22/ Although many commentators missed the distinction, the reference, in that part of the brief, to the "United States" meant that the Commission did not join in that argument.

III. How Can the Commission be Persuaded to Enter a Case as Amicus Curiae?

I'd like to turn, then, to some suggestions concerning how to interest the General Counsel's staff in supporting your position in pending, private litigation -- and when not to bother asking.

A. Policy Perspective

According to Office legend, some years ago, a Commission attorney delivered a particularly stirring and effective oral argument in a private case in which the Commission was appearing as amicus curiae. Following the Commission's argument, the lawyer for the side we were opposing rose to speak. He began his rebuttal of the Commission's position by telling the judges, in a bitter and disgusted tone, "Your Honors, the Commission is no more a friend of this court than I am."

This lawyer's frustration is understandable. When the Commission appears as amicus curiae in private litigation, it has a certain perspective, an axe to grind, if you will. The agency's mandate is investor protection and it uses its limited amicus curiae resources to take positions that it believes will be of general importance and benefit to investors or to the Commission's ability to use its regulatory and enforcement powers to protect them. We do not seek to support particular parties; who wins a case is, in that sense, of no interest to us. It is the legal principle, not the litigant, that is important in selecting amicus cases. Accordingly, the most important single consideration in persuading the Commission to enter a case is to identify the policy which the Commission's participation would serve and how that policy will further the objectives of the federal securities laws.

This does not, however, mean that the Commission will only enter a case to take a position supporting an investor/plaintiff. Since at least its decision in 1976 to file a brief in Tannenbaum v. Zeller, 23/ arguing that investment company

22/ Brief for the Securities and Exchange Commission and the United States as Amici Curiae, CTS Corporation v. Dynamics Corporation, Nos. 86-71 and 86-97 at 8 (January, 1987).

23/ 552 F.2d 402 (2d Cir.), cert. denied, 434 U.S. 934 (1977).

independent directors could, under appropriate circumstances, forego recapture of brokerage commissions, the Commission has recognized that there are situations in which its goals are best served by amicus filings supporting positions which, at first blush, might appear to be adverse to investor interests. In Tannenbaum, for example, the Commission thought it important to underline the role of independent directors as watch-dogs. I'll mention two more recent illustrations:

- First, last month, we filed a brief in support of rehearing in a Ninth Circuit case, Hocking v. Dubois, 24/ urging that the availability, from an unrelated party, of a rental pool agreement does not transform the sale of a condominium into the sale of an investment contract. In reaching the opposite conclusion, the panel had relied on a Commission interpretive release concerning the applicability of the securities laws to condominium sales. Since we believe the panel's decision to be contrary to the Commission's release, we felt obligated to construe the release for the court, even though our position is adverse to that of the plaintiff in that case.

- Second, last term, in Pinter v. Dahl, 25/ we urged the Supreme Court to adopt a narrow construction of the term seller in Section 12(1) of the Securities Act of 1933. We argued that Section 12(1), which makes "sellers" liable for rescission when they sell securities that should have been registered, encompasses only persons who passed title or actually solicited the transaction. The brief argues that "substantial participants, like accountants and lawyers who prepare offering documents but aren't actually involved in the selling activity are not Section 12 sellers. This position reflects an effort to maintain some balance in the standards for private liability. Some lower courts have held that, if collateral participants are liable under Section 12, then it is necessary to import principles of causation and scienter, not found on the face of this statute, in order to limit these persons' liability within reasonable bounds. In our view, it is more consistent with congressional intent to limit Section 12 liability to sellers, and those who solicit, and at the

24/ 839 F.2d 560 (9th Cir. 1988), reh'g en banc granted (Aug. 1, 1988).

25/ 108 S. Ct. 2063 (1988).

same time to avoid the intrusion of causation and scienter into these causes of action. Last month, in a pending Second Circuit case, Wilson v. Ruffa & Hanover, P.C., 26/ we took the same position with respect to the liability under Section 12(2) of a lawyer who prepared the offering documents.

B. The Litmus Tests

That brings me to my eight litmus tests for Commission participation in amicus curiae litigation. I would urge anyone contemplating seeking our participation in private litigation to first ask these 8 questions -- and, if he decides to proceed, to let us know the answers. Of course, I don't mean to suggest that a case must satisfy all eight criteria before we will be interested in it. In general, a case which satisfies the first test, and any one or more of the other seven, is worth discussing with us.

1. Will the court's decision in this case have substantial precedential impact?

Because of our limited resources, we look for cases that will have a substantial impact on the development of the law. For that reason, we rarely participate, absent a judicial request, in cases at the trial court level. For one thing, a district court decision has only limited precedential impact. Second, trial court litigation often turns out to be highly dependent on what facts can be proven, rather than on the resolution of legal issues. We would prefer to wait until the record is made, and the facts found, and then address legal issues in the appellate court. By the same token, we participate in almost every securities law case in which the U.S. Supreme Court grants certiorari. But, unless the Court asks, the Commission rarely volunteers a view on whether certiorari should be granted.

Of course, there are exceptions to every rule. In the past six months we have filed briefs in federal district courts attacking the constitutionality of the Delaware, New York, and Wisconsin third generation antitakeover statutes. 27/ This type of litigation, involving constitutional claims, presents to the

26/ 844 F.2d 81 (2d Cir. 1988), rehearing petition pending.

27/ RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476 (D. Del. 1988); RTE Corp. v. Mark IV Industries, Inc., Fed. Sec. L. Rep. (CCH) ¶93,789 (E.D. Wis. May 6, 1988); Salant Acquisition Corp. v. Manhattan Industries, Inc., 682 F. Supp. 199 (S.D.N.Y. 1988).

trial court a pure legal issue. Moreover, because of the speed at which these control contests move, most cases never reach the appellate courts.

2. Could the decision in the case have an impact on the Commission's enforcement program?

This is probably the single most persuasive factor in entering a case. In Basic v. Levinson, 28/ for example, we were concerned that a narrow construction of materiality could potentially affect many of the Commission's own Rule 10b-5 enforcement cases. Indeed, as we pointed out in our brief to the Supreme Court, if preliminary merger negotiations which had not reached an agreement on price and structure were immaterial for Rule 10b-5 purposes, significant cases in the Commission's insider trading enforcement program could be adversely affected.

In a somewhat different twist, we took the unusual step of filing a Commission amicus brief in the Second Circuit in U.S. v. Carpenter, 29/ the government's criminal case against Foster Winans and the other Wall Street Journal "Heard on the Street" defendants. Obviously, the validity of the misappropriation theory is a central issue in the insider trading enforcement program, and we felt it was vital to assist the U.S. Attorney in preserving it.

We are also interested in cases which arise, not under the federal securities laws, but under procedural statutes and rules, if they could affect the Commission's enforcement litigation. In 1986, we filed an amicus curiae brief, jointly with the State Department, in the Supreme Court in Societe Nationale Industrielle Aerospatiale v. United States District Court, 30/ urging that the provisions of the Hague Convention on the Taking of Evidence Abroad did not foreclose a federal district court from ordering discovery against foreign parties in ways not specified in the Hague Convention. While this might seem rather far afield from the securities laws, the Commission is, as a result of the effects of internationalization of the securities markets on our enforcement program, a frequent user of the Hague

28/ 108 S. Ct. 978 (1988).

29/ 791 F.2d 1024 (2d Cir.), aff'd 108 S. Ct. 316 (1987).

30/ 107 S. Ct. 2542 (1987).

Convention and is directly affected by judicial decisions construing the reach of U.S. discovery orders. 31/

3. Does the case put in issue the scope of the federal securities laws?

Cases which deal with scope of the federal securities laws catch our attention, especially cases involving the definition of the term security -- the basic predicate to Commission jurisdiction. Several years ago, for example, we participated very actively in the series of cases involving the sale-of-business doctrine -- the theory that the sale of all of the stock of a business was outside the securities laws because it was, in effect, the sale of the business itself. Ultimately, the Supreme Court rejected the doctrine, as the Commission had urged. 32/ Within the past year, we have argued that such diverse instruments as notes issued by a state-regulated trust company, 33/ "international certificates of deposit" issued by a foreign currency dealer, 34/ and oil and gas interests traded between sophisticated petroleum producers 35/ are securities.

The definition-of-security cases are of interest to us in part because of their potential impact on the enforcement program. If it is not a security in private litigation, it won't be in Commission cases either. A pending example is Arthur Young & Co. v. Reves, 36/ an Eighth Circuit case, in which rehearing is sought with respect to a panel's holding that a demand note with a fixed rate of interest is not a security, because of its no-maturity demand nature and because fixed interest does not constitute profits for purposes of the investment contract test. The Commission has already brought and

31/ Brief for the United States and the Securities and Exchange Commission as Amici Curiae, Societe Nationale Industrielle Aerospatiale v. United States District Court at 15-18 (August, 1986).

32/ See notes 9 and 10, supra.

33/ Holloway v. Peat, Marwick, Mitchell & Co., Nos. 87-1486 and 87-1490 (10th Cir.) pending.

34/ Sanderson v. Roethenmund, 682 F. Supp. 205 (S.D.N.Y. 1988).

35/ Adena Exploration, Inc. v. Dave Sylvan, No. 87-1429 (5th Cir., Nov. 1, 1988).

36/ Nos. 87-1726, 1727, 1803, 2533, and 88-1014 (8th Cir.), rehearing petition pending.

settled an enforcement action based on the same facts as underlie the private case. 37/

4. Will the case depend upon an interpretation of a Commission rule or statement?

Where private litigation hinges on the construction of the Commission's own rules or interpretive statements, we are likely to have an interest in participating. Hocking, the case involving the Commission's condominium release, is a good example. Similarly, Texaco Inc. v. Pennzoil Co. 38/ represented, we thought, an erroneous interpretation by an intermediate court of Rule 10b-13, which precludes a bidder from arranging to acquire shares outside of the tender offer; the wide publicity which the brief was sure to receive made it a good vehicle to offer our views to the bar and the securities industry of the proper construction of Rule 10b-13.

5. Is the relationship between state and federal law at issue?

Since prior to the Supreme Court's 1983 decision in Edgar v. MITE Corp., 39/ the Commission has been active in filing briefs challenging the constitutionality of successive generations of state statutes which, in its view, tip the neutrality between bidder and target and undermine the shareholder choice philosophy, both of which underlie the Williams Act. In addition, the Commission has challenged statutes which, in its view, burden interstate tender offers disproportionately to the state interest they seek to advance. This has been a controversial area, both inside the Commission and out, because

37/ SEC v. White, No. CA 86-2015 (W.D. Ark. 1986), Lit. Release No. 11,066 (April 17, 1986), 35 SEC Docket 874; Lit. Release No. 11,087 (May 1, 1986), 35 SEC Docket 1076.

For reasons similar to those underlying the definition-of-security briefs -- the importance of cases dealing with the scope of the federal securities laws -- the Commission also has an interest in filing briefs in cases which raise issues of the reach of the subject matter jurisdiction of the courts in securities law cases. See, e.g., Psimenos v. E.F. Hutton & Co., Inc., 722 F.2d 1041, 1045 (2d Cir. 1983) (commodities case in which the Commission filed a brief because of close relationship between securities law and commodities law jurisdictional concepts).

38/ No. C-6432 (S. Ct. Texas, 1987).

39/ 457 U.S. 624 (1982).

of differing views concerning the proper relationship between state and federal law in this area and the benefits, or lack thereof, of hostile takeovers.

Concern about the relationship between state and federal law has occasionally led us to file briefs in state courts. In Moran v. Household International, 40/ we attempted to persuade the Delaware Supreme Court that Household's poison pill plan produced results contrary to Congress' intent in adopting the Williams Act by shifting from shareholders to the board of directors the decision with respect to whether a hostile tender offer could go forward.

While litigation which raises issues concerning the interplay between state and federal law is of interest to us, it cannot be assumed that our position will necessarily be adverse to state regulation. Indeed, in one case we defended the validity of a state's broker-dealer regulatory scheme against the challenge that it was preempted by federal law. 41/

6. Will the decision have substantial impact on private enforcement of the federal securities laws?

While, as I said earlier, our positions are not invariably pro investor/plaintiff, the Commission has traditionally recognized that, as the Supreme Court observed in J.I. Case Co. v. Borak, private actions are a "necessary supplement" to the Commission's own efforts to enforce the securities laws. 42/ Accordingly, the Commission has generally supported private rights of action and sought to avoid undue restrictions on implied causes of action. In Basic v. Levinson, 43/ for example, we argued that the Court should adopt the fraud-on-the-market presumption under which it could be presumed, subject to rebuttal, that material information disseminated by the company affected the market price of its securities and, in turn, that investors could be presumed to have relied on the market price in making decisions to purchase or sell. The Supreme Court agreed with us; if it had not, the need for a plaintiff to prove actual reliance would have substantially inhibited private Rule 10b-5 litigation involving issuer false statements.

40/ 500 A.2d 1346 (S. Ct. Del. 1985).

41/ Underhill Associates v. Bradshaw, 674 F.2d 293 (4th Cir. 1982).

42/ 377 U.S. 426, 432 (1964).

43/ 108 S. Ct. 2063 (1988).

7. Is the brief an opportunity to guide the court to a safe, narrow holding, instead of a broad, damaging one?

In a few cases, Commission briefs are not so much an effort to influence the result of a case, but rather the manner in which the court reaches that result. Our brief in Marine Bank v. Weaver, is an example. ^{44/} The Commission, joined by the bank regulators, argued there that a bank certificate of deposit was not a security in light of the pervasive scheme of federal bank regulation. This brief was, I think, in part, an effort to tell the Court how to reach the result the Commission believed it was going to reach anyway without doing broader violence than necessary to the scope of the definition of a security.

Similarly, I see the Commission's brief in the Shearson/American Express v. McMahon as falling into this category. ^{45/} It was in part an effort to show the Court a way of upholding the validity of the predispute agreement to arbitrate Rule 10b-5 claims -- something our colleagues in the Solicitor General's Office predicted was likely to happen -- without holding, as Shearson had urged, that private rights of action under Rule 10b-5 were deserving of lesser protection than express rights.

8. Is the brief an opportunity for the Commission to make a needed policy statement?

Finally, in some cases, we may be influenced by the fact that a by-product of filing an amicus brief will be the opportunity to issue an interpretive statement concerning a point of law or procedure that may need clarification. As I've mentioned, this was one element of the decision to file a brief in Texaco. Similarly, in Newmont Mining Corp. v. Pickens ^{46/} and IU International Corp. v. NX Acquisition Corp., ^{47/} the Commission filed briefs which are, in part, guidance concerning the circumstances under which a bidder must extend its offer in order to permit the dissemination of an amendment concerning financing sources when that amendment is made late in the tender offer.

^{44/} 455 U.S. 557 (1982).

^{45/} 107 S. Ct. 2332 (1987).

^{46/} 831 F.2d 1448 (9th Cir. 1987).

^{47/} 840 F.2d 220 (4th Cir. 1988).

IV. Conclusion

That completes my 8 factors. Other criteria could undoubtedly be added; I think, however, that these 8 tests explain most, if not all, of the briefs we have filed in the last few years. They can, I hope, serve as a useful starting point for someone who wants to get our attention in private litigation.

And, I hope you will try to get our attention when you are involved in litigation in which significant legal issues are at stake. Because of the extreme difficulty we face in making decisions and preparing briefs when cases come to our attention in their late stages, I would rather, all things considered, receive more requests, rather than fewer. As I said at the outset, I believe that amicus briefs are one of the Commission's most potent tools. Please help us use it effectively by letting us know about cases we should consider for amicus participation.

Thank you.

APPENDIX

Set forth below is a list, arranged by subject, of selected, significant Commission amicus curiae briefs filed during the past three years.

A. TRADING ON MATERIAL NONPUBLIC INFORMATION

1. United States v. David Carpenter, Kenneth P. Felis, and R. Foster Winans, 791 F.2d 1024 (2d Cir.) aff'd, 108 S. Ct. 316 (1987)
2. Anheuser-Busch v. Thayer, CA3-85-0794-R (N.D. Tex., Aug. 19, 1986) (unpublished order)

B. TAX OFFSET CASES

1. Randall v. Loftsgaarden, 478 U.S. 647 (1986)
2. Salcer v. Envicon Equities Corp., 744 F.2d 935 (2d Cir. 1984), vacated, 478 U.S. 1015 (1986)
3. Freschi v. Grand Coal Venture, 767 F.2d 1041 (2d Cir. 1985), vacated, 478 U.S. 1015 (1986), on remand 800 F.2d 305 (2d Cir.), on reh, 806 F.2d 17 (2d Cir. 1986)
4. Feldman v. Pioneer Petroleum Corp., 813 F.2d 296 (10th Cir.), cert. denied, 108 S. Ct. 346 (1987)

C. TENDER OFFERS AND MERGERS -- FEDERAL SECURITIES LAW ISSUES

1. Basic, Inc. v. Levinson, 108 S. Ct. 978 (1988)
2. Nationwide Corp. and Nationwide Mutual Insurance Co. v. Howing Co., 826 F.2d 1470 (6th Cir. 1987), cert. denied, 105 S. Ct. 2830 (1988)
3. Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985), cert. denied, 106 S. Ct. 3272 (1986)
4. American Carriers, Inc. v. Baytree Investors, Inc., et al., No. 88-1533 (10th Cir.) pending
5. IU International Corp. v. NX Acquisition Corp., 840 F.2d 220 (4th Cir. 1988)
6. Newmont Mining Corp. v. Pickens, 831 F.2d 1448 (9th Cir. 1987)

7. Beaumont v. American Can Company, 797 F.2d 79 (2d Cir. 1986)
8. Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985)
9. Koppers v. American Express Co., 689 F.2d 1413 (W.D. Pa. 1988)
10. R.H. Macy & Co. v. Campeau Corp., 683 F. Supp. 422 (S.D.N.Y. 1988)
11. Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 636 F. Supp. 444 (S.D.N.Y. 1986)
12. Texaco Inc. v. Pennzoil Co., No. C-6432 (S. Ct. Texas Nov. 2, 1987) (without opinion)

D. TENDER OFFERS AND MERGERS -- CONSTITUTIONAL CHALLENGES TO STATE TAKEOVER STATUTES

1. CTS Corp. v. Dynamics Corp., 107 S. Ct. 1637 (1987)
2. RTE Corp. v. Mark IV Industries, Inc., Fed. Sec. L. Rep. (CCH) ¶ 93,789 (E.D. Wis. May 6, 1988), vacated June 22, 1988
3. RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476 (D. Del. 1988)
4. CRTF Corp. v. Federated Department Stores, Inc., 683 F. Supp. 422 (S.D.N.Y. 1988)
5. Salant Acquisition Corp. v. Manhattan Industries, Inc., 682 F. Supp. 199 (S.D.N.Y. 1988)

E. DEFINITION OF A SECURITY AND REGISTRATION REQUIREMENTS

1. Variable Annuity Life Insurance Co. et al. v. Otto, 814 F.2d 1127 (7th Cir. 1986), cert. denied, 108 S. Ct. 2004 (1988)
2. Holloway v. Peat, Marwick, Mitchell & Co., Nos. 87-1486, 1490 (10th Cir.) pending
3. Arthur Young & Co. v. Reves, Nos. 87-1726, 1727, 1803, 2533, and 88-1014 (8th Cir. 1988), rehearing petition pending
4. Hocking v. Dubois, 839 F.2d 560 (9th Cir. 1988), reh'g en banc granted, (Aug. 1, 1988)

5. Adena Exploration, Inc. v. Sylvan, No. 87-1429 (5th Cir., Nov. 1, 1988)
6. Busch v. Carpenter, 827 F.2d 653 (10th Cir. 1987)
7. Manufacturers Hanover Trust Co. v. Drysdale Securities Corp., 801 F.2d 13 (2d Cir. 1986)
8. Sanderson v. Roethenmund, 682 F. Supp. 205 (S.D.N.Y. 1988)

F. INTERPLAY BETWEEN FEDERAL SECURITIES LAWS AND BANKING AND COMMODITIES STATUTES

1. Rembold v. Pacific First Federal Savings Bank, 798 F.2d 1307 (9th Cir., 1986)
2. Point Landing, Inc. v. Omni Capital International, 795 F.2d 415 (5th Cir., 1986), aff'd, 108 S. Ct. 404 (1987)
3. Craft v. Florida Federal Savings & Loan Association, 786 F.2d 1546 (11th Cir. 1986)

G. REGULATION OF SECURITIES PROFESSIONALS AND MARKETS -- LIABILITY FOR FRAUD

1. Pinter v. Dahl, 108 S. Ct. 2063 (1988)
2. AZL Resources, Inc. v. Margaret Hall Foundation, Inc. cert. denied, 107 S. Ct. 2469 (1987)
3. Wilson v. Ruffa & Hanover, 844 F.2d 81 (2d Cir. 1988), rehearing petition pending
4. Hollinger v. Titan Capital Corporation, No. 87-3837 (9th Cir.) pending
5. Ettinger v. Merrill Lynch, 835 F.2d 1031 (3d Cir. 1987)

H. REGULATION OF SECURITIES PROFESSIONALS AND MARKETS -- MISCELLANEOUS

1. Shearson/American Express v. McMahon, 107 S. Ct. 2332 (1987)
2. McLaughlin, Piven, Vogel, Inc. v. Gross, No. 87-0311 (E.D. Pa. March 16, 1988), aff'd, No. 88-1367 (3d Cir., Oct. 13, 1988)

3. Brawer v. Options Clearing Corp., 807 F.2d 297 (2d Cir. 1986), cert. denied, 108 S. Ct. 76 (1987)
4. Long Island Lighting Co. v. Barbash, 779 F.2d 793 (2d Cir. 1985)

I. PRODUCTION OF EVIDENCE FROM FOREIGN STATES

1. Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 107 S.Ct. 2542 (1987)