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"The Interest of the Securities and Exchange Commission in
Private Civil Actions Under the Securities Acts"

I. Introduction

I want first to thank your Continuing Education Committee and the University of California Extension for having invited me from the snow and cold of the District of Columbia to this sunny land. It combines a chance to speak to you about a very dynamic subject with a chance to recall what pleasant weather is really like. Despite (or some would say because of) my New York background, I am and have been a constant admirer of California. To anyone accustomed to the Adirondacks, which I dearly love, a view of your Cascades and the Sierras brings, well overpowering admiration.

According to the program I am to give you an "Introduction to Federal Securities Acts." Now that's a very appealing topic for any speaker. It leaves me free to say as little or as much as I wish about any aspect of the immense subject. I can justify statements of the most obvious points as a necessary foundation for what is to come later in the program. I can excuse any omissions to deal with significant complexities on the ground they are matters of detail to be covered by later speakers. I shall try not to succumb too completely to either temptation.

Instead I shall try to focus my remarks on a subject about which I feel uniquely qualified to speak -- well, twenty percent unique. That is, the interest of the Securities and Exchange Commission in private civil actions under the securities acts. It might also be of some value at the outset for me to trace as best I can something of the evolution of civil liability concepts under the federal securities laws and to speak to some of their potentialities and limitations.

In doing so I would like to emphasize the high regard which the Commission has for programs such as this, where intensive thought and attention are given to significant aspects of the rights of owners of American business. A minor caution though. I speak neither derivatively for the Commission nor representatively for any of my colleagues on the Commission.

II. Express Rights in the 1933 Acts

Now to the subject. The Commission is responsible for the administration and enforcement of six separate statutes. Four of them are quite specialized and, I imagine, beyond the scope of this program. The other two, the earliest of our statutes -- the Securities Act of 1933 and the Securities Exchange Act of 1934 -- were passed by successive sessions of the same Congress as part of a comprehensive federal program to end abuses that, in significant part, contributed to the 1929 stock market crash and its aftermath. They are the most familiar I am sure to most of you, and they are the two acts that give rise to the greatest part of the ever-increasing private civil litigation involving securities transactions.

The 1933 Act was intended to deal primarily with new issues of securities. In general, it does this in three ways: by the Section 5(a) and 5(c) requirement of registration of new issues by filing pertinent information about them with the Commission, by the Section 5(b) requirement of physical delivery to the purchasers of a prospectus containing the most important parts of this information, and by the Section 17(a) prohibition of fraud in the offer or sale of securities. The prohibition of fraud in Section 17(a) is not limited to sales on original issuance but applies to all sales -- even those which are exempt from registration. Please note that neither Section 5 nor 17(a) gives any express civil right of action.

In passing the 1933 Act Congress recognized that no governmental agency -- no matter how expert and vigilant -- would be able to prevent all injury to the investing public before it occurred. It was also aware that concern for his pocketbook is as sure a way to encourage a man's compliance with the law as fear of censure, or removal from the business, or the hoosegow. Accordingly, Congress provided certain express civil rights of action in favor of investors.

In the first place, Section 12(1) allows the purchaser of a security that should have been registered but was not, or who should have received a prospectus but did not, to recover from his seller. If a registration statement has been filed but contains a material misstatement or omission, any purchaser of a security subject to that registration statement may, in general, recover damages under Section 11 of the Act. That recovery may be from the issuer, the directors or partners of the issuer, the experts who helped prepare the registration statement or the underwriters of the issue. Whether or not a registration statement has been filed, the purchaser may recover under Section 12(2) if the seller has made any material misstatements or omissions in either written or oral communications.

You will note that all of the 1933 Act express liability provisions, as well as the antifraud provision of Section 17(a), are directed at the sell-side of a securities transaction. This, of course, is not surprising since the 1933 Act was directed primarily at the obligations that should be placed on persons selling new securities. Because of this focus only on the sell-side, and for other reasons, the 1933 Act is not as broad in scope in terms of fraud prohibition as the 1934 Act.

III. Express Rights in the 1934 Act

The 1934 Act deals not only with certain problems of original issues not covered by the 1933 Act, such as stabilization, but also with the whole range of problems created by the continuous trading of securities that takes place on securities exchanges and in the over-the-counter market. To accomplish this the Act provides, among other things, for registration, with

oversight by the Commission, of securities exchanges, of associations of brokers and dealers, and of the broker-dealers themselves. It provides for the control of stock market credit, and for disclosure of information about corporate activities and management personnel -- this is done through the filing with the Commission of periodic corporate reports and reports of insider securities transactions. The Act also provides for the dissemination to shareholders of proxy or information statements. Also, and relevant to our program here today, it provides for the prohibition of manipulative and deceptive conduct, both directly and through rules promulgated by the Commission.

For much the same reasons as existed under the 1933 Act, Congress provided a number of express civil rights of action in the 1934 Act -- there are three.

Section 9(e) provides a remedy for both purchasers and sellers of securities against persons who engage in certain specified manipulative or deceptive activities with respect to securities listed on a national securities exchange or in purchases or sales of options contrary to rules promulgated by the Commission. Section 16(b) provides for the recovery by the corporation (and shareholders can sue derivatively for the corporation) of the short-swing profits of its insiders. Finally, Section 18(a) allows both purchasers and sellers of securities who rely on false or misleading statements in reports or other documents filed with the Commission to recover against those who made or caused those statements to be made.

In describing the various express private rights of action, I have left out a number of very pertinent details. Congress circumscribed these remedies quite closely: There are specific statutes of limitations. There are provisions for security for costs and attorneys fees. Elements that the plaintiff must prove, and affirmative defenses which a defendant may assert, are provided. There are specific provisions for the measure of damages. And each of these circumscriptions varies somewhat from one express right to another. Professor Jennings, I expect, will be going into these pleaders' delights in some detail later this afternoon. They are a large part of the reason that so

relatively little litigation has actually developed under the express liability provisions (other than 16(b) and possibly 12(2)) over the past 30 odd years. Anyway, they are not really essential to our introductory discussion now. What is important about this quick thumbnail sketch of the securities acts is the breadth of their regulatory and prohibitory scope and the large portion of that broad scope for which Congress did not provide any express private right of action.

For example, there is no express right of action for the investor who unknowingly purchases or sells an outstanding security in the over-the-counter market at a time when the price is being manipulated. Section 9(e) of the 1934 Act is limited to listed securities. There is no express right of action for the investor who sells a security in the over-the-counter market on the basis of false or misleading statements unless those statements are in a document filed with the Commission. The filing is a requirement of Section 18(a) of the 1934 Act. There is no express right of action for the stockholder whose approval for most kinds of important corporate action has been secured through a false or misleading proxy statement. Here Section 18(a) requires a purchase or sale. Nor is there an express remedy for the customer of a broker-dealer whose account has been churned. Section 9(e), which is directed at broker-dealers, does not cover churning. And this is only the beginning of a very long list.

IV. Development of Implied Rights under the 1933 and 1934 Acts

Thus, it should not have come as any great surprise when the courts began to imply private rights of action to fill in these large gaps left by Congress. To paraphrase Voltaire rather badly, if Congress had not intended implied private rights of action under the securities acts, the courts would have found it necessary to invent them under the common law. But despite the contentions of some commentators, I do not believe implied private rights of action were either created for the purposes of Rule 10b-5 or created contrary to the intention of Congress.

Indeed, the first reported decision to find an implied private right of action under the securities acts, the 1941 decision of Judge Alfred Coxe of the United States District Court

for the Southern District of New York in Geismar v. Bond & Goodwin, Inc., occurred both before the promulgation of Rule 10b-5 and in an area in which it was quite clear that Congress did intend a private right of action to be implied. That case involved an alleged scheme by a registered broker-dealer and others to cause the plaintiff to sell certain bonds in the over-the-counter market by means of false and misleading statements, a clear violation of Section 15(c)(1) of the 1934 Act and the Commission's rules under that section, for which -- as we have seen -- there is no express private right of action under either of the securities acts. But in 1938 Congress had amended Section 29(b) of the 1934 Act, the contract voiding provision, to provide a one-year statute of limitations for private actions brought by persons who purchase or sell securities in transactions in which a broker-dealer has violated any rule of the Commission promulgated under Section 15(c)(1). Congress obviously did not add a statute of limitations to apply to a right of action that did not exist, and Judge Coxe drew the obvious conclusion that "[t]he 1938 amendment to Section 29(b) clearly contemplates that a civil suit against all of the defendants may be brought."

Having taken this first small step in the implication of private rights of action, the courts began to proceed to the next logical step in their development. In Baird v. Franklin in 1944 Judge Charles Clark of the Court of Appeals for the Second Circuit wrote a dissenting opinion in which he concluded that a private right of action should be implied for a violation of Section 6(b) of the 1934 Act, which imposes on a registered securities exchange certain supervisory responsibilities over its members. In this case there was no explicit evidence of congressional intent on which he could rely, and he based his conclusion on the traditional principle of tort law that, when a statutory standard of conduct has been violated, a member of the class sought to be protected by the provision may recover damages caused by the violation. Although the other two members of the panel denied recovery because the plaintiff had failed to establish a causal connection between his injury and the violation of Section 6(b), they did not express any disagreement with this aspect of Judge Clark's dissent.

Within six weeks a panel of the same court, composed of Judge Clark and two different judges, decided Goldstein v. Groesbeck, in which a unanimous panel held that a private right of action should be implied for a violation of a provision of the Public Utility Holding Company Act, which prohibits an unregistered public utility holding company from making or performing service, sales or construction contracts with public utilities. This time Judge Clark relied upon a provision of the 1935 Act which, like similar provisions in the other securities laws, voids contracts made in violation of those laws. The reasoning proceeded that where a contract is voided, equity requires a return of the parties to the contract to their previous position.

The stage was now set for Judge Kirkpatrick's famous opinion of 1946, this time in the Eastern District of Pennsylvania, in Kardon v. National Gypsum Co. In that case he held that a defrauded seller in an over-the-counter transaction has a private right of action for damages under Section 10(b) of the 1934 Act and Rule 10b-5. In reaching this conclusion Judge Kirkpatrick relied on both the tort theory and the voiding theory. After the Kardon opinion more and more courts came down with decisions upholding implied private rights of action under the securities acts and brought us to their present status in which they are almost universally accepted, at least in areas not covered by express civil remedies.

Indeed, whatever question still existed as to the implication of private rights of action in the gaps left by Congress seems fairly well settled by the Supreme Court's decision of 1964 in J.I. Case Co. v. Borak, in which the highest court upheld an implied private right of action for violation of the proxy rules promulgated by the Commission under Section 14(a) of the 1934 Act.

One major question that was not fully resolved by this line of decisions is whether private rights of action should be implied under the securities acts in situations in which one or another of the express private rights of action is generally available. One district court has recently held in Jordan Bldg. Corp. v. Doyle, O'Conner & Co. that no private right of action should be implied in one such circumstance, that of the

investor who has allegedly been defrauded in the purchase of securities, where presumably Sections 11 and 12 of the 1933 Act would generally be available. The case is now pending in the Court of Appeals for the Seventh Circuit. Most of the courts of appeals, however, have taken this next step in the implication of private rights of action and have not viewed the express right as an absolute barrier to the development of the doctrine even in situations in which they might apply. In doing so, however, they have proceeded in two different manners.

Some of the courts, as exemplified by the Court of Appeals for the Ninth Circuit in Ellis v. Carter in 1961, have resolved any possible inconsistency between express private rights of action with carefully circumscribed limitations and implied private rights of action without any such limitations in favor of the latter. That decision is a particularly candid one, and I should like to quote it:

"Appellees correctly point out that read together, the 1933 and 1934 acts, as amended, present certain inescapable anomalies, no matter which of several alternative constructions are placed on section 10(b). Four possible constructions of that section and rule 10b-5 suggest themselves:

"(1) As permitting no civil actions to either buyer or seller on the ground that the 1933 and 1934 acts were too closely drafted to permit the inference of any private remedies in addition to those expressly provided But under such a construction defrauded sellers are given no civil remedy under either act, which seems inconsistent with the all-embracing scope of the legislation and requires that an unexplained distinction be drawn between buyers and sellers.

"(2) As permitting sellers but not buyers to sue under the rule, thereby giving both buyers and sellers a civil remedy but limiting that of buyers to the remedies provided in the 1933 act.

But this seems inconsistent with the fact that section 10(b) and rule 10b-5 are expressly applicable to buyers as well as sellers. Moreover, there seems to be no good reason why Congress would want to restrict buyers to the limited remedies provided in the 1933 act, while giving sellers an unrestricted civil remedy. The converse inference -- drawn by reading the restrictions of the 1933 act which apply only to buyers as applicable also to sellers under the 1934 act -- would constitute judicial rewriting which even appellees concede would be too gross.

"(3) As permitting buyers as well as sellers to sue under the 1934 act, but to make buyers' actions thereunder subject to the same restrictions as provided for them in the 1933 act. This avoids the anomaly of giving the buyer a less restricted remedy under the 1934 act than he has under the 1933 act. In effect, however, it is the same as giving him no right under the 1934 act, leaving an unexplained distinction between buyers and sellers as noted above.

"(4) As permitting buyers as well as sellers to sue under section 10(b) and rule 10b-5 without any distinction whatever, free of the restrictions imposed under the 1933 act. This construction has the virtue of giving both buyers and sellers a civil remedy and giving buyers the same unrestricted remedy which is given to sellers, no reason being shown why Congress should have intended to treat them differently. But this construction is saying in effect that the procedural restrictions which Congress carefully provided in the 1933 act with regard to a buyer's civil remedy were completely nullified or ignored by Congress a year later in giving buyers an unrestricted civil remedy.

.... Recognizing the anomaly inherent therein, ... we consider ... [the last as] the most acceptable of the four possible alternatives. It gives controlling weight to what seems to have been the dominant policy of Congress to provide complete and effective sanctions, public and private, with respect to the duties

and obligations imposed under the two acts. It requires no variance in procedures under the 1934 act as between buyer and seller, no reason appearing why Congress would have wanted the procedures to be different. While it assumes that Congress in 1934 undid what it carefully did in 1933, it avoids judicial rewriting of the 1934 act to include procedural provisions which appear only in the 1933 act. As between two acts which deal with the problem, it permits the most recent enactment to govern."

Other courts, as exemplified by the Court of Appeals for the Second Circuit in its 1951 decision in Fischman v. Raytheon Mfg. Co. have found it necessary to read into the implied private rights of action certain elements of proof of fraud not required under the comparable express provisions in order to justify dispensing with the specific limitations written into the latter by Congress. The eventual resolution of this problem is still something of an open question and will undoubtedly be discussed in more detail later in this program.

V. Development of Rule 10b-5

This brings me to, depending upon your point of view, either the bogeyman under the federal securities laws, or the cornerstone of civil recovery in securities transactions, or something in between. I should say something briefly about what is involved in Rule 10b-5, and I would also like to tell you something of its origin.

As I am sure you already know, Section 10(b) under the Exchange Act makes it unlawful for any person, in connection with the purchase or sale of any security, to use or employ any manipulative or deceptive device or contrivance in contravention of such rules as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

A series of rules under Section 10(b) has been promulgated by the Commission. They were adopted to meet various problems. For example, the basic rules governing trading and stabilizing during a distribution -- Rules 10b-6, 10b-7 and 10b-8 -- were

promulgated under Section 10(b). Rule 10b-5, on the other hand, is operative whether or not a public distribution of securities is involved. It seeks to prohibit any person, in connection with the purchase or sale of any security from engaging in three categories of fraudulent conduct, the lines between which become somewhat blurred. I am sure you will hear more about the three clauses during the next two days. Suffice it to say here that they are substantially identical with the language in the antifraud section of the 1933 Act, Section 17(a).

Let me read to you a recent statement by Milton Freeman who as a relatively young lawyer at the Commission actually drafted the rule:

"It was one day in the year 1943, I believe [actually, it was May 1942]. I was sitting in my office in the S.E.C. building in Philadelphia and I received a call from Jim Treanor who was then the Director of the Trading and Exchange Division. He said, 'I have just been on the telephone with Paul Rowen,' who was then the S.E.C. Regional Administrator in Boston, 'and he has told me about the president of some company in Boston who is going around buying up the stock of his company from his own shareholders at \$4.00 a share, and he has been telling them that the company is doing very badly, whereas, in fact, the earnings are going to be quadrupled and will be \$2.00 a share for this coming year. Is there anything we can do about it?' So he came upstairs and I called in my secretary and I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where 'in connection with the purchase or sale' should be, and we decided it should be at the end.

'We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the Commissioners. All the Commissioners read the rule and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, 'Well,' he said, 'we are against fraud, aren't we?' That is how it happened. [Those obviously were

the days before the Administrative Procedure Act of 1946.]

"Louis [Loss] is absolutely right that I never thought that twenty-odd years later it would be the biggest thing that had ever happened. It was intended to give the Commission power to deal with this problem. It had no relation in the Commission's contemplation to private proceedings. How it got into private proceedings was by the ingenuity of members of the private Bar starting with the Kardon case. It has been developed by the private lawyers, the members of the Bar, with the assistance or, if you don't like it, connivance of the federal judiciary, who thought this was a very fine fundamental idea and that it should be extended. Recently, we have seen among the people who have joined the private Bar in extending it, the staff of the Securities Exchange Commission, and I think this is something that you can think of as either a good thing or a bad thing."

VI. The Commission's Interest in Private Litigation

So much for an introductory description of the express and implied private rights of action under the securities acts and the emergence of Rule 10b-5 itself. Let us turn now to the interrelationship between the Commission's own enforcement activities and private litigation under the securities acts, and the resulting interest of the Commission in these private actions.

One of the purposes served by private litigation, from the Commission's standpoint, is to bring to our attention matters appropriate for enforcement action of which we had not previously

been aware. For this reason we have established internal procedures by which significant private litigation set forth in registration statements, proxy statements and periodic reports filed with the Commission is referred to the appropriate office for possible enforcement action or participation amicus curiae. In addition, the possibility that monetary sanctions will be imposed in private actions for violations of the securities acts operates as a further additional deterrent to such violations. Indeed the Court of Appeals for the Second Circuit has recently extended the role of private litigation as an enforcement device by holding in Mutual Shares Corp. v. Genesco, Inc. that a private party may seek injunctive as well as monetary relief for a violation of the antifraud provisions, and that for an injunction proof of reliance and causation need not be established.

This function of private litigation in assisting the Commission to enforce the securities acts for the benefit of all investors has been sharply set forth in the context of the proxy rules by the Supreme Court in Borak. The Court there said:

"Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it. Indeed, on the allegations of respondent's complaint, the proxy material failed to disclose alleged unlawful market manipulation of the stock of ATC, and this unlawful manipulation would not have been apparent to the Commission until after the merger."

The Commission's interest in private litigation is not limited to its usefulness in supplementing our own enforcement activities. After all, the Commission is in the business of

protecting investors, and no system of protection would be complete unless it provided some reasonably usable means for injured investors to obtain monetary redress in cases in which our own enforcement activities did not prevent the injury. We naturally look upon investors' own efforts to obtain appropriate monetary redress from a generally favorable point of view and, where warranted, we give them what indirect assistance we can. The Commission attempts to avoid being a collection agency for injured investors or becoming directly involved in the trial of facts except where, of course, the Commission itself brings an enforcement action. But I shall describe later the ways in which the Commission does affect private litigation.

A recent example of a case where we were interested in a general principle is Dolgow v. Anderson. Judge Weinstein in the Eastern District of New York asked for our views on the extent to which class actions may be maintained under Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who purchased and sold securities at a time when the market was allegedly affected by false information distributed by a company or its management to manipulate the market for their benefit. The law on liability in this area is far from settled. The question put to the Commission at this stage, however, related only to the procedural availability of class actions. We filed an amicus brief that said:

"The Commission believes that the class action procedure is particularly appropriate where a large number of persons are alleged to have suffered a common wrong and their individual injuries may be small -- a situation which typically arises where there has been a wide-spread securities fraud or manipulation of the securities markets."

Judge Weinstein has recently come down with a decision in accord with the Commission's views as to the importance of class actions in such situations and has set the case down for a preliminary hearing to determine whether the plaintiffs have sufficient basis for their action to justify the additional expenses required in the defense of a class suit. This preliminary hearing is a significant new wrinkle that appears to me to be a good one in balancing valid adversary interests.

It at least provides a less expensive forum to answer the question once put this way: "You may sue the Bishop of Boston for bastardy, but do you have a cause of action?" I am not suggesting this is Dolgow, on which I expressly do not comment on the merits, and only use that form of the question to dramatize the value of Judge Weinstein's preliminary hearing device.

In a significant respect, private litigation under the securities acts has a direct impact on our own enforcement activities. A great deal of the substantive law under the provisions of those acts that we enforce has been determined in private litigation. The major portion of litigation under Rule 10b-5, for example, has always taken place between private litigants, and many of the important questions under the rule have first been decided in that context. Therefore, we have an important interest in following such litigation to make sure that legal precedents are not created in our absence that will have an adverse effect upon our own enforcement activities or defeat "the protection of investors" which is our general mandate.

And this brings me to the other aspect of my topic: the various ways in which the Commission expresses its interest in private litigation.

VII. The Commission's Participation in Private Litigation

A. Amicus Briefs

The Commission is probably unique among government agencies in the frequency with which it files amicus curiae briefs on important questions arising in private litigation under the statutes it administers. In many cases these briefs are filed in response to specific requests from the courts. In others the Commission seeks leave to participate amicus either at the request of one or more of the private parties or on its own initiative. Our General Counsel's office closely follows private litigation so that we shall be in a position to respond promptly to requests by the courts and private parties and to seek leave on our own to file amicus briefs when appropriate.

Since our resources are not, and probably never will be, sufficient even for our own enforcement actions, we must necessarily limit our amicus participation only to cases raising significant question of law under the statutes that we enforce. As a general rule we express no position as to the facts of the case, and in the majority of cases we refrain from participating until the legal issues have reached the appellate courts after having been more sharply focused by an opinion below. We believe that by limiting our participation in this way we are in a position to maximize the benefits that may be achieved by use of the limited resources available. Over the years the Commission has found this policy quite effective, and the courts have not only expressed appreciation for its efforts but -- what is more important -- have agreed with its amicus positions more often than not. Just a few weeks ago, for example, the Supreme Court came down with a decision in Tcherepnin v. Knight agreeing with the Commission's amicus position that withdrawable capital shares in saving and loan associations are securities for purpose of Section 10(b) of the 1934 Act and Rule 10b-5.

During 1967 the Commission filed ten amicus curiae briefs under the securities acts. It may surprise at least some of you to learn that three of these briefs essentially supported the position of the defendants in the private litigation.

One was a 10b-5 case, Mutual Shares v. Genesco, in which we supported the defendant on most issues. The plaintiffs in that case claimed to have purchased rather than sold stock of a corporation in reliance upon a tender offer for that corporation's shares; and they argued, among other things, that there should be implied in the tender offer a representation that the tenderor would not mismanage the corporation if the tender was successful. The Commission took the position in its amicus brief that acceptance of such a theory would "convert practically any instance of corporate mismanagement into a Rule 10b-5 case" and the Court of Appeals for the Second Circuit agreed with the Commission's position.

B. Enforcement Action

Our own enforcement proceedings often affect private litigation, at least indirectly. It is not at all uncommon for

a Commission complaint in an injunctive action in the courts or a Commission order for public administrative proceedings to be followed by one or more private actions either of an individual or a representative nature, and more often than not the complaints in these private actions closely track the Commission's own complaint or order for proceedings. The Georgia Pacific litigation is an example of this type of situation. It is also not uncommon for the private plaintiffs to allow the Commission to take the lead in developing evidence through the discovery procedures of the Federal Rules of Civil Procedure and at trial.

It goes without saying, of course, that we take enforcement action only because we believe that it is warranted and for no other purpose. But insofar as our own enforcement activities alert private investors to their own rights under the securities acts so that they may take appropriate action, they indirectly serve another useful purpose. And, if private plaintiffs wish to rely indirectly upon the Commission's superior resources in developing the case through civil discovery and trial, the result at least accords with similar situations in other areas of the law. We know of some situations in which private plaintiffs have forged ahead with their own actions without waiting for the Commission, only to fail to establish their case while the Commission later prevailed. The Federal Rules of Civil Procedure provide that the taking of depositions and certain other discovery procedures are to be conducted in public, presumably at least in part so that the information developed will be available to all. We have usually opposed attempts to consolidate our enforcement actions in the courts with any related private actions for the purposes of trial.

C. Investigatory Materials

From time to time private parties request the Commission to furnish them with materials obtained in our investigation of the matter. The Commission rarely makes its investigative files, as such, public. To do so might injure wholly innocent persons who have testified or lead to other undesirable results. Our Rules Relating to Investigations expressly provide that such investigations and the material obtained in them are private unless the Commission otherwise orders. There have been some exceptions to this general policy, however, usually associated with a critical need to inform investors.

D. Disclosure in Documents Filed With the Commission

Private litigants do not always have to wait for the initiation of enforcement proceedings by the Commission to learn through us that they may have specific rights of action against given persons under the securities acts. The existence of possible liability on the part of corporations and individuals may also be disclosed in registration statements, proxy statements or reports filed with the Commission. In at least one respect Congress specifically intended that the various disclosure devices in the securities acts should serve the purpose of alerting the public to the existence of possible private remedies under those acts. The reporting of insider transactions under Section 16(a) of the 1934 Act was designed, in part, to serve just this purpose, and many 16(b) actions are brought as a result of the disclosure of the transactions in the 16(a) reports. Although not expressly designed in that manner, similar disclosures in other public documents filed with the Commission may serve the same purpose. If a corporation or an officer or director of that corporation has violated the securities acts and thus exposed himself to possible monetary liabilities for those violations, this fact may be material in certain circumstances so that its disclosure is required in a prospectus or an annual report or other public document filed with the Commission.

E. Civil Damages

My discussion of the Commission's interest in private litigation under the securities acts should not lead you to conclude that it never causes problems for us.

Depending upon the number of the holders of outstanding securities, 10b-5 cases can raise difficult questions on the measure of damages to be adopted, or perhaps it would be more appropriately described as a problem of the scope and amount of the liability. This is a question upon which the Commission has not as yet expressed an overall view. It seems to me this is a necessary, responsible and relevant inquiry if class implied rights are to be enforced, particularly for the benefit of market purchasers. It is conceivable to me that because of the potential gigantic recoveries that would result from a mechanical

application of existing damage rules, some courts might draw back from implying liability in otherwise appropriate cases, thus leaving defrauded investors with no recovery, and possibly, by a constricting reading of the law, compromising the Commission's own direct enforcement efforts. On the other hand, it makes no sense to bankrupt a company with huge damages to pay stockholders who may have been injured in that amount when they purchased, thereby sinking all the stockholders of the company, including those who were entirely uninvolved in the transactions. A rational balance must be struck to relate the sanction to the violation, the recovery aggregate to the fraud.

If we are to carry out our duties to insure fair and honest markets for all investors, we must have means of dealing with information sources directed to the securities markets in general rather than to particular individuals engaged in a limited number of transactions. But concepts of monetary liability that were developed in the context of limited numbers of securities transactions with a given number of individuals are not necessarily appropriate in such situations.

I hope that the Commission will address itself in due course to this important question because I don't believe that the existence of the right can be separated from its monetary consequences. In the end this will be a question that the courts will have to work out, but, as in the naked question of the existence of the right the courts have looked to the Commission's views, we should expect to be called on to express our views on the monetary consequences. On this problem some commentators have suggested that the Commission's dual mandate of "the public interest" and "the protection of investors" are different concepts. I would choose to think they are ultimately the same, and that the investors ultimate protection rests as much on reasonable limits of recovery as on the right of recovery itself.

VIII. Conclusion

By now I am sure that you are anxious to move on to more practical topics that will be useful to you as practicing attorneys, and to hear Commissioner Volk describe the new corporation code that he is proposing for this state. I hope you will remember, however, that, although the Commission does not represent particular clients or view the development of the law in terms of particular interests, we do have a long-standing interest in private litigation under the securities acts, which serves an important role in a comprehensive system of protection for investors.