In the

Supreme Court of the United States

E. I. du PONT de NEMOURS and COMPANY, et al.,

Petitioners,

v.

RICHARD J. COLLINS, JR., et al.,

Respondents;

No. 75-1870

and

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

RICHARD J. COLLINS, JR., et al.,

Respondents.

No. 75-1872

Washington, D. C.
March 2, 1977

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and	
SECURITIES AND EXCHANGE COMMISSION, Petitioner, v. RICHARD J. COLLINS, JR., et al., Respondents.	No. 75-1872

Washington, D. C.

Wednesday, March 2, 1977

The above-entitled matter came on for argument at 11:44 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DAVID FERBER, Esq., Solicitor, Securities and Exchange Commission, Washington, D. C., for the petitioner Securities and Exchange Commission.

DANIEL M. GRIBBON, Esq., Covington & Burling, 888 Sixteenth Street, N.W., Washington, D. C. 20006, for the petitioner E. I. du Pont de Nemours and Company, et al.

RICHARD J. COLLINS, JR., Esq. 314 North Broadway, St. Louis, Missouri 63102, for the respondents.

LEWIS C. MURTAUGH, Esq., 111 West Jackson Boulevard, Chicago, Illinois 60604, for the respondents.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Nos. 75-1870 and 75-1872, E. I. du Pont against Collins and Securities and Exchange Commission against Collins.

Mr. Ferber, I think you may proceed.

ORAL ARGUMENT OF DAVID FERBER ON BEHALF OF THE PETITIONER SECURITIES AND EXCHANGE COMMISSION

MR. FERBER: Mr. Chief Justice, and may it please the Court: As this Court knows, a closed-end investment company, like a mutual fund, which is an open-end investment company, consists of a portfolio of securities that is managed in the interest of its stockholders. Unlike a mutual fund, the outstanding stock of a closed-end investment company is not redeemable at the instance of the shareholder. Over the years the stock of closed-end companies is usually traded on the market at a significant difference from the value of the asset portfolio, usually substantially lower. It is this disparity between the asset value, that is, the market value of the portfolio held by a closed-end investment company, in this case Christiana Securities Company, and the lower value in the market of its own stock, the Christiana stock, that gives rise to the difference in this case between the Securities and Exchange Commission and the Court of Appeals for the Eighth Circuit.

The case involves the reasonableness of the Commission's determination that the terms of a proposed merger of Christiana Securities Company and E. I. Du Pont de Nemours and Company are,within the meaning of section 17(b) of the Investment Company Act of 1940, reasonable and fair and do not involve overreaching. As the Court knows, Du Pont, of course, is a giant industrial company, having some 47 million shareholders, and its stock is considered to be of prime investment quality. Christiana is a closed-end company with some 8,000 shareholders. Its stock is traded on the over-the-counter market. Ninety-eight percent of its assets consist of Du Pont common stock, and that adds up to some 28 percent of all of Du Pont's stock outstanding.

Now, the merger that is involved here essentially provides that Christiana is to turn over all its assets consisting almost entirely of its Du Pont stock, and will then disappear. Du Pont will issue its common stock in a slightly smaller amount than the amount turned in by Christiana to Christiana's shareholders.

QUESTION: Mr. Ferber, I suppose it isn't relevant, but how long has Christiana been in existence? Was it formed in the pre-Personal Holding Company Act days?

MR. FERBER: Yes. It was formed around 1915, I believe, your Honor. And I believe Du Pont was formed about the same time.

In all, there are 13.4, roughly, million shares of Du Pont stock that Christiana is turning in to Du Pont, and it is about 13.2 million shares that Du Pont is putting back. So the effect of the transaction is really a liquidation of Christiana that will cost its shareholders approximately 1.8 percent of its assets. Now, that comes to less than the 2.5 percent, the difference -- because, of course, the same Christiana stockholders will become Du Pont shareholders, and that accounts for the difference between the 2.5 percent, which would be about $55.6 million, and the cost of the merger to the Christiana stockholders.

The great advantage, of course, or one of the advantages to the Christiana stockholders by this kind of a merger is that it permits the elimination of Christiana without the heavy tax consequences that would be required either by Christiana liquidating by distributing its Du Pont stock to its Christiana shareholders or by somehow selling that stock and distributing the money to the shareholders.

The advantage --

QUESTION: I take it there is no question about the qualification as a tax-free transaction within the Internal Revenue Code.

MR. FERBER: As I understand it, the Internal Revenue people have approved the proposed transaction.

What it would do particularly for any Christiana shareholder which would want to sell his shares is he will presumably get somewhere between 20 to 25 percent more than he would get if he just went out on the market and sold his Christiana stock, because that has been 20 to 25 percent, the discount over the past few years prior to the announcement of this merger.

The amount cumulatively, as of the figures in 1972 on which the record was based, would be a saving, if you totaled it all up and if everyone were going to sell their stock, which of course is not going to occur, of some $450 million for the Christiana Securities holders.

The merger is subject to the Commission approval because 17(a) of the Act provides that an affiliate of an investment company,which Du Pont is by definition, may not purchase, and I quote, "any security or other property from" such investment company unless the Commission finds under Section 17(b) of the Act that the -- and I quote again -- "terms including consideration to be paid or received are reasonable and fair and do not involve overreaching."

The Commission made this fairness finding on the ground that the transaction was based primarily, almost entirely, upon an exchange of equivalents, Du Pont stock for Du Pont stock. Using the market value of the Christiana stock, as the Court of Appeals indicated should have been used at least to some degree, would, of course, deprive the

Christiana shareholders of a significant portion of the value of their company's assets.

The Commission also specifically found that the Du Pont stockholders would be in no way injured. They would be benefited, in fact, to the extent that each share would represent the somewhat greater interest in Du Pont, there being 188,500 fewer Du Pont shares outstanding after the merger than before, and in addition the Du Pont Company would get some $34 million, the remaining 2 percent of Christiana's assets.

The Commission must approve any application under Section 17(b) if it can make the requisite findings. There is no public interest consideration that is spelled into the statute at this point. But the Commission did indicate that the elimination of the unnecessary holding company was sound and salutary, pointing to the provisions of Section 11(b) of the Holding Company Act where the Commission, of course, has been instructed to get rid of, and has over the years done so, many of the unnecessary holding companies in the electric and gas holding company systems.

The majority of the Court of Appeals held that the Commission erred in establishing, and I quote, "a rule of law that closed-end investment companies should be presumably worth the value of their net assets." The Court of Appeals held, the majority, two judges, that fairness required the

Commission to give substantial weight to the market price of Christiana's stock. It stated also that the Commission had to find, and again I quote, "that the transaction carries the earmarks of an arm's length bargain." So in effect it held the Commission could not find the proposed merger fair unless Du Pont should have exerted its strategic bargaining position to extract probably as much as several hundred millions dollars worth of Christiana's assets as consideration for Du Pont going along.

Now, I propose to deal in the rest of my time with the justification of the Commission's use of asset value, essentially the value of Christiana's Du Pont holdings, and the court's error in holding, first, that the market value of Christiana's stock was to be given substantial weight, and, second, that the transaction must have the indicia of Arm's length bargaining, as the court interpreted that term.

QUESTION: Christiana's stock wasn't really involved in this merger, was it, except insofar as determining what amount of Du Pont stock after the merger the various Christiana stockholders would receive?

MR. FERBER: Exactly. The stock will disappear; Christiana will disappear. The stock is in effect merely the measure of what each of the -- in other words, if you want --

QUESTION: -- owners of the stock will receive in terms of Du Pont's shares after the merger.

MR. FERBER: That's exactly right, your Honor. So the Christiana people are being permitted to own directly a little less of what they owned indirectly through Christiana.

I was about to say that Mr. Gribbon will deal with suggestions of the Court of Appeals and of petitioners that even if the Commission would otherwise have been right, it could not approve the merger because there was an insufficient sharing of the benefits and because of the alleged detrimental market impact the merger would have on Du Pont's stock.

Contrary to the Court of Appeals, it is our position on each of the subjects that the Court of Appeals dealt with, statutory language, legislative history, prior Commission decisions, practice under comparable statutory provisions, that the Commission did act in accordance with each of these. The use of the net asset value, the value of Christiana's portfolio, is certainly in accord with the statutory language. The words "reasonable," "fair," "not involving overreaching," describing the terms, including the consideration to be paid or received, describe exactly what the Commission found to be an exchange of equivalents, Du Pont stock for Du Pont stock.

Du Pont is not buying, as the Court of Appeals indicated, Christiana stock. It is buying Du Pont stock and that is the consideration to be paid within the statutory language.

An investment company, unlike an operating company, has no going concern value -- that is, a full investment company. There are some that are so-called hybrid companies that might have some business operation as well as being an investment company. But in the company that has only securities which have a market, the way the value has always been determined by the Commission and generally in most instances is you measure the value of its assets, its portfolio.

As the Commission noted, it said, "Investment companies are as a general rule media for long-term investment. That makes net asset value the touchstone, and the Act is based on that premise."

The use of net asset value also is in accord with the legislative history. The Commission stated, "Congress chose to protect closed-end stockholders against dilution of intrinsic value." The 1939 study of the Commission that led to the Investment Company Act showed that security holders were often in need of protection against their affiliates. The report is filled with numerous examples of unscrupulous managers who are entering into transactions with their investment company and diluting the net asset value.

That many shareholders of Christiana may be sophisticated, unlike perhaps the more usual situation with investment companies, does not mean that they aren't to be accorded the same protections that Congress provided for all shareholders of investment companies. And section 17 was the means Congress set up for that protection.

Now, the court cites numerous opinions to suggest that the Commission has not always found that net asset value is the appropriate test. The Commission has always said that that is the starting point where you have an investment company that does consist, like Christiana, solely of securities. Most of the other cases --

MR. CHIEF JUSTICE BURGER: We will resume there, Mr. Ferber, at 1 o'clock.

(Whereupon, at 12 noon, the oral argument was recessed, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Ferber, you may continue.

ORAL ARGUMENT OF DAVID FERBER ON BEHALF OF THE PETITIONER SECURITIES AND EXCHANGE COMMISSION (RESUMED)

MR. FERBER: Mr. Chief Justice. When the break came, I was just about to point out that the Court of Appeals, we think, misread the Commission's opinions in stating that the Commission did not always give great weight to the net asset value, that is, the portfolio value test. Some of the cases which the Court of Appeals cited were situations where the investment company involved was what I described before as a hybrid company, a company that had enough securities for investment purposes that it fell within the Act, but also was operating a business. And in those situations the business would, of course, be valued as businesses normally are in accordance with its income and expenses, and so forth.

The other type of cases, and there were several, particularly the Talley case, which involved the Talley-General Times merger, where neither company was an investment company; because 17 is broad enough to catch mergers between affiliates of an investment company, you had that situation where there was a machinery company and a great many other things and General Times, which was a watch company, merging. So the net asset value, the portfolio value of the stock, was not involved.

The fourth area in which the court disagreed with the Commission was that the court suggested that the net asset value test of the Commission was not consistent with some of the reorganization statutes. But certainly the Public Utility Holding Company Act under which the Commission for many years, in the forties and fifties particularly, was conducting reorganizations of electric and gas utility holding companies, in those cases the one thing that goes through all the cases is that the security holder is to receive the equitable equivalent of what he is giving up. And, of course, that seems to be completely consistent here. The Christiana people are giving up Du Pont stock and they are getting Du Pont stock. Similarly, the reorganizations under Chapter 10 of the Bankruptcy Act have that same test of equitable equivalent. And one of the cases under Chapter 10, the Central States Electric Corporation case, is very, very much in point. Central States at that time had as its two principal assets two closed-end investment companies. And in the advisory report of the Commission, they went into this question of how should they be valued, according to what the stock of these subsidiary companies were selling for in the market or according to what their holdings were selling for, and it made a difference of close to $4 million. And the Commission determined that it was what their portfolio securities sold for in working out the value of this company for reorganization purposes. The district court accepted the Commission's recommendation, and the Court of Appeals for the Fourth Circuit affirmed, quoting much of the language of the Commission's report.

It said, and I quote, "The proper method of valuing the assets of an investment company such as this is the presently realizable market values of the securities on hand." And it was referring to the holdings of these subsidiary investment companies, almost $4 million more than the market value of their own stocks.

Similarly here, of course, it is the market value of Christiana's holdings that is basic.

I would like finally to refer to the case of Pepper v. Litton which our opponents and the court below cited against us, which is sort of odd since that is one of the cases that I think in most of our briefs we were relying on. It's cited for Mr. Justice Douglas' language about arm's length bargaining. But in the Pepper case, a person who owned his one-man corporation was using it to defraud creditors, and in fact did so greatly to the creditors' injury. Unlike the Pepper case, as we have seen here, no one has been injured by this merger.

More importantly, the Pepper case was a protest against a fiduciary utilizing what Mr. Justice Douglas referred to as his strategic position for his own preferment. Section 17 treats affiliates of an investment company as in a position that is certainly comparable to that of a fiduciary relationship to the investment company. So here we have the respondents claiming that there should have been arm's length bargaining so that they can in effect hold up Christiana's shareholders and require them to hand over something approaching $200 million of their company's Du Pont stock. As the Commission pointed out, a principal reason why Section 17 of the Investment Company Act requires us to pass upon the fairness of transactions such as this is to prevent persons in the strategic position from using that position to effect transactions for other than fair value. Surely it was not unreasonable for the Commission to conclude that fairness does not require that Du Pont use its strategic position to deprive Christiana's shareholders of several hundred million dollars of their company's assets.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gribbon.

ORAL ARGUMENT OF DANIEL M. GRIBBON ON BEHALF OF THE PETITIONER E. I. DU PONT DE NEMOURS AND COMPANY ET AL

MR. GRIBBON. Mr. Chief Justice, and may it please the Court: As the members of the Court have already perceived, this case presents none of the tantalizing constitutional issues that are the Court's usual fare. Indeed, the transaction under question is a direct response to the vagaries of the Internal Revenue Code. If the liquidation of Christiana could be accomplished with the same simplicity and lack of tax consequences that attended its creation 60 years ago, there would be no occasion for this merger. The shares of Du Pont stock which Pierre Du Pont and his five associates contributed to Christiana would simply be taken out of the vault, broken up into denominations appropriate to be distributed to their successors in interest, the 8,000 shareholders of Christiana. But the tax consequences, and particularly the complexities of determining Christiana's accumulated earnings and profits rule out a simple liquidation of its assets.

Paradoxically, however, essentially the same result can be accomplished through a merger with Du Pont and not, I might say, because of any quirk or technicality in the merger law. Mergers are tax free because they involve only a change in the form rather than in the substance of an investment, and this fits that and has been ruled to be a tax-free merger by the Internal Revenue Service.

Now, the terms of the merger, as have been stated, call for Du Pont to issue about 13.2 million shares of its own stock and to receive in turn from Christiana about 13.4 million shares and miscellaneous assets valued at about $26 million net. Now, these terms reflect, as Mr. Ferber has shown, what has been referred to as net asset value. That is, the shares of Du Pont stock, which represent 98 percent of Christiana, are valued in exactly the same way as the shares of Du Pont stock which Du Pont is going to issue.

It is my understanding that the respondents contend that even if, as Mr. Ferber has shown, the Commission is justified in saying that presumptively net asset value should be used in determining the terms of merger between an investment company and its operating affiliate, that nonetheless there are two special considerations in this case that dictate a different result. Those two considerations are, first, a sharing-of-benefits contention. It is clear from the terms and has been recognized that Christiana shareholders will receive greater benefits than the Du Pont people.

The second reason why it is said that the net asset value should not control is an apprehension that the merger will cause a significant adverse market impact in the value of the Du Pont stock. These are the two contentions I propose to deal with, and I believe that an understanding of a little of the background of this transaction may be helpful in viewing those two contentions.

When Christiana proposed a merger, the Du Pont management considered it and concluded that such a transaction would cause no detriment to the Du Pont Company or stockholders and would bring about certain significant benefits. Now, the principal benefit that the management saw was the dispersion of the block of Du Pont stock, some 28 percent of Du Pont, presently in the hands of Christiana. That dispersion, in the view of the management, would remove that block as a target for people, unlike Christiana, who were inexperienced in the chemical business and who might do harm or threaten to do harm to Du Pont.

Now, I recognize that the Commission was less than greatly impressed by the magnitude of that benefit, but that benefit, as far as the Du Pont management is concerned, was and remains the basic reason for this transaction from Du Pont's viewpoint.

The Commission did agree completely that the transaction would have no detriment to Du Pont or its shareholders, and the Court of Appeals took no exception to that. And both the Commission and the court agreed that in general the elimination of companies such as Christiana was in the public interest in terms of corporate democracy and elimination of proliferation of holding companies.

Now, in connection with the merger,both Christiana and Du Pont sought outside legal and financial guidance as to the terms upon which a merger would be appropriate. Both of them were advised independently that the established practice in the merger of investment companies into their operating affiliates was that the terms represent net asset value with perhaps a discount of premium of modest amount, depending upon individual circumstances.

Now, an exhibit prepared by one of the advisers, which appears at 687 of the record, collects in short form the 10 most comparable transactions that had occurred. Six of them had been approved by the Commission; four of them had not been approved by the Commission. The important thing, and it is unchallenged that this is an accurate statement of prior practice in this area, every one of those transactions was done at net asset value.

Now, what this background suggests, indeed shows, I submit, is that the merger terms were developed with the assistance of outside financial legal guidance in an effort by both sides to arrive at what terms would,first,reflect established financial practice, and second, reflect the decision of the Commission under Section 17. The ultimate authority of the Commission to find out whether these terms were fair, reasonable, or reflected overreaching was recognized from the outset of negotiations. There was never any attempt to put anything over on anybody.

Now, the fact that these merger negotiations were carried out in this manner may not necessarily be the end of the inquiry, and I don't suggest it is. I do say it is the complete answer to the charge that respondents make, which was accepted in part by the Court of Appeals, that Messrs. McCoy and Shapiro on the Du Pont side laid down and played dead for their Christiana masters. The fact is that the terms that they obtained for Du Pont turned out to be the most favorable terms for Du Pont that the Commission would have approved. The Commission specifically said it would not have allowed anything to be significantly better than the terms that Messrs. McCoy and Shapiro got for Du Pont in these negotiations.

Let me turn now to the benefits. The benefits that we are talking about here --

QUESTION: Mr. Gribbon, could you tell me where the Commission said that. I was under the impression they said there was a range that was OK and that this fell within the range.

MR. GRIBBON: They said it was at the upper part of the range, that something lower would have been satisfactory but nothing significantly higher. It's at the very end of its opinion. I don't have the opinion. I can get it.

It's at the bottom of page 35 and the top of page 36 in the Appendix on petition.

These benefits are of two kinds: First, the 7 percent intercorporate dividend tax that Christiana now pays as a corporation is obviously going to be eliminated when it ceases to be a corporation. In addition, the market value of the Du Pont stock which Christiana's shareholders receive will be higher than the present market value of the Christiana stock which they hold, the reason being that they are permitted, by going through a merger, to get that stock in their hands and defer the taxes that would be payable had they received that stock through a liquidation at this time. So we have a combination of a saving of the 7 percent tax and a deferral of the tax that might be payable were this done through a liquidation rather than through a merger.

The Commission refused to direct a sharing of these benefits essentially for the same reason that it felt that the Investment Company Act required it to look to net asset value in these transactions. Sharing of benefits here is really a euphemism for dividing what belongs to Christiana, and they said, the Commission, the objective of the Investment Company Act was to protect investment company shareholders and not to take things away from them. And therefore, we do not regard it as fair to have any significant division of the property values of the Christiana shareholders. In substance, the shareholders of all investment companies when they come to dispose of their assets are in essence wards of the Commission. It is the Commission that makes the final determination as to the terms on which they are going to be able to sell, and the Commission had very much in mind that it was the protection of investment company shareholders even though some of them may be wealthy and even though they may carry the name Du Pont, they are the ones to be protected under the Investment Company Act.

QUESTION: Would you carry that argument to the point at which if there had been overreaching in the sense that Christiana had a benefit that was so large there was some detriment to Du Pont, that the Commission couldn't have disapproved there?

MR. GRIBBON: They could have disapproved it. The Commission went out of its way to --

QUESTION: Even though the impact were not on the investment company shareholders.

MR. GRIBBON: The Commission took the view, and I think quite properly, in one of these transactions to look out for the shareholders of both companies, not just the investment company, but for the shareholders of the affiliate and for the management of both companies.

QUESTION: Do you attach any independent significance to the word "overreaching" as opposed to the words "fair" and "reasonable"? In other words, I take it your opponents argue that that requires something equivalent to arm's length bargaining.

MR. GRIBBON: I cannot, your Honor, attach any precise significance to the use of that. I think it is fairly common drafting of legislation to use a lot of words, and I think this just may have occurred to somebody as being a stopgap. It's hard for me to see a transaction that is fair and reasonable but is set aside because there is overreaching. There may be. I should think they are substantial equivalents.

QUESTION: Your view on the legal question, then, is as long as there is no detriment to either side, it would be fair and reasonable within the statute.

MR. GRIBBON: Yes. Well, to put it the other way, it would be unfair and unreasonable to take from the Christiana shareholders any significant part of their property.

QUESTION: Even if you assume, as the Commission did for purposes of decision, that arm's length bargaining might have resulted in a transaction between willing parties, it would have been somewhat different.

MR. GRIBBON: I think that's right. If, in fact, as the Commission was prepared to assume, there might have been a different transaction, and this is highly speculative, whether there would have been different terms.

QUESTION: I think they assumed that.

MR. GRIBBON: They assumed it would. And if that is the case, then I think the Investment Company Act creates an entirely new standard, one of fair and reasonable and lack of overreaching.

Now, a second reason why the Commission declined to engage in this sharing of benefits was that it felt that it shouldn't use its powers under the Investment Company Act in effect to supplement the terms of the Internal Revenue Code.

QUESTION: I take it we should judge this case on the same assumption, then, that an arm's length bargaining would have had a different result. We should judge it on that basis.

MR. GRIBBON: I would say might have had a different result. I think that's what the Commission was saying. And I think, yes, the answer is that if you can conceive that an arm's length transaction might have had it, then the question is do the terms of Section 17, which the Commission found to be fully carried out here, fall by the wayside, because somebody thinks that at arm's length --

QUESTION: We aren't going to,first, engage in any independent fact-finding as to whether or not arm's length bargaining would have produced a different result.

MR. GRIBBON: I wouldn't think so.

QUESTION: We just take it the way the Commission judged it.

MR. GRIBBON: Yes.

QUESTION: Even if this was fair and reasonable.

MR. GRIBBON: This is fair and reasonable and reflects no overreaching.

QUESTION: You can conceive of a case, I suppose, Mr. Gribbon, where even at the appellate reviewing level you could make a determination perhaps of something that was so flagrant that on its face it would be unreasonable.

MR. GRIBBON: In that event I should think you would be reversing the Commission's finding that there was no overreaching. I find difficulty between those two judgments.

QUESTION: This Court would be --

MR. GRIBBON: It would be justified, I think, in doing that.

QUESTION: Then it could go back to the Commission perhaps.

MR. GRIBBON: But let me suggest to you that in Niagara Hudson this Court said that the judgment of the Commission has been desigrated by Congress as the appropriate guide to fairness under the Public Utility Holding Company Act. I suggest that similarly, in the Investment Company Act it is the judgment of the Commission that is the appropriate guide to fairness that has been designated by the Congress, and the Commission has made that determination.

But in urging deference to the Commission's informed judgment under the Niagara Hudson principle, I don't need to concede in the slightest that any genuine doubt has been raised on this record as to the correctness of that judgment.

Consider first the 10 similar mergers of investment companies, all that could be found by anybody involved in this transaction. And every single one of them was done on the same principle. Now, are we to conclude that all the people involved in those transactions and all of the members of the Commission who approved them from time to time were either misguided or venal, as the respondents charge Du Pont to Christiana.

Next, three experienced investment bankers, each independently, looked at these terms and approved them, and doing so, they put their integrity and their reputations on the line. And I suggest it is significant that in the five years that this transaction has been in gestation, not a single member of the financial community has come forward and suggested that there was any flaw in these terms. I think one can be assured that a transaction of this size has had considerable scrutiny throughout the financial community.

QUESTION: The price was related to the actual market price of Du Pont shares?

MR. GRIBBON: Yes; at the time of the merger. But as Du Pont shares go down in value, up in value --

QUESTION: I understand.

MR. GRIBBON: It floats.

QUESTION: But no consideration was given to the fact that this block of Du Pont stock had any potential for control?

MR. GRIBBON: Control premium? No. Du Pont would not -- there was some discussion by the Christiana negotiators that instead of a discount from that value, they were entitled to a premium, but Du Pont refused to do anything like that.

QUESTION: Did the FCC talk about that at all?

MR. GRIBBON: Did not address itself to that point.

QUESTION: Did they make any finding as to whether there was a potential for control?

MR. GRIBBON: They said there was under their Act, there was a presumption of control under the Investment Company Act with an ownership of more than 25 percent.

QUESTION: But in arriving at their judgment of value they didn't mention this factor.

MR. GRIBBON: No, your Honor.

Now, what of the Commission's unanimous approval after an evidentiary hearing and 15 months of deliberation, I ask whether there is any rational basis for believing that this public, nonpartisan body with the full support of its extensive staff, with full knowledge of Christiana's long relationship with Du Pont, failed either wittingly or unwittingly to balance the interests of the 225,000 public Du Pont stockholders against the interests of the many few Christiana stockholders. On the contrary, there is every reason to conclude that the Commission gave the transaction the very unbiased scrutiny which the Court of Appeals said was intended by Congress. And, finally, a Federal district court, after an extended evidentiary hearing, has given the transaction its blessing.

What, then, is there on the other side that suggests doubt as to the correctness of the Commission's informed judgment? Two things: First, the unsupported claims of two out of Du Pont's 225,000 stockholders with no particularly relevant experience that Du Pont should exact a heavy price for cooperation in the termination of Christiana's existence. And, second, concurrence in that view by two members of the reviewing court who found it highly significant and important enough to observe that the "du Pont family", not Christiana, the "du Pont family" had for many years retained the economic, political, and social advantages that accompany control of one of America's largest enterprises. To what extent that entered into the opinion is not clear, but it was important enough that they made specific mention, something like a bill of attainder.

I submit that weighed against these two considerations, the Commission's informed judgment stands clean and untarnished and is wholly acceptable.

I should now like to turn to the contention of the respondent Murtaugh. He alone asserts, as a reason for rejecting the merger terms or, indeed, for prohibiting the merger, an apprehension that the merger will have a serious adverse impact on the market value of Du Pont stock. The Commission gave this contention the most careful consideration. The entire evidentiary hearing in substance was taken up with it. What that hearing disclosed was that the Murtaugh contention rests upon market impact concerns that were expressed with respect to certain plans having to do with Du Pont's divestiture of General Motors stock pursuant to the order of this Court in the early 1960s. The Commission correctly found that this merger and the General Motors divestiture have nothing in common. There were two essential characteristics of the General Motors merger that gave rise to the apprehension that it would have an adverse impact on the value of the General Motors stock. The first of these was that substantial sales of the General Motors stock each year over a period of 10 years were ordered by the court, creating a very substantial overhang for a 10-year period. The second essential characteristic was that there was bound to be substantial unorganized selling by the individual shareholders of Du Pont who would be receiving the General Motors stock as a dividend, taxable at ordinary income tax rates that the record showed would average at about 60 percent.

It was, thus, these two characteristics for selling and tax selling which did give rise to reasonable apprehension of market impact and was one of the factors that led to legislation.

This transaction is entirely tax free. Nobody has to pay any taxes, nobody has to sell any stock to raise any money to pay taxes, and there is no required selling by court order or otherwise. Indeed, the record shows and the Commission found that there are strong reasons here for suggesting that holdings for investment rather than selling will be the course followed by the former Christiana shareholders. Du Pont is an issue of prime investment. They have been holding it in substance for many years, and they have no occasion to consider a change in their investments. The owners of about 70 percent of the stock, the record shows, have no intention of selling. Over half of the Christiana stock is, for all practical purposes, locked in because the holders have either no basis or zero basis as a result of the distribution of the General Motors stock, that locked-in position being a substantial disincentive to any kind of selling. And about 75 percent of the Christiana stock is held by affiliates of Du Pont who can dispose of substantial amounts only in carefully regulated transactions.

The Commission went on to say, "Even if we assume, with Murtaugh, that there will be some substantial selling, we nonetheless feel that it is inappropriate for us at the Commission to attempt to predict what the stock market behavior is going to be." And it did that for basically two reasons:

First, the merger would not alter Du Pont's investment quality in the slightest,have no effect on its earnings, its assets, or on its prospects. So there would be no effect there.

The second was that everybody would be free to follow his own personal interests because there would be no uneconomic factors that would cause either buying or selling. Under these circumstances the Commission concluded that it should not attempt to speculate on stock market behavior in determining the fairness of this transaction.

QUESTION: Mr. Gribbon, before you sit down, could you answer one question for me? I noticed in the appendix the report of Professor Upson and a series of questions that he answered. Could you tell me who drafted those questions for him? Does the record tell us?

MR. GRIBBON: The record discloses only that the court drafted those questions.

QUESTION: And the order indicates that there was a 5-day period in which you could respond to the report. Did you so respond?

MR. GRIBBON: We did so respond. I think the Commission so responded. But I believe, now that your Honor has raised that, that the Eighth Circuit going to Professor Upson really reflects the compexities of these problems and the reason why it is the Commission rather than either the reviewing court or a professor of business history who ought to be passing on them. Professor Upson produced for the court what is really a whole new record. It's in here. It's about 45 pages. The Commission never saw that. And it isn't the lawyers who were supposed to look at the evidence; it's the Commission that is supposed to look at the evidence. To some extent, and we will never know how much, Professor Upson and the data he produced did influence two members of that court to substitute their views for that of the Commission.

MR. CHIEF JUSTICE BURGER: Mr. Collins.

ORAL ARGUMENT OF RICHARD J. COLLINS, JR.

ON BEHALF OF THE RESPONDENTS

MR. COLLINS: Mr. Chief Justice, and may it please the Court: The first point that I would like to make is that the question before this Court is whether the Commission should have given significant notice to both the market value and the net asset value of Christiana. Repeatedly in the briefs that have been filed by my opponents, the question is presented as though the Commission should have made a choice between either the net asset value or the market value. And I believe that the question is a choice of using both of them and arriving at a verdict. And I go back to my letter of October 27, I believe, 1972, which appears at the end of the appendix. And I wrote to the Commission in answer to their request for any objections to the transaction, and I said that in my opinion after considering the fact that Christiana had consistently sold at a 20 to 25 percent discount, that I believed the terms should be done on a 10 percent basis. And that to me is saying that both the net asset value and the market value have a material meaning.

Now, this case involves both economics and law, and I believe that we should have an understanding of the different types of economic systems that the country can operate under. You have first a capitalist system which is laissez faire and money counts exclusively and the man with the most money has power and the ownership or the means of production are in private hands.

Another system completely opposed to that would be a socialist system where all of the means of production are owned by the state. In either of these two systems I submit that this case would not have arisen. But there is a third system, which I believe prevails today in this country, and that is a middle-of-the-road system whereby there is government intervention to balance the powers that are controlled by private people, and that generally speaking the government intervention that has taken place in this country has been intervention on the part of the weak as opposed to the strong. You have the antitrust laws, you have the public utility holding company laws that are generally, I believe, written with the philosophy of putting restraints on individual powers.

Now, getting down to the specific Act of 1940, one provision of the Investment Company Act says that the ownership of 25 percent or more of the voting stock is control, it is presumed to be control unless the Commission finds to the contrary.

Now, I submit that, forgetting about the Act, that where you have 28 percent owned by one corporation and the other 72 percent of the voting stock scattered among 225,000 stockholders, that Act or no Act, it would be presumed that the man with 28 percent of the votes controls.

Now, the second part of the Act says that if there is a transaction between the man in control and his controlled corporation, there should be no overreaching. Another part of the Act says that the Commission's findings of fact shall be conclusive if supported by the evidence. And there is a general law, I believe, that says that the administrative agency, the Commission, should be upheld unless it has an erroneous view of the law or unless its findings are based on factual findings not supported by the evidence. And I believe that it is my burden to show either that the Commission has an erroneous view of the law or else that its findings of fact are not supported by the evidence.

Now, I believe, first, we should now have a picture of Christiana, and Christiana is a control device. It is a control device, and when you are talking about the positions of Du Pont and Christiana, to say that Du Pont is in the strategic position, I believe, is somewhat out of order. I would say that the person on top, the person in control, as between the two parties, the person on top is in the strategic position if anyone is in a strategic position.

Now, there is a factual finding by the Commission at page A49 of the Appendix, and the Commission says that Christiana stock and Du Pont stock are economically equivalent, and I challenge that finding. I say that the Commission has made a mistake, because it has not realized the meaning of a holding company, and for simplification purposes what I would like to point out is this: that if you have an operating company with, say, 100 shares of stock outstanding scattered among 20 people, that each share of stock is a share of stock with an equal value.

Now, the minute that the owners of 28 of those shares, 28 percent of those shares, get together and exchange their shares of operating stock and put it into a holding company and issue holding company stock against it, they have owned something different, they have created a different animal.

Let's say that one man with 15 shares and another man with 13 shares get together and they say we are going to have a holding company. The man with the 15 shares out of the 28 in the holding company immediately has control of 28 shares. He has a different stock. He has something that is not economically equivalent to what he had the day before, his 15 shares of the operating company.

Now, that is the inherent nature of a holding company. The purpose, the sole purpose, of the holding company, people talk about it as dominating the operating company, but first and foremost the sole purpose of that holding company is to dominate the other stockholders.

QUESTION: Was there a controlling shareholder of Christiana?

MR. COLLINS: I do not know, your Honor.

QUESTION: I thought your theory was that if there were, then that single controlling shareholder of Christiana would become the controlling shareholder of Du Pont.

MR. COLLINS: I was saying, your Honor, that the ownership of stock, that the stock itself of the holding company is different from the stock of the operating company.

QUESTION: I see.

MR. COLLINS: Now, I used the analogy of 15 and 13. If you broke it down that there were 28 shareholders of the holding company, I say that 15 of those 28 have control. I am saying that one share of Christiana is inherently different than one share of Du Pont. It has the potential voting power that is greater than the operating company.

QUESTION: And yet that might be expected, at least in some circumstances, to command a premium.

MR. COLLINS: Yes, your Honor.

QUESTION: And yet in answer to my brother White's statement, there was no value accorded at all, no control premium accorded at all in this case.

MR. COLLINS: No. But the Commission made the mistake in saying that they are the same, that they are economically the same. And you get this strange situation, strange on the surface, that the stock of Christiana, the control stock, is selling at a discount.

Now, I submit to the Court that it is selling at a discount made up of two factors. It is made up that ordinarily without any taxes, if you eliminate the tax situation, that Christiana stock would be worth more than Du Pont stock on a share-per-share basis. But along comes Congress, not the minority stockholders of Du Pont, but along comes Congress and says here are certain tax laws and those tax laws knock down the price of the holding company. They don't do anything for the stock of the operating company. All they do is knock down the price of the holding company.

QUESTION: That is the tax on intercorporate dividends of, what, 7.2 percent and a potential capital gains tax.

MR. COLLINS: And an unknown tremendous capital gains.

QUESTION: On the appreciation of Christiana.

MR. COLLINS: Yes, your Honor.

QUESTION: And that is just a threat hanging there. It's not a tax that is imposed --

MR. COLLINS: It's not a tax that is imposed, but it exists.

QUESTION: -- until there is recognition of the gain.

MR. COLLINS: Now, the Commission's view at first glance is a very simple and a very fair view that these people started the holding company, in my example with the 28 shares, or to translate it into Christiana, they put in 13 million shares of Du Pont. And now they are in a jam and they are tired -- they don't say this. They are tired of dominating the other stockholders. I say that. Now they are in a jam and they don't want to control any more. It's outlived its usefulness. They say we, the minority stockholders, the public stockholders, should cooperate with these people at essentially no cost, give it the 2.5 percent, but at essentially the no-cost idea, we should agree that they should have a merger and avoid their taxes.

Now, an important distinction, I submit, lies between the Public Utility Holding Company Act and the Investment Company Act. In the public utility holding company situation, the general idea was to break up these holding companies and they could not be born tomorrow or sometime in the future. But with the Investment Company Act, the Commission itself says that these people had every right to form Christiana, and I have no quarrel with that, every legal right in the world to form Christiana. But they do not go on to say that tomorrow or five years from now another group can form another holding company. But the Public Utility Holding Company Act, which says that you have got to disband these things, says they are not going to be resurrected again.

So here we are. This particular group is tired, for one reason or another, of its position and it wants to get out. Judge Learned Hand said people are entitled to arrange their affairs to avoid taxes, and I am in the tax business, that's my general field of work, and I believe that's true. But no one, as a matter of principle, as a matter of general principle, ever said people are allowed to arrange their tax affairs or their business affairs so as to avoid taxes without paying anything for it. I don't think anyone ever said especially that the people who have been in control, who have taken the control out of the majority holders' hands are entitled to arrange their business affairs by calling on the people they control to help them and who have been dominated for 50 years.

Now, I believe it was Mr. Gribbon who described this holding company as a ward of the Investment Company Act, that the Investment Company Act was created to protect holding companies or investment companies. I like the word "holding company." But protect it against whom? If Christiana is the ward of the Investment Company Act, what is Du Pont, what is the party controlled by the investment company? The ward of the ward? I don't know. I don't know.

Now, I submit that the Commission did not realize that by its net asset value you are really writing an insurance policy to the people who want to control an operating company. And as I say, there is nothing illegal or morally wrong, perhaps, even, in creating a holding company. It's just a fact of the way of our life. This is the way the rules of the game are played, that the owners of 28 percent of the stock can get together and dominate the other 72 percent. But I say this, that if they are going to do so, they should not be given a guarantee against loss. If they a re going to do this, they do it with the idea of gain. In a capitalist society we operate on the idea of individual gain. It may not sound very nice, but I believe that is the way the game is played.

Now, if they are allowed to do this, to create this holding company, I believe that they have the right to the profit, if any, they can gain from it. They create a holding company, they take the control of an operating company. If they could find a buyer, if they could find a buyer at a premium, at a 20 percent premium, they could go over and sell it and put it in their pocket and walk away with it and they would not have to share it with the other 72 percent of the stockholders. And that is perfectly legal and perfectly justified as far as I am concerned. But if that is their right to put the profit in their pocket, they should not be allowed to come along and say, "We are in a jam, and now our stock instead of selling at a premium, for whatever reason, it is selling at a discount, that we want you, the people whom we have dominated for 50 years, we want you to agree to let us out of our tax jam. We are not going to guarantee that you won't be dominated tomorrow by a different group, but we want you to let us out of our tax jam." Now, if that is fair, if that is fair, I am completely wrong and my case is lost.

My case is that when people set out for a gain, for a profit in this society, they have to be prepared to take a loss. It's elementary. I don't have any cases to cite, but I believe that that's the way the game is played.

I think that old case in 1922, the International Radio Telegraph case, I believe that that sets forth in simple terms and common sense terms what should be the measure of fairness. If two strangers were to agree to a deal where neither one of them is compelled to make a deal, I believe that's a fair deal. This is not the case of the man sitting in the middle of the Sahara Desert with a jug of water and some poor guy comes along and he is dying of thirst and the man with the jug of water says, "I want $10,000 for a glass of water." Mr. Shapiro, Mr. Edward du Pont, both of them testified that there was no compulsion, no compulsion on Christiana to merge. It could go on. It has gone on for many years, and it can continue to go on. It's not something that has to be done. It's not that we the public stockholders of Du Pont are sitting and these people are grasping for water or economic life and that we can simply sit here and say, "Meet our price or else you die." They have admitted that they can go on. So to say that we are in the strategic bargaining position, we could grab 10 pounds of flesh, I think is unrealistic. It's unrealistic.

I think what is more to the point is that the Christiana people have been in the driver's seat for 50 years and we have been in the rumble seat, and we have been taken for a ride. Now, I am not saying that it's a bad ride or a good ride. But I am saying that here is an opportunity that no one ever dreamed of. It's an opportunity for us to get out of that rumble seat into the front seat, not to take command, not to push Christiana out of the driver's seat, but simply to be there as an equal and say, "There is plenty in it for you in this deal, there is tremendous opportunities for you, Christiana, there are tremendous opportunities for us."

The Commission says that Christiana should not have to pay a high price. But how do you measure a high price?

I say you measure it by what they have had. They have had the control of this corporation for 50 years. They are getting tremendous tax savings. So that just to say it's a high price, the high price has to be related to something.

Thank you, your Honors.

QUESTION: May I ask you a question? Your argument has focused on the control relationship between Christiana and Du Pont. Let's assume for the moment that you have a situation, a merger situation, involving no control element. Let's assume that Christiana, instead of owning Du Pont stock, had owned IBM stock. The SEC wouldn't have any jurisdiction over the merger, but you as a stockholder of Du Pont would be interested in the terms of the merger from the standpoint of fairness to Du Pont stockholders. Let's assume that the terms of the merger contemplated net asset value as a basis for the exchange. What would you say to that?

MR. COLLINS: I would say, your Honor, that --

QUESTION: Let me add one other factor. Suppose a discount between net asset value and what you argue would be the market value of Christiana selling at a discount were precisely the same in this case. The only difference would be that you would not have the control relationship.

MR. COLLINS: Then, your Honor, I would say that my case does not apply, because my case, your Honor, is predicated on the fact that there was control and that by using the control, they got a better price than they could have had without the control.

QUESTION: May I ask you this:

MR. COLLINS: Yes, your Honor.

QUESTION: If you are a Du Pont stockholder, you would be interested in the fairness of the merger if that came about, wouldn't you, whether it resulted from control or from bad bargaining?

MR. COLLINS: But I believe that you cannot judge the end without --

QUESTION: But your theory, one of your theories at least, is that it was error for the SEC to look solely on net asset value.

MR. COLLINS: Yes, and your --

QUESTION: I'm saying without regard to the investment company situation or the control situation, just an ordinary merger, would you as a stockholder object if your company accepted or entered into a merger on the basis of an exchange determined solely by the net asset value of the other company's shares?

MR. COLLINS: With Christiana owning some IBM --

QUESTION: IBM, for example. Everything the same except you don't have a control relationship.

MR. COLLINS: No, I probably wouldn't.

QUESTION: You would not.

MR. COLLINS: I would not.

QUESTION: You would think it a fair merger under those circumstances.

MR. COLLINS: I would say this, that what is the advantage to me in voting for the merger, if I am paying net asset value? If Christiana has IBM stock worth so many dollars, what is there in it for us? Why should I vote for it if I am only getting it at net asset value? Why should I give them a deal that I can accomplish by writing a check and buying it on the New York Stock Exchange? Why should I do it?

QUESTION: So you are now saying it would be unfair even if there were no holding company situation.

MR. COLLINS: I can't say that it would be unfair. I can't say that it would be unfair, but I would ask the question why should I do it? I would say this, that as an economic man, guided by the principles of self-preservation or self-aggrandizement, as you call it, I would say, "What's in it for me?"

QUESTION: I can understand one asking that question, but the question the Court would have to answer if a stockholder brought a suit challenging the fairness of the measure, is whether or not the terms were fair, not whether a stockholder should say, "Why should I do it?"

MR. COLLINS: Let me answer it this way, your Honor.

I go back and I would say, yes, it would be fair. But if I may go on just for a second.

QUESTION: You may be using your colleague's time, so I won't keep you.

MR. COLLINS: I am sorry.

MR. CHIEF JUSTICE BURGER: Mr. Murtaugh.

ORAL ARGUMENT OF LEWIS C. MURTAUGH ON

BEHALF OF THE RESPONDENTS

MR. MURTAUGH: Mr. Chief Justice, and may it please the Court: On the back page of my brief, almost back,page 70, is a list of who gets what out of this merger. There are about seven advantages that Christiana shareholders get. Some of them are money advantages right on the face of the table; some of them are tax advantages, tax delay advantages, or tax avoidance of a billion dollars, as I calculate it. But if you knocked out that tax-free liquidation result, I would still be against this merger because of the fact that they are getting $41.25, a 37 percent markup in the value of their holdings, and because of the fact that we are loosing on the floating supply of Du Pont 13 million shares on the present 34 million-share floating supply. And I would be against the merger regardless of the terms. In fact, I am still against the merger regardless of the terms. But I don't see the tool by which I can block the merger if they have the votes.

Now, the only thing that we can do in that event is to come and say, "Compensate us for our cooperation in letting you avoid a billion dollars in taxes at the present time, letting you have a half-billion markup in the presence of your holdings, giving you greater liquidity." That is worth over a billion dollars right there. What is the advantage for Du Pont?

The distinct disadvantage, the detriment which I fear and which I attempted to get time to put in evidence was the market impact argument. Fifty-six percent of the stock of Christiana is held in one fiduciary capacity or another by Wilmington Trust Company as trustee. Now, I would have been able -- in fact, I am able now -- to show the nature of those holdings. Some of them are just exclusively Christiana. And it just stands to reason under general trust diversification principles, when they get into a stock of the liquidity that Du Pont has, they are going to take advantage of that liquidity or they are going to be sued for lack of diversification.

Now, I participated in the 7-day hearing. At the conclusion I asked for a continuance to have an opportunity to put in evidence that would bear on the question of the aptness of my contention. The Commission denied that on the grounds it wasn't relevant, what would happen to the price of Du Pont stock was not relevant, and therefore they disregarded any evidence that was in the record or that might come in the record on the question of market impact because of lack of relevance. I claim that was pure error.

But regardless of that, this table of advantages is just fabulous. I was delighted to hear Mr. Ferber say that Pepper v. Litton is one of the favorite references of the SEC because I believe strongly that it not only was a question of detriment, but it went on to say that the controlling power -- on page 311 -- is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestui.

Now, exclusion or detriment, that's two categories. We are all familiar with the fact that a fiduciary makes a profit out of dealing with his cestui que trust even if it could be shown that the cestui wasn't disadvantaged as under grave suspicion of having to kick it back into the pot.

Now, the detriment that is involved here on the issue of market impact affects Du Pont as a company. If Du Pont wants to acquire a company with the use of its shares and if the market has been damaged by a turnover of these magnificent holdings of Du Pont which will now become marketable, why, it's going to have to give more shares than it would if the market was stable as it is now. That is one reason I am really against the merger. But all I can do is take it out in terms of the merger terms. And it's perfectly fair if we change these terms so that we split the benefit, just the cash benefit, of $450,000, why, we still leave them with all these other benefits. Their dividend would be neutralized by that. There would be no decrease in dividends. The liquidity would be added. The tax-free liquidation result would still be there. So there is a possibility of damage to Du Pont and to Du Pont's shareholders, but we can't explore that unless we have the record complete.

Now, if the Commission is right that as a matter of law the market impact is immaterial, then that point of detriment can't be gone into; then we only have the sharing of benefits. The Commission went a long way here. It said there is absolutely no benefit to Du Pont except the 1.75 percent discount. They said the dispersion is of no value. They said that the witnesses of prestigious Wall Street houses was of no value. They said that they would be better off probably if Du Pont was controlled by Christiana who would have stockholder responsibility for making it productive.

Now, I certainly don't want to knock the stock of Du Pont, but it has gone down to 50 percent of what it was 13 years ago, and it's not a bulwark of the market, and there is no reason to assume that it could stand a vast increase in the potential supply, which is, I mean, the supply actually brought to market.

Those are the principal factors in my thing.

Now, as a continued argument that the Commission said that this was an exchange of equivalents, I have treated that in my brief, but it's perfectly clear that the Commission was only paraphrasing their contention, because it says at first blush there is no problem for Christiana stock is really already Du Pont stock under another name. So this in essence is the view of the two companies involved. That's merely a statement. I am reading from Petition, page 9a and 10a. That is merely a statement. In fact the whole Commission's opinion goes to the fact that it isn't the same, that there are striking disparities with the result that Christiana is utterly incommensurate and that there is no reason for the merger at all except the advantage that Du Pont gets is that 4 cents per share will be earned on the basis of $7.33. That's the only advantage that Du Pont gets out of this magnificent transaction, which is, in my opinion, inexcusable, very damaging, and so on.

Now, this is not a liquidation. The parties are free to liquidate. They can't deny that, and they don't have to come to the Commission for it. But the Commission is bound to follow the statute under which it operates. That statute includes in its preamble, upon the basis of facts disclosed by the record and the reports of the SEC made pursuant to Section 79 z of this title -- that's found in Appendix A of my brief -- such companies, namely, investment companies, commonly, customarily invest and trade in securities issued by, and may dominate and control or otherwise engage in business in interstate commerce, have management of companies engaged in business and interstate commerce. In other words, one of the features in the preamble was to control investment companies from taking advantage of affiliates.

Furthermore, section 17(a) -- there is no use going into the history or picking little bits and pieces from remarks and cases that weren't contested. Most of the cases that are referred to generally here are without examination. It says that -- there are five, maybe six, categories -- the terms of the proposed transaction, if the evidence establishes that -- first we have to have evidence; the SEC said evidence is immaterial here because net asset value controls -- the terms of the proposed transaction, including the consideration to be paid or received --that indicates a sense of balance; people ordinarily pay for something what it is worth -- are reasonable and fair and do not involve overreaching on the part of any person concerned.

Now, Du Pont is a person concerned here, and if Du Pont enters into a deal where it should be getting more money than it does, more of a consideration than it does, then it has been overreached. Now, that is exactly what the terms of the statute says, and the SEC said, We will disregard the concept of overreaching the stockholders of Du Pont because the entire flavor of the Act is so protective of investment Company shareholders. But that flies right in the face of the terms of the statute as it is written. There is no need to go back to a bankruptcy reorganization advisory opinion years ago to be concerned about this. Of all the language, in the bankruptcy reorganization case of about 30 years ago is the only place that the principle is stated. In fact, as the Court pointed out in footnote 12, I think, to the opinion, Covington & Burling stated in its advice to the financial advisers, "In general the Commission examines proposed transactions and merger terms affecting common stock. Passing on merger terms affecting common stock, the Commission has looked to such factors as comparative earnings, dividends, market values, and net asset values, including adjustments for potential taxes arising from unrealized capital gains in portfolio securities and the tax benefits resulting from tax loss carried forward." No single factor has been considered determinative.

Now the SEC took a different view, says you don't have to have any facts, just show us that you are getting the net asset value, and we will forget whether it is fair and reasonable or overreaching. Now, it is overreaching in any normal business transaction, it is overreaching if a person can get a bigger price than he otherwise could if he was independent. Now, there can't be any overreaching by Du Pont because it is the controlled person. Christiana is the dominating person. It's utter fantasy to say that it is somehow exercising control or extracting. It can't extract. It's perfectly helpless, and it can't do any harm to Christiana either. But it isn't a transaction that is a business transaction that a businessman would make, even if he really wanted the merger and he laid out these advantages. If Christiana stock were nonvoting, why, no Du Pont manager would ever sponsor a transaction like this even if the equities were the same.

So, getting back to Pepper v. Litton again, which I hope still remains intact after every writing of whatever opinions are written here, the idea of a merger is a consentual transaction. When you deal with consentual transactions, you deal with things that people have to agree to. If the agreement is meaningless because its controlled, then you have written out the section of the Act that says there shall be no overreaching.

QUESTION: Mr. Murtaugh, this transaction has not been submitted to the shareholders of either company. That is going to follow after the SEC --

MR. MURTAUGH: That is correct, yes.

QUESTION: So we don't know what views the minority shareholders might have with respect to this.

MR. MURTAUGH: Yes, I think we do. With Christiana having 28 percent of the stock and with Christiana transferring control to the managers of the company who are the negotiators of the transaction and who, by the way, testified before the SEC that they felt they represented all the shareholders of Du Pont, including the Christiana shareholders, why, it's perfectly obvious that they will be able to swing enough votes with the proxy machinery and the 28 percent to control the thing. That is the reason you have to come in in protection of the minority in this forum. That is the reason that we are here.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Murtaugh.

Do you have anything further on this side of the table, gentlemen?

Very well. Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:13 p.m., the oral argument in the above-entitled matter was concluded.]