OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ARTHUR L. GUSTAFSON, ET AL., Petitioners v. ALLOYD COMPANY, INCORPORATED fka ALLOYD HOLDINGS, INCORPORATED, ET AL.

CASE NO: No. 93-404

PLACE: Washington, D.C.

DATE: Wednesday, November 2, 1994

PAGES: 1-52

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

ARTHUR L. GUSTAFSON, ET AL. :

Petitioners :

v. : No. 93-404

ALLOYD COMPANY, INCORPORATED :

fka ALLOYD HOLDINGS, :

INCORPORATED, ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, November 2, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

DONALD W. JENKINS, ESQ., Chicago, Illinois; on behalf of the Petitioners.

ROBERT J. KOPECKY, Chicago, Illinois; on behalf of the respondents.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 93-404, Arthur L. -- do you know how your client's full name -- is it Gustafson, or Gustafson?

MR. JENKINS: Gustafson.

CHIEF JUSTICE REHNQUIST: Arthur L. Gustafson v. Alloyd Company, Incorporated. Mr. Jenkins.

ORAL ARGUMENT OF DONALD W. JENKINS

ON BEHALF OF THE PETITIONERS

MR. JENKINS: Mr. Chief Justice and may it please the Court:

As the briefs indicate, this case turns in large part on whether or not the phrase, by means of a prospectus or oral communication, as used in section 12(2) of the Securities Act of 1933, is a phrase of limitation.

The case also turns on whether, by section 12(2), the act covers negotiated private transactions even though the act does not otherwise intrude into such business arrangements.

The House report answers both these questions, stating the bill affects only new offerings of securities. It does not affect ordinary redistribution of securities.

As to liability provisions, the report states the bill's civil liabilities attach only when there's been

an untrue statement of material fact in the registration statement or the prospectus, the basic information on which the public is solicited.

This case involves no new offering of securities, and presents the paradigm example of a private transaction the act plainly left free from regulation other than by its section 17.

Art Gustafson, Dan McLean, and Francis Butler sold their company to a sophisticated investor which conducted its own due diligence and negotiated the deal it wanted. The buyers had full access to information about Alloyd. Indeed, Mr. McLean and Mr. Butler were officers and shareholders of the buyer.

The stock purchase agreement contained numerous risk-allocating provisions. In particular, the parties knew that Alloyd's interim earnings were estimated, so, as is common, they closed with an estimated purchase price subject to a later dollar-for dollar adjustment after an audit determined actual earnings. They plainly could have, but did not, agree that some multiple of the variance should apply to the transaction.

After the audit, the parties agreed that the estimated price had been $815,000 too high, and sellers paid that amount to buyers as the agreement required. Buyers, who knew Alloyd's interim earnings were estimated,

now claim that sellers warranted a certain level of such earnings in the agreement. They claim a breach of that warranty, which is a contract law matter, and also claim a violation of section 2 of the -- 12(2) of the Securities Act. They have made no claim of fraud.

As to the section 12(2) claim they assert, it is that the purchase agreement itself, the negotiated purchase agreement, was a prospectus, and they claim they are entitled to rely on oral communications during due diligence about Alloyd's inventory, even though the agreement specifically provided such oral statements were superseded by the terms of the agreement.

Buyers seek rescission of the transaction or rescissionary damages, even though by the agreement they agreed that they would not seek rescission.

The act, and section 12(2) in particular, makes a seller, we submit, a fiduciary only when there is an initial public offering of securities. It does not do so in the context of ordinary secondary transactions such as privately negotiated resales of stock that have never been publicly distributed.

A stock purchase agreement memorializing the terms of a negotiated deal is not a prospectus, nor are discussions in the course of due diligence regarding the reliability of inventory estimates.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: If it had been an offering circular -- not just a purchase agreement, but would an offering circular fit within the definition of section 2(10)?

MR. JENKINS: An offering circular would certainly be a circular, I think, within the meaning of section 2(10). It specifically uses that phrase. But the preceding words in 2(10) is, the very first definition of prospectus is prospectus itself, which as commonly defined then had a public solicitation connotation.

We believe the correct interpretation, as demonstrated by numerous portions of the House report and other commentary by draftsman, is, an offering circular is a prospectus when it's used to solicit the public to purchase securities.

QUESTION: But if it's in connection with a private offering, it would not -- is that what you're saying would not?

MR. JENKINS: We don't believe that would be the proper definition under 2(10), or, particularly, under section 2(12), given the context of 2(12) as a liability provision in the act.

QUESTION: But 2(10) just says, offers any security for sale. It doesn't -- it's not -- the words of the statute aren't limited to a public offering.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. JENKINS: The very first word that section 2(10) uses is prospectus. In defining what a prospectus is, prospectus, as commonly used then, connoted, or was defined as, a document prepared by a company describing its stock or prospects and inviting the public to subscribe to an issuer. Inviting the public. That's the first word used in the definition of prospectus. We believe the following words have similar import.

QUESTION: Where is that limitation used? I mean, suppose you had what might be called an offering circular in connection with this private offering, but it was labeled, prospectus. Would it then fit within the definition?

MR. JENKINS: We don't believe so, not for section 2(10) purposes, and certainly not for section 12(2) purposes, because of their use of the word prospectus, used as a selling document.

QUESTION: And you're -- when you say similar import,. you mean public offering import?

MR. JENKINS: Public offering, yes, Your Honor.

QUESTION: So if this deal has -- no, it would still be -- well, if this deal had been done with the company, the control company issuing new shares, and then Gustafson redeeming the shares that they had originally, then that -- otherwise everything is the same. That would

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

be covered, right?

MR. JENKINS: If Alloyd had issued new shares to --

QUESTION: To the --

MR. JENKINS: The buyers?

QUESTION: Yes. The buyers got new shares, and then the sellers redeemed their old shares. I don't think --

MR. JENKINS: As to the first portion of the transaction, the issuance by Alloyd of new shares to the buyers, the exemption of section, I think it's 4(2) of the act, would exempt that transaction.

As to the second portion, a redemption, then, of the seller's shares by the company, I believe that would also be a 4(2)-exempted transaction, but I'm not certain. But in either event, because there is no public selling, no public offer involved in the transaction, no --

QUESTION: But then you would have to make your distinction turn on the actions of a public offering, not on the sale versus resale. In other words --

MR. JENKINS: There --

QUESTION: -- I gave you a situation where you end up with the same result, but in one case it's done in the form of a sale of new shares, redemption of old shares, in the other it's done in the form of just a

direct sale of the --

MR. JENKINS: There is some authority, particularly in the comments of legislators, and I think these are cited in the SIA's brief in particular, for the proposition that the act just does not apply to transactions in old stock, period.

Some of the commentary in the House report is inconsistent with that sort of declaration, because the commentary in the House report indicates that if there's a redistribution of old stock either by a company or a control person, that transaction is subject to regulation by the act.

To the extent one prefers to rely on the House report, declared rationale, or the Congressmen's statements of intent that the act doesn't apply to resales of old stock at all, I think either way you reach the same result as to the application of section --

QUESTION: Yes, but I'm giving you two ways of doing essentially the same deal. One, it would involve a resale, and the other would be a first sale, and wholly apart from the private versus public sale, I think you said resales are never included.

MR. JENKINS: Some Congressmen so stated when they were debating the act.

QUESTION: But that's not your position?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. JENKINS: That is part of our position. One view that could be taken of the act based on those statements is the act just doesn't apply to resales of old stock, period.

QUESTION: Yes, but you --

QUESTION: That's all it needs, just a couple of Congressmen to say -- it's not even in the committee report, just a couple of Congressmen say it --

MR. JENKINS: I --

QUESTION: -- and that is enough to interrupt the act that way?

MR. JENKINS: No, Your Honor. I think the preferred view is the view that is articulated in our briefs, that the House report carefully lays out how the bill -- the bill -- regulates such transactions. If a redistribution of old stock looks like a public offering, becomes a public offering, then the act applies. I think that is the better --

QUESTION: As I understand it, you don't rely at all on the distinction between a sale and a resale, do you? You rely on the distinction between public offerings or nonpublic offerings.

MR. JENKINS: That is the primary position we take. There is a --

QUESTION: But you wouldn't --

MR. JENKINS: -- a different position -- I'm sorry.

QUESTION: You wouldn't contend that a secondary offering -- say I'm a major shareholder of General Motors. I have a public offering of my stock. You'd admit that's covered, wouldn't you?

MR. JENKINS: I would admit that is -- I personally believe that is covered by section 12(2).

QUESTION: Sure.

MR. JENKINS: I personally also believe that that is a transaction that the act requires to register.

QUESTION: Of course. I'm just saying that there are some secondary offerings that must be registered, so there is no basis in the statute for drawing a distinction simply about whether it's a primary offering or secondary offering.

MR. JENKINS: I think the only basis is the statements over and over in the House report and by legislators --

QUESTION: There's nothing --

MR. JENKINS: -- it applies to new stock, and looking at just the entire structure of act, it just does not appear to be designed to apply to secondary transactions, period.

QUESTION: Unless they're public offerings.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. JENKINS: That's my view as to the proper position to come down on.

Buyers and the SEC argue that section 12(2) extend far beyond the otherwise limited coverage of the act, and applies to all communications in all contexts involving sales of securities. Their argument in both their briefs is based in part on the 1948 decision of Moore v. Gorman and its progeny.

They reason, as that court did, that section 12(2) covers secondary transactions and including private resales, because section 4 exempts such transactions from section 5, but does not exempt such transactions from section 12.

Seller's position, of course, is that this begs the initial question, what did section 12(2) intend to regulate in the first instance? Plainly, Congress would not have seen any need to exempt a transaction from section 12(2) if it didn't perceive the transaction as covered by section 12(2) in the first place.

QUESTION: Well, Mr. Jenkins, I guess the problem is that the language of the section 12(2) does say that any person who offers or sells a security by means of a prospectus or oral communication which includes an untrue statement is liable, so the language itself, of course, is broad, as you have to concede.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. JENKINS: I respectfully do not so concede. The language itself is limiting language. If Congress had meant to say it broadly, it would have said, any communication, or it would have said nothing, as it did in section 17 of the act. Section 17 says, you shall not acquire money by means of any untrue statement. That is a broad statement.

When they put the phrase, by means of a prospectus or oral communication in section 12(2), they had to be connoting some limitation. We believe the limitation is the limitation that flows from the natural lay understanding of the term prospectus, which is a document soliciting the public to subscribe to an issue of stock.

We don't think section 2(1) requires that you go any differently and, indeed, if it does, as the buyers are attempting to read section 2(10), why did Congress not simply use the word, any written communication or broadcast in section 2(10)? It used many more words than that.

We think that the usage of all of the words have to be read together in light of the initial word, prospectus, as further communications which are used to solicit the public to purchase securities.

QUESTION: And then, having defined prospectus

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

in a way that's contrary to the definition in the statute, you define oral communication the same way, by sort of guilt by association, right? It does say, prospectus or oral communication. How do you get oral communication to mean something less than an oral communication?

MR. JENKINS: Certainly by guilt by association, or noscitur a sociis, or whichever term you want to put on it, and by the reverse reasoning that also applies to section 2(10). If they meant any communication, why didn't they just simply say so? They knew how to write that way. That's the way they wrote section 17. When they used more words than just, any communication, they were connoting limitation.

We have articulated in our briefs where we believe the limitation leads. The SEC and the buyers are in the position of necessarily being all or nothing. If it's totally unlimited, their view is the phrase does require application to every communication in every context involving securities.

As just mentioned, the list of items that 12 -- 2(10) uses in defining prospectus is limited to selling statements. The words used when the act was passed were, first, any prospectus, notice, circular, advertisement, letter -- which could be broad -- or communication, written or by radio, which offers any security for sale.

That is treating and describing a specific type of communication, not a negotiated stock purchase agreement and not comments made during the course of due diligence, which the parties agreed were superseded by the stock purchase agreement.

QUESTION: One of the briefs in support of respondents said -- discussed section 410(a)(2) of the Uniform Securities Act, said it was similar to 12(2), and said that the consensus among the States is contrary to your position. The consensus is that both private sales and secondary market transactions are covered.

MR. JENKINS: Well, 4 -- the section of the Uniform Securities Act that they're referring to does not, specifically does not include the phrase, by means of a prospectus or oral communication. Those words are left out of that act.

Certainly, with those words left out, I think they're correct the Uniform Securities Act does apply to such transactions, but it's an awfully big distinction. I mean, they're saying the things mean the same even though the '33 act has words of limitation in them that the uniform act does not have.

QUESTION: I thought perhaps the reason for the use of the word prospectus is it's a term of art, which is as broad as you say but also encompasses (a) and (b),

which are exceptions, in 2(10).

You know, it defines prospectus as any prospectus, notice, circular, advertisement, letter, or communication, but then it specifically says, by the way, two things are not prospectuses, and that's if you comply with certain SEC rules and so forth, so the reason that they wouldn't say, any written communication, is they wanted to tie it directly to that definition.

MR. JENKINS: Except that that would have been so much easier to do. Just say, any defin -- any written communication or broadcast except --

QUESTION: But then it wouldn't have had the two exceptions, (a) and (b). If they said, any written communication, it wouldn't pick up the two exceptions, which are not relevant here, because -- I might be not right about that, but that's --

MR. JENKINS: Are you referring to the -- I think it's called the free-writing --

QUESTION: 2(10) defines prospect, and then says -- very broadly, and then says, except that -- except that a communication sent or given, and so forth, then it says, and a notice, circular, shall not be deemed a prospectus if, you know, that stuff.

MR. JENKINS: Right. Those are referring to two categories of stuff --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Nothing to do with --

MR. JENKINS: Well, in some sense they are related, that the (a) part of that exception is reference to so-called free-writing, which is specifically permitted. The whole intent of carving that out is to specifically permit free-writing --

QUESTION: Yes.

MR. JENKINS: -- during the period after a statutory prospectus --

QUESTION: Right, but you see, my question is, you're argument depends on well, if they meant any written communication, why didn't they just say it, and one possible reason they didn't just say it is because they wanted to use the word prospectus, which would then have the technical exceptions written into it. That was my question.

MR. JENKINS: But I -- unless I'm missing it, I still believe the same result would be reached if they'd written; any communication, prospectus means, any communication, they would have still needed to carve out those two types of communications from the definition, unless I'm missing something.

QUESTION: Yes -- all right.

MR. JENKINS: Okay.

QUESTION: I want to talk about what would have

been an easier way to say it. I mean, you've made allusions to that several times.

I find it very odd that the limitation that you're seeking to import into the statute would be imported by the word prospectus, rather than by the word sale. I mean, that limitation, it would have been way up at the top of section 12, any person who publicly offers or sells a security, or offers or sells to the public a security.

Why would you seek to import that limitation, it has to be a public offering or sale, much later in the provision? Why all the way down, by saying, who offers or sells by means of a prospectus, aha, prospectus must mean a public offering. It's a very strange way to do it.

MR. JENKINS: I think the reason --

QUESTION: You can simply say, public offering or sale.

MR. JENKINS: I think the reason that Congress didn't put, public offering or sale, is by that point in the statute, if you look at how the statute is drafted it's clear that the whole statute only applies to public offerings or sale, and the words would have just been superfluous.

QUESTION: Well, you just said section 17 --

MR. JENKINS: 17 is a unique distinction.

12(2) --

QUESTION: So if 17 is not so limiting, well then, 12(2) could be not so limiting.

MR. JENKINS: Two answers. One, the language of 17 is, in comparison to section 12, significantly different and significantly broader, as this Court observed in United States v. Naftalin.

Second, there is specific commentary in the Senate report that this Court felt clearly showed an intent that section 17 extend beyond the rest of the provisions of the act and extend beyond them in the sense that it was applicable to secondary transactions. The court felt that both of those points warranted a treatment of section 17 as departing from the other scope of the act.

QUESTION: Following up on Justice Scalia's question, am I correct in understanding that the term, public offering, is not defined in the statute?

MR. JENKINS: I believe that's correct.

QUESTION: Rather, what they do, they talk -- use the broad term, sale, and then list a series of exemptions from the registration requirement, and anything --

MR. JENKINS: That's correct.

QUESTION: -- that's nonexempt therefore becomes

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

public in the way we use the term.

MR. JENKINS: I believe that's correct also.

QUESTION: Section 4 exempts certain transactions from section 5, but not from section 12.

MR. JENKINS: That's --

QUESTION: Does that silence suggest that section 12 applies to transactions that do not have to be registered?

MR. JENKINS: We believe not. We know that section 12 applies to transactions in exempt securities that do not have to be registered. That is pretty clear from the language that got added to section 12(2).

QUESTION: The point is that the style of the act does use exemptions in section 4, exempting one section from another.

MR. JENKINS: That's correct in terms of exempting transactions, if you will, and securities, from section 5 which is the heart of the act, and the section from which violation flows.

The fact -- excuse me. I apologize. I think I've lost the thrust of the question.

Oh, the exemption --

QUESTION: You were saying, the heart of the act --

MR. JENKINS: -- from section 12(2) is just only

necessary if 12(2) was intended to cover. We believe it wasn't, as the House report makes clear at various points.

QUESTION: Is it your position that the word prospectus includes only transactions required to be registered --

MR. JENKINS: No.

QUESTION: -- under section 5?

MR. JENKINS: No. Prospectus can clearly be a term that applies in the context of a public distribution of an exempt security. The act, for whatever reasons, chose to exempt the security, but if there's a public distribution of that exempt security, plainly section 12(2) intends to bring the communications, selling communications oriented toward the public, within its definition in that context.

The act treats Government securities in a fairly unique way, which we believe supports our interpretation of section 12(2). Government securities are specifically carved out with section 12. Do they bring in resales, do they bring in public sales of all other securities but exclude public sales of Government securities, obvious reasons of comity and that sort of thing, or perhaps even constitutional considerations.

If, as the buyers claim, section 12(2) was some broad remedy, though, that applies to all after-market

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

trading and so on, why would the Congress have felt any need to, in that after-market context, still exempt resellers who might make misleading statements about Government securities from the coverage of the provision?

We believe that that special provision of the Government in section 12(2), or any governmental entity, further reflects the fact that section 12(2) was perceived as applying solely in a public offering context. That's when they intended to protect the Government even if the Government made an untrue statement, not in later contexts.

I will reserve the remaining time, if I may.

QUESTION: -- Mr. Jenkins --

QUESTION: If I could ask you one question -- excuse me, Chief Justice. The brief of the amicus for the Securities Industry Association says that research reports would be covered if we were to rule against you in favor of the respondent, and tells us the adverse consequences of that. Do you agree with their theory?

MR. JENKINS: I think there's a possibility of research reports being included. There is also the potentiality, which I believe also applies to a stock purchase agreement, to conclude that those are not the kind of selling documents that even 2(10) intended to include, even if you apply it as including all written

communications.

QUESTION: The question is, what is a selling document?

MR. JENKINS: Yes, and I think that point is even touched upon in the buyer's briefs, that maybe they're not a selling document and therefore not a prospectus. I think the same argument can be made as to a prospectus itself. I do think in the context of research reports, though, there's a severe danger that the issuer of the report could be deemed a seller, having used a prospectus, and the liability imposed by section 12(2) in that context on one who just receives a commission for selling stock is drastic.

QUESTION: Very well, Mr. Jenkins.

Mr. Kopecky, we'll hear from you.

ORAL ARGUMENT OF ROBERT J. KOPECKY

ON BEHALF OF THE RESPONDENTS

MR. KOPECKY: Mr. Chief Justice, and may it please the Court:

We begin with the presumption that the plain language of the statute reflects Congress' intent. Here, neither the text of section 12(2) nor the structure of the act as a whole supports imposing upon section 12(2) the limitations that petitioners ask this Court to read into that express civil remedy.

QUESTION: Mr. Kopecky, in 2(10), after it says, the term prospectus means any prospectus, et cetera, et cetera, which offers any security for sale, now, would you say that an, simply an agreement of sale signed by both parties is always something which offers a security for sale?

MR. KOPECKY: I'm not sure an agreement, per se, would always offer a security for sale. I think in this case the agreement clearly did.

QUESTION: Why is that?

MR. KOPECKY: Well, the agreement here was the culmination of a long process. The agreement included specifically representations by the sellers that were made as an inducement, and that's in the language of the agreement itself, as an inducement to the buyers to buy the stock, so the agreement itself was part of the selling process.

QUESTION: So if there had been no representations in the agreement, then perhaps it would not be a prospectus?

MR. KOPECKY: I think perhaps it would not be. Section 12(2) reaches those communications that convey information to the buyer about some security. If there's no representation being made, then I'm not sure how you would ever have a cause of action under section 12(2).

QUESTION: But take a very simple agreement in which the seller represents that he or she is the owner of the stock. The only representation says, I, as the owner, hereby offer the following stock, you describe it, you send it in the mail, it said if you want to buy it, sign here. That would be a prospectus, wouldn't it?

MR. KOPECKY: In my view, it would, because in that case there would be a representation being made about the security.

QUESTION: So you could, have very simple transactions would be covered by this.

MR. KOPECKY: It is conceivable that --

QUESTION: And it could be true, just five shares of stock.

MR. KOPECKY: Of course, you would have to prove that the person who made that statement was negligent.

QUESTION: Sure. It has to be something --

MR. KOPECKY: Right.

QUESTION: -- that, he in fact didn't own three of the shares or something like that.

MR. KOPECKY: Correct. That's correct.

QUESTION: But that would be Federal jurisdiction, to resolve that.

MR. KOPECKY: If you use the jurisdictional means --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Right.

QUESTION: I --

MR. KOPECKY: -- I would agree --

QUESTION: Excuse me. I thought negligence was not required under section 12.

MR. KOPECKY: It is, Your Honor. It is. It's an affirmative defense. The seller is required to prove that he was not negligent, but if he can prove that he was not negligent, there is no liability under the statute.

QUESTION: So it's affirmative.

MR. KOPECKY: But it is commonly referred to as a negligence-based liability.

QUESTION: Mr. Kopecky, if your interpretation of the statute prevails, wouldn't it virtually swallow up any 10(b)-5 causes of action?

MR. KOPECKY: Not at all, Your Honor. The scope of transactions covered by section 12(2) is a very small subset of those now covered by 10(b)-5, in this respect, 10(b)-5' covers any statement or omission in connection with the sale of securities. It doesn't require that there be a buyer-seller relationship between the parties.

Most 10(b)-5 actions, and most class actions under 10(b)-5, are brought in the context of statements by issuers that then get relied upon by the market or by some buyer who bought his stock from somebody else, not from

the issuer. That is the vast majority of 10(b)-5 cases. Those would be unaffected by this case, because section 12(2) simply doesn't reach them. Section 12(2) requires privity between a buyer and a seller.

QUESTION: But where a 10(b)-5 action would also lie, or a plaintiff such as you represent, your preferred route would be section 12(2) I assume because of its attorneys' fees and lesser requirements for proof.

MR. KOPECKY: The attorneys' fees would be hard for the plaintiff to get in this case, so I don't think that's a motivating factor.

The negligence standard is obviously a benefit, so it is true that in those categories of cases where there's an overlap between section 12(2) and 10(b)-5, a plaintiff would prefer to sue under 12(2), just as in the context of a registered public offering of securities, if there's a misstatement in the registration statement, the plaintiff in that case would much prefer to sue under section 11 of the '33 act, which has no scienter requirement whatsoever, than under 10(b)-5, where he would have to prove fraud.

QUESTION: I was going to say, what is your answer to the question why the drafters didn't simply use the word, statement, in place of prospectus, or oral communication?

MR. KOPECKY: The answer to that statement is not clear from the legislative history, so I can only speculate, but let me offer a couple of explanations.

One, this statute was basically walking into new territory. There had not been significant regulation of the securities industry. I think it is reasonable for Congress to have started with some terms that were known and commonly used, prospectus, circular, notice, and then worked from that in increasing breadth, ending with the term, written communication. Could they have simply said any communication, or any written communication? They certainly could have.

I think a second explanation is that, as pointed out in the Solicitor General's brief, we know that the draftsmen started with the British Companies Act as a model, and the British Companies Act has a definition of prospectus that starts out similarly to the definition of this case.

However, in this case the drafters diverted significantly, because the British Companies Act referred to public offerings of securities. That was eliminated from the definition of prospectus by the Congress that enacted the '33 act.

QUESTION: Under the British Companies Act, would there be a remedy such as this, for this

transaction?

MR. KOPECKY: Under the British Companies Act -- well, certainly if we were relying on a prospectus I think we'd have a hard time, because the British Companies Act defines prospectus to include a public offering, so I think we would have a harder case.

I do not have clearly in mind what the British Companies Act says about oral representations, which is a key part of our case here, so I don't know if we could win under that statute.

QUESTION: Has this issue been litigated over in --

MR. KOPECKY: Your Honor, I confess I have not studied that.

QUESTION: Well, you brought up the British Companies Act.

MR. KOPECKY: A fair --

QUESTION: All right.

QUESTION: How would you answer Justice Kennedy's question that was brought up in the SIA brief, the question of the research reports done by a brokerage firm?

MR. KOPECKY: I think it is far from clear that brokerage research reports would be subject to liability under section 12(2) for a couple of reasons. First, in

order to have liability under section 12(2), you must be a seller. You must be a statutory seller. It's unclear, far from clear, I think, that someone who issues a research report is a seller.

In Pinter v. Dahl, this Court explained what it means to be a statutory seller under section 12(1). Assume for a minute that definition extends to 12(2). You must either be the person who passes title to the security, or one who solicits the sale for your own financial benefit, so someone who issues an analyst's report is not necessarily soliciting anybody to buy stock.

Second, the analyst's report itself would have to be a prospectus, and prospectus is defined as a document that offers or confirms the sale of the security.

Now, an analyst's report does not offer a security for sale, nor does it confirm the sale of the security, so I think the concerns about open-ended liability for analysts is significantly overblown.

QUESTION: Why do you say that prospectus is defined as a document that offers or confirms the sale of a security? Where do you -- I thought it means -- I thought part of your case was precisely that it means any notice circular, not just, it means any prospectus, notice, circular, advertisement, letter or communication written --

MR. KOPECKY: That offers -- any of those that offers --

QUESTION: I see.

MR. KOPECKY: -- any security for sale --

QUESTION: I see, which offers --

MR. KOPECKY: Right.

QUESTION: Which offers any security for sale.

MR. KOPECKY: Right. Right, exactly. That's the end of the definition. All of those things, any of them have to offer the security for sale, or they're not covered.

QUESTION: That's -- although my thought favored you, I hope you'll disabuse me of it if it's not correct, as I'll just get mixed up if it is, but I thought the reason they used the word prospectus instead of any written communication is because they wanted to pick up that particular definition with its limitations, and the limitations are two you just mentioned, plus the fact that a written prospectus, a written communication is not a prospectus if a registration statement has been filed previously and certain things have been done.

MR. KOPECKY: That's correct, Your Honor.

QUESTION: And they wanted to build that all in --

MR. KOPECKY: I --

QUESTION: -- which the word written communication couldn't have done. Am I on a correct track?

MR. KOPECKY: I agree with that, Your Honor.

QUESTION: Fine. Then why didn't they use the word oral communication next, because oral communication doesn't have those limitations?

MR. KOPECKY: Again, the legislative history doesn't enlighten us much on why they used oral communication. I believe what Congress was getting at in enacting the statute was the process by which owners of securities solicit people to buy those shares from them, and there are two ways you can do that. You can do it in writing, or you can do it orally.

If the question is, why didn't they subject oral communications to the free-writing exception, I don't know the answer to that.

QUESTION: That cuts off my thought, because I can't get it to work with oral communication.

MR. KOPECKY: I understand, and I'm not sure the logic of all that hangs together, and there's been a lot of question raised about exactly what the free-writing exemption is meant to accomplish and why it was there, so I can't answer how the oral communication precisely fits into that exception from the definition of prospectus.

QUESTION: A prospectus has to be related to the registration statement, doesn't it?

MR. KOPECKY: No.

QUESTION: I thought section 10 required that.

MR. KOPECKY: Section 10 requires what has to be in a prospectus that is issued in conjunction with a registered offering of securities. If you have a registered offering, the act requires you to provide certain information to the SEC in your registration statement.

It also requires you to provide certain information to investors in the prospectus that's issued with that registration statement, but those requirements, the strict, detailed requirements of section 10, apply only to prospectuses issued in connection with registered offerings of securities.

QUESTION: But section 10 doesn't say, some prospectuses, it says all, so I had thought, unless --

MR. KOPECKY: I think where that --

QUESTION: -- qualifications.

MR. KOPECKY: I think that comes out of section 5, Your Honor. Section 5 makes it unlawful to sell any securities that have been registered unless you comply with the provisions of section 10, so section 10 only --

QUESTION: So then you can limit the term, prospectus, in section 10 at least by reference to other provisions of the act.

MR. KOPECKY: I believe -- I believe that's correct, Your Honor. The meaning of section -- of prospectus in section 10 is defined by its context, which is in reference back to registered offering under section 5.

QUESTION: Are punitive damages available in this sort of a cause of action?

MR. KOPECKY: I don't believe so, Your Honor.

QUESTION: Why not?

MR. KOPECKY: I'm not aware of any case that has upheld punitive damages.

QUESTION: Are punitive damages available under a 10(b)-5 action?

MR. KOPECKY: I'm not sure, Your Honor.

Let me return, if I could, to what I think are the key points in our argument today. One is that the language of section 12(2) simply does not expressly impose the limitation that petitioners are asking for.

Second, the other provisions of the act demonstrate that when Congress meant to exempt either a particular type of transaction or particular type of security from some portion of the act it did so

explicitly, and we've talked about, during Mr. Jenkins' argument, sections 4(2), 4(1), which create express exemptions from the registration requirement.

There's no comparable exemption from section 12(2) and, further, again as Mr. Jenkins pointed out, when Congress meant to exempt a particular type of security from section 12(2), it did that explicitly as well.

So when Congress meant there to be exemptions, it enacted them.

QUESTION: Does -- Justice Breyer asked you whether one aspect of the definition of prospectus is carried over into the phrase, oral communication. What about the aspect that requires a prospectus to be in connection with the offer to sell, in connection with the offer or confirmation of sale? Is oral statement in section 12 limited to that as well?

MR. KOPECKY: I believe it is, Your Honor, by the by-means-of language in section 12(2).

I think to say that a particular security is sold by means of either a written or oral communication means that that statement is made in connection with the solicitation of the sale. I think the whole purpose of section 12(2) was to focus in on that process by which sellers solicit buyers, and the focus of the by-means-of clause is to hone it right in on just that, those

statements, whether oral or written, that are used to solicit sales of securities.

I want to return to just one other point in the text of section 12(2) itself, if I may, and that's the term, oral communication. This Court has said repeatedly, and most recently in FDIC v. Meyer, that undefined statutory terms are to be given their ordinary, or natural meaning.

Now, petitioners cannot dispute that giving the words of the statute their ordinary meaning, section 12(2) on its face unambiguously applies to any security sold by means of a false or misleading oral communication. There simply is no connotation you can give to oral communication that limits it to a public offering or an initial offering of securities.

To the contrary, an oral communication is going to occur most often in the context of a private transaction, a negotiated transaction where people are talking to each other, so oral communication, it seems, if you read it just in its natural sense, clearly applies to all transactions.

Now, they say you can't do that. You have to look to prospectus as a term of limitation on oral communication. It seems to me that what they're asking you to do is take a term that we think is unambiguously

defined -- that is, prospectus -- find some ambiguity in that, construe it narrowly, and then use that to narrow a clearly broad term.

QUESTION: Are you suggesting that one of the major purposes Congress had in mind was to eliminate the statute of frauds from this transaction?

MR. KOPECKY: I don't think that was a major purpose, Your Honor.

QUESTION: I don't, either.

MR. KOPECKY: I think the major purpose Congress had in mind was --

QUESTION: It surely wasn't primarily concerned with oral communications.

MR. KOPECKY: I don't disagree with that, Your Honor. I don't disagree with that.

I would note that in the conference report on the bill, in discussing section 12 in particular, and this is one of the few places we have any reference to section 12 in the legislative history, in paraphrasing section 12, the conference committee said that this bill reaches the sales of securities by means of representations which are untrue or misleading. That's a very broad term, representations which are untrue or misleading.

QUESTION: Is it fair to say, though, that the 1933 Securities Act was really an act that concerned

initial public offerings, and that the '34 act generally addressed private and secondary trading?

MR. KOPECKY: I think as a --

QUESTION: I mean, isn't that the general thrust?

MR. KOPECKY: As a generality, I think that's correct, Your Honor, but I'd like to respond to that in a couple of ways.

QUESTION: And so this interpretation of 12(2) doesn't fit exactly with that general thrust.

MR. KOPECKY: If you're going to limit the statute by the primary purpose I think one could make that argument.

It is interesting that in the '34 act there was no express right of action created that would cover the transaction in our case, so I think that suggests just the contrary, that Congress thought they had taken care of that in 1933.

QUESTION: Could you have brought a 10(b)-5 action?

MR. KOPECKY: In theory, we could.

QUESTION: Yes.

MR. KOPECKY: The reason we didn't allege it is because we felt we didn't have a Rule 11 basis for asserting fraud, scienter, and so we brought the cause of

action we felt the facts supported.

Let me return to the question about primary purpose. I think the situation here is analogous to RICO, a statute this Court has construed repeatedly in the last few years. You can look at the legislative history of RICO, and it is absolutely clear that what motivated RICO, the primary purpose, was to seek the eradication of organized crime in the United States, and yet Congress wrote the statute to pick up persons other than mobsters or organized criminals.

QUESTION: A good example.

MR. KOPECKY: And this Court has said, we're going to construe RICO not in light of what was the primary motivation, but the way Congress wrote the statute, and I suggest that's what the Court should do here with section 12(2), is construe the statute the way Congress wrote it.

QUESTION: And put us in the same boat we are with all those unpleasant RICO cases.

MR. KOPECKY: Your Honor --

(Laughter.)

MR. KOPECKY: Your Honor, that's a good point, but I think I have a response to it. It has been the law in the circuits for 50 years that section 12(2) reaches privately negotiated sales of securities. Even today, no

appellate court has ever reached a contrary conclusion.

That tell us something about 1) how the statute should be read, 2) this Court has said on a number of occasions that it is inappropriate to set aside longstanding interpretations of express statutory remedies that parties have come to rely on, but third, in response to your question, Justice O'Connor, there simply hasn't been a flood of section 12(2) suits. This cause of action has been around for 50 years.

QUESTION: Maybe that's because of our more recent holding here as to the scienter requirement under 10(b)-5.

MR. KOPECKY: Perhaps. I think the explanation is that section 12(2), even if you read the term prospectus as we think it should be read, still applies to a fairly narrow universe of transactions. You have to be able to prove that you bought from the seller. You have to prove that he sold to you by means of some misleading statement.

It really focuses in on those transactions that are a small subset of what is driving the explosion of securities litigation in the country today. I don't think a ruling construing the statute our way is going to add to the burden of the Federal courts or cause an explosion of litigation. It hasn't happened to date.

If there are no further questions, I thank the Court.

QUESTION: Thank you, Mr. Kopecky.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

In our view, the cause of action provided in section 12(2) of the Securities Act of 1933 does extend to all sales of securities made by means of a prospectus or oral communication that contains a misleading statement, and there is no limitation to initial offerings, initial public offerings, or an exclusion of private transactions or secondary transactions.

The key in construing section 12(2) is the phrase, prospectus or oral communication, which is a defined term in the act, and when one looks at the definition in section 2(10) of the prospectus, it's fairly clear that Congress used words that cover a very, very broad range of kinds of communications that offer a security for sale or confirm the sale of a security.

And as my cocounsel alluded to, the origins of the statutory definition of prospectus are very revealing,

because they show that the first four terms in that definition are the same that appear in the British Companies Act, and there is evidence from the people who wrote this act that they used the British Companies Act as a model.

QUESTION: Mr. Dreeben, how do you answer Justice Kennedy's question about section 10, which uses the word, a prospectus, but that is definitely the kind of prospectus that would be part of a registration statement? There, the word prospectus does have a circumscribed meaning.

MR. DREEBEN: Well, for most of section 10, that is true. Section 10 is by and large concerned with the kind of formal prospectus that's included with a registration statement. There is also authority for the Commission later in section 10 to classify various prospectuses according to type, and that is not a limitation that would necessarily apply to prospectuses filed in a registration statement.

But I think the most important point here is that the structure of the acts, the securities laws as a whole, reflects that Congress understood the difference between the broad definition in section 2(10) and the narrower association of prospectus used in a registration statement.

In the Investment Companies Act of 1940, Congress included a definition of prospectus that says, prospectus for certain sections of the act means the prospectus that is described in section 10 of the Securities Act of 1933. Elsewhere, it has the definition that is contained in section 2(10) of the Securities Act of 1933.

So Congress itself was fully capable of drawing that distinction, and the act itself invites courts to draw appropriate distinctions in --

QUESTION: Well, Mr. Dreeben, speaking of distinctions, what would you do about research reports that brokers commonly use in the sale of securities?

MR. DREEBEN: There is no one, unqualified answer to that, Justice O'Connor. The question would be, is the research report being used as a selling tool by the broker? If the broker is using this --

QUESTION: Broadly speaking how could it not be? I mean,. the broker says, well, here's a stock to consider and here's our research report.

MR. DREEBEN: Well, I think in that context, Justice O'Connor, a research report would be the kind of document that's picked up by the language, and the application of section 2, 12(2) would be justified in light of the cause of action.

QUESTION: So all research reports sent out by brokers are prospecti?

MR. DREEBEN: To the extent that they are used in a situation that one can conclude, Justice Kennedy, that they are offering a security for sale.

QUESTION: Does that mean they have the same high standard of full disclosure that the prospectus that accompanies the normal public offering has?

MR. DREEBEN: No, Justice Stevens, they don't, because the requirement that would attach under 12(2) is not a requirement of affirmative disclosure. The only requirement that's imposed by virtue of 12(2) is that the search report not contain false or misleading statements, and misleading statements in this context means an omission which makes the statements that are made misleading.

QUESTION: Well, that's the same standard under the prospectus.

MR. DREEBEN: Well, but the question that I thought you were asking, Justice Stevens, is whether there was a laundry list of things that had to be included in a research report analogous to the kinds of things that are required to be included in a registered public offering.

QUESTION: Not by -- itemized, but it has the same standard, same high standard of care.

MR. DREEBEN: Well, it would have a -- it would have the same standard of care under section 12(2). Of course, under section 11 of the Securities Act, a registered offering would subject the issuer to strict liability for --

QUESTION: Right.

MR. DREEBEN: -- misstatements, and the persons who signed the registration statement would also have a very high duty of care.

QUESTION: May I ask, since I interrupted you, do you know the answer to my question about the British Companies Act? How did the English treat this?

MR. DREEBEN: The British Companies Act only applies to initial public offerings. It doesn't regulate any secondary transactions, and it doesn't regulate private transactions.

And the point that I was trying to make about the comparison between the language is that the British Companies Act quite deliberately included the word, prospective circular, et cetera, and then said, in offering of securities to the public, and the Securities Act drafters dropped that language and substituted in the words, which offers any security for sale, which really expresses a quite different and deliberately broader connotation.

And when picked up in 12(2), I think as Justice Ginsburg indicated, you can have offering circulars that are used in private placements, private transactions. The plain language of the statute quite clearly applies to seller misstatements in the context of those transactions.

QUESTION: Mr. Dreeben, do we owe any deference to the SEC interpretation of these sections?

MR. DREEBEN: Not in the sense of Chevron, Justice O'Connor. We're not asking for deference in that sense, but we do think that it is extraordinarily revealing and very important to the construction of 12(2) that at the time that this statute was passed, the administrators who were responsible for its implementation, which was the Federal Trade Commission, issued releases that quite clearly said that the act in the main applies to new public offerings, but note, industry, that section 17 and section 12(2) apply also to old securities which exist in the marketplace already.

. Section 17, of course, is the remedy that the Government has available against fraud.

QUESTION: Well, that would just affect the distinction between initial and secondary, not necessarily between public and private.

MR. DREEBEN: That is true, but the -- in addition to the interpretations by the Federal Trade

Commission there were also a raft of articles that were written at the time, or around the time, by such people as William O. Douglas and Felix Frankfurter -- Felix Frankfurter was at the time very heavily involved in the drafting process -- and those articles asserted without qualification that section 12(2) applied to any sale of security and wanted to educate the investment community that was concerned with this that that was true.

This understanding continued not only immediately after the '33 act was passed but for decades, until the late 1980's.

There was very significant work trying to revise the act in 1940, in which the industry and the Commission together met, and everybody understood and expressed in written documents that section 12(2) applies to a really broad range of transactions, it doesn't distinguish among the various types, it doesn't distinguish broker transactions from initial public offerings, and it should, and recommendations were made to Congress to amend it, and then World War II came along and those amendments were not acted upon.

But the revealing thing here is that these very knowledgeable practitioners, who had every reason to understand --

QUESTION: The one question that prompts us, how

do you account for the fact there have been so very few cases like this?

MR. DREEBEN: Well, I -- the -- probably the principal explanation in years up until the late 1980's was the existence of Rule 10(b)-5 and causes of action under it, which had really swamped the area, and so litigation under 12(2) certainly did increase as the statute of limitations for Rule 10(b)-5 was held to be shorter and scienter requirements were imposed, but it is a very significant point, Justice Stevens, that Rule 10(b)-5 did not exist when the '34 acts were enacted.

QUESTION: Can I ask you a quick question about the research reports?

MR. DREEBEN: Sure.

QUESTION: A research report is this, would perhaps be, you offer something for sale, you include a research report, it would be picked up.

MR. DREEBEN: Yes.

QUESTION: But I take it you could get out of that if in fact you enclosed as well a prospectus that had met the SEC's registration requirement because of the exception in (a). Is that right, or not?

MR. DREEBEN: That question has not been definitively decided in the courts. The weight of the view of commentators is that the exceptions that are

contained in section 2(1) do not apply to the remedy that's provided in section 12(2).

There are several reasons for that, and there is a statutory argument that supports it. The first reason is that there is an unequivocal statement in the House report that assumed that free-writing, oral communications made in the sale of securities are absolutely covered by section 12(2) whether or not a prospectus has been delivered. There was no sort of free zone for fraud in that area.

And the statute allows you to reach that result because it introduces all of its definitions --

QUESTION: Because it's oral, free-writing oral. Oral isn't picked up with the definition of prospectus. Prospectus picks up the written part.

MR. DREEBEN: That is true. The legislative history doesn't --

QUESTION: Is there any reason (a) and (b) don't apply? .

MR. DREEBEN: The reason is --

QUESTION: To a written -- to a written.

MR. DREEBEN: The reason is that the result would be that you would have a free zone for fraud or misstatements so long as you provided a copy of the written prospectus, and commentators have viewed that as

an implausible result and one that is contrary to the direct evidence of legislative intent.

QUESTION: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you.

QUESTION: Mr. Jenkins, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF DONALD W. JENKINS

ON BEHALF OF THE PETITIONER

MR. JENKINS: The fundamental issue here is whether, when everybody says the '33 act was following the British act, which only applied to public offerings, did Congress somehow in the process, by section 12(2), totally convert the '33 act to apply to all private communications in all privately negotiated contexts?

The references by the draftsmen, by the House report, and others that were involved in the process, not later commentary in magazines, demonstrate irrefutably that the overall scope of the act, and its civil liability provisions in particular, didn't expand so drastically from the British Companies Act. They said it was the same act.

QUESTION: What do you say about commentators named Frankfurter and Douglas?

MR. JENKINS: Mr. Frankfurter was involved in the drafting of the act but not as heavily as Mr. Landis,

I think, if you believe what Mr. Landis wrote, which may be a stretch, I don't know, but it appears accurate that Mr. Frankfurter was overseeing it but was not as heavily drafted.

In fact, I think Mr. Landis in his article referred to Mr. Frankfurter seeing the draft of the act for the first time before a meeting, or something along those lines. He was not as heavily involved as Mr. Landis, who said public offerings not private offerings defines the exact scope of the act. The act was not intended to regulate sales to institutional --

QUESTION: -- the British act which did include an express limitation to public offerings?

MR. JENKINS: I think the simple answer is, they felt it wasn't necessary. The whole design of the first ten sections of the act, and in particular section 5, the heart of the act, is directed solely at one context, public offerings. Everything else is exempt.

. QUESTION: You rely on using the same litany of prospectus, notice, circular, et cetera, but then say, well, it's all right for them to have skipped out the other part, that they didn't copy the British wording to that extent.

MR. JENKINS: That's correct, they did not follow the phrase, include the phrase, to the public,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

which is in the British Companies Act, but Congress repeatedly said, the draftsmen said, this act is the British securities act.

How could those statements be correctly made if one applies only to public distributions and the other is much, much broader, applying to every private transaction that ever involves the sale of a security and an interstate communication?

The lack of any explanation, specific discussion or anything, anywhere in the legislative history or the House report of any notation that the act extended so much more broadly is to our mind very, very strong proof that Congress, none of the Congressmen, none of the drafters intended such a broad departure from the public offering context.

They just simply couldn't have said the things they said in the reports about the act or in Mr. Landis' article about the act if that were the case, if the act intended to go into such a wide range of private, negotiated transactions.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jenkins. The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ARTHUR L. GUSTAFSON, ET AL., Petitioners v. ALLOYD COMPANY, INCORPORATED fka ALLOYD HOLDINGS, INCORPORATED, ET AL.

CASE NO.:93-404

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)