Docket No. 04-14894-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FINANCIAL SECURITY ASSURANCE INC.

Plaintiff-Appellant

v.

STEPHENS INC. and

HAYES, JAMES & ASSOCIATES, INC.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CIVIL ACTION FILE NO. 1:00-CV-3181-JOF

AMICUS CURIAE BRIEF OF THE BOND MARKET ASSOCIATION URGING AFFIRMANCE IN SUPPORT OF DEFENDANT-APPELLEE STEPHENS INC.

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Appeal Number: 04-14894-G
Financial Security Assurance v. Stephens Inc.

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned Counsel of Record for *amicus curiae* The Bond Market Association certifies that the following is a full and complete list of all additional attorneys, persons, associations of persons, firms, partnerships, or corporations (including those related to a party as a subsidiary, conglomerate, affiliate, or parent corporation) having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case:

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The Bond Market Association ("TBMA") submits this *amicus curiae* brief in opposition to the appeal of plaintiff-appellant Financial Security Assurance Inc. ("FSA") from the two decisions of the district court dismissing FSA's claim under Section 10(b) of the Securities Exchange Act of 1934 Act and granting summary judgment dismissing FSA's state law fraud and negligent misrepresentation claims. TBMA also addresses some of the points raised in the *amicus curiae* brief submitted by the Association of Financial Guaranty Insurers ("AFGI"). Each of the parties to this litigation has consented to the filing of this *amicus curiae* brief.

INTEREST OF THE AMICUS CURIAE

The Bond Market Association ("TBMA") represents approximately 200 securities firms and banks that underwrite, trade and sell fixed-income securities in the United States and in international markets. TBMA's members transact business in a wide variety of public and private fixed-income securities. Its membership comprises a diverse mix of securities firms and banks, including large, multi-product firms and companies with special market niches. It includes all primary dealers in U.S. government securities, as recognized by the Federal Reserve Bank of New York, and all major dealers in federal agency securities, mortgage-backed and asset-backed securities, corporate bonds, money market instruments, and funding instruments such as repurchase and securities lending agreements.

In order to benefit from a broad range of debt market views, TBMA also offers associate memberships to firms whose business interests are closely tied to the debt securities markets, including financial guaranty insurers. Defendant-Appellee Stephens, Inc. ("Stephens") is a member of TBMA, and Plaintiff-Appellant FSA is an associate member.

TBMA's membership collectively accounts for approximately 95% of the U.S. municipal bond underwriting and trading activity. Of the $447.5 billion tax-exempt municipal bonds issued in 2003, about half were insured by a financial guaranty insurer. Financial guaranty insurance policies are also used as credit-enhancement for other types of securities underwritten by TBMA's members, including asset-backed securities.

From its inception in 1976, TBMA has worked with its member firms, Congress, the SEC, the Federal Reserve Board and the Federal Reserve Bank of New York, state regulators, and self-regulatory organizations to foster effective, efficient regulation; to enhance the liquidity and efficiency of the fixed income markets; to encourage sound credit and business practices for participants in such markets; and to promote the highest levels of professional standards and conduct in such markets. (More information about TBMA is available at www.bondmarkets.com.)

As an *amicus curiae*, TBMA has no position on the factual disputes in this case nor on the application of those facts to the relevant law. However, in order to protect the workings of the municipal bond market, TBMA believes that it must address certain questions raised by FSA's appeal, namely: (i) whether the implied civil cause of action under Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, should be extended to issuers of financial guaranty insurance by finding such insurers to be "purchasers" of securities; (ii) whether, pursuant to the language of the insurance contract at issue in this case, FSA is subrogated to the securities law claims of the bondholders; and (iii) whether there exists a relationship of trust and confidence between an underwriter of a bond offering and the insurer of such bond offering. As detailed below, TBMA believes that in order to protect the market for insured municipal bonds, the answer to all three questions is and must be: "No."

Because these matters are of great import to the bond market, TBMA has a vital interest in the presentation of the issues in this case, and TBMA believes that its views may assist the Court in resolving them.

INTRODUCTION

In order to address the legal issues presented by this case, it is important to understand the workings of the municipal bond market. While some of this information already has been provided in other briefs, TBMA believes that a more complete picture of the working of the insured municipal bond market is necessary and will be helpful to this Court.

Municipal bonds are the debt obligations of states, their political sub-divisions (i.e. states, counties) and certain agencies and authorities. The purchaser of a municipal bond lends money to an issuer who promises to pay the purchaser a specified rate of interest and to return the principal amount on a specified date. The rate of interest paid by the issuer is a function of many factors such as market forces, demand, and the perceived market risk.

Though insurance is not required and only about half of all bond offerings are insured, many municipal bonds are backed by financial guaranty insurance specifically designed to reduce credit risk. These insurance polices guarantee that interest and principal will be paid as scheduled should the issuer default. Each guaranty is unconditional and irrevocable and covers 100% of the interest and principal for the full term of the bond.

In order to take a municipal bond offering to market, the issuer assembles a deal team to work on the offering. This team consists of the issuer, the underwriter, the issuer's accountant and their respective counsel. In the case of an insured deal, the deal team also includes the insurer issuing the policy. While the roles of each member of the deal team are typically spelled out in contracts between the relevant parties, each member of the team has access to all information it requires, or desires, to perform its functions and to satisfy its own needs and practices. The members of the deal team regularly share information, including drafts of the Official Statement (the "OS") and work together to bring the offering to market.

The companies issuing financial guaranty insurance are "monoline" insurers, meaning that they are in one business only, the insurance of investment grade debt securities, and are not exposed to risks from any other line of business. Most monoline bond insurers have a Triple A rating from one of the nationally recognized rating agencies; every bond insured by a Triple A insurer receives a Triple A rating.

Insurance provides many value-enhancing benefits to the purchasers of a municipal bond, such as safety, ratings strength, liquidity, yield, pre-selection of issuers and issues, and surveillance. Insured bonds are considered safer than uninsured bonds because they provide a second source of repayment. They have a higher perceived quality thanks to the Triple A rating of the insurer. They benefit from the ratings strength of the insurer because such insurers are highly regulated by state insurance departments and closely monitored by the major rating agencies. Triple A-rated insured bonds are also highly liquid, trading daily in secondary markets, and may offer slightly higher yields than Triple A-rated uninsured securities.

Further, the marketplace understands and expects that before a monoline insurer agrees to guarantee a municipal security, the insurer rigorously analyzes the issuer and the specific issue. By agreeing to insure the offering, the monoline insurer is putting its imprimatur on the bond and signaling to investors that they can be confident that its experts have thoroughly researched every aspect of such bond. In addition, the performance of every insured issue is monitored to final maturity by the insurer that provided the insurance through on-site visits and by requiring a variety of financial reports which are carefully analyzed for signs of credit deterioration.

Central to the provision of all of these benefits is the Triple A rating of the monoline insurers. And central to that rating are the insurers' rigorous internal standards, particularly the standard known as "zero-loss" underwriting. Simply put, "zero-loss" underwriting is the industry standard pursuant to which monoline insurers will enter into only those deals that are sufficiently strong such that the insurers can have confidence that they will sustain virtually no losses. Zero-loss underwriting in the municipal bond industry contrasts with the actuarial approach used by multiline insurers, in which insurers assume a certain level of losses will be sustained.

To the ratings agencies, the conservative "zero loss" underwriting standard is crucial. One of the key indicators ratings agencies carefully scrutinize before they assign a Triple A rating to a monoline insurer is the quality of the monoline's insured portfolio. For example, Standard & Poor's states that:

> One major difference [of financial guaranty insurance] compared with other insurance products is the expectation that only minimal net losses will occur in a normal operating environment. This expectation is based on the credit quality of the insured portfolios, which overwhelmingly consist of issues that are investment grade or near investment grade quality on an uninsured basis. In other words, it is presumed that insurers only take on liabilities judged to have minimal loss potential, except under extreme economic conditions.

Standard & Poor's Bond Insurance Book 2004 (Standard & Poor's, 2004) at 43.

Another important contributor to the strength of bond insurers' Triple A ratings is government regulation. States exercise rigorous oversight of financial guaranty insurers. *See, e.g.*, New York Insurance Law § 6901 et seq. (subjecting financial guaranty insurers to strict financial regulatory requirements and requiring that financial guaranty insurers be monoline companies).

All parties agree that bond insurance is important to the municipal bond market. While FSA and AFGI are correct that financial guaranty insurance allows issuers to pay a lower rate of interest, they understate or ignore the other benefits of such insurance and the importance of these benefits to the market. As discussed below, expanding the reach of the federal securities laws to allow monoline insurers to assert a Rule 10b-5 claim would undercut the value of financial guaranty insurance by providing a disincentive to insurers to continue performing the type of independent analysis expected by the rating agencies, by state insurance regulators and by the market place. Similarly, ignoring the fact that insurers and underwriters are both independent members of the same deal team and instead imposing a relationship of trust and confidence between them would also cause turmoil in the bond market by shifting the existing and well-understood balance between the insurer and the underwriter.

ARGUMENT

I. FSA Does Not Have Standing To Assert a Federal Securities Law Claim

The district court correctly dismissed FSA's claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated there under, 17 C.F.R. § 240.10b-5, for lack of standing. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Supreme Court articulated the rule that a plaintiff seeking to state a securities fraud claim under Rule 10b-5 must be the purchaser or seller of the security at issue or must have entered into a legally binding contract to buy or sell the security. The Eleventh Circuit recognizes and rigorously applies this bright-line rule. *See Pelletier v. Stuart-James Co., Inc.*, 863 F.2d 1550, 1555 (11th Cir. 1989) ("a person who alleges a violation of Rule 10b-5 must demonstrate that he is an actual purchaser or seller, or that he was party to a legally enforceable contract to purchase or sell securities"). Because FSA neither purchased nor sold any of the bonds at issue here and because it did not have a contract to purchase or sell any of the bonds, the district court was correct to dismiss FSA's federal securities law claim. That decision was also correct in light of policy considerations that weigh heavily in favor of the need to protect the established workings of the insured bond market, including the independent review of each insured bond offering currently performed by insurers.

A. **FSA's Insurance Policy Is Not <u>A Contract To Purchase Securities</u>**

FSA argues that it has standing to assert a Rule 10b-5 claim as a purchaser because it effectively had a conditional right to acquire the securities, pursuant to the terms of the insurance policy. (FSA's Brief at 24-25). But this argument is not correct. An insurance policy is different in kind from a true contract to purchase securities, such as an option contract. Options and similar contracts to purchase or sell a security represent an investment decision (*i.e.* they are entered into based on the contracting parties' beliefs regarding the future value of the investment). An insurance policy is not an investment decision but rather is a risk decision based on the insurer's analysis of the risk of default. Insurers set the amount of premium charged so as to offset the level of default risk they perceive, not in accordance with what economic theory states is the value of an option or other conditional right to purchase a security.

In addition, insurers are in a completely different position from the purchaser of an option or from a direct holder of a bond. Insurers are not the type of "investor" that Section 10(b) was designed to protect. Insurers are sophisticated members of the deal team involved in bringing the offering to market. In addition, an insurer has access, directly from the issuer, to all information it desires, and it can negotiate changes to the structure of the offering before agreeing to insure it. An individual investor, of course, can do none of these things, and it is such investors that the securities laws were designed to protect. As correctly noted by the district court, the federal securities laws are not in place to benefit and protect sophisticated insurance companies insuring the issuance of securities in order to make those securities attractive to investors. (R12-159 - p. 41).

Nothing in Section 10(b) suggests that Congress intended that financial guaranty insurers be among the types of plaintiffs who could seek damages for fraud committed in connection with the issuance of securities. Nor is there any case law precedent supporting a financial guaranty insurer's standing to bring a Rule 10b-5 claim. Quite the contrary, the only case that TBMA is aware of that is directly on point holds that financial guaranty insurers do not have standing to bring federal securities law fraud claims.

That case is the recent decision of the United States District Court for the Southern District of New York in *MBIA Ins. Corp. v. Spiegel Holdings, Inc.*, 2004 WL 1944452 (S.D.N.Y. Aug. 31, 2004). In that case, MBIA, which like FSA is a monoline insurer and an AFGI member, insured two series of asset-backed notes issued by Spiegel. MBIA agreed to insure the distributions to be made to the noteholders in the event of a default. When a default in fact occurred, MBIA brought suit against Spiegel, asserting claims for fraud under the federal securities laws. But the court dismissed those claims for lack of standing because MBIA was neither a purchaser nor a seller of the insured notes. The court rejected MBIA's argument that its insurance policy made it a "*de facto* purchaser" of the bonds and noted that an application of a "*de facto*" standard to the purchaser/seller requirement would lead to the exact sort of "endless case-by-case erosion" of the purchaser/seller requirement that the Supreme Court rejected in *Blue Chip Stamps*. *Id.* at *4 (citing *Blue Chip Stamps*, 421 U.S. at 755).

Considerations of public policy also strongly weigh against any weakening of *Blue Chip Stamps'* purchaser/seller requirement in this case. Purchasers of bonds look to financial guaranty insurance not only as guaranty of repayment but also as an independent statement by the guarantor that the bond issue has a low risk of default. Allowing an insurer to sit back and rely on others to do its investigation would undercut the advantage investors receive from a "second set of eyes" reviewing the transaction.

As for FSA's argument that upholding the district court's ruling would result in the injustice of a harm without a remedy (FSA's Brief at 23), that is simply incorrect. A refusal by the Court to extend Rule 10b-5's reach to insurers by defining them as purchasers of securities would merely respect the existing limits on an insurer's remedies under the federal securities laws. Insurers, of course, would maintain whatever common law remedies are available to them. The fact that the district court determined that under the facts of this case FSA cannot satisfy the elements of its common law claims is no justification for expanding the reach of Rule 10b-5 to include hitherto unrecognized claims by insurers.

Indeed, the district court in *MBIA Ins. Corp.* rejected a similar argument from MBIA. MBIA had argued that public policy considerations required that it have standing to bring a claim because otherwise no one would have standing to do so, because MBIA's insurance coverage itself prevented the noteholders from suffering any injury. The court found this argument unpersuasive, noting that the Supreme Court in *Blue Chip Stamps* recognized that its bright-line rule would prevent some injured parties from bringing suit under Rule 10b-5. *Id.* at 6. The court also found MBIA's argument unpersuasive because of the true nature of a financial guaranty insurer's role in the issuance of insured securities:

> Second, MBIA's claims ring hollow in the context of a sophisticated insurer who is in the business of providing "financial guaranty insurance to the issuers of asset backed securitizations," and who elected to participate in this transaction and sign the various agreements documenting it. MBIA is an insurer – it evaluates risk and charges premiums

> accordingly. Occasionally, it may find itself in the position of having to make disbursements on policies, precisely because of the occurrence of events whose contemplation prompted people to seek insurance in the first place.... If, as a condition of insuring the distributions, MBIA had desired the right to bring securities fraud claims on behalf of the Noteholders, it could have bargained for that right or charged a higher premium in its absence. The failure to do these things does not give rise to an equitable or policy argument that overrides MBIA's lack of standing to bring claims under the securities laws that belong to the Noteholders.

Id. at *6 (internal citations omitted).

As discussed above, these same considerations apply with equal force in this case.

Amicus Curiae AFGI argues that imposing independent due diligence obligations upon insurers might make the cost of insurance prohibitive in some cases. (AFGI's *Amicus* Brief at 9). But AFGI fails to provide any support for this speculation, which on its face makes little sense. Indeed the opposite conclusion is suggested by the fact that, as discussed below, AFGI and its member-insurers market their insurance policies by emphasizing the extensive due diligence they conduct.

Moreover, even if AFGI were correct that an insurer's due diligence obligations would significantly increase the costs of insurance in some instances, resolution of that problem is best left to market forces. Indeed, if an insurer cannot obtain affordable insurance for a new bond offering, that fact may signal the market that the offering is problematic. In this way, an insurer's due diligence obligation – even if it imposes higher costs on purchasers of insured bonds – also benefits the market by identifying problematic offerings before they go forward. In contrast, allowing insurers to avoid performing their own due diligence would undercut the market's perception of the benefits of the insurance, the stability and the credit rating of the insurer, and the strength of the deal, all of which would themselves result in the higher costs of borrowing that FSA and AFGI argue they wish to prevent.

FSA's attempt to sidestep the purchaser/seller requirement of *Blue Chip Stamps* and expand the reach of Rule 10b-5 to financial guaranty insurers must de denied as a matter of law and as a matter of public policy.

B. FSA Is Not A Subrogee of The Bondholders

FSA also argues that it has standing to bring a Rule 10b-5 claim because it is a subrogee both (1) as a matter of fact (because it paid the bondholders); and (2) based on the language of the insurance policy. (FSA's Brief at 27-28). Neither of these arguments is correct. It is well settled that there is no automatic subrogation to Rule 10b-5 rights, and the insurance contract here does not expressly assign Rule 10b-5 rights to FSA.

Based in large part on the Supreme Court's decision in *Blue Chip Stamps*, federal courts have decided that there are no automatic assignments of Rule 10b-5 fraud claims. *See, e.g.*, *Sanderson v. H.I.G. P-XI Holding, Inc.*, 2000 WL 1042813, *9 (E.D. La. July 27, 2000) (noting that "Rule 10b-5 rights are not automatically assigned by the transfer" of a security and holding that there was no assignment of Rule 10b-5 rights in the transfer of "stock appreciation rights"); *Small v. Sussman*, 1995 WL 153327, *13 (N.D. Ill. April 5,1995) (finding no assignment of Rule 10b-5 standing to plaintiff who had purchased an option contract after the alleged fraud and who had not executed the option); *In re Saxon Securities Litigation*, 644 F. Supp. 465, 470 (S.D.N.Y. 1985) (holding that assignment of Rule 10b-5 standing is not automatic and suggesting that such standing may not be assignable at all).

While some case law suggests that an express assignment of a Rule 10b-5 claim might be permissible, the financial guaranty insurance policy in this case does not clearly and expressly assign any Rule 10b-5 claim to the insurer. Pursuant to the policy, FSA did not immediately acquire the bonds from the original purchaser. Indeed, it still has not acquired the securities, but is instead merely making interest and principal payments as they come due. Thus, the bondholders themselves still own the bonds and have not "sold" the bonds to FSA (and, in fact, might never "sell" them to FSA. Nor does any provision of the policy expressly refer to any assignment of Rule 10b-5 claims to the insurer.

Furthermore, FSA has not adequately pled a subrogation claim. A party asserting subrogation claims must plead and prove the claims to which it is subrogated. *See Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 217-18 (2d Cir. 2003) (holding that health insurer's subrogation claims against tobacco company could not proceed because health insurer failed to identify each subrogor and failed to detail each subrogor's claim). To maintain a subrogation claim, FSA had to allege every element of the bondholders' claims to which it alleges it was subrogated, including the bondholders' reliance and their damages. *See Sec. Investor Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 72 (2d Cir. 2000) (dismissing fraud claim where subrogee failed to allege that subrogors relied on the allegedly fraudulent statements at issue). FSA has not asserted any allegations related to the reliance of, or damages suffered by, the individual bondholders to whose claims FSA seeks to be subrogated. FSA, therefore, cannot maintain any subrogation claims.

II. There Is No "Municipal Bond Industry Standard" Relieving Financial Guaranty Insurers of Their Obligation to Conduct Their Own Due Diligence

Citing an alleged "municipal-bond-industry standard," FSA argues that it shared a relationship of trust and confidence with Stephens, the underwriter, and, therefore, could reasonably rely upon Stephen's due diligence in lieu of its own investigation. (FSA Brief at 34, fn.21.) As an initial matter, TBMA notes that it is not even clear whether this Court has jurisdiction to consider the issue of whether there exists a relationship of trust and confidence between a bond underwriter and the insurer of that bond. It appears that the evidence upon which FSA principally relies was excluded by the district court as untimely and that FSA has not challenged that ruling. (Stephens' Brief at 47, fn.34.) However, FSA and AFGI argue the issue nonetheless and TBMA addresses it in the event that this Court determines to consider the issue.

Turning to the merits of the issue, FSA is mistaken in its assertion that there is an "industry standard" that would permit FSA to forgo its own due diligence obligations or would create a "special relationship" imposing a duty to speak upon Stephens. Municipal bond underwriters and financial guaranty insurers are both sophisticated entities engaging in an arm's length transaction. Both have equal access to the information developed during the process of a negotiated bond underwriting.

Moreover, considerations of public policy caution against the judicial creation of any such "special relationship" duty in this context. As discussed above, one of the key facts supporting the effective functioning of the insured municipal bond market is the independent judgment of financial guaranty insurers. Investors rely on that independent evaluation of bond offerings, and rating agencies expect and require such independence before issuing the Triple A ratings that make the financial guaranty insurance valuable to the market.

Both AFGI and FSA have made public statements touting insurers' independent due diligence and encouraging investors to rely upon insurers' independent judgment. Indeed, AFGI and FSA both make such statements on their respective websites, www.afgi.org and www.fsa.com. AFGI's webpage highlights the vigorous due diligence performed by its members and touts the fact that its members underwrite to a "zero-loss" standard:

- "[W]e conduct our own thorough research on the insurability of an offering, and all triple-A insurers subscribe to a zero-loss underwriting standard, meaning that only issues with the lowest probable risk of defaulting are insured."

- "[I]nvestors can rely on the guarantor's expert analysis and careful diligence of the credit, as well as its continual monitoring of performance over the life of the transaction."

- "To manage transaction risk, bond insurers subject transactions to a rigorous analysis and due diligence process and structure them with credit protections and other rights and remedies designed to mitigate losses."

- "Core benefits of monoline credit enhancement include: . . . an expertise in credit analysis allowing for the application of conservative, zero-loss underwriting criteria to insured transactions . . . [and] . . . a level of scrutiny and analysis beyond the rating agencies, ensuring that most transactions are believed to be investment-grade before they are wrapped."

FSA similarly touts its own vigorous due diligence in statements on its website:

- "Our experienced underwriters thoroughly review the credit, legal and structural elements of each transaction, relieving investors of these tasks."

- "We minimize both the likelihood and severity of claims through conservative underwriting."

While some of these statements can also be found in earlier website printouts contained in the record (*see* R14-117-Ex. 5), all of the statements quoted above currently appear on the respective websites of AFGI and FSA.[1] This Court, therefore, can take judicial notice of the fact that AFGI and FSA have made these statements to the investing public via their

[1] For the convenience of the Court, printouts from the relevant website pages are attached as an exhibit to this brief.

websites. *See, e.g., Denius v. Dunlap*, 330 F.3d 919, 926-27 (7th Cir. 2003) (noting the authority of appellate courts to take judicial notice of facts that are "not subject to reasonable dispute" and taking judicial notice of information appearing on the National Personnel Records Center's website); *The Frances Kenny Family Trust v. World Savings Bank FSB*, 2005 WL 106792, *1 (N.D. Cal. Jan. 19, 2005) (holding that material posted on plaintiffs' website was "proper matter for judicial notice").

An affirmance of the district court's decision on the points addressed herein, therefore, will not destroy the bond market. Rather an affirmance will simply hold financial guaranty insurers to the standards that they have already set for themselves and require them to conduct the due diligence that they have already promised to do and that investors, rating agencies and state regulators expect them to perform.

CONCLUSION

For the foregoing reasons that portion of the Orders of the district court discussed herein should be affirmed.

Dated: May 11, 2005

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Rule 32(a)(7(B) of the Federal Rules of Appellate Procedure because this brief contains 4,614 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: May 11, 2005

John D. Gordan, III

EXHIBIT ONE