UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NUVEEN PREMIUM INCOME MUNICIPAL FUND 4, INC. and STRONG MUNICIPAL BOND FUND, INC., Appellees/Cross-Appellants v. MORGAN KEEGAN & COMPANY, INC., Appellant/Cross-Appellee.	Case Nos. 02-6258 02-6278 02-6374

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
DISTRICT COURT NO. CIV-00-935-HE

BRIEF *AMICUS CURIAE* FOR THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. (NASAA)

IN SUPPORT OF APPELLEES / CROSS-APPELLANTS

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In accordance with Fed. R. App. P. 29(a), all parties have consented to the filing of this brief. The consents are appended after the Conclusion to the brief.

IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS CURIAE*

The North American Securities Administrators Association ("NASAA") is a nonprofit association of the state, provincial, and territorial securities regulators in the United States and Canada, and of the Mexican national government. Formed in 1919, it is the oldest international organization devoted to the protection of investors in securities. The Oklahoma Department of Securities is a member.

State securities regulators are responsible for ensuring that securities are offered and sold only in accordance with state securities laws and regulations, which have been adopted in some form in every state to protect investors from fraud and abuse. NASAA seeks to enhance investor protection, increase uniformity in the interpretation of securities laws, and preserve the stability of capital markets. Reversal of the District Court's decision would impede the achievement of each of these missions.

A. Protecting Investors

NASAA has an interest in protecting investors in securities. In recent years, there have been many well-publicized investment frauds, resulting in financial losses to thousands of institutional and individual investors nationwide. Those whose investments have a nexus to the State should remain entitled to the protections conferred by the Oklahoma Securities Act, including testing and licensing of sales agents; registration of

investments; mandatory pre-purchase disclosure of material information; and strong remedial and punitive sanctions against violators. To the extent the District Court's ruling is reversed, many Oklahoma investors will be deprived of these important safeguards.

B. Promoting Uniformity

NASAA also seeks to preserve a decision that unites Oklahoma with other states in a uniform system of regulation. Virtually every state has enacted a law regulating the offer and sale of securities. Forty jurisdictions have enacted a version of the Uniform Securities Act. Most of those are patterned after the 1956 version of the Uniform Act, as in Oklahoma.

Uniformity helps ensure that securities offerings originating from any particular state do not become targets for financial fraud. This case involves an initial distribution or offering of bonds relating to property in Oklahoma. The bonds were issued by a unit of Oklahoma government, the offering documents were prepared in Oklahoma, and the proceeds of the initial distribution were ultimately received in Oklahoma. If it is held that this offer to sell is beyond the reach of the Oklahoma Securities Act, then investors may view future bond issues in Oklahoma as riskier and less desirable than offerings from other states. The Court should not allow this disparity to develop in Oklahoma protections.

C. Preserving Stable Capital Markets

The United States has the most efficient and stable capital markets in the world. Companies and governments have ready access to these markets to obtain the financing necessary to start or expand their operations. For such companies to thrive, the general public must continue to accept the integrity and stability of the marketplace.

The number of individuals investing in securities has grown steadily over the past 50 years. The breadth of stock and bond ownership has never been greater. Individuals and businesses are comfortable investing, in large part because of the safeguards that exist. While investors may be subject to the volatility of the market, they rightly expect that they will not be defrauded by those with whom they have entrusted their funds, or if they are, they have adequate legal recourse.

Reversing the District Court will only erode investor confidence, to the detriment of the market as a whole.

CORPORATE DISCLOSURE STATEMENT

NASAA is an association of state regulators that qualifies as a tax-exempt organization. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

ISSUE PRESENTED

Whether the Oklahoma Securities Act applies to an offer to sell an initial distribution of Oklahoma public housing bonds where the evidence demonstrates that the offer to sell originated from Oklahoma, even though the buyer and seller were not physically present in the state at the moment of the sale.

BACKGROUND

The parties have provided Statements of the Facts for the Court, and the *amicus curiae* will not reiterate them in detail here. The case resulted from an initial distribution of Oklahoma County Finance Authority Revenue Bonds that were purchased from Morgan Keegan and Company, Inc. ("Morgan Keegan"). Neither Morgan Keegan nor the purchasers, Nuveen Premium Income Municipal Fund 4, Inc. ("Nuveen") and Strong Municipal Bond Fund ("Strong"),were physically present in the State at the time of the sale. After the bonds defaulted, Nuveen and Strong sued Morgan Keegan, alleging, *inter alia*, violations of the Oklahoma Securities Act ("Oklahoma Act"). Morgan Keegan argued that the Oklahoma Act should not apply.

The District Court noted that Section 413(c) of the Oklahoma Securities Act provides that an offer to sell or buy is considered "made in the state, whether or not either party is present in the state, when the offer … originates from the state." OKLA. STAT. tit. 71 § 413(c). "Without attempting to determine precisely where the 'originates' line is drawn," the Court held that "plaintiffs have alleged a sufficient territorial nexus between the transactions at issue in this case and the State of Oklahoma. Thus, the Oklahoma

Securities Act is applicable." *Nuveen Premium Income Municipal Fund 4, Inc. v. Morgan Keegan & Company, Inc.*, 200 F.Supp.2d 1313, 1319 (W.D. Ok. 2002) ("*Nuveen*"). A jury found for the plaintiffs on a fraud claim brought under the Oklahoma Securities Act and Morgan Keegan appealed.

SUMMARY OF ARGUMENT

It is well settled that a person may violate the securities law of a particular state without ever being within the state or without performing in the state every act necessary to violate the law within that state. Suggestions by Appellants and the Mortgage Bankers Association that this Court should apply a "simple geographic test" is a request for the Court to write new law changing the jurisdictional test traditionally applied in Oklahoma and most other states.

A jury decided that the offer to sell the bonds in question originated from Oklahoma. The District Court correctly held that there was sufficient evidence to support the jury's decision. The criteria used by the District Court are consistent with those applied under other state securities statutes and decisions under state law. The determination that the Oklahoma Act applies to offers to sell Oklahoma bonds, where those offers originates from Oklahoma, provides the certainty necessary for an efficient market.

ARGUMENT

I. The Oklahoma Securities Act Applies to Any Offer to Sell Securities that Originates from Oklahoma

A. The Oklahoma Act is Remedial

The District Court's holding is fully consistent with the scope and purpose of the Oklahoma Act: protecting investors in securities transactions that have a significant nexus to Oklahoma. Morgan Keegan and others offer this Court an interpretation that has been argued repeatedly without success by those found to have violated the securities laws — an interpretation that elevates form over substance and ignores the reality of the transactions at issue.

It is important to adhere to the United States Supreme Court's admonition that remedial legislation such as the Oklahoma Act should be broadly construed to effectuate its purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553 (1967). Further, "form is to be disregarded over substance and the emphasis should be on (the) economic reality" of the transaction. *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 848, 95 S.Ct. 2051, 2058 (1975).

B. The Act Does Not Require that the Parties to an Offer Be Present in the State

Section 413 of the Oklahoma Act describes the scope of the statute as follows:

> For the purpose of this section, an offer to sell or buy is made in this state, **whether or not either party is then present in this state**, when the offer: (1) originates from this state; or (2) is directed by the offerer to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer).

OKLA. STAT. tit. 71 § 413(c) (2001 & Supp. 2002) (emphasis added).

Section 413 is based upon section 414 of the Uniform Securities Act of 1956 ("USA"). The phrase "whether or not either party is then present in this state" was designed to clarify that a person may violate the law of a particular state without ever being within the state or without performing in the state each act necessary to violate the law within that state. *See* UNIFORM SECURITIES ACT § 414 comment (Nat'l Conf. of Comm'rs on Unif. St. Laws 1956).

C. The Oklahoma Act Can Apply When Any Portion of the Selling Process Occurs in Oklahoma

The Oklahoma Act and other state securities statutes recognize that the initial distribution of securities often is not a simple process with one seller and one buyer. Rather, a sale of municipal bonds in an initial distribution typically includes an issuer, bond counsel, underwriters, financial advisors, corporate trustees, credit enhancers, guarantors, and consultants. Robert A. Fippinger, *The Public Finance Participants,* THE SECURITIES LAW OF PUBLIC FINANCE § 8:10.1 (Practising Law Institute 2001). The sale of municipal bonds involves complicated financial structures designed to protect bondholders. Public officials who wish to issue such bonds are dependent on the expertise of specialized financial professionals, including investment bankers, financial advisors, consultants and attorneys. *Id*. These professionals may reside outside the state and never visit the state where the offer originates, but they still play an integral part in the offering.

These activities are but a few of the factors to be weighed in determining whether an offer to sell originated from a state. A simple geographic test does not suffice. "[A]ny

portion of the selling process of securities" can be the basis for deeming that the offer to sell originated from Oklahoma. *Newsome v. Diamond Oil Producers, Inc.* [1982-984] Blue Sky L. Rep. (CCH) 71,869 (Okla. Dist. Ct. 1983) (Tulsa County).

There is ample evidence in this case to support the determination of the jury that the offer originated from Oklahoma. The bonds were issued by Oklahoma County. They related to Oklahoma property. As the District Court stated, Morgan Keegan helped prepare the offering documents and conducted research in Oklahoma. *Nuveen*, 200 F.Supp.2d 1313 at 1318. The totality of the evidence supports a determination that the offer to sell originated from Oklahoma.

D. Oklahoma Follows the Majority of States in Using the "Originates" Test For Applying Its Act to the Offer to Sell Securities

The 1956 Uniform Securities Act ("USA"), the Revised Uniform Securities Act of 1985 ("RUSA"), and the Uniform Securities Act of 2002 ("USA 2002") each provides for state authority when the offer to sell securities originates in the state, whether or not either offeror or purchaser is in the state. At least 33 states have adopted this jurisdictional provision.[1] Professor Loss, in his final commentary to the Uniform Securities Act of 1956, stated that "one thing which is quite clear is that a person may violate the law of a given state, even criminally, without ever being in the state or performing within the state every act necessary to complete the offense." *See* UNIFORM SECURITIES ACT § 414 comment, *supra*.

[1] Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columb ia, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming.

The Colorado Supreme Court clearly recognized this principle in *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995). In *Rosenthal*, the court reversed a determination that the investors had insufficiently pleaded a cause of action under the civil liabilities provision of the Colorado Securities Act. Stating that one policy underlying the statute was to protect the business interests of legitimate resident issuers by exposing illegitimate ones to liability, the court looked to the substance of the underlying transaction to conclude that Dean Witter's offer to sell originated with the Colorado issuer. *Id*.at 1105. In making this determination, the *Rosenthal* court noted, as did the District Court in the instant matter regarding Morgan Keegan, that the seller assisted the issuer in preparing the offering documents. *Id*. at 1105.

In *Barneby v. E.F. Hutton & Co.*, 715 F.Supp 1512 (M.D. Fla. 1989), the court found that Oklahoma securities law could apply to an out-of-state broker dealer. The court looked at the interaction among the issuer (VEMCO), the out-of-state broker dealer of the securities issued by VEMCO, and the buyers. It reasoned that "in sum, the extent of the activities which took place in and are connected to Oklahoma create a sufficient nexus with Oklahoma to apply its securities law." *Id* at 1541. Similarly, the District Court in this case relied upon the activities of and relationships among the issuer and the broker dealer in deciding to allow the jury to determine whether the offer to sell originated from Oklahoma.

E. It Was Proper to Consider Other Factors Besides the Issuer's Oklahoma Presence

The Bond Market Association (BMA) brief points out that just because an issuer is domiciled or incorporated in a state, the seller is not automatically subject to the securities statute in that state. BMA Brief at 9. However, as discussed *supra*, it is not the issuer's Oklahoma presence **alone** that is grounds for application of the Oklahoma Act in the present case. The BMA cites *Allen v. Oakbrook Secs,* 763 So.2d 1099, 1101 (Fla. App. 1999), and *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), for the proposition that the issuer's state of domicile or incorporation is irrelevant. However, *Allen* and *Singer* are inapposite because neither of the underlying securities statutes at issue in those cases included the same "originate from" language found in the Oklahoma Act. *See* FLA. STAT. ANN. ch. 517 (West 2003) and DEL. CODE ANN. ch. 73 (West 2002).

II. Application of the Oklahoma Securities Act Will Not Create Uncertainty in the Marketplace

A. The Statute Could Not Be Expected to Explicitly Address Every Conceivable Set of Facts

The phrase "originates from this state" is not defined in the Oklahoma Act or the USA from which it derived. The drafters of the USA intentionally did not include an exclusive list of factors to delineate whether an offer to sell originates from the state because such a list would have been too restrictive. Trying to account for all possible scenarios would be impossible and undesirable. The drafters thus intended the "Scope" provisions "(1) [to] be explicit as possible; (2) to forego complete coverage in the interest

of simplicity; and (3) to make certain that no legitimate person who is properly advised will be entrapped by the law." UNIFORM SECURITIES ACT § 414 comment, *supra*.

The drafters accomplished what they set out to do. Nearly 50 years after its issuance, this provision of the USA has been enacted by 33 states. The 2002 USA drafters left the language intact, reiterating that "the law is now settled that a person may violate the law of a particular state without ever being within the state or performing each act necessary to violate the law within that state."[2] UNIFORM SECURITIES ACT 2002, § 610 cmt. No. 1 (Nat'l. Conf. of Comm'rs on Unif. St. Laws 2002).[3]

When words and phrases of a statute are not explicit, the Court must determine their meaning in a way that produces a reasonable result and promotes the general purpose for which they were enacted. It is axiomatic that the cardinal rule of statutory construction is to ascertain the intent of the legislature and if possible to give effect to all of its provisions. *Kratz v. Kratz*, 905 P.2d 753 (Okla. 1995) (*citing, AMF Tubescope Company v. Hatchel*, 547 P.2d 374 (Okla. 1974)).

B. Morgan Keegan Should Have Known It Is Unlawful to Materially Misrepresent the Securities It Sells

The BMA argues that the Oklahoma Act should not apply because Morgan Keegan did not know the law applied to it, asserting that such an application would create "uncertainty" in Morgan Keegan's business practices. BMA Brief at 22. But there is no

[2] The BMA tries to explain away this provision by arguing it only applies to an agency relationship. Not only does this ignore case law, but if it were true, the drafters of the USA 2002 would have so stated in the Act or commentary. Instead the prior language was reiterated verbatim.

[3] Available at http://www.nccusl.org.

indication that Morgan Keegan would have acted differently had it known that the Oklahoma Act applied.

Further, it is inherently incredible that Morgan Keegan did not appreciate its obligations that applied to its conduct. Morgan Keegan holds itself out to the public as one of the nation's leading underwriters of tax-exempt and taxable municipal securities.[4] The firm routinely extends its underwriting and other bond business into Oklahoma, as evidenced by its website marketing material where, for example, it lists the Tulsa County (OK) Home Finance Authority as one of its clients. As a registered broker dealer in Oklahoma, Morgan Keegan knows that the Oklahoma Act applies to it and that it has a duty to assure that its employees comply with the law and regulations. *See* §201 of the Oklahoma Act, registration requirements. Even absent registration, the Oklahoma Act's fraud provisions would have applied.

In Oklahoma, broker dealers also have to establish written procedures enabling them to supervise the activities of each salesperson to assure compliance with applicable securities laws, rules, regulations and statements of policy promulgated by the Oklahoma Department of Securities under the Oklahoma Act . *See* Oklahoma Rule Sec. 660:10-5-42(b)(22)(A), Standards of Ethical Practices**.** Oklahoma broker dealers also have to observe high standards of commercial honor and just and equitable principles of trade. *See* Oklahoma Rule Sec. 660:10-5-42(b)(1). It defies logic that Morgan Keegan would have established policies that comply with Oklahoma law when it underwrites offerings

[4]*See* http://www.morgankeegan.com/html/g2/capital_markets/Pub_Fin/default.asp.

for Tulsa County but would have no anti-fraud policies when it offers to sell an initial distribution of securities in Oklahoma County.

The BMA argues that applying the Oklahoma Act to Morgan Keegan will undermine the certainty necessary for an efficient capital market. BMA Brief at 19-25. Its lengthy argument about risk planning, however, disregards the facts in this case by failing to acknowledge Morgan Keegan's extensive dealings in Oklahoma. Morgan Keegan should realize that if they make material misrepresentations regarding an Oklahoma bond offering in which they participate as a seller, the Oklahoma Act's civil liability provisions will apply.

C. Similar Requirements Exist in Other Jurisdictions

Morgan Keegan conducts business in most states and thus is subject to various jurisdictions' legal requirements at one time or another. Besides Oklahoma, 38 states and the District of Columbia have adopted versions of the Uniform Securities Act.[5] Morgan Keegan thus should be familiar with requirements a majority of these states have in common. The assertion that Morgan Keegan's business practices will suffer because a court says it cannot commit fraud is simply not credible. BMA Brief at 23-26.

[5] *See* list at http://www.law.cornell.edu/uniform/vol7.html#secur.

What the firm really seems to object to is the Oklahoma statute of limitations. Under Section 408(f) of the Oklahoma Act, a claim must be raised within 2 years from discovery of the violation, but in no event later than 3 years after the sale of the security. OKLA STAT. tit. 71 § 408(f) (West Supp. 2001). But most state securities laws have similar statute of limitations as Oklahoma. *See*, *e.g.*, COL. STAT. ANN. art. 11-51-604(8) (West 2003) (suit based on fraud barred three years after discovery of the fraud but not later than five years after transaction); IOWA STAT. ANN. ch. 502 §504 (West 2002) (suit based on fraud barred two years after discovery of the fraud but no later than five years), NEW MEX. STAT. ANN. ch. 58 § 58-13B-41 (West 1986) (suit based on fraud barred two years after discovery of the fraud but no later than five years). Moreover, a recent trend has been towards longer statutes of limitation. Both the federal Sarbanes-Oxley Act and USA 2002 provide that suit must be instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation. 28 U.S.C. § 1658(b); USA 2002 § 509(j). Having the Oklahoma Act apply to Morgan Keegan's activities in Oklahoma therefore should not disrupt its risk planning strategies.

CONCLUSION

Because the totality of the evidence supports the conclusion that the offer to sell the bonds in question in this case originated from Oklahoma, the Oklahoma Securities Act applies. Morgan Keegan's request to rewrite Oklahoma law so that it applies only to some of the firm's activities in Oklahoma is without merit. The District Court's decision should be affirmed.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of May 2003, the required number of copies of the foregoing brief of *amicus curiae* North American Securities Administrators Association, Inc., together with NASAA's Motion for Leave to File, and the Entry of Appearance and Certificate of Interested Parties, were served by next-business-day delivery service, on the following persons at the following addresses:

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