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# PROFESSOR ALAN R. BROMBERG AND THE SCHOLARLY ROLE OF THE TREATISE

Wendy Gerwick Couture\*

**D**ISTINGUISHED Professor Alan R. Bromberg's scholarship is multi-faceted and extensive, but this essay focuses on the unique scholarly role of his treatise on securities fraud.<sup>1</sup> Professor Bromberg first published the treatise as a single volume in 1967 under the title *Securities Law: Fraud—SEC Rule 10b-5*. In 1979, Lewis D. Lowenfels joined Professor Bromberg as a co-author, and in 2012, Michael J. Sullivan joined as a second co-author. By 2014, the treatise, re-titled *Bromberg and Lowenfels on Securities Fraud*, had reached eight volumes in length.

In the 48 years since Professor Bromberg published the first edition of this treatise, it has been extraordinarily influential in the development of securities fraud jurisprudence. For example, the Supreme Court has cited the treatise in nine opinions,<sup>2</sup> and the treatise has been cited in at least 757 law review and journal articles.<sup>3</sup> This essay uncovers and revisits earlier versions of the treatise<sup>4</sup> to demonstrate its influence in the development of securities fraud jurisprudence and to identify the factors that led to its importance, arguing that Professor Bromberg and his co-authors' treatise shows the continuing importance of treatises within legal scholarship.

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1. Securities fraud is prohibited by § 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. 15 U.S.C. § 78j(b) (LEXIS through Pub. L. No. 114-13); 17 C.F.R. § 240.10b5-1 (2015).

2. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 179 (2008); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 601 (1995); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 n.19 (1983); *Chiarella v. United States*, 445 U.S. 222, 250 (1980); *Santa Fe Indus., v. Green*, 430 U.S. 462, 476 (1977); *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 23, 27, 38, 65 n.17 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729, 734, 735, 752 n.15 (1975); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154 (1972); *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 470 (1969).

3. On April 6, 2015, the author performed the following advanced search in Westlaw's law reviews and journals database: Bromberg /10 (securities rule).

4. The author would like to thank Professor Michael Greenlee at the University of Idaho College of Law for his help in locating and retrieving several out-of-date versions of Professor Bromberg's treatise.

## I. THE ROLE OF TREATISES WITHIN LEGAL SCHOLARSHIP

Treatises currently play a somewhat controversial role within legal scholarship. Historically, the writing of treatises was closely tied with American legal education.<sup>5</sup> More recently, however, numerous scholars have documented the decline of treatise-writing by law professors,<sup>6</sup> citing the rise of the realist movement<sup>7</sup> and the waning prestige of treatises among legal academics.<sup>8</sup> Critics of modern legal education often decry this development, citing it as evidence of disconnect between the legal academy and the legal profession.<sup>9</sup>

Additionally, treatises often influence in the shadows. Although litigators and courts<sup>10</sup> rely on treatises when performing legal research and analysis,<sup>11</sup> they shy away from citing treatises in briefs or opinions be-

5. A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 670–71 (1981) (“From Story’s time forward, the production of treatises was associated with organized, systemic legal education . . . [T]he writing of treatises became the appropriate activity for law professors.”).

6. *Id.* at 633 (“[I]t is remarkable that in the United States the practice of writing treatises has declined significantly.”).

7. *Id.* at 678 (“A movement that minimizes the importance of legal doctrine is hardly likely to generate enthusiasm for the work of analyzing doctrine and expounded it as the principled science of the law.”).

8. Erwin Chemerinsky, *2009 Survey of Books Related to the Law: Foreword: Why Write?*, 107 MICH. L. REV. 881, 886–87 (2009) (“If I were advising a young colleague who wanted to advance within or move to an elite institution, I would frankly say that there are many rewards to doing casebooks and treatises, but recognition within the academy of law professors is not among them.”); Michael J. Madison, *Symposium: Open Access Publishing and the Future of Legal Scholarship: The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 910 (2006) (“The problem is that the traditional form of book-based legal scholarship is the treatise and the treatise is the kind of scholarship that doesn’t count for tenure and promotion as much as it used to.”); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983) (“The treatise is no longer even a credit to those competing on the leading edge of legal thought.”); Christopher D. Stone, Comment, *From a Language Perspective*, 90 YALE L. J. 1149, 1150 (1981) (“Treatises, some of them splendid, are still being written, but the prestige of the undertaking has tarnished.”).

9. *E.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 57 (1992) (“Finally – and this is my main point – pure theory should not wholly displace the production of treatises or articles that, *inter alia*, focus on legal doctrine. Unfortunately, this displacement is now beginning to occur and therewith a grave disjunction between legal scholarship and the legal profession. ‘Practical’ scholarship constitutes a vital link from the law schools to our system of justice – to the legislators, administrators, judges, and practitioners who need thorough, thoughtful, concrete legal advice.”).

10. *E.g.*, Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1, 7 (2011) (“The survey data also show that, even if judges do not cite legal scholarship, they or their law clerks may, nevertheless, use scholarship in researching issues raised in their cases. This result captures a utility of legal scholarship not susceptible to observation in the data pulled from the courts’ dockets (whether in this or other studies).”).

11. DAVID F. HERR ET AL., *FUNDAMENTALS OF LITIGATION PRACTICE* § 3:2 (2014 ed.) (“If the lawyer already has the big picture of the law governing the particular question but desires more specific information or case citations to support what the lawyer already knows to be the truth, multi-volume treatises with annual supplements usually are most useful.”).

cause they do not constitute primary authority.<sup>12</sup> Likewise, transactional attorneys consult treatises when negotiating deals and advising clients, but their work product is not captured in databases.

Finally, treatises, unlike other forms of legal scholarship, are ephemeral. When treatises are updated, early insights on unanswered questions are lost as pages are removed, discarded, and replaced with updated authority. Often the treatise's role in shaping that authority is lost in the process.

Against this backdrop, this essay argues that Professor Bromberg and his co-authors' treatise on securities fraud demonstrates the important role that treatises can continue to play within legal scholarship. In particular, Professor Bromberg created his treatise when securities fraud jurisprudence was in a dynamic state; he promoted clarity by creating an interpretive framework and providing guidance therein. The treatise was thus poised to exert influence at pivotal moments in the development of securities fraud doctrine and to serve as a springboard for other scholarly contributions.

## II. RECOGNITION OF A DYNAMIC AREA OF LAW

The creation of an important new treatise often depends on the recognition of a dynamic, uncharted area of law. As Professor Richard A. Danner asks: "Do we need a new Blackstone? Do we need new writers of grand treatises like Story and Williston?"<sup>13</sup> After other scholars have engaged in the rigorous and creative activity of providing interpretive frameworks for an area of law, a new treatise is less likely to be groundbreaking and intellectually stimulating.<sup>14</sup> Professor A. W. B. Simpson concludes: "It requires some dramatic change to give rise to a distinguished new treatise."<sup>15</sup>

Indeed, in 1967, Professor Bromberg, inspired by the filing of the *SEC v. Texas Gulf Sulphur* case,<sup>16</sup> recognized that securities fraud jurispru-

12. Simpson, *supra* note 5, at 667 (explaining that, under "the formal status of the treatise in the English theory of precedent . . . the opinion of a treatise writer generally is not authoritative").

13. Richard A. Danner, *2013 Survey of Books Related to the Law: Foreword: Oh, The Treatise!*, 111 MICH. L. REV. 821, 834 (2013).

14. Stone, *supra* note 8, at 1151 ("Treatise-writing is discouraged, too, by the fact that much of the most challenging, creative, and rewarding work that the enterprise once entailed—the supplying of insight and system—has largely been done in the major common-law fields."); Simpson, *supra* note 5, at 674 ("The great enterprise in which the treatise or institutional writer is engaged is the methodizing of disorderly traditional or customary law; once the job has been done competently by a Blackstone or a Story, much of its intellectual excitement disappears.").

15. Simpson, *supra* note 5, at 674–75.

16. *SEC v. Tex. Gulf Sulphur Co.*, 258 F. Supp. 262, 267 (S.D.N.Y. 1966) (explaining that the SEC brought an enforcement action against Texas Gulf Sulphur, alleging that the company's press release downplaying the results of its drilling was fraudulently pessimistic and that company insiders had committed securities fraud by trading the company's securities before the drilling results were reported to the public), *aff'd in part, rev'd in part*, 401 F.2d 833, 864 (2d Cir. 1968).

dence was in a dynamic state, worthy of treatment in a treatise.<sup>17</sup> In the preface to the first edition, Professor Bromberg explained:

The filing of the *Texas Gulf Sulphur* case gave us all a jolt. I was asked to talk about the *TGS* case to the Corporation, Banking and Business Law Section of the State Bar of Texas. My resurvey of Rule 10b-5 for this purpose prompted me to plan an article, then convinced me that a book was more appropriate.<sup>18</sup>

At that time, Professor Bromberg foresaw the potential expansion of securities fraud jurisprudence, describing it as "a classic of the common-law vine supported by the legislative trellis, but with a distinct growth of its own."<sup>19</sup> Eight years later, in similarly metaphorical language, the Supreme Court would describe securities fraud jurisprudence as "a judicial oak which has grown from little more than a legislative acorn."<sup>20</sup>

Uniquely, in recognition of the potentially surprising implications of Rule 10b-5's reach, Professor Bromberg expanded the target audience of his treatise beyond the traditional audience of practitioners and judges to business people themselves. As he explained in the preface to the first edition, "Since the Rule may apply to any business deal involving securities, the businessman must know something of the subject, and I have tried to write for him as well as his lawyer . . . ."<sup>21</sup>

### III. CREATION OF AN INTERPRETIVE FRAMEWORK AND PROVISION OF GUIDANCE THEREIN

An influential treatise author, once identifying a dynamic area of the law, attempts to bring order to the chaos by creating an interpretive framework and providing guidance within that framework. As explained by Professor Simpson, "The great enterprise in which the treatise or institutional writer is engaged is the methodizing of disorderly traditional or customary law."<sup>22</sup> Professor Bromberg, confronting the dynamic area of securities fraud, rose to that challenge by classifying the types of transactions to which Rule 10b-5 potentially applies, by identifying the potential elements of a private claim under Rule 10b-5, and by providing guidance within this interpretative framework.

First, drawing on the jurisprudence to date, Professor Bromberg identified four classes of transactions to which Rule 10b-5 potentially applies: (1) "Direct-Personal Dealing (Face-to-Face Transactions, Other than with

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17. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5*, at vii (1967) ("10b-5's rapid evolution is still under way . . . .").

18. *Id.* (italics added).

19. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 12.1 (1967).

20. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

21. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5*, at vii (1967).

22. Simpson, *supra* note 5, at 674; *see also* Danner, *supra* note 13, at 834 ("In the twenty-first century, American lawyers could benefit most from authoritative works on specialized subjects by knowledgeable scholars who are not only able to provide interpretive frameworks for tackling new questions but also conversant with the technologies that lawyers employ for seeking and working with legal information.").

Broker-Dealers);” (2) “Direct-Personal Dealing (Broker-Dealers);” (3) “Direct-Impersonal Dealing (Mergers, Tender Offers, etc.);” and (4) “Indirect-Impersonal Dealing (Stock Exchange and Open-market Trades).”<sup>23</sup> He explicitly recognized that this analytical framework differed from that of previous scholars, who had “surveyed the same authorities in terms of persons subject to the Rule or in terms of legal concepts.”<sup>24</sup> He explained that he chose to use this analytical framework because “the areas have developed in quite different degrees to date, and the evolution of one sheds light on the probabilities for another.”<sup>25</sup> Professor Bromberg’s framework has proven lasting; indeed, the most recent edition of the treatise continues to rely upon these initial classifications.<sup>26</sup>

Second, Professor Bromberg, drawing from common-law fraud concepts and the Rule 10b-5 case law to date,<sup>27</sup> identified the following framework for analyzing private claims under Rule 10b-5: (1) misrepresentation or nondisclosure; fact versus opinion; (2) materiality; (3) scienter; negligence; (4) privity; (5) reliance; (6) causation of damages; and (7) closed transaction; buyer or seller requirement.<sup>28</sup> This articulation bears remarkable similarity to the now-accepted elements of a private claim for securities fraud: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.<sup>29</sup>

Within that interpretive framework, Professor Bromberg provided remarkably prescient guidance about the application of Rule 10b-5. For example, five years before the Supreme Court held in *Affiliated Ute Citizens of Utah v. United States* that in cases “involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery,”<sup>30</sup> Professor Bromberg noted that “[i]n nondisclosure cases, reliance has little if any rational role.”<sup>31</sup> Indeed, the *Affiliate Ute* Court cited the 1967 edition of Professor Bromberg’s treatise in support of its holding.<sup>32</sup> Likewise, before the Supreme Court weighed in, Professor Bromberg opined: “Some sort of reasonable-man, objective test of investment judgment, intrinsic value, or (in the case of a publicly traded security) significant market effect is appropriate.”<sup>33</sup> His recommendation came nine years before *TSC Industries, Inc. v. Northway, Inc.*, in which the Supreme Court stated that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to

23. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* §§ 4-7 (1967).

24. *Id.* § 3.1.

25. *Id.*

26. ALAN R. BROMBERG ET AL., *BROMBERG & LOWENFELS ON SECURITIES FRAUD* §§ 4-6 (2d ed. 2014).

27. *Id.* § 8.1.

28. *Id.* § 8.

29. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

30. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972).

31. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 8.6 (1967).

32. *Affiliated Ute*, 406 U.S. at 153-54 (citing ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* §§ 2.6 & 8.6 (1967)).

33. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 8.3 (1967).

vote” for purposes of Rule 14a-9,<sup>34</sup> and twenty-one years before the Supreme Court adopted the *TSC Industries* test for Rule 10b-5 actions.<sup>35</sup> Within the category of open-market trades, Professor Bromberg mused about the possibility that “the market action of the stock” could operate to communicate misrepresentations to investors,<sup>36</sup> twenty-one years before the Supreme Court adopted the fraud-on-the-market presumption of reliance in *Basic Inc. v. Levinson*.<sup>37</sup> As another example, four years before the Supreme Court’s first expansive interpretation of the “in connection with” requirement,<sup>38</sup> he predicted that “[p]ossibly the courts will conclude that any release of financial information by a publicly traded company has the necessary connection.”<sup>39</sup> Further, in 1968, Professor Bromberg noted that expanding the class of potential plaintiffs beyond buyers or sellers “looks suspiciously speculative.”<sup>40</sup> Seven years later, the Supreme Court agreed, limiting the class of potential plaintiffs to actual purchasers and sellers in order to avoid the “largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff’s subjective hypothesis.”<sup>41</sup> As a final example, twenty-one years before the Supreme Court rejected a bright-line test for assessing the materiality of information about corporate transactions,<sup>42</sup> Professor Bromberg advocated for a fact-specific assessment of the materiality in this context, including “how easily the corporate transaction can be consummated,” “how early its values become fairly ascertainable,” whether the company to be acquired “is very small in relative assets or earnings,” and whether “it is just one more acquisition by a company which is engaged in a continuous acquisition program.”<sup>43</sup>

#### IV. INFLUENCE AT PIVOTAL MOMENTS IN THE DEVELOPMENT OF DOCTRINE

Once a treatise writer has identified a dynamic area of the law, created an interpretive framework, and provided guidance within that frame-

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34. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

35. *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

36. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 7.2(1) (1967).

37. *Basic*, 485 U.S. at 247 (“Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.”).

38. *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13 (1971) (“The crux of the present case is that Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor.”); *see also* *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1066 (2014) (holding that a fraudulent misrepresentation or omission is “in connection with” the purchase or sale of a security if it is “material to a decision by one or more individuals (other than the fraudster) to buy or to sell” the security).

39. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 7.2(2) (1967).

40. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 8.8 (1968).

41. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735 (1975).

42. *Basic*, 485 U.S. at 240 (endorsing a “fact-specific inquiry” into the materiality of merger discussions).

43. ALAN R. BROMBERG, *SECURITIES LAW: FRAUD—SEC RULE 10B-5* § 7.4(4)(b) (1967).

work, he or she is poised to influence the development of the doctrine at pivotal moments.<sup>44</sup> Indeed, Professor Bromberg and his co-authors' treatise exerted this influence at multiple moments in the development of securities fraud jurisprudence,<sup>45</sup> such as in the creation of the widely-applied "*Cammer* factors."<sup>46</sup>

In March 1988, in *Basic Inc. v. Levinson*, the Supreme Court adopted the fraud-on-the-market presumption of reliance, which enables plaintiffs to establish the commonality and predominance prerequisites of class certification.<sup>47</sup> In short, in order to invoke the presumption, a plaintiff must show "(1) that the alleged misrepresentation were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed."<sup>48</sup> The Court in *Basic* provided little guidance to lower courts, however, about how to define an efficient market and how to determine whether a market is efficient.

In August 1988, Professor Bromberg and Mr. Lowenfels updated their treatise to provide guidance on these issues. First, they defined an "efficient market" as "one which rapidly reflects new information in price,"<sup>49</sup> and they clarified that such a market will almost invariably be both open and developed.<sup>50</sup> Second, they opined that, for fraud-on-the-market purposes, "each security has a distinct market,"<sup>51</sup> thus, the applicability of the fraud-on-the-market presumption must be analyzed on a security-by-security basis. Third, they provided guidance on factors that courts should consider when analyzing the efficiency of a market for a particular security, including "average weekly trading" volume,<sup>52</sup> the "number of market makers,"<sup>53</sup> "size of float,"<sup>54</sup> and the "degree of responsiveness" to new information.<sup>55</sup>

44. Chemerinsky, *supra* note 8, at 890 (explaining that treatises "that deeply analyze doctrine in specific areas can be useful to judges deciding cases that present novel and difficult issues"); Edwards, *supra* note 9, at 44 (discussing how treatises can use theoretical arguments to help judges decide the "hard" or "very hard" issues).

45. See, e.g., *supra* text accompanying notes 29–42.

46. See *infra* text accompanying notes 48–59.

47. *Basic*, 485 U.S. at 245–47; see FED. R. CIV. P. 23(a)(2) & 23(b)(3).

48. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014).

49. *Cammer v. Bloom*, 711 F. Supp. 1264, 1276 n.17 (D.N.J. 1989) (quoting BROMBERG & LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

50. *Id.* (quoting ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

51. *Id.* at 1281 (quoting ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

52. *Id.* at 1292–93 (quoting ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

53. *Id.* at 1283 n.30 (quoting ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

54. *Id.* (quoting ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

55. *Id.* at 1292 (quoting ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).



In April 1989, Judge Alfred James Lechner, Jr., in the United States District Court for the District of New Jersey, issued *Cammer v. Bloom*, one of the first opinions to complete an in-depth analysis of *Basic*'s application, and he cited Professor Bromberg and Mr. Lowenfels' treatise nine times, quoting from it extensively.<sup>56</sup> First, he adopted their definition of market efficiency.<sup>57</sup> Second, he agreed with them that market efficiency must be determined on an individualized basis.<sup>58</sup> Third, he identified a series of factors (the so-called *Cammer* factors) that courts should consider when analyzing whether the market for a particular security was efficient: (1) whether "there existed an average weekly trading volume during the class period in excess of a certain number of shares;" (2) whether "a significant number of securities analysts followed and reported on a company's stock during the class period;" (3) whether "it could be alleged the stock had numerous market makers;" (4) whether "the Company was entitled to file an S-3 Registration" and, if not, whether "ineligibility was only because of timing factors rather than because the minimum stock requirements [*i.e.*, public float requirements] . . . were not met;" and (5) whether "empirical facts show[ ] a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price."<sup>59</sup> Judge Lechner relied on Professor Bromberg and Mr. Lowenfels' guidance in crafting four of these five factors.<sup>60</sup>

*Cammer* has been an extraordinarily influential. To date, 200 courts have cited the opinion,<sup>61</sup> and eight circuits have (1) cited the *Cammer* factors with approval,<sup>62</sup> (2) identified the factors as useful,<sup>63</sup> or (3) affirmed the district court's application of the factors without adopting them.<sup>64</sup> By extension, Professor Bromberg and Mr. Lowenfels' guidance on how to apply *Basic*, on which the *Cammer* court relied heavily, likewise exerted tremendous influence in this area. In light of the Supreme Court's recent reaffirmation of the fraud-on-the-market presumption of

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56. *Id.* at 1276 n.17, 1281, 1283 n.30, 1286, 1286 n.35, 1292, 1293.

57. *Id.* at 1286 n.35.

58. *Id.* at 1281.

59. *Id.* at 1286-87.

60. *Id.* at 1286-87, 1292-93 (not citing Professor Bromberg and Mr. Lowenfels in support of the analyst coverage factor).

61. Shepard's search performed in Lexis Advanced Research database on May 29, 2015.

62. *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004); *Binder v. Gillespie*, 194 F.3d 1059, 1065 (9th Cir. 1999); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990).

63. *In re DVI, Inc. Sec. Litig.*, 639 F. 3d 623, 634 (3d Cir. 2011) (noting that the *Cammer* factors "may be instructive depending on the circumstances"); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 511 (1st Cir. 2005) (describing the *Cammer* factors as "useful evidence from which market efficiency may be inferred" but "not exhaustive").

64. *Local 703, I. B. of T. Grocery & Food Empls.' Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1255 (11th Cir. 2014) (declining to adopt the *Cammer* factors but "not suggest[ing] that a [d]istrict [c]ourt would be wrong to rely on the *Cammer* factors to guide its analysis"); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 210 (2d Cir. 2008) (concluding that "the district court properly used the *Cammer* factors as an 'analytical tool' under the facts of the case).

reliance, this influence will undoubtedly continue.<sup>65</sup>

## V. SPRINGBOARD FOR OTHER TYPES OF LEGAL SCHOLARSHIP

Finally, a treatise's comprehensive and in-depth treatment of a dynamic area of the law can highlight discrepancies in the jurisprudence and serve as a springboard for other types of legal scholarship, which can then inform the treatise itself in an iterative relationship. Indeed, Professor Bromberg and his co-authors have repeatedly drawn on their treatise to make other scholarly contributions, which they have in turn incorporated into their treatise. As one example, Professor Bromberg and his co-authors have published significant scholarly commentary about the evolution of aiding and abetting liability under Rule 10b-5, both in their treatise and in journal articles.

In 1988, Professor Bromberg and Mr. Lowenfels expanded on their treatise's discussion of aiding and abetting liability with a comprehensive law review article, titled "Aiding and Abetting Securities Fraud: A Critical Examination," which was published in the *Albany Law Review*.<sup>66</sup> Despite widespread acceptance by courts of private claims for aiding and abetting securities fraud,<sup>67</sup> they analyzed the validity of aiding and abetting liability as an implied private action under the *Cort v. Ash* criteria,<sup>68</sup> concluding that "in general, they weigh against the aiding-abetting cause of action."<sup>69</sup> In addition, they "attempt[ed] to untangle the elements of an aiding-abetting violation," identified other factors that have influenced courts when considering whether to impose liability, addressed the "breadth of liability under the theory," and surveyed the usage of the theory in private and enforcement actions.<sup>70</sup> Finally, they recognized that the "the uncertainty and unpredictability of the law raises difficult problems for the accountant, lawyer, lender or other person peripherally involved in a transaction and trying to protect against liability"<sup>71</sup> and called upon either the Supreme Court or Congress to address the existence and scope of a private claim for aiding and abetting securities fraud.<sup>72</sup>

In 1994, the Supreme Court answered that call in *Central Bank of Denver v. First Interstate Bank of Denver*, holding that there is not a private cause of action for aiding and abetting securities fraud under § 10(b) and

65. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014).

66. Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637 (1988) [hereinafter Bromberg, *Aiding*].

67. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 192 (1994) (Stevens, J., dissenting) ("In hundreds of judicial and administrative proceedings in every Circuit in the federal system, the courts and the SEC have concluded that aiders and abettors are subject to liability under § 10(b) and Rule 10b-5.").

68. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

69. Bromberg, *Aiding*, *supra* note 66, at 650.

70. *Id.* at 643.

71. *Id.* at 772.

72. *Id.* at 773.

Rule 10b-5.<sup>73</sup> The Court distinguished between questions about the scope of conduct prohibited by § 10(b), which are controlled by the text of the statute, and questions about the elements of a private claim for conduct within the scope of § 10(b), which are inferred from how the 1934 Congress would have addressed the question if a private right of action had been expressly included in Rule 10b-5.<sup>74</sup> After characterizing the question of private aiding and abetting liability as one of the former type, the Court reached “the uncontroversial conclusion” that “the statute itself resolves the case.”<sup>75</sup> Additionally, the Court determined that this interpretation of the statute was not “‘so bizarre’ that Congress could not have intended it,” echoing Professor Bromberg and Mr. Lowenfels’s discussion about the potential negative ripple effects of private aiding and abetting liability on those peripherally involved in a transaction.<sup>76</sup>

In response, a few months later, Professor Bromberg authored another law review article, titled “Aiding and Abetting: Sudden Death and Possible Resurrection” and published in *The Review of Securities & Commodities Regulation*,<sup>77</sup> which analyzed the Supreme Court’s reasoning in *Central Bank* and discussed the implications of the decision. Although the Court reached the same conclusion that he and Mr. Lowenfels had forecast in their 1988 article, Professor Bromberg criticized the Court’s analysis:

The Central Bank majority did away with a cause of action that was capable of abuse and that led to many settlements probably unjustified by the fact. But it did so in a flawed opinion based on a simplistic and overly literal rationale if it’s not explicit in the statute, it doesn’t exist. The reverence for the letter of the statute was coupled with indifference to legislative history, disdain for lower court precedent, and highly selective use of the Court’s own precedents with little or no effort to distinguish its cases that point the other way. The policy discussion was a one-sided add-on, and the opinion failed to consider such broader issues such as whether alternative sources of liability are desirable in situations where the principal violators are judgment-proof; whether private actions of this kind are still an important supplement to government enforcement of the securities laws; and whether aid-abet liability is a useful incentive to professional competence and [/] or deterrent to misconduct.<sup>78</sup>

Professor Bromberg and Mr. Lowenfels included a similar critique of *Central Bank* in their treatise, criticizing the Court’s “literal no-word, no-

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73. 511 U.S. 164, 191 (1994).

74. *Id.* at 172–73.

75. *Id.* at 177–78.

76. *Id.* at 188–90 (“[N]ewer and smaller companies may find it difficult to obtain advice from professionals. . . . In addition, the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company’s investors, the intended beneficiaries of the statute.”).

77. Alan R. Bromberg, *Aiding and Abetting: Sudden Death and Possible Resurrection*, 27 REV. SEC. & COMMODITIES REG. 133 (1994).

78. *Id.*

case ruling” and identifying flaws in the Court’s reasoning.<sup>79</sup>

In 1995, Congress responded to the ambiguity created by *Central Bank* about whether the SEC could pursue enforcement actions against aiders and abettors of securities fraud by explicitly authorizing such actions. The Private Securities Litigation Reform Act of 1995 (“PSLRA”) amended § 20 of the Exchange Act, authorizing the SEC to pursue money penalties in civil actions against “any person that knowingly provides substantial assistance to another person in violation of a provision of this title, or any rule or regulation issued under this title.”<sup>80</sup>

In response, in 1996, Professor Bromberg and Mr. Lowenfels again published an article, titled *A New Standard for Aiders and Abettors Under the Private Securities Litigation Reform Act of 1995* and published in *The Business Lawyer*.<sup>81</sup> They analyzed the impact of the PSLRA’s explicit aiding and abetting provision on the elements of an aiding-abetting violation, which they had previously analyzed in their 1988 article.<sup>82</sup> They predicted that the provision (1) “will require the second element of aiding and abetting to scale upward to a ‘knowing’ or full scienter requirement eliminating the constructive knowledge in the form of recklessness and ‘should have known,’ which had previously sufficed in some cases” and (2) “will require the third element of aiding and abetting to scale upward to require the SEC to prove that the actions and/or inactions of the alleged aider and abettor were a substantial proximate causal factor of the primary violation and loss.”<sup>83</sup> They also incorporated these predictions into the 1997 update to their treatise.<sup>84</sup>

In 2002, in the wake of various corporate scandals, Congress enacted the Sarbanes-Oxley Act.<sup>85</sup> Although Sarbanes-Oxley did not modify the aiding and abetting standard for § 10(b) and Rule 10b-5 violations by attorneys, it codified the role of attorneys as “gatekeepers” by directing the SEC to issue rules that (1) require “an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof),” and (2) require the attorney, “if the counsel or officer does not appropriately respond to the evidence,” to “report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly

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79. ALAN R. BROMBERG & LEWIS D. LOWENFELS, 3 BROMBERG & LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 8.5(608) (2d ed. 1997).

80. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737 (codified in 15 U.S.C. § 78t(e)).

81. Lewis D. Lowenfels & Alan R. Bromberg, *A New Standard for Aiders and Abettors Under the Private Securities Litigation Reform Act of 1995*, 52 BUS. LAW. 1 (1996) [hereinafter Lowenfels, *A New Standard*].

82. Bromberg, *Aiding*, *supra* note 66, at 668-739.

83. Lowenfels, *A New Standard*, *supra* note 81, at 11-12.

84. ALAN R. BROMBERG & LEWIS D. LOWENFELS, 3 BROMBERG & LOWENFELS ON SECURITIES FRAUD § 8.5(612) (2d ed. 1997).

85. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

or indirectly by the issuer, or to the board of directors.”<sup>86</sup>

In response, in 2006, Professor Bromberg, Mr. Lowenfels, and Mr. Sullivan co-authored another article, titled *Attorneys As Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley* and published in the *University of Toledo Law Review*.<sup>87</sup> They argued that, “during the post-Sarbanes-Oxley era, the SEC has initiated actions against lawyers for activities which would never have been sanctioned pre-Sarbanes-Oxley.”<sup>88</sup> As one example, they cited SEC enforcement actions against attorneys for “relatively minor participation in filing an allegedly misleading Form 12b-25.”<sup>89</sup> In addition, they incorporated into their treatise a discussion of the impact of Sarbanes-Oxley on the aggressiveness of SEC enforcement against attorneys.<sup>90</sup>

Finally, in 2010, in response to the upward scaling effect of § 20’s “knowingly” language, which Professor Bromberg and Mr. Lowenfels had identified in their 1996 article, Congress again amended the statute. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 expressly extended the SEC’s enforcement authority to aiders and abettors who act “recklessly.”<sup>91</sup>

In sum, as exemplified through their extensive scholarly contributions on aiding and abetting liability under Rule 10b-5, Professor Bromberg and his co-authors’ treatise has served both as a springboard for other scholarly work and as a beneficiary of their insights developed in other scholarly fora.

## VI. CONCLUSION

In closing, this essay argues that Professor Bromberg and his co-authors’ treatise on securities fraud exemplifies the important role that treatises can still play within legal scholarship and, drawing therefrom, identifies key attributes of impactful treatises to guide other scholars who wish to emulate their contributions. On a personal note, as a graduate of SMU Dedman School of Law who respected Professor Bromberg as a faculty member, and as a junior scholar who seeks to build an impactful body of scholarship, I am inspired by Professor Bromberg’s lasting scholarly contributions to the understanding and evolution of the dynamic area of securities fraud.

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86. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (codified in 15 U.S.C. § 7245).

87. Lewis D. Lowenfels, Alan R. Bromberg & Michael J. Sullivan, *Attorneys As Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. TOLEDO L. REV. 877 (2006).

88. *Id.* at 930.

89. *Id.* at 929.

90. ALAN R. BROMBERG ET AL., 5 BROMBERG & LOWENFELS ON SECURITIES FRAUD § 7:395:10 (2d ed. 2014) (“The ushering in of what appears to be a new era of the SEC as active and enthusiastic proponent of the ‘gatekeeping’ role of attorneys, raises serious questions.”).

91. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 929O, 124 Stat. 1376 (2010).