

# Table of Contents

About the Authors . . . . .	vii
Preface . . . . .	viii
Disk Instructions . . . . .	xi

## CHAPTER 1

### General Pleading Requirements Under the Securities Act of 1933 and the Securities Exchange Act of 1934

A.	Pleading Subject Matter Jurisdiction . . . . .	1-1
1.	Under the Securities Act . . . . .	1-1
2.	Under the Exchange Act . . . . .	1-3
3.	Transnational Securities Fraud Claims . . . . .	1-5
B.	Pleading Venue . . . . .	1-9
1.	Under the Securities Act . . . . .	1-9
2.	Under the Exchange Act . . . . .	1-10
C.	Pleading Personal Jurisdiction . . . . .	1-13
D.	Pleading Fraud with Particularity . . . . .	1-15
1.	Rule 9(b) . . . . .	1-15
2.	Pleading Scienter Under the Reform Act . . . . .	1-18
a.	The Reform Act’s Legislative History Regarding Whether Congress Intended to Adopt the Second Circuit’s Pleading Standard . . . . .	1-19
b.	The Securities Litigation Uniform Standards Act’s Legislative History Regarding Whether Congress Intended to Adopt the Second Circuit’s Pleading Standard . . . . .	1-22
c.	Pleading a “Strong Inference” of Scienter—The Supreme Court’s <i>Tellabs</i> Decision . . . . .	1-23
d.	Circuit Court Decisions Regarding the Reform Act’s Pleading Standard . . . . .	1-24.3
3.	Group Pleading . . . . .	1-32
4.	Pleading on Information and Belief . . . . .	1-33
E.	Definition of a “Security” for Purposes of Pleading the Existence of a Security . . . . .	1-36

CHAPTER 2

The Private Securities Litigation Reform Act of 1995

A.	Safe Harbor Provision for Forward-Looking Statements . . . . .	2-1
1.	The SEC Safe Harbor . . . . .	2-2
2.	The Bespeaks Caution Doctrine . . . . .	2-3
3.	The Reform Act’s Safe Harbor . . . . .	2-8
B.	Loss Causation Limitation on Damages and Proportionate Liability . . . . .	2-14
1.	Loss Causation . . . . .	2-15
2.	The Implications of <i>Dura Pharmaceuticals Inc. v. Broudo</i> . . . . .	2-15
3.	Limitation on Damages . . . . .	2-17
a.	<i>The Exchange Act</i> . . . . .	2-17
b.	<i>Section 12 of the Securities Act</i> . . . . .	2-18
4.	Proportionate Liability . . . . .	2-18
5.	Effect of Settlement on Damages . . . . .	2-120
C.	Management of Class Actions . . . . .	2-20.1
1.	Appointing Lead Plaintiff . . . . .	2-20.1
2.	Restricting Professional Plaintiffs . . . . .	2-24
3.	Selecting Lead Counsel . . . . .	2-25
4.	Settling Class Actions . . . . .	2-27
5.	The Securities Litigation Uniform Standards Act of 1998 . . . . .	2-27
D.	Heightened Pleading Standard . . . . .	2-28
E.	Stay of Proceedings . . . . .	2-29
F.	Sanctions for Meritless Claims . . . . .	2-31
G.	Aiding and Abetting . . . . .	2-33
H.	Elimination of Securities Fraud as a Predicate for RICO Liability . . . . .	2-33
I.	Auditor Disclosure of Corporate Fraud . . . . .	2-34
1.	Audit Requirements . . . . .	2-34
2.	Reporting Requirements . . . . .	2-34
3.	Revised Regulations . . . . .	2-35
4.	Liability . . . . .	2-36

CHAPTER 3

Section 11 of the Securities Act: Civil Liability Arising from  
Misstatements or Omissions in Registration Statements

A.	The Statute . . . . .	3-1
----	-----------------------	-----

TABLE OF CONTENTS

B.	Elements of a Violation . . . . .	3-2
	1. Untrue or Misleading Material Statement of Fact or the Failure to State a Material Fact . . . . .	3-2
	2. Scienter, Reliance, and Causation . . . . .	3-4
C.	Statute of Limitations . . . . .	3-6
D.	Persons Who May Sue . . . . .	3-7
E.	Persons Who Are Liable . . . . .	3-11
F.	Statutory Defenses . . . . .	3-13
	1. Plaintiff’s Knowledge . . . . .	3-13
	2. Defendant’s Resignation . . . . .	3-14
	3. Registration Statement Becomes Effective Without Defendant’s Knowledge . . . . .	3-14
	4. Due Diligence . . . . .	3-14
	a. Reasonable Grounds . . . . .	3-15
	b. “Expertising” Portions of the Registration Statement . . . . .	3-17
	5. Negative Causation . . . . .	3-17
G.	Damages . . . . .	3-18

CHAPTER 4

Section 12(a)(1) of the Securities Act: Civil Liability Arising from  
Violation of the Registration and Prospectus Provisions

A.	The Statute . . . . .	4-1
B.	Elements of a Violation . . . . .	4-3
	1. Offer or Sale of a Security by a Person . . . . .	4-3
	2. Violation of Section 5 . . . . .	4-4
	a. Illegal Sales under Section 5(a)(1) . . . . .	4-5
	b. Illegal Deliveries of Securities and Prospectuses under Sections 5(a)(2) and 5(b) . . . . .	4-6
	c. Illegal Offers under Section 5(c) . . . . .	4-6
	3. Use of Interstate Commerce or the Mails . . . . .	4-7
C.	Statute of Limitations . . . . .	4-8
D.	Persons Who May Sue . . . . .	4-11
E.	Persons Who Are Liable . . . . .	4-12
	1. Primary Liability . . . . .	4-12
	2. Secondary Liability . . . . .	4-14

FEDERAL SECURITIES LITIGATION

F.	Damages . . . . .	4-15
1.	Rescission . . . . .	4-15
2.	Monetary Damages . . . . .	4-17
G.	Defenses . . . . .	4-17
1.	Lack of Violation of Section 5 . . . . .	4-17
2.	Exceptions and Exemptions to Section 5 . . . . .	4-18
3.	<i>In Pari Delicto</i> . . . . .	4-19
H.	Right to a Jury Trial . . . . .	4-21

CHAPTER 5

Section 12(a)(2) of the Securities Act: Civil Liability Arising in Connection with Offers or Sales of Securities by Means of False or Misleading Prospectuses or Communications

A.	The Statute . . . . .	5-1
B.	Elements of a Violation . . . . .	5-3
1.	Offer or Sale of a Security by a Person . . . . .	5-4
2.	Use of Any Means of Interstate Commerce . . . . .	5-4
3.	Through a Prospectus or Oral Communication . . . . .	5-6
4.	Untrue or Materially Misleading Statement (and Plaintiff's Lack of Knowledge Thereof) . . . . .	5-12
5.	Privity between Buyer and Seller . . . . .	5-16
C.	Statute of Limitations . . . . .	5-16
D.	Persons Who May Sue . . . . .	5-18
E.	Persons Who Are Liable . . . . .	5-19
1.	Primary Liability . . . . .	5-19
2.	Secondary Liability . . . . .	5-22
F.	Damages . . . . .	5-23
1.	Rescission . . . . .	5-23
2.	Monetary Damages . . . . .	5-25
G.	Statutory Defenses . . . . .	5-26
1.	Tender of Securities . . . . .	5-26
2.	Ignorance of Untruth or Omission and the Due Diligence Defense . . . . .	5-26
3.	Loss Causation . . . . .	5-29
4.	The Reform Act's Safe Harbor for Forward-Looking Statements . . . . .	5-29
H.	Right to Jury Trial . . . . .	5-29

TABLE OF CONTENTS

CHAPTER 6

Section 10(b) of the Exchange Act: Fraud in the Purchase or Sale of Securities

A.	The Statute . . . . .	4-1
B.	Elements of a Cause of Action . . . . .	6-3
	1. Misrepresentation or Omission . . . . .	6-3
	2. Material Fact . . . . .	6-6
	a. Statements that Bespeak Caution . . . . .	6-7
	b. Characterizations . . . . .	6-9
	c. Firm-Specific Information . . . . .	6-9
	d. Mismanagement Claims . . . . .	6-10
	e. Merger Negotiations . . . . .	6-11
	3. Scienter . . . . .	6-13
	4. Causation and Reliance . . . . .	6-14
	a. Reliance on Affirmative Misrepresentations . . . . .	6-17
	b. Fraud on the Market . . . . .	6-17
	c. Omission Cases . . . . .	6-19
	d. Loss Causation . . . . .	6-20
C.	Statute of Limitations . . . . .	6-22
D.	Persons Who May Sue . . . . .	6-25
	1. Purchaser or Seller Requiremen . . . . .	6-25
	2. “In Connection With” Requirement . . . . .	6-27
	3. SLUSA and Its Enactment . . . . .	6-27
E.	Persons Who Are Liable . . . . .	6-29
	1. Central Bank . . . . .	6-29
	2. Scheme Liability . . . . .	6-34
F.	Insider Trading . . . . .	6-34
	1. Theories of Duty . . . . .	6-34
	a. The Classic Theory of Insider Trading . . . . .	6-35
	b. The Misappropriation Theory of Insider Trading . . . . .	6-36
	c. Non-Business Relationships That Give Rise to a Duty . . . . .	6-36.2
	2. The “On the Basis of” Requirement . . . . .	6-37
	3. Standing to Bring a Private Civil Action—Section 20A of the Exchange Act . . . . .	6-38
G.	Statutory Defenses . . . . .	6-39
	1. <i>In Pari Delicto</i> . . . . .	6-40
	2. Due Diligence . . . . .	6-41

## FEDERAL SECURITIES LITIGATION

H.	Damages	6-42
1.	Rescission	6-42
2.	Out of Pocket and Benefit of the Bargain	6-43
3.	Effect of the Reform Act on Damages Calculations	6-44
4.	Apportionment of Damages	6-45
a.	<i>Joint and Several Liability vs. Comparative Fault</i>	6-45
b.	<i>Contribution Claims</i>	6-46
c.	<i>Impact on Non-Settling Defendants</i>	6-48
I.	Right to a Jury Trial	6-48.1

### CHAPTER 7

#### Section 14(a) of the Exchange Act: Proxy Litigation

A.	The Statute	7-1
B.	Elements of a Violation	7-3
1.	Misrepresentation or Omission	7-3
2.	Material Fact	7-5
a.	Allegations of Undisclosed Motivation	7-7
b.	Allegations of Director Misconduct	7-8
c.	Allegations of Conflict of Interest	7-9
3.	Standard of Culpability	7-10
4.	Causation	7-12
5.	Damages and Injunctive Relief	7-15
a.	Damages	7-15
b.	Injunctive Relief	7-16
C.	Statute of Limitations	7-18
D.	Persons Who May Sue	7-19
E.	Persons Who Are Liable	7-23
F.	Shareholder Proposals	7-24
G.	Right to a Jury Trial	7-25

### CHAPTER 8

#### Sections 13 and 14 of the Exchange Act: The Williams Act: Tender Offer Litigation

A.	The Statute	8-1
B.	Section 13(d) Claims	8-6
1.	Control Intent Claims	8-7

## TABLE OF CONTENTS

2.	Funding Claims .....	8-10
3.	Identity and Background Claims .....	8-11
4.	Undisclosed Group Claims .....	8-12
5.	Remedies .....	8-13
C.	Tender Offer Claims .....	8-16
1.	The Unannounced Tender Offer .....	8-17
2.	Actions by the Target .....	8-20
a.	The Bidder's Purpose .....	8-20
b.	Undisclosed Bidders .....	8-21
c.	Bidder's Financial Information .....	8-22
d.	Background and Integrity Claims .....	8-23
e.	Margin Violations .....	8-24
f.	Bidder's Misuse of Confidential Information .....	8-26
3.	Actions by Raiders .....	8-29
4.	Actions by Shareholders .....	8-30

## CHAPTER 9

### Section 16 of the Exchange Act: Short-Swing Profits

A.	The Statute .....	9-1
B.	Elements of a Violation .....	9-2
1.	Strict Liability .....	9-2
2.	Status as a Statutory Insider .....	9-3
a.	Ten Percent Beneficial Owner .....	9-3
b.	Director .....	9-4
c.	Officer .....	9-4
3.	Equity Securities .....	9-5
4.	Purchase and Sale within a Six-Month Period .....	9-5
5.	Exempt Transactions .....	9-6
a.	Statutory Exemptions .....	9-6
b.	Unorthodox Transactions .....	9-6
c.	Fiduciaries .....	9-8
d.	Market Makers and Odd-Lot Dealers .....	9-8
e.	Underwriters .....	9-8
f.	Arbitrage .....	9-8
C.	Damages .....	9-9

## FEDERAL SECURITIES LITIGATION

D.	Standing .....	9-10
E.	Attorney's Fees .....	9-11
F.	Statute of Limitations .....	9-12

### CHAPTER 10

#### Section 18 of the Exchange Act: Liability for False Filings

A.	The Statute .....	10-1
B.	Elements of a Cause of Action .....	10-2
1.	Application, Report or Document Filed with the SEC .....	10-2
2.	False Statements .....	10-3
3.	Purchase or Sale in Reliance on the Filing .....	10-3
C.	Statute of Limitations .....	10-4
D.	Persons Who May Sue .....	10-5
E.	Persons Who Are Liable .....	10-5
F.	Statutory Defenses .....	10-6
G.	Right to a Jury Trial .....	10-6

### CHAPTER 11

#### Liability of Controlling Persons

A.	The Statutes .....	11-1
B.	Elements of a Violation .....	11-4
1.	Primary Liability .....	11-5
2.	Control .....	11-5
3.	Culpable Participation .....	11-6
C.	Statutory Affirmative Defenses .....	11-8
D.	Comparison with Common Law Tort of <i>Respondeat Superior</i> .....	11-11
E.	Statute of Limitations .....	11-14
F.	Persons Who May Sue .....	11-15
G.	Damages .....	11-16
H.	Right to a Jury Trial .....	11-16

### CHAPTER 12

#### Criminal Violations of the Securities Act of 1933 and the Securities Exchange Act of 1934

A.	The Exchange Act of 1934 .....	12-1
----	--------------------------------	------

TABLE OF CONTENTS

1.	The Statute .....	12-1
2.	Criminal Mens Rea for a Violation of the Exchange Act of 1934 .....	12-2
	a. The Meaning of “Willfully” .....	12-2
	b. The Meaning of “Willfully and Knowingly” ..	12-7
	c. The “Materiality” Standard .....	12-8
	d. Defense to Imprisonment for Violations of the Exchange Act: The “No Knowledge” Rule .....	12-9
B.	The Securities Act of 1933 .....	12-12
	1. The Statute .....	12-12
	2. The Meaning of “Willfully” under The Securities Act of 1933 .....	12-12
 CHAPTER 13		
The Sarbanes-Oxley Act of 2002		
A.	Extended Statute of Limitations for Securities Fraud Claims .....	13-1
	1. The Statute .....	13-2
	2. Claims to Which Section 804 Applies .....	13-2
	3. Notice .....	13-4
	4. Retroactivity of Section 804 .....	13-5
B.	Section 806—Whistleblower Protection Claims .....	13-13
	1. Statute .....	13-13
	2. Exhaustion of Administrative Rights .....	13-14
	3. Arbitration of Whistleblower Claims and Section 806 .....	13-16
C.	Section 306—Claims to Redress Insider Trading During Blackout Periods .....	13-17
D.	Implied Private Rights of Action .....	13-18
 Appendix A		
Complaint alleging violation of Sections 11 and 12(a)(2) of the Securities Act .....		APP A-1
 Appendix A1		
Answer to the Complaint in Appendix A .....		APP A1-1
 Appendix B		
Complaint alleging violation of Sections 10(b) and 20(a) of the Exchange Act and Sections 11, 12(a)(2), and 15 of the Securities Act .....		APP B-1
 Appendix B1		
Answer by Underwriter Defendant to Complaint in Appendix B ..		APP B1-1

FEDERAL SECURITIES LITIGATION

Appendix C	
Consolidated class action complaint alleging violation of Sections 11, 12(a)(2), and 15 of the Securities Act and Sections 10(b) and 20(a) of the Exchange Act . . . . .	APP C-1
Appendix C1	
Answer by the Underwriter Defendants to Complaint in Appendix C . . . . .	APP C1-1
Appendix C2	
Answer by the Individual and Corporate Defendants to Complaint in Appendix C . . . . .	APP C2-1
Appendix C3	
Answer by the Individual Defendant to Complaint in Appendix C . . . . .	APP C3-1
Appendix D	
Complaint alleging violation of Section 12(a)(1) of the Securities Act . . . . .	APP D-1
Appendix E	
Complaint alleging violation of Sections 10(b) and 20(a) of the Exchange Act . . . . .	APP E-1
Appendix E1	
Answer to Complaint in Appendix E . . . . .	APP E1-1
Appendix F	
Complaint alleging violation of Section 14(a) of the Exchange Act . . . . .	APP F-1
Appendix G	
Complaint alleging violation of Sections 14(d) and (e) of the Exchange Act . . . . .	APP G-1
Appendix G1	
Complaint alleging violation of Section 13(d) and 14(e) of the Exchange Act . . . . .	APP G1-1
Appendix H	
Complaint alleging violation of Section 16(b) of the Exchange Act . . . . .	APP H-1
Appendix H1	
Answer by Issuer to Complaint in Appendix H . . . . .	APP H1-1
Appendix H2	
Answer by Shareholder to Complaint in Appendix H . . . . .	APP H2-1
Appendix I	
Complaint alleging violation of Section 18 of the Exchange Act . . . . .	APP I-1

TABLE OF CONTENTS

Securities Exchange Act of 1934: Cumulative Table . . . . .	INDEX-1
Securities Act of 1933: Cumulative Table . . . . .	INDEX-3
Table of Cases . . . . .	INDEX-5
Subject Index . . . . .	INDEX-56
Forms Index . . . . .	INDEX-68