Securities Litigation
A Practitioner’s Guide
Gibson, Dunn & Crutcher LLP
(Edited by Jonathan C. Dickey)

This eighth annual update of Securities Litigation keeps you current with the latest developments in the field of securities and trends in the case law as the landscape of securities class action litigation continues to be reshaped by the dramatic evolution of capital markets and significantly enhanced regulatory scrutiny, and as the risks of shareholder litigation, SEC enforcement actions, and other parallel proceedings remain. Expanded and updated coverage in this seventh supplement includes:

Fraud-on-the-Market Presumption and “Halliburton II.” In a unanimous decision, the U.S. Supreme Court in Halliburton Co. v. Erica P. John Fund, Inc. issued its watershed ruling upholding the fraud-on-the-market doctrine first established in Basic Inc. v. Levinson, but for the first time articulated a new “price impact” test in connection with class certification under Rule 23 of the Federal Rules of Civil Procedure. The Court expressly held that defendants may rebut the presumption of reliance by introducing direct evidence at the class certification stage that an allegedly misleading statement did not have any material impact on the price of the security. This ruling is expected to have a profound impact on the litigation of securities class action in the years to come. See §§ 1:1.1, 2:2.2[A][1][d], 7:3.2–7:3.3, and 18:2.4.

The “Moench Presumption.” In a unanimous decision, the Supreme Court in Fifth Third Bancorp v. Dudenhoeffer held that there is nothing in ERISA to support “a special presumption” favoring fiduciaries of 401(k) plans that offer company stock as an investment option. See §§ 16:1, 16:2.1, 16:4.1[C], and 16:4.2[A].

Extra-Territorial Application of U.S. Securities Laws. In City of Pontiac Policemen’s & Firemen’s Retirement System v. UBS AG, the Second Circuit held that even when a foreign security is cross-listed on a domestic exchange, the purchase of that security on a foreign exchange is not a domestic transaction. This was true despite some plaintiffs having executed their purchases by submitting buy orders in the United States because the submission of buy orders did not itself establish irrevocable liability. See §§ 2:2.2[A][6], 3:13, 7:7, and 18:2.1 for further discussion of City of Pontiac, as well as how Morrison and Dodd-Frank bear on issues related to extra-territoriality.

(continued on reverse)
SLUSA. Contributing author Robert E. Palmer has extensively revised and updated chapter 17’s coverage. Among the scores of recent pertinent cases covered is the U.S. Supreme Court’s important 2014 decision in Chadbourne Park LLP v. Troice, which required the Court to further define the scope of the phrase “misrepresentation or omission in connection with the purchase of a covered security.” See new § 17:2.1[E][4].

Credit Crisis Securities Litigation and Enforcement. Contributing author Jennifer H. Rearden has significantly revised and rewritten chapter 18. Her new distilled and streamlined coverage looks at the various categories of credit crisis–related litigation, examines the related issues, devotes special attention to the prominence of monoline insurance company litigation, and reports on the most current trends in state and federal enforcement.

Statute of Repose. Addressing the unsettled question of whether American Pipe tolling extends to the three-year statute of repose in section 13, the Second Circuit concluded that it does not. The Supreme Court has issued certiorari to review the decision. See § 2:1.1[I]. See also new §§ 10:2.3[G] and 18:2.2.

Forward-Looking Statements: Disclosing Known Facts Regarding Risk. In two separate cases decided just weeks apart, two different judges on the same Nevada court recently issued contradictory holdings regarding the importance of the speaker’s state of mind when it comes to determining the meaningfulness of cautionary language in a forward-looking statement. See § 6:4.1[C].

Loss Causation and Damages. Chapter 8’s updated coverage includes discussions of a 2014 Eleventh Circuit case considering the “leakage” theory of loss causation (§ 8:4.3[A][2]), and a Fourth Circuit case addressing whether the disclosure of a government investigation standing alone is a sufficient “revelation of the truth” to plead loss causation under the corrective disclosure theory (§ 8:4.3[C]).

Court Scrutiny of Proposed Settlement Class. Recent securities class action settlements have rarely been disapproved on fairness grounds, and it is often thought that federal district courts tend to rubber-stamp the parties’ proposed stipulated settlement class. New § 13:2.1[A] looks at one recent case in which the district court rejected the proposed settlement for failing to show that the section 10(b) reliance element was satisfied.

Indemnification and D&O Insurance. Chapter 14’s coverage has been significantly updated and expanded with several new and lengthy discussions of recent decisions addressing important issues such as: the standard of review applicable to a merger and how it impacts the standard for determining whether directors are entitled to exculpation under a section 102(b)(7) provision in a company charter (§ 14:1.2); advancement of defense costs, in a 2014 Third Circuit case that reversed the lower court’s summary judgment order granting a computer programmer with the title “vice president” the right to advancement of his legal expenses as an officer, concluding that the term “officer” as used in the company’s bylaws was ambiguous, making summary judgment inappropriate (§ 14:1.3[A]); mandatory indemnification and partial successes (new § 14:1.4[C]); whether a subpoena issued in connection with a grand jury investigations and related expenses incurred constitute a “claim” (§ 14:2.2[A]); timeliness of reporting of claims (§ 14:2.8[B]).

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