Preface and Acknowledgments .................................................... vii
About the Contributors .......................................................... ix
Table of Chapters ..................................................................... xxiii

Chapter 1  Introduction
Jonathan C. Dickey

§ 1:1 The Changing Landscape of Securities Litigation ............. 1-1
§ 1:1.1 Judicial Decisions .................................................... 1-1
§ 1:1.2 Impact of New SEC Initiatives on Private Securities Litigation ............................................. 1-5
§ 1:2 Future Outlook ............................................................. 1-7

Chapter 2  Basic Claims Under the Federal Securities Laws
Robert F. Serio & Aric H. Wu

§ 2:1 Securities Act of 1933 .................................................... 2-4
§ 2:1.1 Section 11 .............................................................. 2-4
[A] Standing ..................................................................... 2-5
[B] Who May Be Sued ..................................................... 2-7
[C] Elements ................................................................. 2-7
[D] Damages ................................................................. 2-9
[E] Defenses—Purchaser’s Knowledge of Untruth or Omission .................................................. 2-9
[F] Defenses—Due Diligence ............................................. 2-10
[G] Defenses—Resignation and Notice ........................... 2-10
[H] Defenses—Loss Causation ......................................... 2-10
[I] Statute of Limitations and Statute of Repose ............ 2-11
§ 2:1.2 Section 12(a)(1) ...................................................... 2-12
[A] Who May Be Sued ..................................................... 2-12
[B] Elements ................................................................. 2-13
[C] Remedies ............................................................... 2-14
[D] Defenses ............................................................... 2-14
[E] Statute of Limitations and Statute of Repose ............ 2-14

(Securities Litig., Rel. #8, 9/14)  XXV
§ 2:1.3  Section 12(a)(2) ...................................................... 2-15
[A]  Standing ............................................................... 2-15
[B]  Who May Be Sued .................................................. 2-15
[C]  Elements ............................................................. 2-16
[D]  Remedies ............................................................. 2-17
[E]  Defenses—Seller’s Due Diligence .......................... 2-17
[F]  Defenses—Loss Causation ....................................... 2-17
[G]  Statute of Limitations and Statute of Repose ........ 2-17

§ 2:1.4  Section 15............................................................ 2-18
[A]  Private Right of Action Against Control Persons .... 2-18
[B]  Elements ............................................................. 2-18
[B][1]  Primary Violation by Controlled Person ............. 2-19
[B][2]  Control Over Controlled Person ....................... 2-19
[B][3]  Culpable Participation of Control Person .......... 2-20
[C]  Defenses—Good Faith ......................................... 2-21
[D]  Statute of Limitations and Statute of Repose ......... 2-21

§ 2:2  Securities Exchange Act of 1934................................... 2-22
§ 2:2.1  Express Causes of Action....................................... 2-22
[A]  Section 9(e) .......................................................... 2-22
[A][1]  Standing .......................................................... 2-22
[A][2]  Elements .......................................................... 2-22
[A][2][a]  Section 9(a) .................................................. 2-23
[A][2][b]  Sections 9(b) and 9(e) ................................... 2-24
[A][3]  Statute of Limitations and Statute of Repose ...... 2-24
[B]  Section 16(b) ........................................................ 2-24
[B][1]  Elements .......................................................... 2-25
[B][1][a]  Insiders Subject to Liability ......................... 2-26
[B][1][b]  Purchase or Sale of Non-Exempt Security ...... 2-27
[B][1][c]  Short-Swing Period ....................................... 2-28
[B][1][d]  Profit ............................................................ 2-28
[B][2]  Strict Liability .................................................. 2-29
[B][3]  Limitations Period ............................................. 2-29
[C]  Section 18(a) ........................................................ 2-30
[C][1]  Standing .......................................................... 2-30
[C][2]  Elements .......................................................... 2-31
[C][2][a]  False or Misleading Statement ...................... 2-31
[C][2][b]  “Filed” Document ........................................ 2-31
[C][2][c]  Reliance ......................................................... 2-32
[C][2][d]  Causation ......................................................... 2-32
[C][3]  Pleading Standards ............................................. 2-32
[C][3][a]  Rule 9[b] ....................................................... 2-32
[C][3][b]  PSLRA ............................................................ 2-33
[C][4]  Good-Faith Defense ............................................ 2-33
[C][5]  Statute of Limitations and Statute of Repose ...... 2-33
Table of Contents

[D] Section 20(a) .......................................................... 2-34
[D][1] Elements .......................................................... 2-34
[D][1][a] Primary Violation by Controlled Person........... 2-35
[D][1][b] Control Over Controlled Person....................... 2-35
[D][1][c] Culpable Participation of Control Person............ 2-36
[D][2] Defenses—Good Faith........................................ 2-36
[D][3] Statute of Limitations and Statute of Repose......... 2-37
§ 2:2.2 Implied Causes of Action ................................... 2-37
[A] Section 10(b)/Rule 10b-5 ........................................ 2-37
[A][1] Misstatement or Omission Claim Under Rule 10b-5(b) ........................................................................ 2-38
[A][1][a] Misstatement or Omission of Material Fact....... 2-39
[A][1][b] In Connection with Purchase or Sale of Security ............................................................. 2-40
[A][1][c] Sciente ......... 2-41
[A][1][d] Reliance ............................................................ 2-42
[A][1][e] Loss Causation ................................................. 2-44
[A][2] Market Manipulation Claim Under Rule 10b-5(a) or (c) ............................................................. 2-45
[A][3] No Private Right of Action for Aiding and Abetting a Section 10(b) Violation ...................... 2-47
[A][4] Damages .................................................................. 2-50
[A][5] Statute of Limitations and Statute of Repose .... 2-52
[A][6] No Extraterritorial Application ........................... 2-53
[B] Section 13(d) .......................................................... 2-54
[B][1] Standing .............................................................. 2-55
[B][2] Elements .................................................................. 2-56
[B][3] Remedies .................................................................. 2-56
[B][4] Defenses—Mootness ........................................... 2-57
[C] Section 14(a)/Rule 14a-9 ........................................ 2-58
[C][1] Standing .............................................................. 2-59
[C][2] Elements .................................................................. 2-61
[C][2][a] Falsity .................................................................. 2-62
[C][2][b] Materiality ........................................................ 2-62
[C][2][c] State of Mind .................................................... 2-64
[C][2][d] Causation ............................................................ 2-65
[C][3] Damages .................................................................. 2-66
[C][4] Statute of Limitations and Statute of Repose .... 2-66
[D] Section 14(e) .......................................................... 2-66
[D][1] Purpose .................................................................. 2-67
[D][2] Scope of Implied Cause of Action ....................... 2-68
[D][3] Elements .................................................................. 2-69
[D][3][a] Materiality ........................................................ 2-69
[D][3][b] State of Mind .................................................... 2-69
[D][3][c] Detrimental Reliance ........................................ 2-70
[D][4] Statute of Limitations and Statute of Repose .... 2-71
Chapter 3  Pleading Standards

Paul J. Collins & Ethan D. Dettmer

§ 3:1  Pleading Standards Applicable to Claims
Under the Securities Act of 1933 and the
Securities Exchange Act of 1934.............................. 3-3

§ 3:1.1  “Notice Pleading” Under Rule 8 of the
Federal Rules of Civil Procedure ......................... 3-4
Table of Contents

[A] The Supreme Court’s *Twombly/Iqbal* Decisions.................. 3-4
[B] Effect of *Twombly/Iqbal* on Securities Litigation
   Pleading ........................................................................ 3-6
§ 3:1.2 Pleading Fraud Under Rule 9(b) of the
   Federal Rules of Civil Procedure ................................... 3-6
§ 3:1.3 Pleading Fraud Under the PSLRA............................... 3-10
§ 3:2 Pleading Falsity............................................................ 3-10
§ 3:2.1 Statutory Requirement............................................. 3-10
§ 3:2.2 Fraud-by-Hindsight Allegations ............................... 3-11
§ 3:2.3 “Known Trends or Uncertainties” ............................. 3-13
§ 3:2.4 “Temporal Proximity” ............................................. 3-18
§ 3:2.5 The “Contemporaneous Inconsistent Facts”
   Standard.......................................................................... 3-19
§ 3:2.6 Statements of Opinion............................................. 3-22
§ 3:3 Pleading Scienter Generally ......................................... 3-26
§ 3:3.1 The PSLRA’s “Strong Inference”
   Pleading Standard Under *Tellabs* ................................. 3-26
§ 3:3.2 Pleading Recklessness Under *Tellabs* ....................... 3-27
§ 3:3.3 “Access to Information” Allegations .......................... 3-30
§ 3:3.4 Pleading Scienter Through “Motive and
   Opportunity” Allegations.............................................. 3-31
[A] Insider Trading Allegations ......................................... 3-32
[B] Performance-Based Incentives ...................................... 3-34
[C] Professional Fees Allegations ....................................... 3-35
[D] Mergers and Acquisitions Allegations ......................... 3-36
§ 3:3.5 Pleading Scienter in Accounting Fraud and
   Restatement Cases........................................................ 3-38
[A] Pleading Scienter Based upon Failure to
   Comply with GAAP, GAAS, and Internal
   Company Policies ............................................................ 3-39
[B] Ignoring “Red Flags” or Failing to Monitor ...................... 3-42
[C] Inferring Knowledge Based upon a Person’s
   Position in the Company.................................................. 3-43
[D] Knowledge of or Access to Contradictory
   Information........................................................................ 3-46
§ 3:3.6 Pleading Scienter Based on Government and
   Internal Investigations.................................................... 3-47
§ 3:3.7 The “Magnitude of the Fraud” Theory ....................... 3-49
§ 3:3.8 “Channel Stuffing” Allegations................................ 3-50
§ 3:3.9 Special Factors for Auditors..................................... 3-52
§ 3:4 Proper Defendants and Theories of Group Pleading........ 3-53
§ 3:4.1 *Central Bank, Stoneridge, and Janus Capital
   Group*............................................................................. 3-53
§ 3:4.2 Group Pleading After *Janus Capital Group*.............. 3-59
SECURITIES LITIGATION

§ 3:5 Pleading Fraud on “Information and Belief” .................. 3-62
§ 3:5.1 Statutory Requirement ............................................ 3-62
§ 3:5.2 What Is Information-and-Belief Pleading? ............... 3-62
§ 3:5.3 Pleading Information and Belief
Allegations—Confidential Witnesses and
Other Sources ........................................................ 3-63
§ 3:6 The Safe Harbor for Forward-Looking Statements ...... 3-72
§ 3:7 Pleading Materiality .................................................. 3-73
§ 3:7.1 Pleading Materiality Generally .............................. 3-73
§ 3:7.2 Vague Statements and Puffery ................................ 3-75
§ 3:7.3 The “Bespeaks Caution” Doctrine ......................... 3-79
§ 3:7.4 Merger Negotiations .............................................. 3-80
§ 3:8 Pleading Loss Causation After
Dura Pharmaceuticals .............................................. 3-83
§ 3:9 Pleading Primary Liability Under Rule 10b-5 ............ 3-85
§ 3:9.1 Primary Liability for Making False
Representations Under Rule 10b-5:
The Supreme Court's Janus Decision ............... 3-86
§ 3:9.2 Applying Janus .................................................. 3-88
§ 3:9.3 Scheme Liability ................................................ 3-92
§ 3:9.4 The Stoneridge Decision ...................................... 3-94
§ 3:9.5 Post-Stoneridge Decisions ................................. 3-99
§ 3:10 Pleading Issues Under Sections 11 and
12[a](2) of the Securities Act of 1933 .................... 3-101
§ 3:10.1 Causes of Action .............................................. 3-101
§ 3:10.2 Section 11 Claims ............................................ 3-103
[A] Tracing ..................................................................... 3-104
[B] Rule 144A and Private Offering Exemptions .......... 3-106
§ 3:10.3 Section 12[a](2) Claims ...................................... 3-108
[B] “Seller” Status Under Section 12[a](2) ................. 3-110
[C] Public Versus Private Offerings ......................... 3-111
§ 3:11 Section 20A of the Exchange Act of 1934 ............ 3-112
§ 3:12 Pleading “Control Person” Claims ......................... 3-114
§ 3:13 The Morrison Decision and Pleading Application of
U.S. Law ................................................................. 3-117
§ 3:14 Statute of Limitations Defenses ............................... 3-122
§ 3:14.1 Private Securities Fraud Actions ......................... 3-122
[A] Merck v Co. v. Reynolds ......................................... 3-123
[B] Open Questions After Merck ................................. 3-125
§ 3:14.2 Private Securities Actions Not Involving
Claims of Fraud ................................................... 3-128
§ 3:14.3 Securities Actions Brought by Federal Agencies .... 3-130
§ 3:15 Reliance on Facts Outside the Complaint ................ 3-131

xxx
Chapter 4  Automatic Stay of Discovery Under the PSLRA

Gareth T. Evans

§ 4:1  Introduction .............................................................. 4-2

§ 4:2  Policy Rationale .......................................................... 4-3

§ 4:2.1  Congressional Views Regarding
“Fishing Expedition” Discovery Abuses ....................... 4-3

§ 4:2.2  Preventing Plaintiffs from Circumventing the
Stay of Discovery .......................................................... 4-6

§ 4:3  Statutory Text ................................................................. 4-7

§ 4:3.1  Stay Pending Motion to Dismiss and Exceptions .... 4-7

§ 4:3.2  Preservation of Evidence and
Sanctions Provisions .................................................. 4-8

§ 4:3.3  Stay of Discovery in State Court Actions .......... 4-8

§ 4:3.4  Stay Pending Summary Judgment Motions
Based on PSLRA Safe Harbor .......................................... 4-9

§ 4:4  Applicability of Stay ........................................................ 4-9

§ 4:4.1  Before Motion to Dismiss Filed ................. 4-10

§ 4:4.2  Motions to Dismiss Amended Complaints .............. 4-12

§ 4:4.3  Motions for Reconsideration of Rulings on
Motions to Dismiss .......................................................... 4-14

§ 4:4.4  After Court Grants a Motion to Dismiss with
Leave to Amend Complaint .......................................... 4-14

§ 4:4.5  After Court Has Sustained Complaint As to
Some Defendants .......................................................... 4-15

§ 4:4.6  Motions for Judgment on the Pleadings .......... 4-16

§ 4:4.7  Motions for Summary Judgment Based on
PSLRA Safe Harbor ..................................................... 4-17

§ 4:4.8  Individual Claims Versus Class Claims ......... 4-18

§ 4:4.9  Shareholder Derivative Actions ......................... 4-19

§ 4:4.10  Non-Federal Securities Fraud Claims .............. 4-19

§ 4:4.11  Actions by Governmental Agencies .......... 4-22

§ 4:4.12  Third-Party Discovery ....................................... 4-22

§ 4:4.13  Initial Disclosures .................................................. 4-24

§ 4:4.14  Corporate Books and Records Demands .......... 4-24

§ 4:4.15  Other Proceedings ............................................... 4-26

§ 4:4.16  Actions in State Court ........................................... 4-27

§ 4:5  Exceptions to Automatic Stay ....................................... 4-30

§ 4:5.1  Particularized Discovery Requirement .......... 4-30

§ 4:5.2  Preservation of Evidence Exception ................. 4-34

[A]  Parties ................................................................. 4-35

[B]  Non-Parties ............................................................. 4-36

§ 4:5.3  Undue Prejudice Exception ........................................ 4-38

§ 4:6  Statutory Duty to Preserve ....................................... 4-43

(Securities Litig., Rel. #8, 9/14)  xxxi
Chapter 5  Lead Plaintiffs Under the PSLRA

Jennifer L. Conn

§ 5:1 Introduction.................................................................................. 5-1
§ 5:2 Procedure for Appointment of a Lead Plaintiff.................. 5-4
  § 5:2.1 Certification Requirement ........................................... 5-5
  § 5:2.2 Notice to Class Members .............................................. 5-5
  § 5:2.3 Motion for Appointment of Lead Plaintiff............... 5-7
§ 5:3 Determining the “Most Adequate” Plaintiff .................. 5-8
  § 5:3.1 Presumptive Lead Plaintiff ......................................... 5-9
  § 5:3.2 Appointment of a Shareholder Group
    As Lead Plaintiff ....................................................... 5-17
§ 5:4 Challenging Adequacy of Lead Plaintiff Applicants ...... 5-23
§ 5:5 Lead Plaintiff’s Recovery .................................................... 5-25
§ 5:6 Appointment of Lead Plaintiff’s Counsel .................. 5-26
§ 5:7 The Court’s Duty to Monitor Lead Plaintiffs and
    Their Counsel............................................................... 5-30

Chapter 6  The Safe Harbor Provision of the PSLRA for
Forward-Looking Statements

Daniel S. Floyd & Alexander K. Mircheff

§ 6:1 Overview and Statutory Framework ............................... 6-2
§ 6:2 Distinguishing Between the Two Prongs of the
  Safe Harbor........................................................................... 6-5
  § 6:2.1 The Second Prong: A Forward-Looking Statement
    Requires Actual Knowledge of Falsity to
    Be Actionable............................................................... 6-5
  § 6:2.2 First Prong Protection: Role of Issuers’
    State of Mind .................................................................. 6-9
    [A] Majority View: The Prongs Are Independent........ 6-10
    [B] Minority View: The Prongs Are Not
        Independent .......................................................... 6-15
§ 6:3 Determining Whether a Statement Is
  Forward-Looking ............................................................... 6-19
  § 6:3.1 Identifying Forward-Looking Statements
  Under the PSLRA ............................................................ 6-19
  § 6:3.2 Handling Mixed Statements of Historical
    Facts and Future Predictions ........................................ 6-22
    [A] Protection Where Truth or Falsity Cannot Be
        Determined Until After Statement Is Made .... 6-25
    [B] Mere Reference to Future Not Necessarily
        Determinative ......................................................... 6-26
Table of Contents

[C] Holistic Evaluation ................................................ 6-28
[D] Severing Forward-Looking Component from Present-Fact Component ................................. 6-31
[E] The Effect of Context and Presentation................. 6-33
§ 6:4 Deciding Whether the Statement Is Accompanied by Meaningful Cautionary Language .......................... 6-35
   § 6:4.1 Level of Specificity Required ....................... 6-36
   [A] Overview .......................................................... 6-36
   [B] Identifying the Precise Risk .............................. 6-44
   [C] Disclosing Known Facts Regarding Risk ............ 6-48
§ 6:4.2 What Does “Accompany” Mean? ...................... 6-50
   [A] Specific References to Cautionary Language in Readily Available Written Materials .................. 6-50
   [B] Cautionary Language Appearing in Readily Available Written Materials, Even If Not Specifically Referenced .......................................................... 6-51
   [C] Cautionary Language Appearing in the Same Document or Occurring on the Same Occasion As the Forward-Looking Statement.......................................................... 6-54
§ 6:5 Protection of Oral Forward-Looking Statements Accompanied by Meaningful Cautionary Language ...... 6-56
§ 6:6 Evaluation of Cautionary Statements at the Pleading Stage.............................................................. 6-59
§ 6:7 When Is a Statement Immaterial? ......................... 6-64

Chapter 7 Class Certification in Securities Cases

Mark A. Perry

§ 7:1 Rule 23 Requirements.................................................... 7-2
   § 7:1.1 Burden of Proof.................................................. 7-2
   § 7:1.2 Rule 23(a) Requirements .................................... 7-6
       [A] Numerosity ...................................................... 7-7
       [B] Commonality .................................................. 7-8
       [C] Typicality ...................................................... 7-8
       [D] Adequacy of Representation ................................ 7-11
       [E] Private Securities Litigation Reform Act of 1995 .... 7-12
   § 7:1.3 Rule 23(b) ........................................................ 7-14
§ 7:2 Application of Rule 23 Requirements to Actions Arising Under Sections 11, 12, and 15 of the 1933 Securities Act ................................................................. 7-16
   § 7:2.1 General Favorability of Class Certification ........ 7-17
   § 7:2.2 Shelf Registrations ............................................ 7-18

(Securities Litig., Rel. #8, 9/14) xxxiii
§ 7:3 Application of Rule 23 to Actions Arising
Under the Anti-Fraud Provisions of the
1934 Securities Exchange Act................................. 7-20
§ 7:3.1 Proving Reliance on a Class-Wide Basis:
The Fraud-on-the-Market Presumption................. 7-20
[A] Individual Reliance ........................................ 7-21
[B] "Efficient Market" Hypothesis ......................... 7-22
[C] Judicial Limits on the Presumption of Reliance..... 7-23
§ 7:3.2 Rethinking the Fraud-on-the-Market
Presumption................................................................ 7-26
§ 7:3.3 Rebutting the Presumption of Reliance .......... 7-27
§ 7:3.4 The Fraud-on-the-Market Presumption in
Non-Stock Markets.............................................. 7-30
[A] Debt Versus Equity Securities ......................... 7-30
[B] Private Offerings; Initial Public Offerings.......... 7-32
§ 7:4 Settlement Classes............................................. 7-33
§ 7:4.1 Certification Generally ................................ 7-33
§ 7:4.2 Requirements Under Rule 23 ....................... 7-34
[A] Fairness Hearing ............................................. 7-34
[B] Class Member Objections................................. 7-36
[C] Notice Requirements ....................................... 7-37
§ 7:5 Appeals of Class Certification Orders............... 7-38
§ 7:6 The Class Action Fairness Act of 2005............. 7-41
§ 7:6.1 CAFA's Federal Court Original Jurisdiction
Requirements and Removal Rules......................... 7-42
§ 7:6.2 Removal Bar Under the Securities Act of 1933... 7-43
§ 7:7 Class Action Issues Arising in F-Cubed Cases...... 7-44

Chapter 8 Loss Causation and Damages
George H. Brown
§ 8:1 Introduction and Overview................................. 8-2
§ 8:2 Securities Act Section 11—False Registration
Statements.......................................................... 8-3
§ 8:2.1 Standard of Liability ..................................... 8-3
§ 8:2.2 Statutory Damages Formula—Section 11{e}......... 8-5
§ 8:2.3 "Negative Causation" Defense......................... 8-8
§ 8:2.4 Other Limitations on Damages ...................... 8-11
§ 8:2.5 Awarding Costs........................................... 8-12
§ 8:2.6 Class Action Considerations ......................... 8-12
§ 8:3 Securities Act Section 12—Sale of Unregistered
Securities & Misleading Prospectus........................... 8-13
§ 8:3.1 Standard of Liability ..................................... 8-13
§ 8:3.2 Measure of Damages ..................................... 8-17
Table of Contents

§ 8:4 Exchange Act Section 10(b) .......................................................... 8-20
§ 8:4.1 Overview ............................................................................. 8-21
[A] Out-of-Pocket Measure ..................................................... 8-21
[B] Measuring Inflation ............................................................ 8-21
[C] Preliminary Estimates of Shares Purchased in the Class Period, and Sold or Held After the End of the Class Period .................................................. 8-22
[D] Limitations on Recoverable Damages .................................. 8-23
[E] Loss Causation .................................................................... 8-24
§ 8:4.2 The Supreme Court’s Opinion in Dura ............................. 8-24
§ 8:4.3 Pleading and Proving Loss Causation Following Dura ................................................................. 8-27
[A] Necessary Characteristics of a Corrective Disclosure ................................................................. 8-31
[A][1] Corrective Disclosure Must Reveal a Prior False or Misleading Statement .................................. 8-32
[A][2] Multiple Disclosures and “Leakage” Theories of Loss Causation ............................................. 8-46
[A][3] Plaintiffs Must Disentangle Multiple Factors Causing Stock Declines and Identify Which Portion Was Due to Dissipation of Fraud Induced Inflation ........................................... 8-50
[A][3][a] In-and-Out Traders .......................................................... 8-55
[B] “Materialization of Risk” Approach ................................. 8-58
[C] Disclosures by the Government or Third Parties .... 8-68
§ 8:4.4 Loss Causation’s Importance at Class Certification ................................................................. 8-71
§ 8:4.5 The PSLRA’s Loss Causation Requirement May Necessitate Proof of Loss Causation on a Statement-by-Statement Basis ................................................................. 8-72
§ 8:4.6 Measure of Damages Under Section 10(b) ...................... 8-74
[A] Out-of-Pocket Measure ..................................................... 8-78
[B] Benefit-of-the-Bargain Method ............................................ 8-81
[C] Rescission ........................................................................... 8-83
[D] Limitations on Damages ..................................................... 8-84
§ 8:4.7 Proving Damages ............................................................... 8-86
[A] The Daubert Test and Rule 702 of the Federal Rules of Evidence .................................................. 8-87
[B] Establishing the Number of Affected Shares .... 8-88
[C] Defining the Class Period ..................................................... 8-88
[D] Methods of Estimating the Number of Affected Shares ................................................................. 8-89
[E] Criticisms of and Refinements to the Proportional Trading Model ............................................. 8-92

(Securities Litig., Rel. #8, 9/14) XXXV
Chapter 9  Summary Judgment

Marshall R. King


§ 9:1.1 What Constitutes an Undisputed Material Fact

§ 9:1.2 Summary Judgment and Class Certification

§ 9:1.3 Summary Judgment and Extraterritoriality

§ 9:2  Summary Judgment Based on Failure of Proof That Allegedly False or Misleading Statements Were Made

§ 9:3  Summary Judgment Based on Scienter

§ 9:3.1 Inference of Scienter Based on Position in Company

§ 9:3.2 Collective Scienter

§ 9:3.3 Evidence Sufficient to Negate Issue of Fact As to Scienter

§ 9:3.4 Evidence Insufficient to Negate Issue of Fact As to Scienter

§ 9:4  Summary Judgment Based on Materiality

§ 9:4.1 Evidence Sufficient to Negate Issue of Fact As to Materiality

§ 9:4.2 Evidence Insufficient to Negate Issue of Fact As to Materiality

§ 9:5  Summary Judgment Based on the “Truth-on-the-Market” Defense

§ 9:5.1 Overview of Case Law

§ 9:5.2 Selected Evidentiary Issues for Establishing Truth-on-the-Market Defense

[A] Judicial Notice

[B] Hearsay and Exceptions

[C] Use of Experts

§ 9:5.3 Use of Rule 56(d) to Obtain Discovery Related to Truth-on-the-Market Defense

xxxvi
Table of Contents

§ 9:6 Summary Judgment Based on Loss Causation............. 9-42
§ 9:6.1 “Fraud-on-the-Market” Cases ................................................................. 9-42
[A] Content of the Corrective Disclosure ................................................................. 9-43
[B] Apportioning the Loss Among Multiple Potential Causes .......................................................... 9-50
§ 9:6.2 “Non-Traditional” Securities Fraud Cases .................... 9-54
§ 9:6.3 “Lost Opportunity” Cases................................................. 9-58
§ 9:8 Summary Judgment Regarding Deceptive Conduct ...... 9-60
§ 9:9 The “Due Diligence” Defense............................... 9-62
§ 9:9.1 The Relevant Standards......................................................... 9-62
§ 9:9.2 Escott v. BarChris Construction Corp. ...................... 9-63
§ 9:9.3 Subsequent Case Law ............................................................. 9-65
§ 9:9.4 Recent Case Law on Due Diligence Defense: The WorldCom Opinions ................................................. 9-68

Chapter 10 Defending Claims Under the Securities Act of 1933

Lee G. Dunst & Aric H. Wu

§ 10:1 Introduction................................................................. 10-2
§ 10:2 Defending Claims Under Section 11............................ 10-3
§ 10:2.1 Standing................................................................. 10-3
[A] Tracing .............................................................................. 10-3
[B] Class Standing ...................................................................... 10-6
§ 10:2.2 Who May Be Sued ................................................. 10-7
§ 10:2.3 Elements and Pleadings ............................................. 10-9
[A] Limited to Registration Statements .............................................. 10-9
[B] Misstatements or Omissions ........................................... 10-11
[C] Materiality ........................................................................ 10-13
[D] Reliance ........................................................................... 10-17
[E] No Economic Loss on the Face of the Pleadings................................. 10-17
[F] Heightened Pleading Requirements ........................................... 10-18
[F][1] Allegations of Fraud ......................................................... 10-18
[F][2] Statements of Opinion ....................................................... 10-19
[G] Timeliness ...................................................................... 10-21
§ 10:2.4 Affirmative Defenses to Section 11 Claims............ 10-22
[A] Plaintiff’s Knowledge of Misstatement or Omission at Time of Acquisition .............................................. 10-22
[B] Due Diligence .................................................................. 10-23
[B][1] Experts Versus Non-Experts .............................................. 10-24
[B][2] Reasonableness Standard Across Different Types of Defendants .............................................. 10-25
[B][2][a] Issuer .............................................................. 10-25
[B][2][b] Company Management and
    Inside Directors .................................................. 10-25
[B][2][c] Outside Directors ........................................... 10-26
[B][2][d] Underwriters................................................... 10-28
[C] Resignation and Notice....................................... 10-31
[D] Negative Causation............................................. 10-31

§ 10:2.5 Timeliness—Statute of Limitations and
    Statute of Repose ............................................... 10-32
§ 10:3 Defending Claims Under Section 12......................... 10-36
§ 10:3.1 Section 12[a][1] ............................................... 10-36
  [A] Who May Be Sued ............................................. 10-37
  [B] Elements and Pleadings ..................................... 10-38
  [C] Affirmative Defenses ....................................... 10-39
  [C][1] Security Was Exempt From Registration ............. 10-39
  [C][2] In Pari Delicto............................................ 10-41
  [C][3] Estoppel and Contract Defenses ..................... 10-42
  [D] Timeliness—Statute of Limitations and
      Statute of Repose ........................................... 10-43
§ 10:3.2 Section 12[a][2] ............................................... 10-43
  [A] Standing ....................................................... 10-43
  [B] Who May Be Sued ............................................. 10-45
  [C] Elements and Pleadings ..................................... 10-47
  [D] Affirmative Defenses ....................................... 10-49
  [D][1] Due Diligence—Seller’s Reasonable
         Care/Lack of Negligence ................................ 10-49
  [D][2] Negative Causation ..................................... 10-50
  [E] Timeliness—Statute of Limitations and
      Statute of Repose ........................................... 10-51
§ 10:4 Defending Claims Under Section 15......................... 10-51
§ 10:4.1 Defenses—Elements ....................................... 10-51
  [A] Secondary Liability Requires an Underlying
      Primary Violation ............................................ 10-51
  [B] Plaintiffs Must Prove Control over the
      Primary Violator ............................................. 10-52
  [C] Mixed Views on Whether Culpable
      Participation Is Required ................................ 10-54
§ 10:4.2 Affirmative Defenses....................................... 10-56
  [A] Statutory “Good Faith” Defense Available to
      Control Persons .............................................. 10-56
§ 10:4.3 Timeliness—Statute of Limitations and
    Statute of Repose ............................................... 10-58

xxxviii
Chapter 11  Trial of a Securities Class Action
Robert C. Walters

§ 11:1 Overview........................................................................... 11-2
§ 11:2 Trial Themes .................................................................. 11-6
  § 11:2.1 Plaintiff Themes ..................................................... 11-8
  § 11:2.2 Defense Themes ..................................................... 11-9
  § 11:2.3 Effective Delivery of Trial Messages....................... 11-11
  § 11:2.4 Mock Trials and Jury Research ............................ 11-11
§ 11:3 The Role of Expert Testimony .................................... 11-12
  § 11:3.1 Range of Expert Testimony ................................... 11-12
  § 11:3.2 Expert Testimony on Damages ............................ 11-13
    [A] Calculating Per-Share Damages ........................... 11-14
    [B] Calculating Aggregate Damages........................... 11-15
  § 11:3.3 Procedural Issues ................................................. 11-17
    [A] Discovery of Documents Prepared by a Consulting Expert Later Designated to Testify...... 11-17
    [B] Recalling Introductory Expert Witnesses at Trial ........................................ 11-18
§ 11:4 Fact Witnesses ............................................................ 11-19
  § 11:4.1 Witnesses in a Securities Class Action ................. 11-19
    [A] Named Plaintiffs .................................................. 11-19
    [B] Defense Witnesses ............................................... 11-19
    [C] Use of Non-Class Proof in a Class Action ............... 11-20
  § 11:4.2 Use and Admission of Witness Testimony for Trial ........................................ 11-22
    [A] Live Testimony..................................................... 11-22
    [B] Deposition Testimony............................................ 11-23
    [C] Videotaped Depositions at Trial ........................... 11-25
§ 11:4.3 Drawing Adverse Inferences from Witness Assertions of the Fifth Amendment Privilege Against Self-Incrimination.................................. 11-27
§ 11:5 Admission and Presentation of Documentary Evidence .................................................................. 11-30
  § 11:5.1 Admissibility of Factual Findings in SEC, NYSE, and NASD Consent Decrees ............... 11-30
  § 11:5.2 Restatement As Admission ................................ 11-33
  § 11:5.3 Motions in Limine ............................................... 11-37
    [A] Expert Testimony on Damages and Causation .... 11-37
    [B] References to Unrelated Corporate Wrongdoing ........................................ 11-40
    [C] Evidence or Argument on Class Issues ............... 11-41
    [D] Stock Sales or Allegedly Similar Transactions .... 11-42
§ 11:5.4 Roles of Judge and Jury: Preliminary Factual Questions Surrounding Market Efficiency at Trial .................................................. 11-43

§ 11:5.5 Bifurcation, Proof of Claims, and Other Proceedings .......................................................... 11-46

§ 11:6 Jury Issues .......................................................................................................................... 11-50
  § 11:6.1 Juror Questionnaires............................................. 11-50
  § 11:6.2 Juror Education.................................................... 11-52
    [A] Complex Theories and Concepts ......................... 11-52
    [B] Pre-Instructing the Jury .................................... 11-52
  § 11:6.3 Jury Instructions and Verdict Forms.................... 11-52
    [A] Jury Instructions .............................................. 11-52
    [B] Verdict Forms ................................................ 11-54

§ 11:7 PSLRA Proportionate Fault Issues Relevant to Trial of a Securities Fraud Class Action ...................... 11-54
  § 11:7.1 Joint and Several and Proportionate Liability Rules Applicable to Exchange Act Defendants and Outside Directors in Section 11 Suits ........ 11-55
    [A] Overview ........................................................ 11-55
    [B] Supplemental Liability of Proportionately Liable Defendants ............................................ 11-56
    [C] Separate Representation Issues ...................... 11-56
  § 11:7.2 Joint and Several Liability Carve-Out for Outside Directors Under Section 11 ......................... 11-58
  § 11:7.3 What Must the Defendant Prove to Obtain a Proportionate Fault Allocation? ........................... 11-61
  § 11:7.4 Non-Parties Who May Be Included in the Apportionment .................................................. 11-63
  § 11:7.5 Fault Allocation Between a Corporation and Its Officers ................................................. 11-65

Chapter 12 Appeals

Gregory J. Kerwin

§ 12:1 Appealing an Adverse Decision of a United States District Court ....................................................... 12-2
  § 12:1.1 Final Judgment Rule ............................................. 12-2
  § 12:1.2 Perfecting an Appeal from a Final Judgment Under 28 U.S.C. § 1291(a) .................................. 12-2

§ 12:1.3 Interlocutory Appeals ............................................................. 12-4
    [A] Certification Under Federal Rule of Civil Procedure 54(b) .......................................................... 12-5
    [B] District Court Certification Under 28 U.S.C. § 1292(b) ................................................................. 12-6
## Table of Contents

[C] Appeal of Order Granting or Denying Class Action Certification Under Federal Rule of Civil Procedure 23(f) .................................. 12-8

[D] Collateral Order Doctrine ...................................... 12-9

§ 12:1.4 Writs of Mandamus and Prohibition ............... 12-12

§ 12:1.5 Supreme Court Review .................................. 12-14

[A] Writ of Certiorari ................................................. 12-14

[B] Certify Questions of Law ..................................... 12-14

§ 12:2 General Standards of Review in Securities Cases ...... 12-14

§ 12:2.1 Fact Issues in Securities Litigation Governed by the Clearly Erroneous Standard of Review ...... 12-16

§ 12:2.2 Legal Issues in Securities Litigation Governed by a De Novo Standard of Review ............... 12-17

§ 12:2.3 Mixed Questions of Fact and Law Governed by a De Novo Standard of Review ............... 12-18

§ 12:2.4 Abuse of Discretion ....................................... 12-19

§ 12:2.5 Harmless Error ............................................. 12-20

§ 12:2.6 Unreviewable Issues ....................................... 12-21

§ 12:3 Preserving Points of Error in an Appeal .......... 12-23

§ 12:4 Challenging Evidentiary Rulings on Appeal........... 12-25

§ 12:5 Challenging Jury Instructions ............................. 12-27

§ 12:6 Challenging a Plaintiff’s Damages Claim .......... 12-30

§ 12:7 Challenging Class Certification Issues on Appeal ...... 12-31

§ 12:8 Appeals from Award of Attorney Fees or Costs ........ 12-33

## Chapter 13 Settlement

*Jonathan C. Dickey & Thad A. Davis*

§ 13:1 Typical Settlement Structures ............................. 13-2

§ 13:1.1 Stipulation of Settlement ................................ 13-2

§ 13:1.2 Rule 23(b)(3) Opt-Out Considerations ............... 13-4

§ 13:1.3 Settlement Fund ........................................... 13-6

§ 13:1.4 Plan of Allocation ......................................... 13-6

§ 13:1.5 Claim Administration Process ........................... 13-8

§ 13:1.6 PSLRA Disclosure Requirements ....................... 13-9

§ 13:1.7 Settlement Class Notice .................................. 13-10

§ 13:1.8 Settlement Notice Under the Class Action Fairness Act .................................................. 13-14

§ 13:2 Settlement Approval Process ............................. 13-14

§ 13:2.1 Objections to Fairness of Settlement ................. 13-14

[A] Court Scrutiny of the Proposed Settlement Class .......................................................... 13-16
## Chapter 14 Indemnification and D&O Insurance

*Jonathan C. Dickey, Amy L. Goodman & Gillian McPhee*

### § 14:1 Indemnification

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 14:1.1</td>
<td>Generally</td>
</tr>
<tr>
<td>[A]</td>
<td>Basic Indemnification Statutes</td>
</tr>
<tr>
<td>[B]</td>
<td>Definition of “Proceeding”</td>
</tr>
<tr>
<td>[C]</td>
<td>Mandatory Versus Permissive Indemnification</td>
</tr>
<tr>
<td>[D]</td>
<td>Multiple Sources of Indemnification</td>
</tr>
<tr>
<td>[E]</td>
<td>Public Policy Limitations on Indemnification</td>
</tr>
<tr>
<td>§ 14:1.2</td>
<td>Limited Liability Provisions</td>
</tr>
<tr>
<td>§ 14:1.3</td>
<td>Advancement of Defense Costs</td>
</tr>
<tr>
<td>[A]</td>
<td>Enforcement of Provisions As Written</td>
</tr>
<tr>
<td>[B]</td>
<td>Acting in One’s Official Capacity</td>
</tr>
<tr>
<td>[C]</td>
<td>Reasonableness of Fees and Costs</td>
</tr>
<tr>
<td>[D]</td>
<td>“Unclean Hands” Defense</td>
</tr>
<tr>
<td>§ 14:1.4</td>
<td>Proceedings to Enforce Advancement and Indemnification</td>
</tr>
<tr>
<td>[A]</td>
<td>Summary Proceedings Under Delaware Law</td>
</tr>
<tr>
<td>[B]</td>
<td>“Fees on Fees”</td>
</tr>
<tr>
<td>[C]</td>
<td>Requirement of a Final Adjudication</td>
</tr>
<tr>
<td>§ 14:1.5</td>
<td>Statute of Limitations for Indemnification Claims</td>
</tr>
</tbody>
</table>

### § 14:2 Director and Officer Liability Insurance

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 14:2.1</td>
<td>Overview and Key Aspects of Policies</td>
</tr>
<tr>
<td>§ 14:2.2</td>
<td>Definition of “Claim”</td>
</tr>
<tr>
<td>[A]</td>
<td>Regulatory Proceedings As “Claims”</td>
</tr>
<tr>
<td>[B]</td>
<td>Internal Investigations As “Claims”</td>
</tr>
<tr>
<td>[C]</td>
<td>Separate Coverage for Investigations</td>
</tr>
<tr>
<td>§ 14:2.3</td>
<td>Definition of “Wrongful Act”</td>
</tr>
<tr>
<td>[A]</td>
<td>Official Capacity</td>
</tr>
<tr>
<td>[B]</td>
<td>Employees As Insured Persons</td>
</tr>
<tr>
<td>[C]</td>
<td>Interrelated Wrongful Acts</td>
</tr>
<tr>
<td>§ 14:2.4</td>
<td>Definition of “Loss”</td>
</tr>
<tr>
<td>[A]</td>
<td>Coverage for Claims Under the Securities Act of 1933</td>
</tr>
</tbody>
</table>
Chapter 15  SEC Investigations and Enforcement Actions

Jonathan C. Dickey, Barry R. Goldsmith, Mark K. Schonfeld & Marc J. Fagel

§ 15:1  Introduction ......................................................... 15-2
§ 15:2  SEC Investigations .................................................. 15-3
  § 15:2.1  Investigation Participants ............................... 15-3
  § 15:2.2  Triggering Events ............................................ 15-4
    [A]  Generally ....................................................... 15-4
  § 15:2.3  Phases of SEC Investigations .......................... 15-8
Table of Contents

[A] Informal Inquiry .......................................................... 15-8
[B] Formal Investigation .................................................. 15-9
[D] Resolving Enforcement Actions .................................... 15-14
[E] Closing Investigations .................................................. 15-16

§ 15:3 SEC Enforcement Actions ........................................... 15-17

§ 15:3.1 SEC Enforcement Trends ........................................ 15-17
§ 15:3.2 Civil Remedies ................................................... 15-19
[A] Civil Injunctions .................................................... 15-19
[B] Monetary Sanctions .................................................. 15-21
[B][1] Disgorgement .......................................................... 15-21
[B][2] Civil Penalties ....................................................... 15-21
[C] Ancillary Relief .......................................................... 15-24
[C][1] Officer and Director Bar ........................................... 15-24
[C][2] Corporate Governance Changes ............................... 15-25

§ 15:3.3 Administrative Remedies ........................................ 15-25
[B] Professional Discipline .............................................. 15-27

§ 15:3.4 The Role of Cooperation ......................................... 15-28
[B] Privilege Waivers As an Element of Cooperation ............ 15-32

§ 15:3.5 Parallel Criminal Cases ......................................... 15-34
[A] Common Grounds for Prosecution ................................ 15-34
[B] Cooperation Between SEC and DOJ .............................. 15-35

§ 15:4 Insider Trading Cases ............................................... 15-37

§ 15:4.1 “Classical Theory” of Insider Trading ..................... 15-38
§ 15:4.2 “Misappropriation Theory” of Insider Trading ....... 15-39
§ 15:4.3 “Use” Versus “Possession” .................................... 15-40

§ 15:5 Role of Directors ..................................................... 15-41

§ 15:5.1 Corporate Codes of Conduct and Compliance Policies .. 15-41
§ 15:5.2 Internal Controls .................................................. 15-42
§ 15:5.3 Dealing with Potential Illegal Acts ......................... 15-42
§ 15:5.4 Supervising Internal Investigations and Corporation’s Response to the SEC .... 15-43

§ 15:5.5 Audit Committee Oversight .................................... 15-44

§ 15:6 Role of Counsel ...................................................... 15-45

§ 15:7 Role of Auditors ..................................................... 15-47

§ 15:8 The Janus Decision ................................................... 15-50
Chapter 16  ERISA Litigation

William J. Kilberg, Eugene Scalia & Paul Blankenstein

§ 16:1  Introduction ................................................................. 16-2
§ 16:2  Parties ....................................................................... 16-5
  § 16:2.1  Defendants: Who Is a Fiduciary? ......................... 16-5
  § 16:2.2  Plaintiffs ............................................................. 16-9
    [A]  Former Participants ................................................................ 16-10
    [B]  Suit on Behalf of Plan .................................................... 16-13
    [C]  Standing .................................................................. 16-13
§ 16:3  Procedural Issues ........................................................ 16-14
  § 16:3.1  Automatic Stay ..................................................... 16-14
  § 16:3.2  Demand Requirement .......................................... 16-15
  § 16:3.3  Class Certification Questions ............................. 16-18
§ 16:4  Fiduciary Claims and Defenses .................................. 16-22
  § 16:4.1  Misrepresentation ................................................ 16-22
    [A]  Pleading with Particularity ....................................... 16-23
    [B]  Reliance ................................................................. 16-25
    [C]  Intersection with Securities Laws .......................... 16-27
  § 16:4.2  Prudence .............................................................. 16-30
    [A]  Presumption for Employer Stock ............................ 16-31
    [B]  404(c) Defense ...................................................... 16-35
  § 16:4.3  Other Claims ....................................................... 16-38
    [A]  Conflict of Interest ................................................ 16-38
    [B]  Duty to Monitor .................................................. 16-39
  § 16:4.4  The Special Case of Directed Trustees ................. 16-41
§ 16:5  Relief and Damages .................................................... 16-45
  § 16:5.1  Equitable Relief .................................................... 16-45
  § 16:5.2  Holder Claims ..................................................... 16-49
  § 16:5.3  Measure of Damages ........................................... 16-50
  § 16:5.4  Distribution of Damages ..................................... 16-51

Chapter 17  Developments Under the Securities Litigation Uniform Standards Act

Robert E. Palmer

§ 17:1  Background .................................................................. 17-2
§ 17:2  Removal and Preemption of State Court Class Actions .................................................... 17-3
  § 17:2.1  Requirements for Removal ................................. 17-3
    [A]  Covered Class Action ............................................. 17-4
    [B]  State Court Action Exclusively Based on Federal Law .................................................... 17-13

xlvi
Table of Contents

[C] Covered Securities................................................ 17-14
[D] Misrepresentation, Omission, or Use of a Deceptive Device.................................................. 17-17
[E] “In Connection with” the Purchase or Sale of a Covered Security ........................................... 17-22
   [E][1] The Zandford Decision ..................................... 17-22
   [E][2] The Dabit Decision ........................................... 17-23
   [E][3] Post-Dabit Cases ............................................ 17-25
   [E][4] The Troice Decision ......................................... 17-34
[F] “Delaware Carve-Out” Cases............................... 17-38
§ 17:2.2 Preemption of State-Law Claims ......................... 17-41
§ 17:3 SLUSA and the Class Action Fairness Act ................. 17-46
§ 17:4 Stays of Discovery and Proceedings in Parallel Securities-Related Actions........................................... 17-50
   § 17:4.1 Stay of Discovery in Related State Court Actions ....................................................................... 17-50
   § 17:4.2 Stay of Discovery in Arbitration Proceedings Under SLUSA or the All Writs Act ...................... 17-55
   § 17:4.3 Other Forms of Stays of Concurrent Securities-Related Litigation ................................ 17-56
§ 17:5 Extraterritorial Reach of SLUSA ............................................ 17-57

Chapter 18 Credit Crisis Securities Litigation and Enforcement

Jennifer H. Rearden

§ 18:1 Introduction.................................................................. 18-2
   § 18:1.1 Categories of Credit Crisis–Related Lawsuits ...... 18-3
      [A] Shareholder and Other Investor Class Actions..... 18-3
      [C] Single-Plaintiff Suits by Monoline Insurance Companies......................................................... 18-6
      [D] Single-Plaintiff Suits by Institutional and Pension Fund Investors .............................................. 18-6
   § 18:1.2 Credit Crisis Settlements........................................ 18-7
§ 18:2 Outstanding Major Issues in Credit Crisis Litigation.... 18-7
   § 18:2.1 Foreign Issuers and F-Cubed Litigation .......... 18-8
   § 18:2.2 Statute of Repose ................................................. 18-10
   § 18:2.3 Constitutional Standing in Credit Crisis Class Actions ......................................................... 18-12
   § 18:2.4 The “Fraud-on-the-Market” Presumption and Credit Crisis Litigation .................................. 18-14
§ 18:3 Monoline Insurance Credit Crisis Litigation .......... 18-15