

OUTLINE

ACKNOWLEDGMENTS	III
-----------------------	-----

TABLE OF CASES	XXI
----------------------	-----

Chapter 1. An Overview of Securities

Litigation and Enforcement.....	1
§ 1.1 Introduction	1
§ 1.2 The Securities Act	2
§ 1.2.1 The Registration Requirement	2
§ 1.2.2 Exemptions from Registration.....	2
§ 1.2.3 Liability Provisions	5
§ 1.3 The Securities Exchange Act of 1934.....	7
§ 1.4 The Private Securities Litigation Reform Act of 1995	10
§ 1.5 The Securities Litigation Uniform Standards Act of 1998.....	11
§ 1.6 The Sarbanes-Oxley Act of 2002	12
§ 1.7 The Dodd-Frank Act of 2010	12
§ 1.8 The Jumpstart Our Business Startups Act of 2012	13
§ 1.9 The Courts	13
§ 1.10 The Securities and Exchange Commission	14
§ 1.11 The Department of Justice	15
§ 1.12 Social and Economic Forces.....	16
§ 1.13 The Efficient Capital Markets Hypothesis	17

Chapter 2. Section 10(b) of the Exchange	
	Act and Rule 10b-5 19
§ 2.1	Introduction 19
§ 2.2	The Requirement of Manipulation or Deception 29
	§ 2.2.1 The Basic Parameters of Deception..... 32
	§ 2.2.2 The Claim Recognized by <i>Goldberg v. Meridor</i> 35
	§ 2.2.3 Deceptive Opinions..... 40
	§ 2.2.4 Silence as Deception 41
§ 2.3	Materiality 49
	§ 2.3.1 Puffery 50
	§ 2.3.2 The Relevance of Statistical Significance 52
	§ 2.3.3 Price Movements in Efficient Markets 52
	§ 2.3.4 The Distinction Between Hard and Soft Information 53
	§ 2.3.5 The Probability/Magnitude Test 54
	§ 2.3.6 Forward-Looking Statements 56
	§ 2.3.7 The Bespeaks Caution Doctrine..... 58
	§ 2.3.8 The Statutory Safe Harbor for Forward-Looking Statements 60
§ 2.4	The “In Connection With” Requirement... 63
	§ 2.4.1 <i>SEC v. Zandford</i> 63
	§ 2.4.2 Other Considerations Regarding the “In Connection With” Requirement 65
§ 2.5	Scienter 69
	§ 2.5.1 <i>Ernst & Ernst v. Hochfelder</i> 69

§ 2.5.2	Recklessness as Scienter	72
§ 2.5.3	The Necessity for Scienter in SEC and DOJ Actions	73
§ 2.5.4	Circumstantial Evidence as Proof of Scienter	75
§ 2.5.5	The Problem of Corporate Scienter	76
§ 2.5.6	The Distinction Between Good and Bad Motives	77
§ 2.6	Pleading Scienter	77
§ 2.6.1	<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i>	81
§ 2.6.2	The Group Pleading Doctrine	83
§ 2.6.3	Pleading Anonymous Sources	84
§ 2.6.4	Pleading Insider Trading as a “Motive and Opportunity” for Fraud	86
§ 2.7	The Purchaser-Seller Requirement	87
§ 2.7.1	<i>Blue Chip Stamps v. Manor Drug Stores</i>	87
§ 2.7.2	Standing to Sue for Contract Holders	90
§ 2.7.3	Possible Exceptions to the Purchaser-Seller Requirement	91
§ 2.7.4	Section 29(b) as a Possible Alternative	95
§ 2.8	Reliance	96
§ 2.8.1	The Presumption for Omissions	97
§ 2.8.2	The Fraud-on-the-Market Presumption	100
§ 2.8.3	The Fraud-Created-the-Market Presumption	106

	§ 2.8.4	Justifiable Reliance	107
§ 2.9		Loss Causation	110
§ 2.10		Damages	114
	§ 2.10.1	Proportionate Liability	118
	§ 2.10.2	Indemnification and Insurance	119
§ 2.11		Primary Liability	120
	§ 2.11.1	The Ultimate Authority Test ...	121
	§ 2.11.2	Questions Prompted by <i>Janus</i>	123
	§ 2.11.3	Scheme Liability	125
§ 2.12		Secondary Liability	128
	§ 2.12.1	Aiding and Abetting Liability ...	128
	§ 2.12.2	Conspiracy	130
	§ 2.12.3	Controlling Person Liability	131
	§ 2.12.4	Respondeat Superior	137
§ 2.13		Statute of Limitations	139
§ 2.14		Rule 10b–5 Versus the Express Private Fraud Actions	143

Chapter 3. Liability Under the Securities

Act for Material Misstatements,

Omissions, and Fraudulent Conduct 147

§ 3.1		Introduction	147
§ 3.2		Section 11	148
	§ 3.2.1	Section 11's Enumerated Defendants	150
	§ 3.2.2	The Prima Facie § 11 Case	151
	§ 3.2.3	Section 11's Tracing Requirement	152
	§ 3.2.4	Section 11's Due Diligence Defenses	154
	§ 3.2.5	Due Diligence Criteria	157

	§ 3.2.6	Section 11 Damages and Negative Causation	160
	§ 3.2.7	Section 11 Contribution	161
§ 3.3		Section 12(a)(2).....	162
	§ 3.3.1	By Means of a Prospectus	164
	§ 3.3.2	By Means of an “Oral Communication”	167
	§ 3.3.3	Which Exempt Offerings Does § 12(a)(2) Embrace?	167
	§ 3.3.4	Free Writing Prospectuses.....	170
	§ 3.3.5	Who Is a “Seller”?	171
	§ 3.3.6	Section 12(a)(2)’s Reasonable Care Defense.....	174
	§ 3.3.7	Section 12(a)(2) Damages and Negative Causation	176
§ 3.4		Additional Shared Features of §§ 11 and 12(a)(2).....	177
§ 3.5		The Crowdfunding Exemption and § 12(a)(2)-Type Liability	184
§ 3.6		Fraud Under § 17(a).....	186

**Chapter 4. Proxy Fraud—Section 14(a) of
the Exchange Act and Rule 14a-9** 189

§ 4.1	Introduction	189
§ 4.2	The Materiality of the Alleged Misstatement or Omission.....	194
§ 4.3	The State of Mind Requirement.....	196
§ 4.4	Transaction Causation.....	198
§ 4.5	Loss Causation	203
§ 4.6	Statute of Limitations.....	204

Chapter 5. Tender Offer Fraud—Section 14(e) of the Exchange Act	207
§ 5.1 Introduction	207
§ 5.2 An Overview of the Williams Act	209
§ 5.3 Section 14(e)'s Scope	214
§ 5.3.1 The Omission or Misrepresentation of a Material Fact	217
§ 5.3.2 State of Mind	219
§ 5.4 Section 14(e)'s Implied Private Action	221
§ 5.4.1 Standing to Sue	222
§ 5.4.2 Reliance	223
§ 5.4.3 Loss Causation	225
§ 5.4.4 Damages	225
§ 5.4.5 Statute of Limitations	226
Chapter 6. Class Actions	229
§ 6.1 Introduction	229
§ 6.2 Selection of the Lead Plaintiff and the Lead Counsel	230
§ 6.3 Class Certification	235
§ 6.3.1 The Certification Challenge Posed by the Reliance Element of Rule 10b-5	238
§ 6.3.2 Certification-Stage Prerequisites for Invoking the Fraud-on-the-Market Presumption	239
§ 6.3.3 Certification-Stage Rebuttal of the Fraud-on-the-Market Presumption	241
§ 6.4 Class Action Settlements	241
§ 6.5 The SLUSA	243

§ 6.5.1	The SLUSA’s “In Connection With” Requirement.....	245
§ 6.5.2	The SLUSA’s Application to Securities Act Claims	246
§ 6.6	The Interplay Between Securities Class Actions and Shareholder Derivative Litigation	247
Chapter 7. Insider Trading.....		251
§ 7.1	Introduction.....	251
§ 7.2	Initial Efforts to Combat and Curtail Insider Trading	253
§ 7.2.1	The Common Law.....	253
§ 7.2.2	Exchange Act § 16(b) and Short-Swing Profits	255
§ 7.2.3	Rule 10b–5 and the Parity of Information Theory	257
§ 7.3	The Classical Theory of Insider Trading	260
§ 7.3.1	Who Is an Insider?.....	261
§ 7.3.2	What Is Material Nonpublic Information?.....	261
§ 7.3.3	The “Possession Versus Use” Debate	262
§ 7.3.4	Rule 10b5–1	263
§ 7.3.5	Tipper-Tippee Liability Under the Classical Theory	265
§ 7.3.6	Temporary Insiders	267
§ 7.3.7	Securities Analysts and the Problem of Selective Disclosure.....	268
§ 7.4	The Misappropriation Theory	269

§ 7.4.1	Identifying Fiduciary-Like Relationships	270
§ 7.4.2	Rule 10b5–2	272
§ 7.4.3	Tipper-Tippee Liability Under the Misappropriation Theory	273
§ 7.5	The Personal Benefit Requirement in Tipper-Tippee Cases	275
§ 7.6	Deceptive Acquisition of Material Nonpublic Information.....	277
§ 7.7	Rule 14e–3—Insider Trading in a Tender Offer	279
§ 7.7.1	The Substantial Step Requirement	280
§ 7.7.2	Knowledge on the Part of the Defendant.....	281
§ 7.8	Legislative Efforts by Congress.....	282
§ 7.8.1	The Insider Trading Sanctions Act of 1984.....	283
§ 7.8.2	The Insider Trading and Securities Fraud Enforcement Act of 1988.....	283
§ 7.8.3	Insider Trading During Pension Blackout Periods	286
§ 7.8.4	The Stop Trading on Congressional Knowledge (STOCK) Act	287
§ 7.8.5	The Proposed Insider Trading Prohibition Act of 2019.....	288
§ 7.9	Litigating Insider Trading Cases	290
§ 7.9.1	Suspicious Trading as Proof of Possession	291
§ 7.9.2	Using Circumstantial Evidence to Establish Scienter	291

§ 7.10	Regulation FD	292
Chapter 8. Market Manipulation		297
§ 8.1	Introduction	297
§ 8.2	Manipulative Acts and Practices— Examples	298
§ 8.3	Transactions That Create False Appearances of Genuine Trading.....	301
§ 8.3.1	Section 9(a) of the Exchange Act.....	302
§ 8.3.2	Fictitious Trades in Violation of Rule 10b-5	303
§ 8.3.3	Implied Rights of Action Under Rule 10b-5	305
§ 8.3.4	Manipulative IPO “Laddering” Activity	306
§ 8.3.5	Manipulative Schemes Involving Layering or Spoofing.....	308
§ 8.4	Bona Fide Trading Conducted for a Manipulative Purpose.....	310
§ 8.4.1	The Failure to Disclose One’s Manipulative Intent	312
§ 8.4.2	Marking the Close	314
§ 8.4.3	Manipulative Short Selling.....	314
§ 8.5	Information-Based Manipulation.....	317
§ 8.5.1	Scalping.....	317
§ 8.5.2	Pump and Dumps (or Distort and Short) Schemes.....	321
§ 8.5.3	Conflicts of Interest on Wall Street	323

Chapter 9. SEC Enforcement of the Federal	
Securities Laws 327	
§ 9.1	Introduction 327
§ 9.2	The Division of Enforcement 328
§ 9.2.1	Organizational Structure 328
§ 9.2.2	Office of Market Intelligence and the Whistleblower Program..... 329
§ 9.2.3	Key Priorities 330
§ 9.2.4	SEC Enforcement Manual 330
§ 9.3	SEC Investigations 331
§ 9.3.1	What Prompts an Investigation? 332
§ 9.3.2	An Overview of the Process 332
§ 9.3.3	Informal Investigations/ Matters Under Inquiry..... 333
§ 9.3.4	Formal Orders of Investigation 335
§ 9.3.5	Additional Concerns 337
§ 9.3.6	Staff Recommendations to the Commission..... 340
§ 9.4	SEC Settlements and Consent Decrees ... 346
§ 9.4.1	The General Process..... 347
§ 9.4.2	Neither Admits nor Denies 349
§ 9.5	Civil Remedies for Violations of the Securities Laws 350
§ 9.5.1	The Original Structure..... 350
§ 9.5.2	An Overview of the Modern Landscape 351
§ 9.6	Judicial Remedies 353
§ 9.6.1	Injunctions 354
§ 9.6.2	Disgorgement and Other Equitable Remedies..... 355

§ 9.6.3	Temporary Asset Freezes— Extraordinary Payments.....	357
§ 9.6.4	Officer and Director Bars	357
§ 9.6.5	Civil Monetary Penalties	358
§ 9.6.6	CEO and CFO Bonus and Trading Profit Clawbacks	360
§ 9.7	Administrative Remedies	361
§ 9.7.1	Cease-and-Desist Orders	361
§ 9.7.2	Civil Monetary Penalties	362
§ 9.7.3	Accounting and Disgorgement.....	363
§ 9.7.4	Officer and Director Bars.....	364
§ 9.7.5	Broker-Dealer and Investment Adviser Disciplinary Proceedings	364
§ 9.8	Distribution Funds for Investors	365
§ 9.9	Collateral Consequences.....	365
§ 9.10	Litigating with the SEC.....	366
§ 9.10.1	Litigation in Administrative Proceedings	366
§ 9.10.2	Litigation in Judicial Proceedings	368
§ 9.10.3	The SEC's Choice of Forum	369
§ 9.10.4	The Burden of Proof	371
§ 9.10.5	Statutes of Limitations	371
§ 9.10.6	Collateral Estoppel Effects	373
§ 9.11	Self-Regulatory Organizations (SROs) as Enforcers of the Federal Securities Laws	373
§ 9.11.1	FINRA's Structure and Operation	375
§ 9.11.2	FINRA's Disciplinary Function	375

§ 9.11.3	The State Action Debate	377
§ 9.12	Parallel Proceedings	378
§ 9.12.1	Sharing Evidence.....	379
§ 9.12.2	Double Jeopardy Protections	380

Chapter 10. Enforcement Issues Involving

	Attorneys and Accountants.....	383
§ 10.1	Introduction.....	383
§ 10.2	SEC Discipline of Professionals Under Exchange Act Section 4C and Rule 102(e).....	384
§ 10.3	Professional Conduct for Securities Attorneys	387
§ 10.3.1	State Rules for All Attorneys....	387
§ 10.3.2	SEC Rules for Securities Attorneys.....	391
§ 10.4	Enforcement Actions Against Securities Attorneys	394
§ 10.4.1	Disciplinary Proceedings Under Rule 102(e)	394
§ 10.4.2	Rule 102(e) Actions as “Follow- On” Proceedings.....	397
§ 10.4.3	Rule 102(e) Actions Involving <i>De Novo</i> Determinations	398
§ 10.4.4	Enforcement Actions Against Attorneys Who Commit Securities Law Violations	399
§ 10.4.5	Enforcement Actions Against Attorneys as “Aiders and Abettors”	401
§ 10.4.6	Enforcement Actions Against Attorneys Who “Cause” Violations by Clients	403

§ 10.4.7	Enforcement Actions Against Attorneys as Broker-Dealer Supervisors	403
§ 10.5	Federal Regulation of Accountants	405
§ 10.5.1	Rule 102(e) Proceedings Against Accountants	406
§ 10.5.2	Primary Liability for Material Misstatements or Omissions in Financial Statements	407
§ 10.5.3	Secondary Liability for Accountants	408
§ 10.6	The Public Company Accounting Oversight Board (PCAOB).....	410
§ 10.6.1	The PCAOB's Structure and Principal Functions	410
§ 10.6.2	The PCAOB's Public/Private Status	412
	Chapter 11. Criminal Enforcement	415
§ 11.1	Introduction	415
§ 11.2	Securities Act and Exchange Act Crimes	416
§ 11.2.1	The Willfulness Requirement ...	417
§ 11.2.2	The "No Knowledge" Clause	421
§ 11.2.3	The Rule of Lenity	423
§ 11.3	SOX Crimes	425
§ 11.4	Mail and Wire Fraud	428
§ 11.4.1	The Scheme to Defraud	429
§ 11.4.2	The Materiality Requirement ...	431
§ 11.4.3	The Intent Requirement	434
§ 11.4.4	The Use Requirement	434
§ 11.5	RICO	435

§ 11.5.1	The Liberal Construction Clause	437
§ 11.5.2	Racketeering Activity	437
§ 11.5.3	Racketeering Activity Consisting of “Fraud in the Sale of Securities”	439
§ 11.5.4	The Pattern of Racketeering Activity	440
§ 11.5.5	The Enterprise	442
§ 11.5.6	The Conduct of the Enterprise	444
§ 11.5.7	Private Securities Actions	445
§ 11.6	Criminal Aiding and Abetting	447
§ 11.7	Criminal Conspiracies	448
§ 11.8	Criminal Attempts	449
§ 11.9	Statutes of Limitations	450

Chapter 12. International Securities

	Fraud	451
§ 12.1	Introduction	451
§ 12.2	<i>Morrison v. National Australia Bank, Ltd.</i>	452
§ 12.2.1	Extraterritoriality as a Merits Question	454
§ 12.2.2	Prong One of the Transactional Test	455
§ 12.2.3	Prong Two of the Transactional Test: Irrevocable Liability	459
§ 12.2.4	Is a Domestic Transaction Sufficient to Satisfy Prong Two?	460
§ 12.2.5	The Securities Act and the Transactional Test	463

§ 12.2.6	The Possible State-Law Alternative	464
§ 12.3	The Dodd-Frank Act, § 929P(b).....	464
§ 12.4	The Forum Non Conveniens Doctrine	467
Chapter 13.	Securities Arbitration.....	471
§ 13.1	Introduction	471
§ 13.2	The Relationship Between the FAA and the Federal Securities Statutes.....	472
§ 13.3	A Brief Look at Securities Arbitration Procedures	477
§ 13.4	The Availability of Punitive Damages	478
§ 13.5	The Allocation of Certain Questions as Between Courts and Arbitrators.....	479
§ 13.6	Waivers of the Agreement to Arbitrate ...	483
§ 13.7	Bars on Class-Wide Arbitration and Class Actions	485
§ 13.8	Judicial Review	487
INDEX.....		491