Table of Contents

CHAPTER 1. INTRODUCTION

§ 1:1 Interests involved
§ 1:1.10 What is a regulated security?
§ 1:2 Public interest
§ 1:3 Seller's interest
§ 1:4 Purchaser's interest

Appendix 1:1. 2026 SEC-CFTC Interpretative Release on Regulation of Cryptocurrency

CHAPTER 2. SEC ENFORCEMENT ACTIONS

I. INTRODUCTION

§ 2:1 Generally
§ 2:1.10 SEC enforcement focus
§ 2:1.20 Interagency Securities Council—SEC effort to coordinate financial fraud efforts of various agencies and regulators
§ 2:1.30 Gatekeeper Role in SEC Enforcement

II. INVESTIGATION BY SEC

A. INTRODUCTION

§ 2:2 Authority to investigate
§ 2:3 Rules relating to investigations
§ 2:4 The investigation: An overview
§ 2:4.10 Delegation of Authority to issue Formal Orders of Investigation
§ 2:4.20 Separation of investigation and adjudication functions

B. SOURCES OF INFORMATION

§ 2:5 In General

C. INFORMAL INVESTIGATIONS

§ 2:6 Introduction
§ 2:7 Informal investigation procedure

D. FORMAL INVESTIGATIONS

1. Overview

§ 2:8 Generally

2. Special Rules Relating to Investigations

§ 2:9 Generally
§ 2:10 Overlapping provisions
§ 2:11 Formal investigative proceedings

3. SEC Subpoena Practice

§ 2:12 Issuance

§ 2:13 Enforcement actions—Introduction
§ 2:14 —Judicial standards for enforcement
§ 2:15 — —First level of review
§ 2:16 — —Second level of review
§ 2:17 —Contempt for failure to comply

4. Rights of Witnesses Providing Investigative Testimony

a. Formal Investigative Proceedings

§ 2:18 Generally

b. Rights Afforded Witnesses

§ 2:19 Generally
§ 2:20 Right to counsel
§ 2:21 Right to a transcript of testimony

c. Privileges Applicable to Witnesses

(1) Nonstatutory Privileges

§ 2:22 Generally
§ 2:23 Attorney-client privilege
§ 2:24 Work product privilege
§ 2:24.50 Privilege Logs
§ 2:25 Fifth Amendment privilege against self-incrimination

(2) Statutory Protections

§ 2:26 Right to Financial Privacy Act
§ 2:27 Requests for confidential treatment under the Freedom of Information Act

5. Liability for Perjury and Obstruction of Justice

§ 2:28 Generally

6. Wells Submissions and Notice of Termination

§ 2:29 Generally

7. Investigative Cooperation with Other Governmental Entities and Parallel Proceedings

§ 2:30 Introduction
§ 2:31 Parallel civil and criminal actions
§ 2:32 Interagency Communications

8. Discovery of SEC Investigative Materials

§ 2:33 Generally

9. The Completed Investigation: Options for the Staff

§ 2:34 Generally

III. SPECIAL PRELIMINARY RELIEF

§ 2:35 Introduction
§ 2:36 Foreign restricted list
§ 2:37 Refusal orders

IV. CIVIL REMEDIES

A. INJUNCTION ACTIONS

§ 2:38 Introduction
§ 2:39 Authority
§ 2:40 Jurisdiction
§ 2:41 Standards—Obtaining injunctions and temporary restraining orders
§ 2:42 —Dissolution or modification of equitable relief

B. ANCILLARY RELIEF

§ 2:43 Introduction
§ 2:44 Disgorgement of proceeds from sale
§ 2:45 Freeze of defendant's assets
§ 2:46 Appointment of independent receiver or agent
§ 2:47 Court ordered undertakings
§ 2:48 Accounting
§ 2:49 Prohibition of service as officer or director
§ 2:50 Miscellaneous relief

C. CIVIL PENALTIES

§ 2:51 Introduction
§ 2:52 Monetary penalties
§ 2:53 Corporate bar
§ 2:53.50 Penny stock bar

D. OTHER CIVIL REMEDIES

§ 2:54 Writs of mandamus
§ 2:55 Contempt proceedings
§ 2:56 Constitutionality of civil enforcement authority
§ 2:57 Collateral estoppel effect of SEC injunctions

V. ADMINISTRATIVE REMEDIES

A. INTRODUCTION

§ 2:58 Generally

B. STOP ORDERS

§ 2:59 Introduction
§ 2:60 Overview of statutory scheme
§ 2:61 Stop order proceedings—Timing
§ 2:62 —Procedural method
§ 2:63 —Basis for issuance
§ 2:64 Effect of amendments
§ 2:65 Right of withdrawal
§ 2:65.50 Abandoned offerings: integration issues
§ 2:66 Stop orders: 1985-1991

C. ADMINISTRATIVE SUSPENSION OF REGULATION A EXEMPTION

1. In General

§ 2:67 Introduction

§ 2:68 Equitable relief
§ 2:69 Disciplinary sanctions

2. Rule 258

a. Introduction

§ 2:70 Generally

b. Temporary Suspension

(1) Procedure

§ 2:71 Prior notice not required
§ 2:72 Notice of temporary suspension order

(2) Substantive Grounds

§ 2:73 Generally
§ 2:74 No exemption available or conditions of exemption not met
§ 2:75 Misleading statements
§ 2:76 Violation of Section 17 of the Act
§ 2:77 Post-filing violations
§ 2:78 Violations under rules 262(a)
§ 2:79 Failure to cooperate in commission investigation

c. Vacating a Temporary Suspension Order

§ 2:80 Procedure
§ 2:81 Substantive grounds for vacating order
§ 2:82 —Challenge to allegations in order
§ 2:83 —Amendment
§ 2:84 —Withdrawal
§ 2:85 —Postorder filing

d. Permanent Suspension

§ 2:86 Procedure
§ 2:87 Substantive grounds

e. Vacating a Permanent Suspension Order

§ 2:88 Generally

D. CEASE AND DESIST ORDERS

§ 2:89 Introduction
§ 2:90 Permanent orders
§ 2:91 Temporary orders
§ 2:91.50 Required accounting and disgorgement and corporate bar

E. ADMINISTRATIVE PROCEEDINGS UNDER SECTION 15

1. Introduction

§ 2:92 Generally

2. Procedure

§ 2:93 Generally
§ 2:94 Pleadings

§ 2:95 Discovery
§ 2:96 Offers of settlement
§ 2:97 Evidentiary hearings
§ 2:98 Findings and conclusions
§ 2:99 Orders and petitions for commission review
§ 2:100 Judicial review
§ 2:101 Other procedural limitations

3. Burden of Proof

§ 2:102 Generally

4. Sanctions

§ 2:103 Generally
§ 2:104 Criteria for imposing severe sanctions
§ 2:105 Criteria for imposing lenient sanctions

5. Collateral Estoppel

§ 2:106 Background
§ 2:107 General requirements
§ 2:108 Exceptions to the availability of collateral estoppel
§ 2:109 Application of collateral estoppel

6. Conclusion

§ 2:110 Generally
§ 2:110.50 2022 case

F. RULE 102(E) PROCEEDINGS

§ 2:111 Introduction
§ 2:112 Operation of Rule 102(e)—Persons subject to Rule 102(e)
§ 2:113 —Rule 102(e) sanctions
§ 2:114 —Basis for sanctions under Rule 102(e)
§ 2:115 — —Disbarment or suspension after notice and hearing
§ 2:116 — —Automatic suspension
§ 2:117 — —Temporary suspension without a hearing
§ 2:118 Reinstatement after suspension or disbarment
§ 2:119 Statutory authority for Rule 102(e)
§ 2:120 Incidence of Rule 102(e) proceedings
§ 2:121 2022 cases

G. OTHER TYPES OF PROCEEDINGS

§ 2:122 Administrative Proceedings Under Section 17
§ 2:122.10 Section 17(b) and touting violations

H. SEC ENFORCEMENT AUTHORITY

§ 2:123 SEC administrative proceedings—Constitutional challenges
§ 2:124 Discovery issues

CHAPTER 3. NONLITIGATION RESPONSES TO VIOLATIONS

I. INTRODUCTION

§ 3:1 Problems in general

§ 3:2 Mistakes of law
§ 3:3 Mistakes of fact

II. SELF HELP: IMPLICATIONS AND ALTERNATIVES

A. INTRODUCTION

§ 3:4 Generally

B. UNLAWFUL SALES: IMPORTANT VARIABLES

§ 3:5 Generally
§ 3:6 Value of security
§ 3:7 Statute of limitations
§ 3:8 Nature of violation
§ 3:9 Extent of potential liability
§ 3:10 Relationship with buyers
§ 3:11 Location of sales
§ 3:12 Economic implications
§ 3:13 Legal defenses
§ 3:14 Possible solutions
§ 3:14.10 Company remediation efforts

C. UNLAWFUL OFFERS

§ 3:15 Introduction
§ 3:16 Offers that mislead
§ 3:17 Violations of Section 5—Offers of securities in registration
§ 3:18 —Offers of unregistered securities

III. RESCISSION OFFERS

A. INTRODUCTION

§ 3:19 Model
§ 3:20 Dangers
§ 3:21 Federal attitude—SEC view
§ 3:22 —*Meyers v. C & M Petroleum Producers, Inc.*
§ 3:23 State approach

B. OFFERORS AND OFFEREES

§ 3:24 Offerors
§ 3:25 Offerees

C. AMOUNT OF OFFER

a. In General

§ 3:26 Generally

b. Holders

§ 3:27 Base amount
§ 3:28 Interest
§ 3:29 Adjustments in base amount

c. Ex-holders

§ 3:30 Generally

§ 3:31 Base amount
§ 3:32 Interest

D. TIME FACTORS

§ 3:33 Generally

E. FUNDING AND RELATED MATTERS

§ 3:34 Generally

F. REGISTRATION

§ 3:35 Generally

G. DISCLOSURE

§ 3:36 General observations
§ 3:37 Survey of state law

H. CUTOFF EFFECT

1. Introduction

§ 3:38 General comments
§ 3:39 Multiple sales to one offeree

2. Accepters

§ 3:40 Acceptance of offer
§ 3:41 Consequences of acceptance

3. No accepters

§ 3:42 Generally

4. Scope

§ 3:43 Generally

I. RELEASES

§ 3:44 Generally

IV. ARBITRATION

§ 3:45 Introduction
§ 3:46 *Wilko v. Swan* and its progeny
§ 3:47 *Rodriguez*
§ 3:48 Private transactional disputes: Future for arbitration agreements—Theoretical basis for limiting arbitration to SROs
§ 3:49 —Arbitration agreements between non-SROs

Appendix 3:1. SEC Policy Statement: Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions September 17, 2025

CHAPTER 4. MISLEADING REGISTRATION STATEMENTS: SECTION 11

I. INTRODUCTION

A. IN GENERAL

§ 4:1 Background
§ 4:2 Overview of Section 11
§ 4:2.50 Research concerning Section 11 filings
§ 4:3 Relationship to other civil liability provisions

B. PROPER FORUM

§ 4:4 Overview
§ 4:5 Doctrine of forum non conveniens—Domestic concerns
§ 4:5.10 —International concerns
§ 4:6 — —Forum non conveniens doctrine applied
§ 4:7 — —Comity distinguished

C. STAY OF DISCOVERY

§ 4:8 Generally

II. PERSONS WHO CAN BRING SUIT

A. INTRODUCTION

§ 4:9 Generally

B. TRACING REQUIREMENT

1. General Rule

§ 4:10 Linkage to defective registration statement
§ 4:11 Impact of *Gustafson*
§ 4:12 —Arguments: *Gustafson* does not apply to Section 11
§ 4:13 —Arguments: *Gustafson* applies to Section 11

2. Old and New Securities

a. In General

§ 4:14 Understanding the problem
§ 4:15 A legal challenge: *Barnes v. Osofsky*

b. Probability Based Theories of Tracing

§ 4:16 Generally
§ 4:17 New securities as a percentage of all securities
§ 4:18 Fungible mass theory
§ 4:19 Contrabroker method
§ 4:20 Certificate search

C. MERGERS: RECIPIENTS OF SECURITIES FROM A DISAPPEARING ENTITY

§ 4:21 Generally

D. DELAYED, CONTINUOUS, OR SERIAL OFFERINGS: SHELF OFFERINGS AND STRUCTURED FINANCE PRODUCTS OFFERINGS

§ 4:21.10 Shelf registration offerings
§ 4:21.20 Structured finance products offerings

III. PERSONS WHO ARE LIABLE

A. IN GENERAL

§ 4:22 Introduction
§ 4:23 Persons signing the registration statement
§ 4:24 Issuer
§ 4:25 Directors and partners of issuer
§ 4:26 Officers

B. EXPERTS

§ 4:27 General rule
§ 4:28 Accountants—Overview
§ 4:29 —Unaudited interim reports
§ 4:30 —Republication by issuer of former auditor's report
§ 4:31 Attorneys

C. UNDERWRITERS

§ 4:32 Overview
§ 4:33 Section 2(a)(11) underwriter status: Scope
§ 4:33.10 SPAC and deSPAC Liability
§ 4:34 Qualified independent underwriter

IV. CLASS ACTIONS

A. INTRODUCTION

§ 4:35 Generally

B. CERTIFICATION OF PLAINTIFF AS CLASS REPRESENTATIVE

1. In General; Section 27(a)

§ 4:36 Introduction
§ 4:37 Section 27(a)

2. Rule 23(a)

§ 4:38 Numerosity
§ 4:39 Commonality
§ 4:40 Typicality
§ 4:41 Adequacy and fairness of representation

3. Rule 23(b)

§ 4:42 Generally
§ 4:43 Predominance
§ 4:44 Superiority

4. Limits on Recovery by Plaintiffs and Attorneys

§ 4:45 Plaintiffs
§ 4:46 Attorneys

C. CERTIFICATION OF DEFENDANT CLASS

1. Introduction

§ 4:47 Generally

2. Rule 23(a)

§ 4:48 Generally
§ 4:49 Numerosity
§ 4:50 Commonality
§ 4:51 Typicality
§ 4:52 Adequacy and fairness of representation

3. Rule 23(b)

§ 4:53 Generally
§ 4:54 Predominance
§ 4:55 Superiority

V. MATERIALITY, CAUSATION, RELIANCE, AND STATUTE OF LIMITATIONS

A. MATERIAL MISSTATEMENTS AND OMISSIONS

1. Materiality Defined

§ 4:56 Introduction

2. Nature of Untruth: Factual Statements

§ 4:57 Introduction
§ 4:58 SEC requirements for specific items of disclosure
§ 4:59 Duty to disclose additional information: Rule 408 and Item 303 of Regulation S-K
§ 4:60 Rule 408: Duty to disclose additional information—Traditional cases
§ 4:61 —Special problems
§ 4:62 Voluntary disclosure of factual information
§ 4:63 Method of presentation

3. Nature of Untruth: Predictive Statements

§ 4:64 Background
§ 4:65 Actionable predictive statements: *Virginia Bankshares* test and *Omnicare* test
§ 4:66 Disclosure of soft information in registration statements: Judicial interpretations
§ 4:67 Avoiding Materiality: the "bespeaks caution" doctrine

4. Time for Assessing Accuracy

§ 4:68 Identifying the critical misstatements
§ 4:69 Making the critical judgment

5. Pleading Requirements

§ 4:70 Overview

§ 4:71 Rule 9(b) applied

B. CAUSATION

§ 4:72 Generally

C. RELIANCE

§ 4:73 Overview
§ 4:74 Rule 158

D. STATUTE OF LIMITATIONS & STATUTE OF REPOSE

§ 4:75 Introduction
§ 4:76 Statute of limitation: within one year of discovery
§ 4:77 Statute of repose: no more than three years after public offering

E. SCIENTER

§ 4:78 Generally

VI. DUE DILIGENCE DEFENSES

A. INTRODUCTION

§ 4:79 Overview
§ 4:80 Framework for analyzing due diligence defenses

B. CATEGORIES OF INFORMATION IN THE REGISTRATION STATEMENT

§ 4:81 Generally

C. STANDARD OF REASONABLENESS

1. In General; Section 11(c)

§ 4:82 Introduction
§ 4:83 Section 11(c)

2. Judicial Interpretations: *Escott* and *Leasco*

§ 4:84 Introduction
§ 4:85 *Escott v. BarChris Construction Corporation*
§ 4:86 *Feit v. Leasco Data Processing Equipment Corporation*

3. Due Diligence Under the Integrated Disclosure System: Rule 176

a. Background

§ 4:87 Generally

b. Rule 176

§ 4:88 Generally
§ 4:89 Type of issuer
§ 4:90 Type of security
§ 4:91 Type of person

§ 4:92 Office held by an officer
§ 4:93 Director's relationship to issuer
§ 4:94 Reasonable reliance
§ 4:95 Underwriters
§ 4:96 Facts or documents incorporated by reference

D. NONEXPERTISED AND NONOFFICIAL PARTS OF REGISTRATION STATEMENT

1. In General

§ 4:97 Introduction
§ 4:98 Officers and comptrollers

2. Directors

§ 4:99 Overview
§ 4:100 Inside directors
§ 4:101 Outside directors
§ 4:102 Prospective directors
§ 4:103 Lawyer-director

3. Underwriters

§ 4:104 Introduction
§ 4:105 Lead underwriters
§ 4:106 Participating underwriters
§ 4:107 Subsequent underwriters
§ 4:108 Special SEC guidelines—Integrated registered offerings and shelf registrations
§ 4:109 —Offerings by unseasoned companies

E. EXPERTISED PARTS OF REGISTRATION STATEMENT

§ 4:110 Introduction
§ 4:111 Non-expert's defense
§ 4:112 Expert's defenses

F. OFFICIAL PARTS OF REGISTRATION STATEMENT

§ 4:113 Generally

VII. SPECIAL DEFENSES OTHER THAN DUE DILIGENCE

A. IN GENERAL

§ 4:114 Defenses available to all defendants
§ 4:115 Resignation

B. SAFE HARBORS FOR FORWARD-LOOKING STATEMENTS

1. Introduction

§ 4:116 Generally

2. Rule 175

§ 4:117 Overview
§ 4:118 Avoiding the safe harbor: Plaintiff's burdens

3. Section 27A

§ 4:119 Overview
§ 4:120 Forward-looking statement defined
§ 4:121 Scope: Inclusions and exclusions
§ 4:122 Levels of safe harbor
§ 4:123 —General safe harbor
§ 4:124 —Special safe harbor

VIII. MEASURE OF DAMAGES

A. OVERVIEW

§ 4:125 Generally

B. AMOUNT PAID FOR A SECURITY

§ 4:126 Introduction
§ 4:127 Ceiling of price offered to the public
§ 4:128 Exchange offer setting

C. VALUE OF SECURITY AT TIME OF SUIT

§ 4:129 Introduction
§ 4:130 Market price as value
§ 4:131 No market price available
§ 4:132 Determining time of suit

D. PRICE OF SECURITY WHEN DISPOSED OF IN MARKET BEFORE SUIT

§ 4:132.10 Overview
§ 4:132.20 Disposition of security "in the market"

E. LIMITATIONS ON POTENTIAL RECOVERY LIMITATION

§ 4:133 Public offering price limitation
§ 4:134 Ceiling on underwriter liability

F. DEFENSE OF CONTRIBUTING FACTORS: NEGATIVE CAUSATION

§ 4:135 Introduction
§ 4:136 General declines in the market—Standard market measures
§ 4:137 —Comparative analysis
§ 4:138 —Issuer market measures
§ 4:138.50 Negative causation: lack of presumptive reliance

G. MULTIPLE PARTY LIABILITY

1. Contribution

§ 4:139 Introduction
§ 4:140 Measures of contribution
§ 4:141 Contribution agreements
§ 4:142 Settlement contribution bar

2. Indemnification

§ 4:143 Generally

H. UNDERTAKING FOR COSTS

§ 4:144 Generally

I. AWARD OF COSTS AND ATTORNEY'S FEES

§ 4:145 General rule
§ 4:146 Federal Rule of Civil Procedure 54(d)
§ 4:147 Section 20(f)

CHAPTER 5. REGISTRATION VIOLATIONS: SECTION 12(A)(1)

I. INTRODUCTION

§ 5:1 Statutory provision
§ 5:2 Jurisdiction—Background
§ 5:3 —Essentially foreign transactions: non-fraud claims

II. VIOLATIONS OF SECTION 5

A. IN GENERAL; ILLEGAL SALES AND OFFERS

§ 5:4 Introduction
§ 5:5 Illegal sales
§ 5:6 Illegal offers

B. ILLEGAL DELIVERIES

§ 5:7 Introduction
§ 5:8 Prospectus delivery: Defining obligation
§ 5:9 —Injunctive actions: *SEC v. Manor Nursing Centers, Inc.*
§ 5:10 —Defense to enforcement of contract to purchase
§ 5:11 —Action to impose liability
§ 5:12 —Evaluation of *Manor Nursing*

III. PERSONS HAVING STANDING TO SUE

§ 5:13 Introduction
§ 5:14 Plaintiff as representative for purchaser
§ 5:15 —Derivative claims
§ 5:16 —Suits by court appointed receivers and trustees in bankruptcy
§ 5:17 —Class actions
§ 5:18 Impact of *Gustafson*

IV. PERSONS WHO ARE LIABLE: SELLER REQUIREMENT

A. INTRODUCTION

§ 5:19 Generally

B. PRE–*PINTER* TESTS

1. Strict Privity

§ 5:20 Generally

2. Expanded Seller Doctrine

a. Second Circuit Participation Test

§ 5:21 Introduction
§ 5:22 Pre–*Katz* decisions
§ 5:23 *Katz v. Amos Treat & Co.*

b. Proximate Cause Test

§ 5:24 Background
§ 5:25 Adoption by Fifth Circuit
§ 5:26 Change in labels: Substantial factor test

c. Necessary and Substantial: Ninth Circuit Version

§ 5:27 Generally

d. Extensive Involvement: Eighth Circuit Test: *Wasson v. SEC*

§ 5:28 Generally

3. Seller Status Theory: The *Pinter* View

§ 5:29 Generally

C. *PINTER V. DAHL*

§ 5:30 Introduction
§ 5:31 Factual background
§ 5:32 Lower court opinions
§ 5:33 Supreme Court opinion
§ 5:34 Evaluation

D. *PINTER* SELLERS

§ 5:35 Generally

V. USE OF INTERSTATE COMMERCE OR THE MAILS

§ 5:36 Introduction
§ 5:37 Jurisdictional means
§ 5:38 —Means or instrument of transportation
§ 5:39 —Means or instrument of communication
§ 5:40 —The mails
§ 5:41 Jurisdictional connection

VI. TENDER OF SECURITIES: RESCISSION

§ 5:42 Background
§ 5:43 Federal case law

VII. STATUTE OF LIMITATIONS

A. INTRODUCTION

§ 5:44 Generally

B. WITHIN ONE YEAR OF VIOLATION

§ 5:45 Identifying violations
§ 5:46 Illegal offer, sale, and delivery
§ 5:47 Illegal offer, legal sale, and legal delivery
§ 5:48 Illegal sale
§ 5:49 Legal offer and sale; illegal delivery

C. NO MORE THAN THREE YEARS AFTER PUBLIC OFFERING

§ 5:50 General rule
§ 5:51 Calculating period

D. EQUITABLE TOLLING

§ 5:52 Problem
§ 5:53 One–year limitation
§ 5:54 Three–year limitation

VIII. RELIEF AVAILABLE

§ 5:55 General rule
§ 5:56 Determining appropriate remedy
§ 5:57 Consideration paid—Identifying consideration
§ 5:58 —Valuation
§ 5:59 Interest
§ 5:60 Restitution to seller
§ 5:61 Attorney's fees

IX. AFFIRMATIVE DEFENSES

A. PROOF OF COMPLIANCE OR EXEMPTION

§ 5:62 Generally

B. RULE 508

§ 5:63 Generally
§ 5:64 Violation not intended for protection of complaining party
§ 5:65 Violation insignificant to offering as a whole—Introduction
§ 5:66 —Violations excluded from the rule
§ 5:67 —Violations subject to the rule
§ 5:68 —Insignificant violations
§ 5:69 — —Evaluation of Regulation D conditions and requirements
§ 5:70 — —Evaluation of particular facts
§ 5:71 —Issuer's good faith and reasonable attempt to comply

C. IN PARI DELICTO

§ 5:72 Introduction

§ 5:73 Judicial interpretation

CHAPTER 6. DEFRAUDED BUYERS: SECTION 12(A)(2)

I. INTRODUCTION

A. OVERVIEW

1. In General

§ 6:1 Statutory amendments
§ 6:2 Overview of Section 12(a)(2)
§ 6:3 Elements of Section 12(a)(2)
§ 6:3.50 Date of sale

2. Scope: Secondary Sales?

§ 6:4 Introduction
§ 6:5 Arguments for limiting Section 12(a)(2) to primary offerings
§ 6:6 Fixing proper boundaries: introduction
§ 6:7 Fixing proper boundaries: counter arguments
§ 6:8 Tracing requirement of Section 11
§ 6:9 Legislative history and Section 12(a)(2): the plain language cannon
§ 6:10 Other considerations

3. *Gustafson v. Alloyd Company, Incorporated*

§ 6:11 Background
§ 6:12 Majority opinion
§ 6:13 Dissenting opinions
§ 6:14 Implications

4. Post-*Gustafson*: Open Questions

§ 6:15 Identifying open questions
§ 6:16 When does a public offering end?
§ 6:17 Demarcation between public and private solicitation
§ 6:18 Burden of pleading and proof
§ 6:19 Oral communications
§ 6:20 Impact on state analog to Section 12(a)(2)

B. RELATIONSHIP TO OTHER CIVIL LIABILITY PROVISIONS AND THEORIES

§ 6:21 Introduction
§ 6:22 Section 11
§ 6:23 Section 10(b) and Rule 10b-5
§ 6:24 Standard of culpability
§ 6:25 Reliance
§ 6:26 Offers and sales
§ 6:27 Pleading requirements
§ 6:28 Aiding and abetting

C. PROPER FORUM

§ 6:29 Jurisdiction of courts
§ 6:30 Forum selection clauses

§ 6:31 Arbitration

II. PERSONS HAVING STANDING TO SUE

A. INTRODUCTION

§ 6:32 Statutory limitations
§ 6:33 Who is the purchaser?
§ 6:34 Defining a purchase

B. IDENTIFYING A PURCHASER IN SPECIFIC TYPES OF TRANSACTIONS

§ 6:35 Overview

1. Business Transactions

§ 6:36 Exchange offers
§ 6:37 Mergers and acquisitions of businesses
§ 6:38 Leasehold sales agreements
§ 6:39 Rights offerings
§ 6:40 Margin calls
§ 6:41 Option contracts
§ 6:42 Pledges
§ 6:43 Short sales against the box
§ 6:44 Rescission offers

2. Special Procedural Roles

§ 6:45 Plaintiff as representative for purchaser
§ 6:46 Derivative claims
§ 6:47 Suits by court appointed receivers and trustees in bankruptcy
§ 6:47.50 Suits by federally enacted conservators

3. Class Action Plaintiffs

§ 6:48 Introduction
§ 6:49 Certification of plaintiff as class representative
§ 6:50 Numerosity
§ 6:51 Commonality
§ 6:52 Typicality
§ 6:53 Adequacy and fairness of representation
§ 6:54 Compliance with Federal Rule 23(b)
§ 6:55 Federal Rule 23(b): predominance
§ 6:56 Federal Rule 23(b): superiority

4. Class Action Defendants

§ 6:57 Introduction
§ 6:58 Federal Rule 23(a)
§ 6:59 Federal Rule 23(b)(1)(A) or Federal Rule 23(b)(3)

III. PERSONS WHO ARE LIABLE: SELLER REQUIREMENT

A. BACKGROUND

§ 6:60 Introduction
§ 6:60.50 State law requirements

§ 6:61 Earliest case for loose privity: *Cady v. Murphy*

B. PRE-*PINTER*: EXPANDED SELLER CONCEPT

§ 6:62 Introduction
§ 6:63 Second Circuit participation test
§ 6:64 Proximate cause—Substantial factor test
§ 6:65 Necessary and substantial: Ninth Circuit version
§ 6:66 Extensive involvement: Eighth Circuit test

C. PRE-*PINTER*: CATEGORIES OF SELLER

§ 6:67 Introduction

1. Underwriters

§ 6:68 Firm commitment underwriters
§ 6:69 Best efforts underwriters: an overview
§ 6:70 Best efforts underwriters: outer limit: *Foster v. Jesup & Lamont Securities Co.*
§ 6:71 Representations in offering document
§ 6:72 Role of underwriters in private offerings
§ 6:73 Verbal representations
§ 6:74 Importance to purchaser of underwriter's participation

2. Broker-dealers

§ 6:75 Introduction
§ 6:76 As principal
§ 6:77 As agent for seller
§ 6:78 As agent for both seller and buyer
§ 6:79 As agent for buyer
§ 6:80 Evaluation

3. Issuers

§ 6:81 General rule
§ 6:82 Firm commitment underwritings

4. Insiders of Issuer

§ 6:83 Directors and officers
§ 6:84 General partners

5. Attorneys

§ 6:85 Introduction
§ 6:86 Direct contact with purchaser
§ 6:87 No direct contact with purchaser

6. Accountants

§ 6:88 Direct contact with purchaser
§ 6:89 No direct contact with purchaser

7. Banks, Finance Companies, and Other Lenders

§ 6:90 No contact with seller or sales transaction
§ 6:91 Contact with seller or sales transaction

8. Trustees

§ 6:92 Role of fiduciaries

9. Insurance Companies

§ 6:93 Participant in securities transaction

D. POST-*PINTER*: CATEGORIES OF SELLER

1. Introduction: The *Pinter* Test

§ 6:94 *Pinter v. Dahl*
§ 6:95 Technical seller
§ 6:96 Solicitation seller: solicitation
§ 6:97 Solicitation seller: proper motivation
§ 6:97.50 Limited protection under Rule 159A(b)

2. Underwriters

§ 6:98 Underwriters

3. Broker-dealer Firms

§ 6:99 Broker-dealers

4. Issuers

§ 6:100 Issuers

5. Insiders of Issuers

§ 6:101 Directors, trustees and officers
§ 6:102 General partners

6. Attorneys

§ 6:103 Attorneys

7. Accountants

§ 6:104 Accountants

8. Banks, Finance Companies, and Other Lenders

§ 6:105 Banks, finance companies, and other lenders

9. Insurance Companies

§ 6:106 Insurance companies

10. Rating Agencies

§ 6:107 Securities rating service companies
§ 6:107.50 Social media posts and section 12 liability

IV. USE OF INTERSTATE COMMERCE

A. INTRODUCTION

§ 6:108 Introduction
§ 6:109 Jurisdictional means

1. Transportation

§ 6:110 Means or instrument of transportation

2. Communication

§ 6:111 Means or instrument of communication

3. Mails

§ 6:112 The mails

B. JURISDICTIONAL CONNECTION

§ 6:113 Introduction
§ 6:114 Relationship to misstatement
§ 6:115 Connection with transaction

V. "BY MEANS OF": RELIANCE, CAUSATION, OR PROXIMITY?

A. OVERVIEW

§ 6:116 Introduction

B. RELIANCE

§ 6:117 Introduction
§ 6:118 Misrepresentation
§ 6:119 Non-disclosure

C. CAUSATION

§ 6:120 Background
§ 6:121 Judicial attitudes
§ 6:122 Summary

D. PROXIMITY: THE PROPER CONNECTION

1. Overview

§ 6:123 Introduction
§ 6:124 Legislative design
§ 6:125 Other nexus requirements
§ 6:126 In connection with: Rule 10b-5
§ 6:127 Essential link: Rule 14a-9

2. Defining Proximity

§ 6:128 The theory
§ 6:129 Compromise alternatives

VI. PROSPECTUS OR ORAL COMMUNICATION

§ 6:130 Introduction
§ 6:131 Prospectus defined
§ 6:132 Oral communications

VII. MATERIALITY: INTERRELATIONSHIP WITH FACT AND DUTY

A. OVERVIEW

§ 6:133 Introduction

§ 6:134 Pleading requirements
§ 6:135 Materiality defined
§ 6:136 Critical period of time
§ 6:137 Facts

B. THE BESPEAKS CAUTION DOCTRINE

§ 6:138 Introduction
§ 6:139 The *Trump Casino* decision
§ 6:139.50 Private Securities Litigation Reform Act: statutory safe harbor for forward-looking statements

VIII. IGNORANCE OF UNTRUTH OR OMISSION

A. BACKGROUND

§ 6:140 Plaintiff's burden
§ 6:141 Advantage over common law deceit

B. REFUTING BUYER'S ALLEGATION

§ 6:142 Duties distinguished
§ 6:143 Contradictory evidence
§ 6:144 Non-materiality

C. IMPROPER CHALLENGES

§ 6:145 Introduction
§ 6:146 Sophistication of buyer
§ 6:147 Availability of accurate facts

IX. TENDER OF SECURITIES

§ 6:148 Background
§ 6:149 Federal case law

X. STATUTE OF LIMITATIONS

§ 6:150 Introduction

A. ONE YEAR STATUTE OF LIMITATIONS

§ 6:151 General rule
§ 6:152 Determining when diligence is needed
§ 6:153 Inquiry notice
§ 6:154 Fraudulent concealment

B. THREE YEAR STATUTE OF REPOSE

§ 6:155 General rule
§ 6:156 Computation of the period
§ 6:157 Single purchase
§ 6:158 Multiple purchases: integrated offering doctrine
§ 6:159 Equitable tolling

XI. RELIEF AVAILABLE

§ 6:160 Background

§ 6:161 Federal case law
§ 6:162 Right of contribution
§ 6:163 Indemnification

XII. AFFIRMATIVE DEFENSE

A. OVERVIEW

§ 6:164 Introduction

B. LACK OF POSSIBLE KNOWLEDGE

§ 6:165 Introduction
§ 6:166 Defining legal standards
§ 6:167 Application of due care standards: introduction
§ 6:168 Successful defenses
§ 6:169 Duty to communicate distinguished

C. NEGATIVE CAUSATION

§ 6:170 Lack of loss causation

CHAPTER 7. CONTROL PERSON LIABILITY: SECTION 15(A)

§ 7:1 Introduction—Background and purpose
§ 7:2 —Elements of a Section 15(a) claim
§ 7:3 —Relationship to Section 20(a) of the Exchange Act
§ 7:4 Scope of liability: Need for an underlying violation—Introduction
§ 7:5 —Nature of underlying violation
§ 7:6 —Eligible claimants
§ 7:7 —Role of primary violator in Section 15(a) litigation
§ 7:8 "Controlling person:" Definitions and categories—Introduction
§ 7:9 —Definition of control
§ 7:10 —Tests for identifying a controlling person: Categories of defendants—Introduction
§ 7:11 — —Status test—Formulation of the test
§ 7:12 — — —Categories of defendants—Background
§ 7:13 — — — —Ninth Circuit (post-1990)
§ 7:14 — —Potential control test—Formulation of the test
§ 7:15 — — —Categories of defendants
§ 7:16 — — — —Multiple role defendants
§ 7:17 — — — —Lenders
§ 7:18 — — — —Control groups and members
§ 7:19 — — — —Chief executive officers
§ 7:20 — —Culpable participation test—Formulation of the test
§ 7:21 — — —Categories of defendants
§ 7:22 — — — —Second Circuit
§ 7:23 — — — —Third Circuit
§ 7:24 — — — —Ninth Circuit
§ 7:25 —Assessment and recommendations
§ 7:26 Statute of limitations
§ 7:27 Affirmative defense—Overview
§ 7:28 —Relevant "facts"

§ 7:29 —Elements of the defense
§ 7:30 —Relationship to Section 20(a) defense
§ 7:31 Measure of damages—Overview
§ 7:32 —Right of contribution—Overview
§ 7:33 — —Under the 1934 act
§ 7:34 Availability of common-law principles—Introduction
§ 7:35 —Case for nonexclusivity
§ 7:36 —Impact of *Central Bank*

CHAPTER 8. SEC AND RELATED WHISTLEBLOWER PROGRAMS

§ 8:1 Overview of SEC whistleblower program
§ 8:2 2020 Amendments to the whistleblower rules
§ 8:2.50 2022 Amendments to whistleblower program rules
§ 8:3 SEC whistleblower awards
§ 8:4 SEC enforcement actions against contractual provisions to impede whistleblowers reporting violations
§ 8:5 Case law concerning whistleblowers
§ 8:6 FINRA Whistleblower Office and Rules
§ 8:7 DOJ Whistleblower Program

Table of Laws and Rules

Table of Authorities

Table of Cases

Index