Bromberg and Lowenfels on Securities Fraud

Second Edition

Volume 1

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Bromberg and Lowenfels on Securities Fraud (2d ed.)

What's New in the 2026-2 Update

This December, 2026 update includes coverage of significant new decisions from the Supreme Court and federal circuit courts of appeal.

Coverage of new developments is consolidated in an updated **Chapter 2, Latest Developments in Federal Securities Law**. New developments covered in Chapter 2 include cross-references to the sections of the treatise which provide background information and further discussion of the particular topic.

Highlights include the following:

Supreme Court Holds in *Sripetch v. Sec. & Exch. Comm'n* that Disgorgement May Be Awarded to Investors Without Showing That They Suffered Pecuniary Loss

● Resolving a split between the Second Circuit on the one hand and the First Circuit and the Ninth Circuit on the other hand, the Supreme Court affirmed the judgment of the Ninth Circuit in holding in *Sripetch v. Sec. & Exch. Comm'n,* 146 S.Ct. 1403 (U.S. June 4, 2026) that in SEC enforcement actions, disgorgement may be awarded to investors without a showing of pecuniary loss. The Court analyzed the issue as one of whether the equitable remedy of disgorgement requires a showing of pecuniary harm. § 2:2.

Sales of Fractional Interests in Life Settlements by Unregistered Broker Dealers Violated the Securities Act of 1933

● In *United States Sec. & Exch. Comm'n v. Barry,* 146 F.4th 1242, 1248, Fed. Sec. L. Rep. ¶102,127 (9th Cir. 2025), the Ninth Circuit held in an SEC enforcement action for sales of securities by an unregistered broker dealer that fractional interests in life settlements were "investment contracts" and therefore securities which are subject to the registration requirements of the Securities Act of 1933. The Ninth Circuit agreed with the Fifth Circuit and the Eleventh Circuit that these fractional interests are securities and disagreed with the D.C. Circuit's position that such fractional interests are not securities. § 2:2.

Sixth Circuit Holds that Generalized Statements Do Not Constitute Half-Truths Simply Because the Com-

pany Does Not Disclose Potentially Contrary Information

● In *Newtyn Partners, LP v. All. Data Sys. Corp.,* 165 F.4th 947 (6th Cir. 2026), the Sixth Circuit affirmed the dismissal of a securities fraud class action under Rule 10b–5(b) in which it was alleged that the issuer made misleading misstatements and omissions in presentations to investors and in SEC registration statements. The Court stated that literally true statements that misleadingly omit key context, known as "half-truths," can qualify as misstatements. However, a company can keep quiet about newly-acquired "soft" facts—predictions, matters of opinion, and the like—until they become "virtually as certain as hard facts." § 2:4.

Ninth Circuit Holds That an Independent Accountant Is Not Subject to Strict Liability Under § 11 of the Securities Act of 1933 for Certifying an Issuer's Financial Statements Based on a Reasonable Belief that the Statements Are True

● The Ninth Circuit held in *Hunt v. PricewaterhouseCoopers LLP (PwC),* 159 F.4th 603, Fed. Sec. L. Rep. ¶102,195 (9th Cir. June 11, 2025), cert. denied sub nom. *Hunt v. PricewaterhouseCoopers LLP,* No. 25-1112, 2026 WL 1377050 (U.S. May 18, 2026) that an independent accountant is not strictly liable under § 11 of the Securities Act of 1933 for certifying the information in an issuer's SEC registration statement or financial statements where the independent accountant makes a reasonable investigation and has reasonable ground to believe that the statements are true. The Court concluded that PwC's audit opinion on Bloom Energy's financial statements were protected from Section 11 liability under the Supreme Court's *Omnicare* decision because PwC reasonably believed that the statements were true at the time that the opinion was issued. § 2:4.

Ninth Circuit Holds That Failure to Disclose in a Prospectus that the SEC Had Requested that the Issuer Not Include Projected Returns and the Failure to Disclose the SEC Letter Were Actionable as Material Omissions in a Securities Class Action Under Section 12(a)(2) of the Securities Act of 1933

● In *Pino v. Cardone Cap., LLC,* 139 F.4th 1102, Fed. Sec. L. Rep. ¶102,087 (9th Cir. 2025), the Ninth Circuit held that where a prospectus for the sale of securities did not mention an SEC letter requesting that the projections not be included, the allegations were sufficient to state claims under Section 12(a)(2) of the Securities Act of 1933. Further, the lead Plaintiff's disclaimer of any allegations of fraud did not result in a waiver of claims under Section 12(a)(2) for securities offered or sold using prospectuses or oral communications that contain material misstatements or omissions. The Court stated that the narrow inquiry is whether the specific "statement(s), in the light of the circumstances under which they

were made," were misleading for what they omitted. The Court also stated that the fact that truthful information is available elsewhere does not relieve a defendant from liability for misrepresentations in a given filing or statement." § 2:4.

Dedication

To Anne, on whose time this was largely written

About the Authors

Alan R. Bromberg is a University Distinguished Professor of Law at the Southern Methodist University Dedman School of Law. He has been a senior fellow of the Yale law faculty and visiting professor at Stanford Law School. He is the author of a number of authorative publications and numerous articles on tax, partnership, corporate, securities, and commodities law. A life member of the American Law Institute, he sits on the editorial boards of four corporate, securities, and derivatives reviews. He has drafted substantial parts of the Texas corporate, partnership, and securities statutes. He is active on six American Bar and Texas Bar committees in his areas of interest. He is a director of and co-chairs the Legislative Committee of the Texas Business Law Foundation. He practiced law in Dallas before joining the SMU faculty in 1956. Professor Bromberg earned his A.B. from Harvard University and his J.D. from Yale Univeristy.

Lewis D. Lowenfels has been a practicing corporate securities attorney for over 50 years. He has represented investment banking firms and many prominent Wall Street individuals in all facets of their businesses, including public offerings, private placements, investigations, disciplinary proceedings, and arbitrations. He has served as Special Counsel to the American Stock Exchange and as a Public Governor of the American Stock Exchange from 1993 to 1996. Mr. Lowenfels is also an Adjunct Professor of Law at Seton Hall University Law School. A scholarly practitioner, he has authored dozens of articles on securities law for law reviews and law journals. Earning his B.A. degree from Harvard University, he graduated *Phi Beta Kappa* and *Magna Cum Laude.* He earned his J.D. degree from Harvard Law School.

About the Contributor

Author Lewis D. Lowenfels has the following remarks concerning his contributor.

Eliot J. Katz has worked with me for 20 years as a collaborator on my eight-volume treatise, Bromberg and Lowenfels on Securities Fraud. I have found Eliot to be a superb lawyer in every way. His research is meticulous and all embracing. His writing is clear, concise, and well organized. And his thinking is creative and imaginative. I could not have had a better collaborator.

Eliot J. Katz has been a licensed attorney since 1980 and a member of the New York bar since 1990. After working in private practice in a suburb of Cleveland, Ohio from 1981 to 1984, he worked as an attorney-editor in legal publishing for over 30 years. Between 2002 and 2019 in his capacity as a principal attorney-editor at Thomson Reuters, he has edited, updated, and written for numerous securities regulations treatises to provide incisive coverage of new developments in securities law. He earned his juris doctor degree from Cleveland-Marshall College of Law in 1980 where he served on the law review. In 2022 he was recognized by JustCause with the organization's McKnight Award for exemplary pro bono legal work in civil matters.

First Preface

Most corporate and securities lawyers have kept an eye on SEC Rule 10b-5's impressive growth through the years. If my experience and observation are typical, they gave it too little attention–despite extensive coverage in the law journals (see Appendix H)–wishfully thinking it were still a quasi–criminal matter. Businessmen on the whole remained serenely unaware. The filing of the Texas Gulf Sulphur suit gave us all a jolt.

I was asked to talk about the TGS case to the Corporation, Banking and Business Law Section of the State Bar of Texas. My resurvey of 10b-5 for this purpose prompted me to plan an article, then convinced me that a book was more appropriate.

One of the more serious aspects of 10b-5 is that people often get into trouble with it before the lawyers can help. Since the Rule may apply to any business deal involving securities, the businessman must know something of the subject, and I have tried to write for him as well as his lawyer, especially in Part Two (Chapters 4 - 7) and in the chapter summaries.

10b-5's rapid evolution is still under way, and my analysis is certainly not the last word. The publishers and I expect to keep this volume current by supplements as often as developments warrant.

The decision to write this book came at a time which was as ripe for me as for the topic. Southern Methodist University Law School had given me leave and a grant. Yale Law School had appointed me to its faculty as a Senior Fellow with no responsibilities except to study, think, and write. For all this I say thanks to the two schools and their respective Deans, Charles O. Galvin and Louis H. Pollak. I am also grateful to the Yale Law Library staff for its extensive, cheerful help and to Isabel Malone who had the manuscript typed by unseen hands.

Alan R. Bromberg
New Haven 1967

Second Preface

Since the first preface was written and published in 1967, many things have happened. The law of securities fraud has proliferated beyond even my expectations, although some contractions have occurred since 1975. These changes are described in the text. This book has expanded from one volume to many. In the process (which still continues) numbering systems have changed to permit more subdivisions; citations have moved to text from footnote to speed and simplify both manuscript and printed copy. The scope has widened to give more or less equal treatment to antifraud provisions other than 10b-5, for it is clear that they are all significantly interrelated, and that some will operate when 10b-5 will not.

I am pleased, and a little awed, by the hundreds of references to this book in the court and SEC decisions, and the uncounted references in lawyers briefs and arguments. That my organization, analysis and ideas seem to be helpful is great compensation for the thousands of hours I have spent to develop them.

But the hours have not been sufficient to keep the book as current as I would like. The subject is too vast for one person–at least this one person–to stay on top of without help. The time has come, then, for a coauthor. I have sought, and luckily found, the best. Lewis Lowenfels of the New York bar has been one of the most acute observers of the changing scene in securities law, and one of the most prolific writers about it. His articles are often cited in the courts, in this text and in the literature generally; they are known to all who work in the field. Fifteen of them have been collected in a book, L. Lowenfels, Selected Articles Under the Federal Securities Laws (1978). I welcome him as a collaborator for the future.

We have decided to change the title from "Securities Law: Fraud–SEC Rule 10b-5" to "Securities Fraud and Commodities Fraud." This reflects the expansion of the book to cover all the securities fraud provisions, and some decline in the relative importance of 10b-5 in recent years. It also reflects the extensive consideration now given to commodities fraud in the text.

Special thanks go to Mary Grace Shuey, who has typed virtually all the manuscript since the first volume, and done much more.

Alan R. Bromberg

P.S. Special thanks go also to Anita Fogel, who took over the preparation of the Table of Cases in 1980, and helped in many other ways.

ARB & LDL

September 1980

Publisher's Preface re. Conversion to the New Standard Format (December, 2003)

The full contents of the Bromberg & Lowenfels on Securities Fraud treatise have been converted to a new, standard format as part of a broad initiative by the publisher to give all of our Thomson West information content a standard look and presentation, and to facilitate the publication of that content in multiple media, including online.

As part of the conversion to the publisher's chosen format, the publisher has made many changes to the authors' pre-existing architecture and numbering system. The chapter numbering and section numbering have changed, and the cross-references have been updated. The previous version used an elaborate section numbering system based upon parallelism of parenthetical section numbers, such as (300)s for Securities Act and (400)s for Securities Exchange Act, for comparison of issues in different divisions with decimal section numbers. The new, standard format uses a conventional outline format which starts with Roman numeral divisions as the highest level of organizational hierarchy, and continues with capital letters. The mini-table of contents which serve as road maps for the relation of complicated groups of sections have been preserved and the cross-references therein have been updated. There are correlation tables in each binder in order to convert cites to the prior version of the treatise to the section numbering of the new format.

The following changes in the original 2d edition were carried forward into this new format. Whole sections of the text were replaced by complete revisions in the original locations as frequently as feasible. Partial revisions were made through New Matter sections which consisted of (1) rewritten or expanded passages which superseded part of the text, and (2) additional citations and other material which complemented the text. These New Matter sections have been integrated into the main body of the text in this Westlaw compatible format.

Naturally, there have been developments in this fast-changing field occurring after preparation of text revisions. They should be traced by other research methods, such as KeyCite and consulting the weekly CCH Federal Securities Law Reporter and BNA Securities Regulation and Law Reports.

Readers having comments or questions on the new format of the work should direct them to the Publisher. West Customer

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