

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

What's New in the 2026-1 Update

This June, 2026 update includes coverage of significant new decisions from federal circuit courts of appeal. New developments covered include cross-references to the sections of the treatise which provide background information and further discussion of the particular topic.

Coverage of new developments is consolidated in an updated **Chapter 2, Latest Developments in Federal Securities Law**. Highlights include the following:

Remedy of Disgorgement in SEC Enforcement Actions

- In *United States Sec. & Exch. Comm'n v. Sripetch*, 154 F.4th 980, Fed. Sec. L. Rep. ¶102,150 (9th Cir. Sept. 3, 2025), *cert. granted sub nom. Sripetch v. SEC*, No. 25-466, 2026 WL 73091 (U.S. Jan. 9, 2026), the Ninth Circuit Court of Appeals held that proof of pecuniary harm is not required for issuing an order for disgorgement in an SEC enforcement action. The Ninth Circuit followed the view of the First Circuit and disagreed with the view of the Second Circuit as to whether proof of pecuniary harm is required for the remedy of disgorgement. The Supreme Court has granted certiorari presumably to resolve the split between the circuits on this issue. § 2:2.
- The Eleventh Circuit Court of Appeals upheld a judgment for damages, injunctive relief, and disgorgement to the Treasury after a jury trial in an SEC enforcement action against the perpetrators of two microcap securities fraud schemes in *U.S. Sec. & Exch. Comm'n v. Spartan Sec. Grp., Ltd.*, 146 F.4th 1231 (11th Cir. Jan. 16, 2026). Material misrepresentations were made in the FINRA applications for the penny stocks. The court stated that although the original Exchange Act of 1934 did not authorize district courts to award monetary remedies like civil penalties or disgorgement, two pieces of subsequent legislation authorized monetary penalties in SEC civil enforcement actions. § 2:2.

Securities Class Actions—Nondisclosure in SEC Filings of Pending Federal Investigations Were Not Material Misrepresentations

- In a securities class originating in the federal district court in Delaware, the Third Circuit Court of Appeals in *In re Walmart Inc. Sec. Litig.*, 151 F.4th 103, Fed. Sec. L. Rep. ¶102,146 (3d Cir. Aug. 29, 2025) upheld the granting of a motion to dismiss on claims that Walmart Inc. misled investors by not disclosing in its SEC filings that there was an investigation by a U.S. Attorney's office in Texas into the company's practices in filling prescriptions for opioids. The Court held that the complaint did not plausibly allege that the investigations into Walmart constituted a liability or a reasonably possible liability. § 2:4.

Class Certification: Analysis of Class-Wide Reliance and Damages Methodology

- The Sixth Circuit Court of Appeals addressed in a securities class action the issue of whether a presumption of class-wide reliance in a securities fraud class action can be utilized based on omissions and misrepresentations for purposes of certification of the class. *In Re FirstEnergy Corp. Sec. Litig.*, 149 F.4th 587, 597, Fed. Sec. L. Rep. ¶102,129 (6th Cir. Aug. 13, 2025). The court set forth a rigorous analysis requirement to determine whether the plaintiff class has established "that damages are susceptible of measurement across the entire class." The Court held that in cases presenting allegations of both misrepresentations and omissions, in order to determine which presumption of reliance to apply, the Supreme Court's *Affiliated Ute* presumption or the *Basic Inc. v. Levinson* presumption, the trial court must follow a two-step analysis. The district court must first classify each claim or group of claims as either omissions or misrepresentations and then the trial court must characterize the overall case as based upon omissions or representations. § 2:4.

Minority Shareholders Who Tendered Shares in Freeze Out Merger Can Use the Fraud-on-the Market Presumption to Establish Loss Causation

- In a securities class action brought by minority shareholders who claimed that they were fraudulently induced to tender their shares in a freeze-out merger and thereby forfeited their appraisal rights, the Second Circuit Court of Appeals held in a split decision in *Shanda Games Securities Litigation*, 128 F.4th 126, Fed. Sec. L. Rep. ¶102,006

HIGHLIGHTS

(2nd Circuit. Feb. 3, 2025), *cert. denied sub nom., Shanda Games Ltd. v. Monk*, 164 S. Ct. 366 (U.S. Nov. 10, 2025), that minority shareholders can use the fraud-on-the-market (FOM) presumption of reliance in order to establish the element of reliance. The Complaint alleged that but for the claimed misrepresentations, the market price of the company's shares would have been higher. The Court held that the lead plaintiff was entitled to the rebuttable FOM presumption that in making this choice, he relied on the market price of his shares. and that but for the alleged fraudulent misrepresentations, he would not have entered into a forced sale of his shares that resulted in the forfeiture of his appraisal rights. § 2:5.

- The author of the majority opinion in *Shanda Games* went to great lengths to address the view of the dissenting judge that the fraud-on-the-market presumption of reliance does not apply in a freeze-out merger context. § 2:5.
- Commentators from one law firm have suggested that the *Shanda Games* decision is a substantial deviation from the requirement of an actual purchase or sale due to a false or misleading statement. The same commentators also contend that the *Shanda Games* decision could expand the section 10(b) claims in the Second Circuit by allowing investors who tender shares in a freeze-out merger to present their claims even without allegations that they considered the corporate defendant's alleged misleading statements. § 2:5.