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Securities Litigation
A Practitioner's Guide

Gibson, Dunn & Crutcher LLP, Palo Alto

(Edited by Jonathan C. Dickey)

This ninth annual supplement to *Securities Litigation* keeps you current with the latest developments in the field. Expanded and updated coverage includes:

Halliburton II. In its June 2014 unanimous ruling in *Halliburton v. Erica P. John Fund, Inc.*, expected to have a profound impact on securities class action litigation in the years to come, the Supreme Court **upheld the fraud-on-the-market doctrine** first established in *Basic v. Levinson*, and **articulated a new "price impact" test in connection with class certification** under Rule 23 of the Federal Rules of Civil Procedure. *See* §§ 1:1.1, 7:3.2, and 14:2.9.

Regulation S-K, Item 303's "Known Trends and Uncertainties" Requirement. Until recently, no federal circuit court of appeals had squarely addressed the question of whether **violation of Item 303 in a public filing such as a Form 10-K or Form 10-Q** could give rise to liability under Exchange Act section 10(b) and Rule 10b-5. In the last year, however, two courts have considered the issue and reached different conclusions. *See* § 3:2.3.

Statements of Opinion. In March 2015, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the Supreme Court addressed the longstanding issue of **when opinion statements are actionable**, reaffirming the objective and subjective falsity standard set forth in *Virginia Bankshares* and explaining in detail how the courts should review pleadings (1) "when an opinion itself constitutes a factual misstatement," and (2) "when an opinion may be rendered misleading by the omission of discrete factual representations." *See* §§ 3:2.6, 3:7.2, and 10:2.3[F][2].

Primary Liability Under Rule 10b-5. In May 2015, the Seventh Circuit addressed *Janus* in the context of a post-trial appeal of a $2.46 billion jury verdict against consumer lender Household International, including whether the trial court had erred in instructing the jury that Household and three of its senior executives could be liable following *Janus* if the defendant "made, approved, or furnished information to be included in a false statement of fact." *See* § 3:4.3[B].

Applicability of Automatic Stay of Discovery. While courts typically maintain the stay of discovery upon granting a motion to dismiss with leave to amend the complaint, the Ninth Circuit held that **the automatic stay did not preclude plaintiffs** in *Petrie v. Electronic Game Card* from using documents produced by a third party after defendants filed a dispositive motion in response to a subpoena issued before the stay arose. *See* §§ 4:4.4, 4:4.6, and 4:4.12.

(continued on reverse)

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Challenges to Standing of Lead Plaintiffs Under the PSLRA. In considering whether a prospective lead plaintiff is adequate, some courts have considered whether the plaintiff would have standing to sue. This issue has been raised most frequently in the context of **investment advisers or managers seeking to bring claims on behalf of their clients**, with mixed results. *See* ***new*** § 5:4.2.

Statutes of Limitation/Statutes of Repose. Depending on the timing of the filing of a class action and the court's determination that class status is inappropriate, purported class members who wish to intervene or file their own suits may be attempting to do so **after the expiration of the applicable statute of limitations or statute of repose**. The courts have had to determine whether these statutes are tolled for purported class members during a class action lawsuit. *See* ***new*** §§ 7:5, 7:5.1, and 7:5.2 for full discussion. *See also* § 18:2.2.

"Leakage" Theory of Loss Causation. The Seventh Circuit recently analyzed the viability of a "leakage" theory of corrective disclosures, where loss causation is pled based on **a series of partial disclosures** that together reveal the true financial picture of the company. *See* § 8:4.3[A][2].

Disclosures by the Government or Third Parties. Several recent cases have concluded that **the revelation that an investigation has been commenced by a regulatory body** is usually insufficient to constitute a corrective disclosure for loss causation purposes. *See* § 8:4.3[C].

Recent Case Law: Due Diligence Defense. Coverage of a December 2014 case involving claims based on offerings of residential mortgage-backed securities looks at the court's discussion of the standard applicable to the due diligence defense for non-issuer defendants against liability under Securities Act section 11. *See* § 9:8.4.

Sanctions. Updates to chapter 13 include coverage of several recent cases in which sanctions were sought for **violations of Rule 11**. *See* §§ 13:7.3–13:7.4.

Indemnification and D&O Insurance. Updates include in-depth coverage of numerous recent cases addressing: **multiple sources of indemnification** (§ 14:1.1[D]); the standard of review for determining whether directors have met their duties of care and loyalty, and the standard for determining **whether a director is entitled to exculpation** (§ 14:1.2); availability of **advancement for "offensive" claims** initiated by a director or officer (§ 14:1.3); imposing new terms, conditions, and standards to restrict a party's right to advancement (§ 14:1.3[A]); **reasonableness of fees and costs** (§ 14:1.3[C]); interrelated wrongful acts (§ 14:2.3[C]); exclusion of coverage due to an insured's **deliberate or intentional misconduct** (§ 14:2.5[A]); and more!

Tipper/Tippee Liability. In late 2014, the Second Circuit in *United States v. Newman* vacated the insider trading convictions of two hedge fund managers, clarifying the law for tipper/tippee insider trading cases and arguably making it harder for the DOJ and SEC to prevail where evidence of a pecuniary benefit to the tipper is not readily provable. *See* ***new*** § 15:4.4 for more.

ERISA Litigation. The Supreme Court recently issued a decision with the potential to **expand the time frame** in which claims alleging fiduciary breaches under ERISA may be brought. *See* ***new*** § 16:4.1. New discussions examine **"public information" prudence claims** and **"insider information" prudence claims**. *See* ***new*** § 16:4.3[A][1]–[A][2].

Removal Under SLUSA. Updates include coverage of three recent cases that address the question of **whether a representation or omission was "in connection with" the purchase or sale of the covered security**—one of the requirements for removal under SLUSA. *See* § 17:2.1[E][4].

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