

Table of Contents

About the Authors	v
Table of Chapters	vii

Chapter 1 Introduction

§ 1:1	Historical Perspective	1-2
§ 1:2	Services Commonly Performed by Accountants.....	1-10
§ 1:2.1	Financial Statement Services	1-10
§ 1:2.2	Tax Services	1-15
§ 1:2.3	Business Consulting Services.....	1-16
[A]	Feasibility Studies	1-16
[B]	Acquisition Reviews.....	1-17
[C]	Financial Systems Advice (IT Consulting)	1-17
[D]	Financial Consulting Services	1-19
[E]	Pension and Employee Benefit Consultation Services.....	1-19
[F]	Internal Audit Services.....	1-19
[G]	Other Consultation Services	1-20
§ 1:2.4	Individual Advisory Services	1-21
§ 1:2.5	Litigation Support Services	1-22
§ 1:2.6	Fraud Investigations.....	1-23
§ 1:3	Situations Which Give Rise to Accountants' Liability	1-24
§ 1:4	Claims Commonly Asserted Against Accountants	1-27
§ 1:4.1	Negligence Claims	1-27
§ 1:4.2	Breach of Contract Claims.....	1-29
§ 1:4.3	Common Law Fraud Claims.....	1-30
§ 1:4.4	Breach of Fiduciary Duty Claims	1-31
§ 1:4.5	State Securities Law Claims.....	1-32
§ 1:4.6	Federal Securities Law Claims	1-34
[A]	Section 10(b) Claims.....	1-34
[B]	Section 11 Claims.....	1-37
[C]	Section 12 Claims.....	1-38
[D]	Section 14 Claims.....	1-38
§ 1:4.7	RICO Claims.....	1-39
§ 1:4.8	Secondary Liability	1-41
[A]	Controlling Person.....	1-41
[B]	Respondeat Superior	1-42

[C]	Conspiracy.....	1-42
[D]	Agency.....	1-43
§ 1:4.9	State Consumer Protection Laws.....	1-43

Chapter 2 Standards of the Accounting Profession

§ 2:1	Introduction.....	2-1
§ 2:2	Governance of the Profession.....	2-2
§ 2:3	Standards of Professional Conduct.....	2-4
§ 2:3.1	Standards of Practice.....	2-4
§ 2:3.2	Ethical Standards.....	2-5
§ 2:4	Accounting Standards.....	2-12
§ 2:5	Auditing Standards.....	2-17
§ 2:5.1	Generally Accepted Auditing Standards.....	2-18
§ 2:5.2	PCAOB Standards.....	2-21
§ 2:5.3	Auditor Independence.....	2-22
§ 2:5.4	Audit Documentation Requirements.....	2-25
§ 2:5.5	Limitations on Liability.....	2-26
§ 2:6	Standards for Tax Practice.....	2-27
§ 2:7	Other Professional Standards.....	2-30
§ 2:8	Conclusion.....	2-31
Appendix 2A	AICPA-NASBA Uniform Accountancy Act Model Rules—Seventh Edition.....	App. 2A-1

Chapter 3 Breach of Contract

§ 3:1	General.....	3-1
§ 3:2	Elements of Breach of Contract Claim.....	3-4
§ 3:2.1	Existence and Terms of the Agreement.....	3-4
[A]	In General.....	3-4
[B]	Engagement Letter.....	3-6
[C]	Other Evidence.....	3-9
[D]	Standards of Accounting Profession.....	3-11
§ 3:2.2	Breach of Agreement.....	3-11
[A]	Failure to Perform Services.....	3-12
[B]	Failure to Perform in a Timely Manner.....	3-14
[C]	Failure to Perform in a Satisfactory Manner or to Accomplish Stated Goal.....	3-15
[D]	Failure to Comply with Professional Standards.....	3-15
§ 3:2.3	Causal Relationship.....	3-17
§ 3:2.4	Damages.....	3-21
[A]	In General.....	3-21
[B]	Cost to Complete Performance or Remedy Defects.....	3-22

Table of Contents

[C] Loss in Value of the Performance 3-23
[D] Consequential Damages 3-24
§ 3:2.5 Restitution of Accountant’s Compensation 3-26
§ 3:2.6 Prejudgment Interest 3-26
§ 3:3 Affirmative Defenses 3-27
§ 3:3.1 Statute of Limitations 3-27
§ 3:3.2 Statute of Frauds 3-29
§ 3:3.3 Limitation on Liability and Arbitration Provisions..... 3-30
§ 3:4 Third-Party Beneficiaries 3-35

Chapter 4 Negligence

§ 4:1 General..... 4-2
§ 4:1.1 State Law Claim 4-2
§ 4:1.2 Types of Cases 4-3
§ 4:2 Elements of Claim..... 4-6
§ 4:2.1 Duty of Due Care Owed to Plaintiff..... 4-7
[A] Privity Rule 4-12
[B] Near-Privity Standard 4-14
[C] *Restatement* Standard..... 4-22
[C][1] In General 4-22
[C][2] Rationale for Standard..... 4-26
[C][3] Cases Applying the Standard..... 4-27
[C][4] Impact of *Restatement* Standard 4-32
[D] Foreseeability Standard 4-33
[D][1] In General..... 4-33
[D][2] The *Bily* Case: California Rejects the Foreseeability Approach..... 4-36
[E] Statutory Limitations of Duty..... 4-38
§ 4:2.2 Nature of Duty Owed 4-50
[A] Use of Care of Reasonably Prudent Accountant..... 4-50
[B] Duty to Disclose 4-53
[C] Contractual Limitations of Duty 4-54
§ 4:2.3 Breach of Duty 4-57
§ 4:2.4 Proximate Cause..... 4-58
[A] In General 4-58
[B] Negligent Misrepresentation Cases..... 4-64
[B][1] Transaction Causation (Reliance) 4-65
[B][2] Loss (Legal) Causation..... 4-68
[B][3] Reasonableness of Reliance; Materiality 4-69
[C] Intervening Forces and Superseding Causes..... 4-72
§ 4:2.5 Damages..... 4-74
[A] In General 4-74
[A][1] Compensatory..... 4-75

ACCOUNTANTS' LIABILITY

[A][2] Prejudgment Interest..... 4-77
[A][3] Reduction for Effect of Taxation or for Tax
Benefits Received..... 4-78
[A][4] Punitive Damages 4-79
[B] Items of Damages..... 4-80
[B][1] Money Lost or Stolen 4-80
[B][2] Cost of Restating Financial Statements or
Tax Returns or of Proper Audit 4-81
[B][3] Lost Profits, Injury to Reputation, Etc. 4-81
[B][4] Continuing Losses..... 4-82
[B][5] Fines and Penalties..... 4-83
[B][6] Adverse Tax Consequences and Interest 4-83
[B][7] Overpayment for Investments 4-85
[B][8] Cost to Restore Investment Position 4-85
[B][9] Attorney's Fees and Expenses of Litigation..... 4-86
[B][10] Emotional Harm 4-86
[B][11] Deepening Insolvency 4-87
§ 4:3 Affirmative Defenses 4-90
§ 4:3.1 Statute of Limitations 4-90
[A] Continuous Representation Doctrine 4-99
§ 4:3.2 Plaintiff's Negligence 4-103
[A] Contributory Negligence..... 4-103
[B] Comparative Negligence 4-106
[C] *In Pari Delicto* Defense and Imputation..... 4-111
§ 4:3.3 Failure to File Certificate of Review or Affidavit..... 4-122
§ 4:3.4 Contractual Limitations of Liability..... 4-136
§ 4:4 Joint and Several Versus Proportional Liability 4-136
§ 4:5 Contribution and Indemnity 4-140

Chapter 5 Fraud

§ 5:1 General..... 5-2
§ 5:1.1 Sources of Claim..... 5-3
[A] Federal Law..... 5-3
[B] State Common Law 5-5
§ 5:1.2 Preemption of State Court Class Actions
Alleging Securities Fraud..... 5-6
§ 5:1.3 Types of Claims Encompassed 5-13
§ 5:2 Elements and Pleading..... 5-14
§ 5:2.1 Purchaser/Seller of Security Requirement..... 5-26
[A] "In Connection With"..... 5-26
[B] Purchase or Sale..... 5-31
[C] Of a Security 5-34
[D] Through an Interstate Instrumentality 5-37

Table of Contents

§ 5:2.2	Misstatement or Omission to State Fact with Duty to Disclose	5-38
[A]	Misstatements	5-38
[B]	Omissions	5-41
[C]	Trading Without Disclosing Nonpublic Information	5-49
§ 5:2.3	Materiality and the “Bespeaks Caution” Doctrine.....	5-51
§ 5:2.4	Scienter.....	5-60
§ 5:2.5	Reliance (Transaction Causation).....	5-67
[A]	Actual Reliance	5-68
[B]	Imputed Reliance	5-73
[B][1]	Material Omissions.....	5-73
[B][2]	Fraud-on-the-Market.....	5-75
[B][3]	Fraud-Created-the-Market.....	5-82
[B][4]	Fraud-on-the-Regulatory-Process	5-84
§ 5:2.6	Proximate (Loss) Causation	5-85
[A]	The Requirement.....	5-85
[B]	Some Illustrations.....	5-94
[C]	Loss Causation in Common Law Fraud Cases.....	5-96
§ 5:3	Affirmative Defenses	5-97
§ 5:3.1	Statute of Limitations	5-97
[A]	Federal Securities Law.....	5-97
[B]	Common Law Fraud.....	5-101
§ 5:3.2	Plaintiff’s Lack of Due Diligence	5-102
[A]	Extent to Which Applicable	5-102
[B]	<i>In Pari Delicto</i> and Imputation	5-102
§ 5:4	Damages.....	5-103
§ 5:4.1	In General.....	5-103
§ 5:4.2	Out-of-Pocket.....	5-105
§ 5:4.3	Rescissory Damages.....	5-109
§ 5:4.4	Benefit-of-the-Bargain	5-111
§ 5:4.5	Punitive Damages.....	5-112
§ 5:4.6	Tax Benefit Rule.....	5-118
§ 5:4.7	Prejudgment Interest	5-120
§ 5:5	Rescission.....	5-121
§ 5:6	Proportionate Liability	5-121
§ 5:7	Contribution.....	5-125
§ 5:8	Secondary or Vicarious Liability.....	5-128
§ 5:8.1	In General.....	5-128
§ 5:8.2	Aiding and Abetting; Distinguishing Primary Liability.....	5-129
[A]	Before <i>Central Bank</i>	5-129
[B]	<i>Central Bank</i>	5-131
[C]	After <i>Central Bank</i> and Before <i>Stoneridge</i> , <i>Janus</i> , and <i>Lorenzo</i>	5-132

[D]	<i>Stoneridge</i> and the Necessity of Reliance	5-136
[E]	<i>Janus</i> and the "Maker" of a Statement.....	5-139
[F]	<i>Lorenzo</i> and Liability for "Disseminating" a Misleading Statement.....	5-142
[G]	Enforcement Actions and the Future of Aid and Abet.....	5-144
[H]	Common Law Cases.....	5-146
§ 5:8.3	Controlling Person.....	5-148
§ 5:8.4	Conspiracy.....	5-151
§ 5:8.5	Respondeat Superior	5-154
§ 5:9	Note on Deceptive Trade Practice Statutes	5-157

Chapter 6 RICO

§ 6:1	Introduction	6-1
§ 6:2	Civil Damage Remedy	6-2
§ 6:2.1	In General.....	6-4
§ 6:2.2	Racketeering Activity	6-5
§ 6:2.3	Pattern of Racketeering Activity	6-10
§ 6:2.4	Enterprise	6-14
§ 6:2.5	Participation in or Control of: The <i>Reves</i> Decision	6-17
§ 6:2.6	Conspiracy.....	6-22
§ 6:3	Standing	6-23
§ 6:4	Causal Link.....	6-27
§ 6:5	Damages.....	6-31
§ 6:6	Defenses.....	6-34
§ 6:7	Dissatisfaction with RICO	6-38

Chapter 7 Breach of Fiduciary Duty

§ 7:1	General.....	7-2
§ 7:1.1	Potential Advantages to Bringing a Fiduciary Duty Claim.....	7-2
§ 7:1.2	Fiduciary Relationship Defined.....	7-4
§ 7:1.3	Circumstances in Which Accountant Is Not a Fiduciary.....	7-6
§ 7:1.4	Circumstances in Which Accountant Is a Fiduciary.....	7-10
[A]	Renders Personal Financial, Investment, or Tax Advice	7-11
[B]	Manages Client Assets or Business.....	7-13
[C]	ERISA Fiduciary.....	7-15

Table of Contents

§ 7:1.5	Duties of a Fiduciary.....	7-16
[A]	Duty of Loyalty.....	7-16
[B]	Duty to Disclose Relevant Facts and Render Accounts.....	7-18
[C]	Duty of Due Care	7-19
[D]	Duty to Maintain Client Confidences	7-20
§ 7:2	Elements of Claim.....	7-21
§ 7:2.1	Existence of a Fiduciary Relationship.....	7-22
§ 7:2.2	Breach of a Fiduciary Duty.....	7-23
§ 7:2.3	Damages Resulting from Breach	7-25
[A]	Compensatory Damages.....	7-25
[B]	Punitive Damages.....	7-27
[C]	Prejudgment Interest	7-33
§ 7:2.4	Other Available Remedies	7-34
[A]	Avoidance of Contract	7-34
[B]	Restitutionary Recovery	7-35
[C]	Injunctive Relief.....	7-36
[D]	ERISA Remedies	7-36
§ 7:3	Affirmative Defense: Statute of Limitations	7-37
§ 7:4	Participation by an Accountant in Another Party's Breach of Fiduciary Duty	7-39
§ 7:5	Apportionment and Contribution.....	7-43

Chapter 8 Liability Under Other Securities Law Provisions

§ 8:1	General.....	8-3
§ 8:1.1	Statutes.....	8-3
§ 8:1.2	General Requirements	8-3
§ 8:1.3	Preemption of Certain State Court Class Actions	8-5
§ 8:2	Section 11 of Securities Act	8-10
§ 8:2.1	In General.....	8-10
§ 8:2.2	Requisites	8-12
[A]	Material Misstatement or Omission.....	8-12
[B]	In Expertized Portion of Registration Statement.....	8-14
[C]	Plaintiff Bought in Public Offering.....	8-19
§ 8:2.3	Damages.....	8-21
[A]	As Per Statute; Loss Causation Defense.....	8-21
[B]	Apportionment Among Codefendants	8-23
§ 8:2.4	Affirmative Defenses	8-24
[A]	Due Diligence.....	8-24
[B]	Statute of Limitations	8-25
§ 8:3	Section 12(a)(2) of the Securities Act	8-27
§ 8:3.1	In General.....	8-27

ACCOUNTANTS' LIABILITY

§ 8:3.2	Requisites	8-30
[A]	Securities Sold by Means of Material Misstatement	8-30
[B]	Accountant Was Seller	8-32
[C]	Proof of Causation Not Required	8-34
§ 8:3.3	Damages	8-35
§ 8:3.4	Affirmative Defenses	8-35
[A]	Due Diligence	8-35
[B]	Absence of Loss Causation	8-36
[C]	Statute of Limitations	8-37
[D]	<i>In Pari Delicto</i>	8-39
§ 8:4	Liability Under the Uniform Securities Act	8-40
§ 8:4.1	In General	8-40
§ 8:4.2	Requisites	8-42
[A]	Securities Sold by Means of Material Misstatement	8-42
[B]	Accountant Was Seller or Control Person	8-42
[C]	Causation Not Required	8-47
§ 8:4.3	Damages	8-47
§ 8:4.4	Affirmative Defenses	8-47
[A]	Due Diligence	8-47
[B]	Statute of Limitations	8-48
§ 8:5	Liability Provisions of the Investment Advisers Act	8-49
§ 8:5.1	In General	8-49
§ 8:5.2	Circumstances Under Which Applicable	8-49
§ 8:5.3	Violations	8-51
[A]	Fraud	8-52
[B]	Failure to Disclose Conflicts of Interest	8-53
§ 8:5.4	Standing	8-54
§ 8:5.5	Affirmative Defenses	8-54
§ 8:5.6	Remedy	8-55
§ 8:5.7	Section 509(f) of 2002 Uniform Securities Act As an Alternative	8-55
§ 8:6	Section 18 of Securities Exchange Act	8-56
§ 8:6.1	In General	8-56
§ 8:6.2	Requisites	8-59
[A]	Material Misstatement in Filed Document	8-59
[B]	Standing	8-60
[C]	Reliance and Causation	8-61
[D]	Damages	8-63
§ 8:6.3	Affirmative Defenses	8-64
§ 8:7	Section 14 of Securities Exchange Act	8-65
§ 8:7.1	In General	8-65
§ 8:7.2	Requisites	8-67
[A]	Material Misstatement or Omission	8-68
[B]	Scienter	8-68

Table of Contents

[C]	Reliance	8-71
[D]	Causation	8-72
[E]	Damages.....	8-73
§ 8:7.3	Affirmative Defense: Statute of Limitations.....	8-74
§ 8:8	Section 10A of Securities Exchange Act	8-75
§ 8:8.1	Background.....	8-77
§ 8:8.2	SEC Actions and Proceedings.....	8-78
[A]	Potential Violators	8-79
[B]	Scope of an Audit.....	8-79
[C]	Standard of Care	8-80
[D]	Illegal Act.....	8-80
[E]	Identifying and Investigating Suspicious Circumstances.....	8-81
[F]	Fines and Sanctions	8-81
§ 8:8.3	Private Causes of Action	8-82

Chapter 9 Litigation Against Accounting Firms

§ 9:1	Introduction	9-2
§ 9:2	Litigation Strategies	9-4
§ 9:2.1	Plaintiffs' Strategies	9-4
§ 9:2.2	Defense Strategies.....	9-7
§ 9:3	The Complaint.....	9-9
§ 9:4	Motions to Dismiss.....	9-10
§ 9:5	The Discovery Stage	9-16
§ 9:5.1	Document Discovery	9-17
§ 9:5.2	Depositions.....	9-24
§ 9:5.3	Expert Discovery.....	9-25
§ 9:5.4	Non-Party Discovery.....	9-26
§ 9:5.5	Privilege Statutes.....	9-27
§ 9:5.6	Spoliation	9-28
§ 9:6	Summary Judgment.....	9-29
§ 9:7	Motions in Limine.....	9-30
§ 9:8	Trials	9-31
§ 9:9	Settlement	9-36
§ 9:9.1	Achieving a Settlement	9-37
§ 9:9.2	Terms of the Settlement Agreement.....	9-39
[A]	Consideration	9-39
[B]	Confidentiality Covenants.....	9-39
[C]	Global Settlements	9-40
[D]	Indemnification	9-41
§ 9:10	Alternative Dispute Resolution.....	9-43

Chapter 10 Disciplinary Proceedings Against Accountants

§ 10:1 Introduction 10-2

§ 10:2 SEC Disciplinary Proceedings 10-2

 § 10:2.1 Authority of the SEC 10-3

 § 10:2.2 The Investigative Process 10-5

 § 10:2.3 Grounds for Disciplinary Proceedings 10-6

 § 10:2.4 Suspension Without a Hearing 10-10

 § 10:2.5 Hearings 10-12

 § 10:2.6 Sanctions 10-13

 § 10:2.7 Appeals 10-15

 § 10:2.8 Reinstatement 10-15

§ 10:3 SEC Injunctive Actions and Cease and Desist Proceedings 10-16

§ 10:4 PCAOB Disciplinary Proceedings 10-19

 § 10:4.1 Background 10-19

 § 10:4.2 Investigation 10-19

 § 10:4.3 Hearings 10-21

 § 10:4.4 Sanctions 10-21

 § 10:4.5 Appeals 10-22

§ 10:5 State Disciplinary Proceedings 10-22

 § 10:5.1 Regulatory Framework 10-23

 § 10:5.2 Initiation of Proceedings 10-24

 § 10:5.3 Bases for Disciplinary Action 10-25

 § 10:5.4 Investigations and Hearings 10-27

 § 10:5.5 Sanctions 10-29

 § 10:5.6 Appeals 10-30

 § 10:5.7 Reinstatement 10-30

§ 10:6 AICPA Disciplinary Proceedings 10-31

 § 10:6.1 Sources of Disciplinary Complaints 10-32

 § 10:6.2 The Disciplinary Process 10-32

 § 10:6.3 Sanctions 10-33

 § 10:6.4 Appeals 10-34

Chapter 11 Professional Liability Insurance

§ 11:1 Introduction 11-2

§ 11:2 Market for Accountants' Liability Insurance 11-2

 § 11:2.1 Insurance Market for Large Firms 11-2

 § 11:2.2 Insurance Market for Mid-Size Firms 11-3

 § 11:2.3 Insurance Market for Small Firms 11-4

§ 11:3 Policy Terms 11-5

 § 11:3.1 Period Covered by Policy 11-5

 § 11:3.2 Insured Persons 11-6

Table of Contents

§ 11:3.3 Covered Actions 11-6
§ 11:3.4 Territorial Limitations 11-8
§ 11:3.5 Covered Damages 11-8
§ 11:4 Limits of Liability and Deductibles 11-10
§ 11:5 Exclusions 11-11
§ 11:6 Notice of Claims and Insurer Responses 11-13
§ 11:7 The Insured’s Duty to Cooperate..... 11-17
§ 11:8 Defense of Insureds 11-17
 § 11:8.1 Selection of Counsel 11-17
 § 11:8.2 Conflicts of Interests 11-22
 § 11:8.3 Defense Strategies..... 11-23
 § 11:8.4 Alternative Dispute Resolution..... 11-25
 § 11:8.5 Settlement of Claims 11-26
 § 11:8.6 Counterclaims 11-28
§ 11:9 Subrogation Rights 11-30
§ 11:10 Cancellation and Rescission 11-31
§ 11:11 Changing Insurers 11-32
§ 11:12 Discovery of Insurance Coverage 11-33

Table of Cases T-1

Index I-1

