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Lexology Navigator – Securities Litigation
in USA

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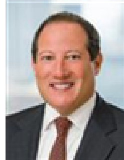
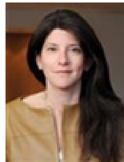
Contributors

USA

Skadden Arps Slate Meagher & Flom LLP
Jay B. Kasner
jay.kasner@skadden.com



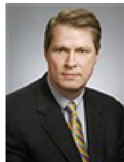
Skadden Arps Slate Meagher & Flom LLP
Scott D. Musoff
scott.musoff@skadden.com



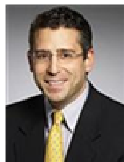
Skadden Arps Slate Meagher & Flom LLP
Susan L. Saltzstein
susan.saltzstein@skadden.com

Skadden Arps Slate Meagher & Flom LLP
Charles F. Smith
charles.smith@skadden.com

Skadden Arps Slate Meagher & Flom LLP
Peter B. Morrison
peter.morrison@skadden.com



Skadden Arps Slate Meagher & Flom LLP
James R. Carroll
james.carroll@skadden.com



Skadden Arps Slate Meagher & Flom LLP
Edward B. Micheletti
edward.micheletti@skadden.com

Skadden Arps Slate Meagher & Flom LLP
Noelle M. Reed
noelle.reed@skadden.com

Skadden Arps Slate Meagher & Flom LLP
William J. O'Brien

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william.obrien@skadden.com

Skadden Arps Slate Meagher & Flom LLP
Nicholas A. Ickovic
nicholas.ickovic@skadden.com

Skadden Arps Slate Meagher & Flom LLP
Ashley P. Grolig
ashley.grolig@skadden.com

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Market trends and climate

Market trends and climate

What is the general state of the securities markets in your jurisdiction, including any notable trends and recent transactions?

The US high-yield and investment-grade debt markets significantly increased in 2017 over 2016 in dollar volume and number of issuances. The US equity indices also reached new highs, with the Standard & Poor's 500 Index ending the year up 19.4%. The slow and steady expansion of the economy (one of the longest expansion cycles on record) and the current favourable market conditions, along with the recently enacted reduction in corporate taxes – which could drive earnings expansion – have fuelled optimism for robust capital markets activity in 2018.

However, questions remain in regard to the sustainability of the bull run and whether volatility can remain at historically low levels (see Michelle Gasaway et al, "US Capital Markets Expected to Remain Robust in 2018", January 23 2018).

Investors and analysts have expressed increased interest in cryptocurrency as one potentially significant area for investment. The securities markets in 2018 may also be affected by:

- corporate tax reform resulting in an influx of cash;
- alternative forms of financing, including venture capital and increasing leverage ratios; and
- federal reserve activity, particularly in increasing interest rates (see
-).

Another potential influence is the impact of the Trump administration's efforts at deregulation, including attempts to roll back portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.

Regulatory framework and enforcement

Legislation

What is the primary legislation governing the offer and trade of securities in your jurisdiction (both primary and secondary markets)?

Various congressional acts, together with implementing regulations promulgated by federal agencies, govern the offer and trade of securities at the federal level in the United States. Congressional legislation includes:

- the Securities Act 1933;
- the Securities Exchange Act 1934;
- the Private Securities Litigation Reform Act 1995; and
- the Securities Litigation Uniform Standards Act 1998.

In addition to the federal securities laws, each state has its own set of securities laws – commonly referred to as 'blue sky laws' – that are designed to protect investors against fraudulent sales practices and activities. Although these laws vary from state to state, most jurisdictions require companies to register securities offerings before their securities can be sold in a particular state, in the absence of an applicable state exemption (see "Blue Sky Laws", Securities and Exchange Commission (SEC) (October 14 2014)). Typically, these statutes also contain anti-fraud provisions that impose liability for misrepresenting or omitting material facts in connection with the purchase or sale of securities (see Antifraud provisions, 14 Fletcher Cyclopedia Corporations, Section 6782).

Regulatory authorities and enforcement trends

Which authorities regulate the securities markets in your jurisdiction and what is the extent of their enforcement powers?

Financial markets are regulated by the SEC Commodity Futures Trading Commission (CFTC). The SEC is a federal agency with broad powers specified by several Congressional statutes – most significantly, the Securities Act and the Securities Exchange Act, and more recently, the Sarbanes-Oxley Act 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 – as well as the regulations that the SEC promulgates thereunder.

The CFTC is a federal agency responsible for regulating agricultural and financial commodities. It ensures that these markets are liquid and that parties to options or futures transactions can meet their contractual obligations.

US securities markets are also regulated by several self-regulatory organisations (SROs), which are non-

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governmental organisations that may create and enforce industry regulations and standards. Notable SROs include the Financial Industry Regulatory Authority.

State securities laws (blue sky laws) are subject to regulation and enforcement by state regulatory agencies and, in some states, by the state attorney general. State securities regulators are responsible for:

- licensing securities firms and investment professionals;
- registering certain securities offerings;
- reviewing financial offerings of small companies;
- auditing sales practices and record keeping;
- promoting investor education; and
- enforcing state securities laws (see "
- ", North American Securities Administrators Association; for an indicative list of state securities regulatory agencies, see "
- ", North American Securities Administrators Association).

Have there been any notable public enforcement trends, including any key recent actions?

In 2017 the SEC created a cyber unit in order to, among other things:

- address manipulation and information breaches across issuers;
- address misconduct effected through the dark web; and
- evaluate the regulation of initial coin offerings.

The first SEC action by the cyber unit was filed on December 4 2013 in New York against Lacroix and PlexCorps (see Vedder Price, "Highlights From SEC Speaks 2018: Litigation and Enforcement Trends", March 1 2018).

In a 2017 decision, the Supreme Court held that disgorgement actions in SEC enforcement of federal securities laws operate as a penalty and are therefore limited by a five-year statute of limitations for initiation of enforcement proceedings (see Kokesh v SEC, 137 S Ct 1635 (2017)).

Further, the Supreme Court recently held that the 'whistle-blower' anti-retaliation provisions in the Dodd-Frank Act apply only to individuals who report alleged misconduct to the SEC (see Digital Realty Trust, Inc v Somers, 138 S Ct 767 (2018)).

Last term, the Supreme Court also analysed the 'personal benefit' requirement for insider trading liability, finding that when a tipper and tippee are relatives or friends, the government need not establish a potential pecuniary or other gain (see Salman v United States, 137 S Ct 420 (2016)).

The total number of enforcement actions decreased from 868 in 2016 to 754 in 2017 (see SEC Division of Enforcement, "Annual Report: A Look Back at Fiscal Year 2017", 2018).

Courts

Court system

How is the court system structured in your jurisdiction? Are there any specialist courts with jurisdiction over securities-related actions?

The federal judicial system has three main levels and is organised geographically into:

- 94 federal district courts, which serve as general trial courts;
- 13 circuit courts, which serve as intermediary appellate courts; and
- the Supreme Court, which holds ultimate judicial authority on all US federal law matters.

While there are no specialty courts for securities matters, every district has specialty bankruptcy courts, each of which falls under the authority of the district judges in its district who address bankruptcy cases (see United States Courts, "Court Role and Structure").

Each state also has its own state court system, established by its own constitution and laws. Many states have courts that handle specific legal matters – for example, probate courts, juvenile courts and family courts (see United States Courts, "Comparing Federal & State Courts").

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Procedure

What rules govern court procedure? Are there any provisions specific to securities cases?

In federal court, the Federal Rules of Civil Procedure and the local rules for each district court generally govern court procedure. For example, Rule 9(b) of the Federal Rules of Civil Procedure imposes a heightened pleading requirement for fraud claims in general.

Court procedural rules are supplemented by several acts of Congress. For example, the Private Securities Litigation Reform Act 1995, among other things:

- instructs district courts to issue a stay of discovery during the pendency of a motion to dismiss;
- requires plaintiffs to meet certain heightened pleading requirements; and
- provides certain rules for selecting lead plaintiffs in securities class actions.

Each state has its own general rules of court procedure that govern cases brought in state court, including different or additional procedures. States may also have courts with exclusive jurisdiction over particular legal matters.

Appeals

What rules and procedures govern the appeal process?

Appeals are governed by the Federal Rules of Appellate Procedure and the local rules for each circuit court of appeals. If further appeals are taken to the Supreme Court, the Rules of the Supreme Court (effective November 13 2017) govern. While a number of exceptions exist, appeals in federal proceedings can be taken only from final orders.

State procedural rules may differ from federal rules in the structure of their appellate process. For example, unlike in federal court, New York state court rules generally permit litigants to appeal, on an interlocutory basis, the denial of a motion to dismiss or motion for summary judgment (see NY CPLR 5701; see also Moleon v Kreisler Borg Florman General Construction Company, 758 NY S 2d 621 (1st Dept 2003) (motion to dismiss denial appealable as a matter of right) and Diaz v Jadan, 984 NY S 2d 55 (1st Dept 2014) (same as to summary judgment denial)).

Recent case law and litigation trends

Have there been any notable recent cases involving private securities claims or trends in private securities litigation?

The Supreme Court recently held that the Securities Litigation Uniform Standards Act 1998 neither strips state courts of jurisdiction to hear claims under the Securities Act 1933 nor permits defendants to remove class actions alleging only Securities Act claims from state to federal court (see Cyan, Inc v Beaver County Employees Retirement Fund, 138 S Ct 1061 (2018)).

The courts have distinguished between a statute of limitations (rooted in equity) and a statute of repose (a creature of statute). In California Public Employees' Retirement System v ANZ Securities Inc (137 S Ct 2042 (2017)) the Supreme Court held that the three-year statute of repose under Section 13 of the Securities Act is not tolled by the timely filing of a putative class action, even though under American Pipe & Construction Co v Utah (414 US 538 (1974)), the one-year statute of limitations is tolled by such filing until the denial of class certification. Further interpretation of the bounds of statutes of limitations and repose – including whether the statute of repose can bar class certification after the three-year period expires – is expected in 2018.

As for filing trends, federal securities class actions reached a high-water mark in 2017. The total of 400-plus filings in 2017 was the second highest on record, topped only in 2001, when the number was skewed by more than 300 cases brought in connection with the allocation of shares in high-tech initial public offerings.

According to NERA Economic Consulting, securities suit filings continue to increase, with approximately 8.2% of exchange-listed companies being subject to a securities suit filed in 2017 – nearly double the rate of filings in 2014 against such companies (see Stefan Boettrich and Svetlana Starykh, NERA Economic Consulting, "Recent Trends In Securities Class Action Litigation: 2017 Full-Year Review", 2018).

One feature of these increased filings is a greater focus on foreign issuers. According to NERA, 25.5% of securities suits filed in 2017 were against non-US companies, a steady annual increase from 17.3% in 2013 (id at 8). Event-driven securities fraud suits following the disclosure of any corporate crisis – including data breaches and environmental, antitrust, Foreign Corrupt Practices Act or other regulatory issues – also continue to rise.

Finally, companies in industries that may have highly volatile results that depend on the success of certain products

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(eg, life sciences and technology) remain particularly susceptible to securities actions and were frequently targeted in 2017 – a trend that is expected to continue in 2018.

Court approach to securities cases

Would you consider your jurisdiction to be a more claimant-friendly or defendant-friendly forum for securities litigation?

Whether a US jurisdiction is more claimant or defendant-friendly is a context-specific inquiry that depends on numerous factors, including:

- the jurisdiction involved;
- the claim being asserted (which may have more or less burdensome pleading requirements);
- the political and other leanings of potential jurors within a specific jurisdiction; and
- the temperament and judicial philosophy of the presiding judge.

Cross-border litigation

How do the courts in your jurisdiction address cross-border securities litigation?

Securities transactions must fall under US law to authorise public or private enforcement. In Morrison v National Australia Bank Ltd (561 US 247 (2010)) the Supreme Court ruled that Section 10(b) of the Securities Exchange Act 1934 reaches only those securities which are "listed on an American stock exchange" or are purchased or sold "in the United States" (id at 273). The courts have grappled with what this means in a variety of different contexts, particularly as to the second prong, but have extended its application to claims under Section 11 of the Securities Act, following the dicta in Morrison that the "same focus on domestic transactions is evident in the Securities Act of 1933" (id at 268).

Claims

Causes of action

Which causes of action can be asserted by claimants in relation to the offer and trade of securities and which are most commonly asserted?

Claims arising under Section 10(b) of the Securities Exchange Act 1934 are the most commonly asserted causes of action under the federal securities laws (see Paul, Hastings, Janofsky & Walker, LLP, Securities Law Claims: A Practical Guide, 2004, p 75). Although Section 10(b) does not specify a private cause of action, courts have held an implied private right of action under Securities and Exchange Commission (SEC) Rule 10b-5 (id). Section 10(b) and Rule 10b-5 impose civil liability on persons who intentionally make false and misleading statements that affect aftermarket trading in securities. Section 20 of the Securities Exchange Act imposes secondary liability on persons who control persons or entities held primarily liable under Section 10(b).

Claimants also regularly assert federal claims under the Securities Act 1933 – most commonly under Sections 11 and 12 of the act. While Section 11 imposes liability on issuers for material misrepresentations or omissions in a registration statement, Section 12 imposes liability on statutory sellers for:

- selling an unregistered security (when the security must be registered); and
- selling securities by means of materially false or misleading prospectuses or oral communications.

Section 15 of the Securities Act imposes secondary liability on persons who control persons or entities held primarily liable under Sections 11 and 12.

Each state also has its own securities laws, which are commonly referred to as 'blue sky laws'. Typically, these statutes also contain anti-fraud provisions that provide a private right of action for misrepresenting or omitting material facts in connection with the purchase or sale of securities.

Directors' and officers' liability

In what circumstances and to what extent can directors and officers be held liable for misrepresentations, omissions or other fraudulent conduct in relation to the offer and trade of securities?

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In theory, a variety of state and federal laws could implicate the legal interests of officers and directors. However, in federal court, one useful starting point in assessing potential liability under the securities laws is Section 10(b) of the Securities Exchange Act. Under this provision, which imposes civil liability on persons who intentionally make false and misleading statements that affect aftermarket trading in securities, primary liability can be imposed only on the maker of the allegedly misleading statement (ie, the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it) (see Janus Capital Group, Inc v First Derivative Traders, 564 US 135 (2011)).

Secondary liability is possible under Section 20 of the Securities Exchange Act if the director or officer controls the entity (15 USC Section 78t(a)) (see also 17 CFR Section 230.405, which defines 'control').

Directors and officers can also be held liable under the Securities Act. For example, Section 11 of the act imposes strict liability for registration statements that contain an untrue or misleading statement of material fact on:

- every person who signed the registration statement;
- directors or partners at the time of the filing of the registration statement;
- every person who is named in the registration statement as being or about to become a director;
- every expert who is named by consent as having certified or prepared any part of the registration statement; and
- every underwriter (15 USC Section 77k(a)).

Generally, each defendant is held jointly and severally liable, except that the liability of underwriters (other than the managing underwriter) is limited to the amount of their participation in the offering (15 USC Section 77k(e)) and an outside director's liability for violations not committed knowingly is proportionate to the damages that the director caused (15 USC Section 77k(f)(2)(A)).

Can liability be limited in any way?

There are a variety of avenues for defending against claims under the securities laws. A useful starting point is to identify case law that may be used to refute one or more of the required elements of the cause of action at issue. In mounting a defence, one should also consider any statutory or other affirmative defences that may apply.

Secondary liability

In what circumstances and to what extent can secondary actors (eg, attorneys, auditors and underwriters) be held liable for misrepresentations, omissions or other fraudulent conduct in relation to the offer and trade of securities?

A number of state and federal laws could implicate secondary actors for misrepresentations, omissions or other fraudulent conduct with regard to the offer and trade of securities. However, in federal court, one useful starting point in assessing potential liability is Section 11 of the Securities Act. For cases brought under Section 11, liability may extend in certain circumstances to secondary actors, including the underwriters of the offering and any expert who consents to his or her opinion being used in the registration statement, such as an accounting firm that audited the company's financial statements (15 USC Section 77k(a)).

Generally, each defendant is held jointly and severally liable, except that the liability of underwriters (other than the managing underwriter) is limited to the amount of their participation in the offering (15 USC Section 77k(e)) and an outside director's liability for violations not committed knowingly is proportionate to the damages that he or she caused (15 USC Section 77k(f)(2)(A)).

For cases brought under Section 10(b) of the Securities Exchange Act, liability is limited to the maker of the statement or the person or entity that had ultimate authority over the alleged misstatement (see Janus Capital Group, Inc v First Derivative Traders, 564 US 135 (2011)).

Some courts have found Janus to prohibit liability of secondary actors, such as attorneys and auditors (see Derby City Capital, LLC v Trinity HR Services, 949 F Supp 2d 712 (WD Ky 2013) (holding attorney who prepared but did not file Securities and Exchange Commission (SEC) filings not liable under Janus); in re DVI Inc Sec Litigation, No 03-5336, 2013 WL 56073 (ED Pa Jan 4 2013) (same)).

Fraudulent actions by customers and suppliers are not actionable under Section 10(b) and the SEC Rule 10b-5 (see Stoneridge Investment Partners v Scientific-Atlanta, 552 US 148 (2008)). Secondary liability is possible under Section 20(a) of the Securities Exchange Act if the secondary actor is found to control the entity (15 USC Section 78t(a); see also 17 CFR Section 230.405 (defining 'control')).

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identify case law that may be used to refute one or more of the required elements of the cause of action at issue. In mounting a defence, one should also consider any statutory or other affirmative defences that may apply.

Eligible claimants

Who may file securities claims? Are there any restrictions on foreign claimants? Who are the most common claimants (eg, pension funds, institutional investors)?

Generally, in both state and federal courts, private litigants must be able to plead and prove that they have legal standing to sue. In other words, they must show that:

- they have an 'injury in fact' – that is, an invasion of a legally protected interest which is:
  - o concrete and particularised; and
  - o actual or imminent, not conjectural or hypothetical;
- there is a causal connection between the injury and the conduct complained of; and
- it is likely (as opposed to speculative) that the injury will be redressed by a favourable decision (see
- , 504 US 555, 560-61 (1992)).

In the federal court system, securities claims are a creature of statute. Therefore, claimants must meet the specific requirements of the law under which they wish to bring suit. For example, with regard to claims brought under the antifraud provisions of the Securities Exchange Act, such as Section 10(b), claimants must be the purchaser or seller of securities in the transaction complained of (see Blue Chip Stamps v Manor Drug Stores, 421 US 723 (1975)).

For cases brought in federal courts, there are no restrictions on foreign claimants asserting claims based on securities purchased on a US-based exchange; however, foreign claimants are prohibited from bringing claims based on securities not purchased in domestic transactions (see Morrison v National Australia Bank, 561 US 247 (2010)).

For putative class actions brought in federal court under the Securities Act and the Securities Exchange Act, the most common claimants are pension funds and other institutional investors. This is largely due to certain procedural requirements that were enacted as part of the Private Securities Litigation Reform Act 1995. These rules govern the selection of lead plaintiffs in certain class actions.

Pleading and evidentiary standards

What pleading and evidentiary standards apply to securities claims, including with regard to:

(a) Proof of reliance on the relevant misrepresentation, omission or other fraudulent conduct?

For claims brought under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, plaintiffs must prove actual reliance on the defendant's misstatement. For claims involving omissions, proof of reliance is unnecessary if the omitted facts were material (see Affiliated Ute Citizens of Utah v United States, 406 US 128 (1972)).

For claims involving false or misleading representations on a public trading market, courts will find a rebuttable presumption of reliance based on a 'fraud on the market' theory. This theory assumes that if the alleged truth had been disclosed, investors would not have traded the securities at issue at the same price (see Basic Inc v Levinson, 485 US 224 (1988)). A defendant can rebut the presumption by showing that:

- the purported misrepresentation did not affect the stock price; or
- the plaintiff knew the alleged truth (id at 248 to 249).

For claims brought under Section 11 of the Securities Act, the plaintiff is not required to show proof of reliance in most circumstances. However, the plaintiff must show proof of reliance if the stock was acquired after the issuance of a 12-month earnings statement (15 USC Section 77k(a)).

(b) Proof of loss causation?

For claims brought under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, plaintiffs must prove that the challenged act or omission caused their loss (15 USC Section 78u-4(b)(4)). The courts apply a two-pronged causation analysis:

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- First, plaintiffs must prove transaction causation – that "but for" the fraudulent misrepresentation, the investor would not have purchased or sold the security (see
- , 485 US 224 (1988)).
- Second, plaintiffs must show loss causation – that "the act or omission of the defendant alleged to violate [the Securities Exchange Act] caused the loss for which the plaintiff seeks to recover damages" (15 USC Section 78u-4(b)(4)).

The loss causation prong takes into consideration the presence of any intervening or superseding causes, as well as the lapse of time between the behaviour complained of and the loss (see Dura Pharmaceuticals, Inc v Broudo, 544 US 336, 342-43 (2005)).

For claims brought under Section 11 of the Securities Act, plaintiffs are not required to plead loss causation. However, the defendant may raise the lack of causation (or 'negative causation') as an affirmative defence. Under the negative causation defence, the defendant can avoid or reduce liability by demonstrating that the depreciation in value was due to factors other than the alleged misstatements or omissions (see Hildes v Arthur Andersen LLP, 734 F3d 854 (9th Cir 2013)).

(c) Materiality requirements?

Plaintiffs must prove materiality in federal securities actions. The courts apply a reasonable investor standard, which requires the plaintiff to prove a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (see TSC Indus, Inc v Northway, Inc, 426 US 438, 449 (1976) (setting forth materiality standard under Section 14(a) of the Securities Exchange Act); Basic Inc v Levinson, 485 US 224 (1988) (expressly adopting the TSC Industries materiality standard for Section 10(b) and Rule 10b-5 claims); Matrixx Initiatives, Inc v Siracusano, 563 US 27 (2011) (reaffirming that materiality must be evaluated in light of the 'total mix' of information); and Litwin v Blackstone Group, 634 F3d 706, 716-17 (2d Cir 2011) (applying the same standard to claims brought under Sections 11, 12(a)(2) and 15 of the Securities Act)).

A material fact "need not be outcome-determinative"; rather, the "information need only be important enough that it 'would have assumed actual significance in the deliberations of the reasonable shareholder'" (see Folger Adam Company v PMI Industries, 938 F2d 1529, 1533 (2d Cir 1991)). Materiality is judged as of the time that the investor makes the investment decision (id at 1532 n2).

(d) Scienter requirements?

For claims brought under Section 10(b) of the Securities Exchange Act, plaintiffs must plead particular facts giving rise to a strong inference that each defendant acted with scienter (ie, a culpable state of mind) as to each act or omission alleged. A plaintiff must prove that each defendant made a deliberate or reckless misstatement with the "intent to deceive, manipulate, or defraud" the buyers or sellers of securities (see Ernst & Ernst v Hochfelder, 425 US 185 (1976)).

For claims brought under Section 11 of the Securities Act, plaintiffs need not prove scienter. However, defendants other than the issuer can establish one or more of the affirmative defences codified at 15 USC Section 77k(b)(3), including what is commonly referred to as the 'due diligence' defence. Generally, under this defence, defendants (other than the issuer) can preclude liability by proving that they had reasonable grounds for believing, and did in fact believe, that there was no misrepresentation or omission of material fact in the registration statement at issue (15 USC Section 77k(b)(3)).

(e) Any other requirements, standards or considerations?

The following requirements, standards or considerations are worth bearing in mind for some common federal securities law claims:

- All claims brought under the Securities Act and the Securities Exchange Act are subject to statutes of limitations and statutes of repose (see 15 USC Section 77m and 28 USC Section 1658(b)).
- Plaintiffs and defendants should assess the applicable personal and subject matter jurisdiction requirements (see 15 USC Sections 78aa(a) and 77v(a)).

In federal court, claims may also be subject to heightened pleading requirements. For example, federal securities fraud claims brought under Section 10(b) of the Securities Exchange Act must comply with the more stringent pleading demands of the Private Securities Litigation Reform Act.

Disclosure

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What pre-trial disclosure/discovery mechanisms are available to support claims, if any?

Generally, both state and federal courts have liberal pre-trial discovery requirements. Although these rules may vary depending on the jurisdiction in which the action is pending, typically litigants can use a variety of discovery devices to obtain relevant information from both parties and non-parties to the litigation. These discovery mechanisms include:

- document requests;
- oral depositions;
- interrogatories; and
- requests for admissions.

Some jurisdictions (eg, all federal district courts) may also have automatic disclosure requirements.

What rules and standards govern non-disclosure of documents on the grounds of professional privilege or other confidentiality considerations?

Generally, the Federal Rules of Evidence and law of the jurisdiction in which an action takes place govern the appropriate circumstances for withholding documents on privilege grounds. Confidentiality considerations are largely determined by court order or the judge's individual rules and may vary based on, among other things:

- the scope of the case;
- the underlying materials; and
- the motions and stipulations of the parties.

Interim relief

What interim measures are available to claimants in securities cases?

Interim measures such as injunctions are governed by the procedural rules of the federal district or state in which the action takes place and may require showing elements, such as a high likelihood of success on the merits by the party seeking the injunction and irreparable harm in the absence of court intervention, which securities actions seeking money damages may lack.

In federal court, interim appeals are generally not permitted – generally, an order must be final to be appealed, although other decisions may be reviewed by the same judge under a motion for reconsideration. One notable form of interim relief which may be available in the class action context (although it is by no means specific to securities cases) is a permissive interlocutory appeal of certain class certification decisions under Federal Rule of Civil Procedure 23(f).

State court rules may differ.

Statute of limitations

What is the statute of limitations for filing claims?

Under 28 USC Section 1658(b), plaintiffs must bring claims under Section 10(b) of the Securities Exchange Act before the earlier of "2 years after the discovery of the facts constituting the violation" or "5 years after such violation".

Under Section 13 of the Securities Act, actions under Sections 11 and 12(a)(2) of the act must be brought within one year of the date of actual discovery or when such discovery "should have been made by the exercise of reasonable due diligence". There is also a statute of repose:

- three years from the date on which the security was offered to the public for Section 11 claims; and
- three years from the sales date of the security for Section 12(a)(2) claims (15 USC Section 77m).

Defence

Defences

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What defences are available to defendant issuers and broker-dealers?

There are a variety of avenues for defending against claims under the securities laws. One starting point is to identify case law that may be used to refute one or more of the required elements of the cause of action at issue. In mounting a defence, any applicable statutory or other affirmative defences should be considered.

Preliminary actions

What preliminary procedural mechanisms are available to defendants to counter claims, if any (eg, motions to dismiss)?

In the federal system, common preliminary procedures include:

- motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure;
- a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; and
- an opposition to class certification (if the case is brought as a putative class action) challenging the elements under Rule 23 of the Federal Rules of Civil Procedure.

Where securities actions are brought in state court, state procedures may vary and could include some or all of these procedural mechanisms.

Damages and costs

Damages

What rules and standards govern the calculation and award of damages?

For federal securities claims, damages are governed by statute, as construed judicially over time. For example, claims under Section 10(b) of the Securities Exchange Act 1934 and Securities and Exchange Commission (SEC) Rule 10b-5 can include various forms of relief, such as injunctive relief and damages. The measure of damages is governed by Section 28(a) of the Securities Exchange Act, which limits recovery to "actual damages". In Affiliated Ute Citizens of Utah v United States (406 US 128 (1972)) the Supreme Court held that the correct measure of damages under Rule 10b-5 is the 'out-of-pocket' measure – in other words, the difference between the price paid or received and the true value at the time of purchase or sale (ie, the fair value in the absence of fraudulent conduct).

Are damages capped?

For statutory claims, damages may be subject to various limitations or 'caps'. For example, under Section 28 of the Securities Exchange Act, a plaintiff's recovery cannot exceed actual damages. Specifically, pursuant to Section 21D(e) of the act, actions in which recovery is based on the market price of the stock, damages are capped at the difference between the transacted price and the average of the daily price during a 90-day period after corrective disclosure (15 USC Section 78u-4(e)).

Are punitive damages allowed?

Punitive damages are not allowed for federal securities claims.

Other remedies

Are any other remedies available?

Only the remedies specified by the statutes (as construed over time by judicial decisions) are available.

Costs

Who bears the costs of proceedings? Can this burden be shifted in any way?

Under the so-called 'American rule', parties generally bear their own costs. Typically, this burden is not altered for securities cases; however, under the Private Securities Litigation Reform Act 1995 (15 USC Section 78u-4(c)), upon the final adjudication of an action, the court must conduct a mandatory penalties review under Rule 11 of the Federal Rule of Civil Procedure. The court must include in the record specific findings regarding each party's compliance with the requirements of Rule 11. The presumed appropriate penalty for a Rule 11 violation is an award of the opposing parties' reasonable attorneys' fees and other expenses.

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How are costs calculated? Does interest accrue on costs?

The rules of the jurisdiction in which the case is pending should be consulted.

What rules and procedures apply to the provision of security for costs?

Generally, parties are not required to provide security for costs in a securities suit.

Class actions

Are class actions or any other collective proceedings available for securities claims in your jurisdiction? If so, what is the procedure for their formation and what benefits do they afford claimants? Are class actions formed on an opt-in or opt-out basis?

Class actions are available for securities claims and are a popular device for pursuing and managing shareholder suits based on alleged violations of the federal securities laws (see Paul, Hastings, Janofsky & Walker LLP, Securities Law Claims: A Practical Guide (2004) p 157).

In federal court, class actions are governed by Rule 23 of the Federal Rule of Civil Procedure.

Class actions are generally considered beneficial to claimants because they can equalise the relative power of the litigants and provide recourse to injured parties whose claims would otherwise be too expensive to litigate on an individual basis. Class actions also promote judicial efficiency by unifying multiple suits (see Phillips Petroleum v Shutts, 472 US 797, 809 (1985)).

Securities class actions are formed on an opt-out basis. Class members are automatically included and eligible for any potential settlements provided that they meet the eligibility criteria in the settlement's plan of allocation. Each case has an opt-out date by which members must opt out or else give up the right to pursue litigation on their own.

Litigation funding

Availability

Is public or third-party litigation funding available in your jurisdiction? If so, what rules, standards and procedures apply?

An April 2017 study found that nearly 30% of private practice attorneys and firms surveyed reported using alternative litigation funding, compared to just 7% in 2013. In March 2017 a third-party litigation financier reported that its average investment in new cases was approximately $13 million, up from less than $4 million in 2013. In 2016 the worldwide market for third-party litigation financing was estimated to exceed $1 billion (see Jason D Russell et al, "Third-Party Litigation Financing: Mandatory Disclosure on the Horizon?", April 19 2017).

There are no specific rules or standards for third-party litigation funding in securities actions, although courts will analyse questions about control of the litigation, conflicts of interest and appropriateness under the attorneys' ethical obligations to the parties that they represent. In the class action context, the court must also conduct an analysis of the fees and expenses from a proposed settlement fund and may award a smaller share than plaintiffs' counsel or the third-party investor expected or promised.

Insurance

Is insurance available to cover the costs of litigation?

Insurance may be available to cover litigation risks and settlement costs, depending on a variety of factors, including the terms, scope and conditions of the policies themselves.

Settlement

Rules and procedure

What rules and procedures govern the settlement of securities litigation?

Securities class action settlements in federal court are governed by Rule 23 of the Federal Rule of Civil Procedure (particularly 23(e)). Under Amchem Products, Inc v Windsor (521 US 591 (1997)), putative classes being certified solely for settlement must meet the same requirements under Rule 23(a) and 23(b).

Rule 23(e) requires:

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- notice in a reasonable manner to all class members;
- a hearing concerning the fairness, reasonableness and adequacy of the settlement;
- a statement by the parties identifying their agreement in connection with the settlement;
- an opportunity for the court to refuse to approve the settlement unless it affords a new opportunity for class members to opt out; and
- an opportunity for class members to object to the settlement.

Federal class action settlements proceed as follows:

- a hearing for preliminary approval;
- the issuance of notice in a form and manner approved by the court;
- a period for objections; and
- a hearing for final approval of the settlement (typically months apart).

In most cases, "the terms of a settlement agreement do not require court approval and the agreement does not need to be filed with the court" (Carolyn M Branthoover and Eric M Matava, Practical Law Institute, "Settlement (Civil Litigation) Q&A: US (New York)", March 31 2017, p 2).

Aside from class actions, settlement of bankruptcy proceedings and shareholder derivative actions may be subject to specific court review and ratification (see id at 3).

Prevalence

How common are settlements in securities-related cases?

According to NERA Economic Consulting, 148 securities cases settled in 2017 – a significant increase from 113 in 2016:

"Very few securities class actions reach the trial stage and even fewer reach a verdict… [As of year-end 2016, o]nly 21 cases have gone to trial [since the passage of the Private Securities Litigation Reform Act], and only 16 have reached a verdict or a judgment."

NERA has also found that, although many cases remain pending, around or over one-half settle. Cases are classified as settling, pending or dismissed. Of securities cases filed in 2011, 47% settled and 52% were dismissed (see Stefan Boettrich and Svetlana Starykh, NERA Economic Consulting, "Recent Trends In Securities Class Action Litigation: 2017 Full-Year Review", 2008, p 41).