U.S. Supreme Court Securities Litigation Decisions

A Practical Guidance® Practice Note by Susan L. Saltzstein and Kyle J. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP

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This practice note highlights a selection of U.S. Supreme Court decisions that touch on key aspects of the securities laws, including (1) liability for statements of opinion and belief; (2) the scope of liability under the Securities Exchange Act of 1934, as amended (Exchange Act); (3) disgorgement in Securities and Exchange Commission (SEC) enforcement actions; (4) issues relating to the Securities Litigation Uniform Standards Act of 1998 (SLUSA); (5) limitation periods; and (6) the scope of liability under the Securities Act of 1933, as amended (Securities Act). The U.S. Supreme Court has shaped the contours of litigation under the Securities Act and the Exchange Act and has been particularly attentive to issues arising under these statutes in recent years. This note discusses critical decisions on issues such as materiality, scienter, loss causation, reliance, extraterritoriality, and insider trading.

For additional practical guidance on securities litigation under the Securities Act and the Exchange Act, see Securities Act and Exchange Act Liability Provisions, Section 11 Elements and Defenses under the Securities Act, Section 12(a)(2) Elements and Defenses under the Securities Act, Control Person Liability, Jurisdictional Defenses under the Securities Act, Jurisdictional Defenses under the Exchange Act, Reliance in Securities Fraud Actions, Materiality in Securities Fraud Actions, Scienter Defenses in Securities Fraud Actions, Securities Litigation under the Private Securities Litigation Reform Act (PSLRA), Special Litigation Committees, Defense Strategies under the Securities Act, Liability under the Federal Securities Laws for Securities Offerings, U.S. Securities Laws, and Liability for Securities Offerings Checklist.

Liability for Statements of Opinion and Belief

The Supreme Court addressed what may constitute a false or misleading opinion for purposes of liability under Section 11 of the Securities Act in Omnicare, Inc. v. Laborers Distr. Council Constr. Indus. Pension Fund, 575 U.S. 175 (2015). Section 11 provides investors with a private right of action for false statements of material fact in a registration statement, or omission of a material fact necessary to render material in the registration statement not misleading. See 15 U.S.C. § 77k(a).

At issue in *Omnicare* were two sentences in the issuer's registration statement—each of which began, "We believe"—that expressed the company's view of its compliance with legal requirements. Omnicare, Inc., 575 U.S. at 179–80. The Court, in an opinion by Justice Kagan, declined to hold that an incorrect statement of opinion was necessarily false for purposes of Section 11 liability. Liability, however, may arise "if the speaker did not hold the belief she professed" or if the statement contained "embedded statements of fact" that were untrue. Omnicare, Inc., 575 U.S. at 185–86. The Court also explained that a reasonable investor may, under

certain circumstances, “understand an opinion statement to convey facts about how the speaker has formed the opinion,” and if contrary real facts are omitted, the opinion could be misleading. Omnicare, Inc., 575 U.S. at 188. An opinion, however, is not necessarily misleading when an issuer does not disclose “some fact cutting the other way” because reasonable investors “understand that opinions sometimes rest on a weighing of competing facts.” Omnicare, Inc., 575 U.S. at 189–90. An investor must identify particular and material facts underlying the opinion, the omission of which renders the opinion “misleading to a reasonable person reading the statement fairly and in context.” Omnicare, Inc., 575 U.S. at 194. That, the Court recognized, “is no small task for an investor.” Id.

Remanding the case for consideration under the misleading by omission standard, the Court emphasized that the lower court should address whether the alleged omission would have been material to a reasonable investor, and whether it rendered Omnicare’s stated opinions misleading because the company “lacked the basis for making those statements that a reasonable investor would expect.” Omnicare, Inc., 575 U.S. at 196. This analysis had to consider the opinion statements’ context. Because the statements at issue involved the company’s view of its compliance with legal requirements, the Supreme Court directed the lower court to “take account of whatever facts [the company] did provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement.” Id.

In the years since *Omnicare* was decided, courts have applied its standard to allegedly misleading statements or omissions outside the Section 11 context. The Second and Ninth Circuits, for example, have applied the *Omnicare* standard in cases involving Section 10(b) of the Exchange Act. See, e.g., Abramson v. Newlink Genetics Corp., 965 F.3d 165, 175 (2d Cir. 2020); Shreiber v. Synacor, Inc., 2020 U.S. App. LEXIS 33535 (2d Cir. Oct. 22, 2020); Fogel v. Vega, 759 F. App’x 18, 24 (2d Cir. 2018); and City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc., 856 F.3d 605, 610 (9th Cir. 2017).

Scope of Liability under the Exchange Act

Who May Be Liable for a Misstatement or Omission

Over the past few decades, the Court’s jurisprudence has significantly evolved on the issue of who private plaintiffs may hold liable for a material misstatement or omission under Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)). Two key decisions in this area—Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164 (1994), and Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)—concern aiding and abetting claims. In *Central Bank*, the Court held that there is no private right of action for aiding and abetting under Section 10(b). See Cent. Bank, N.A., 511 U.S. at 191 (“Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”).

The *Central Bank* decision caused some, including then-SEC Chair Arthur Levitt, to lobby Congress to create an express cause of action for aiding and abetting in the Exchange Act. See Stoneridge, 552 U.S. at 158. Congress did not do so; instead, in the Private Securities Litigation Reform Act of 1995 (PSLRA), it directed the SEC to prosecute aiders and abettors. See id. (citing 15 U.S.C. § 78t(e)). Accordingly, in *Stoneridge*, the Court reaffirmed its *Central Bank* holding that liability under Section 10(b) “does not extend to aiders and abettors.” Stoneridge, 552 U.S. at 158. The Court reiterated that, to be actionable, “[t]he conduct of a secondary actor must satisfy each of the elements or preconditions for liability.” Id.

In Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011), the Court built upon its decisions in Central Bank and Stoneridge, rejecting plaintiff’s attempt to impose Section 10(b) liability upon registrants’ advisors and service providers. The Court held that “[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.” Janus Capital Group, Inc., 564 U.S. at 142. “Without control,” the Court explained, “a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.” Id. The Court analogized to the relationship between a speechwriter and a speaker, noting that the speaker, not the speechwriter, is the one who takes the credit or blame for what is ultimately said. See Janus Capital Group, Inc., 564 U.S. at 143.

Eight years after the Court’s decision in *Janus*, which reaffirmed the somewhat narrow scope of liability under Section 10(b) and Rule 10b-5 first set out in *Central Bank* and *Stoneridge*, the Court arguably took a step in the opposite direction in Lorenzo v. SEC, 139 S. Ct. 1094 (2019). Rule 10b-5 makes it unlawful:

> “(a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact . . . or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . .
>
> in connection with the purchase or sale of any security.”

17 C.F.R. § 240.10b-5. In *Lorenzo*, the Court held, in an opinion authored by Justice Breyer, that a person who did not “make” a false statement under Rule 10b-5(b) may still be

liable under Rule 10b-5(a) or (c) for "disseminat[ing] false or misleading statements to potential investors with the intent to defraud." Lorenzo, 139 S. Ct. at 1099; see also Lorenzo, 139 S. Ct. at 1100–01. Plaintiffs may now argue that *Lorenzo* expands potential liability under Rule 10b-5(a) and (c) for a defendant who disseminates purported misstatements by third parties.

Justice Thomas—who authored the Court's opinion in *Janus*—penned a vigorous dissent, contending that the majority's opinion in *Lorenzo* rendered *Janus* "a dead letter." See Lorenzo, 139 S. Ct. at 1110 (Thomas, J., dissenting). Justice Breyer—who dissented in *Janus*—rejected this argument, maintaining that "*Janus* would remain relevant (and preclude liability) where an individual neither makes nor disseminates false information—provided, of course, that the individual is not involved in some other form of fraud." Lorenzo, 139 S. Ct. at 1103.

Materiality

In TSC Indus. v. Northway, 426 U.S. 438 (1976), which involved claims under Section 14(a) of the Exchange Act (15 U.S.C. § 78n) for an allegedly incomplete and materially misleading proxy statement, the Court defined materiality by stating that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Indus., 426 U.S. at 449. The Court later, in Basic Inc. v. Levinson, 485 U.S. 224 (1988), expressly adopted this definition of materiality for Section 10(b) and Rule 10b-5 as well. See Basic, 485 U.S. at 231–32.

Decades later, the Court referenced this definition again in Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011), when considering whether reports of adverse drug reactions were material, and whether a drug company's failure to disclose them was actionable under the Exchange Act. Defendants argued that the complaint was deficient because it did not "allege that Matrixx knew of a statistically significant number of adverse events requiring disclosure." Matrixx Initiatives, Inc., 563 U.S. at 30. The Court declined to draw a bright-line rule for materiality in this context, and held that plaintiffs had "alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material." See Matrixx Initiatives, Inc., 563 U.S. at 30.

The Court considered the interplay between the materiality requirement and Rule 23's prerequisites for class certification in Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455 (2013). Specifically, the Court considered "whether district courts must require plaintiffs to prove, and must allow defendants to present evidence rebutting, the element of materiality before certifying a class action under § 10(b) and Rule 10b-5." Amgen Inc., 568 U.S. at 465. The focus of the Court's inquiry was Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The Court held that "proof of materiality is not required to establish that a proposed class is 'sufficiently cohesive to warrant adjudication by representation'—the focus of the predominance inquiry under Rule 23(b)(3)." Amgen Inc., 568 U.S. at 469. Responding to policy arguments that the Court's decision would unduly pressure defendants to settle rather than incur the costs of defending a class action, the Court noted that Congress sought to address so-called *in terrorem* settlements in the PSLRA but chose not to "decree that securities-fraud plaintiffs prove each element of their claim before obtaining class certification." Amgen Inc., 568 U.S. at 476. For additional information on materiality, see Materiality in Securities Fraud Actions, Materiality: Relevant Laws, Guidance, and Determination Guidelines, and Materiality Determination for Disclosure Checklist.

Scienter

The Supreme Court has long held that liability under Section 10(b) of the Exchange Act (and Rule 10b-5) requires a plaintiff to prove that the defendant acted with scienter, not mere negligence. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976). The SEC must also establish scienter as an element of a civil enforcement action to enjoin violations of Section 10(b) of the Exchange Act and Rule 10b-5. See Aaron v. SEC, 446 U.S. 680, 701–02 (1980).

The Court elaborated on the standard for pleading scienter in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007), which followed enactment of the PSLRA. "Exacting pleading requirements [were] among the control measures Congress included in the PSLRA," which was designed to curb "abusive litigation by private parties." Tellabs, 551 U.S. at 313. But although the PSLRA requires plaintiffs to "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2) (emphasis added), Congress "left the key term 'strong inference' undefined, and Courts of Appeals [were] divided on its meaning." Tellabs, 551 U.S. at 314.

The Supreme Court held in *Tellabs* that "an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." Tellabs, 551 U.S. at 314. This standard requires district courts to "take into account plausible opposing inferences" and consider how likely it is "that one conclusion, as compared to others, follows from the underlying facts." Tellabs, 551 U.S. at 323. The inquiry is "inherently comparative" and "cannot be decided in a vacuum." Id. The Court cautioned that "[a] complaint will survive . .

. only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Tellabs, 551 U.S. at 324. *Tellabs* therefore clarified that the PSLRA heightens plaintiffs' pleading burden by requiring them to allege in their complaints particular facts sufficient to establish a cogent inference of scienter. When a complaint's allegations insufficiently plead a defendant's intent, the defendant may have a strong motion to dismiss. For more information on scienter, see Scienter Defenses in Securities Fraud Actions.

"In Connection with" a Purchase or Sale

Section 10(b) may give rise to liability for misconduct "in connection with the purchase or sale of any security." In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), the Supreme Court held that only actual purchasers or sellers of securities could maintain a private action under Section 10(b) and Rule 10b-5—not, for example, potential purchasers of shares who decided not to invest because of a misrepresentation or omission. The Court relied, in part, on various "policy considerations" in reaching its decision, including potential problems that could arise if investors who neither bought nor sold could claim that they *would have* traded absent the alleged fraud.

The Court later examined the scope of the "in connection with" requirement in SEC v. Zandford, 535 U.S. 813 (2002). The Court held that a complaint alleging that a stockbroker "[sold] his customer's securities and us[ed] the proceeds for his own benefit without the customer's knowledge or consent" sufficiently alleged conduct "in connection with the purchase or sale of any security" within the meaning of Section 10(b). SEC, 535 U.S. at 815, 818. The Court explained that although not every fraud involving securities constitutes a Section 10(b) violation, a "scheme in which the securities transactions and breaches of fiduciary duty coincide" may give rise to liability under the statute. SEC, 535 U.S. at 820, 825.

Reliance

In *Basic Inc. v. Levinson*, the Supreme Court held that a plaintiff could satisfy Section 10(b)'s reliance requirement through a rebuttable presumption that a company's stock price in an efficient market reflects all material public information, and any investor trading in that market presumptively relies on any material misstatements in that information. Reliance based on this "fraud-on-the-market" theory may only be presumed where a plaintiff demonstrates all of the following:

- The defendant made public, material misrepresentations.
- The shares were traded on an efficient market.
- The plaintiff traded after the misrepresentations were made but before the truth was revealed.

See Basic, 485 U.S. at 248 n.27. Nevertheless, *Basic* provided plaintiffs with an invaluable mechanism for satisfying Section 10(b)'s reliance requirement, particularly as it could be applied on a classwide basis.

Decades later, in 2014, the Supreme Court addressed the continued applicability and scope of this presumption in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) (Halliburton II). Though it declined to modify the presumption, the Court emphasized that, "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." Halliburton II, 573 U.S. at 269 (quoting Basic, 485 U.S. at 248). And, critically, the Court held that "defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." Halliburton II, 573 U.S. at 284. Because reliance in the absence of the presumption would need to be proven by investors on an individualized basis, this opportunity provides a useful tool to potentially defeat certification of an investor class.

The Supreme Court recently clarified in Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System, 141 S.Ct. 1951 (2021) ["*Goldman*"] that courts " should be open to *all* probative evidence" in assessing price impact at the class certification stage—regardless of whether the evidence is also relevant to materiality. 141 S.Ct. 1951, 1960 (internal quotation marks omitted). In *Goldman*, the defendants argued that alleged misstatements (such as " our clients' interests always come first") were too generic to impact the share price. 141 S.Ct. 1951, 1959. The Court held that " [t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact," and remanded the case to the Second Circuit for further consideration. 141 S.Ct. 1951, 1961. The Court further held that it is a defendant's burden to prove a lack of price impact to rebut the *Basic* presumption. 141 S.Ct. 1951, 1963. The Court recognized, however, that parties in securities fraud class actions typically submit competing evidence on price impact, and allocation of burden will be determinative only in the rare situation that the evidence is in equipoise. 141 S.Ct. 1951, 1963. For more information on reliance, see Reliance in Securities Fraud Actions.

Loss Causation

In Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005), the Supreme Court considered what a Section 10(b) plaintiff must plead and prove to establish that a defendant's misstatements and omissions caused plaintiff's losses. It

held that a disparity between the price plaintiff paid for its shares and the shares' true value at the time of purchase is insufficient to prove loss causation; an investor does not necessarily suffer loss by purchasing at an inflated rate, the Court reasoned, since upon purchase, the investor possesses a share of equivalent value—and could, for example, sell before the market corrects the price. And a subsequent drop in price may be attributable to changed economic circumstances, changed investor expectations, or a variety of factors. A plaintiff must therefore establish a causal connection between the alleged fraud and the loss.

The Court subsequently addressed whether a plaintiff is required to prove loss causation at the class certification stage in Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011) (Halliburton I). The Court reasoned that loss causation "has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory," and the Court of Appeals therefore erred by requiring plaintiffs to establish loss causation as a condition of class certification on that ground. Halliburton I, 563 U.S. at 813.

Extraterritoriality

Prior to 2010, lower courts' application of Section 10(b) to extraterritorial cases was often inconsistent. The Supreme Court took up the issue in Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010), in which Australian purchasers of stock in the National Bank of Australia—which is traded on the Australian stock exchange—sought to bring Section 10(b) claims in the United States based on misconduct that allegedly occurred in Florida. The Court held that the plaintiffs failed to state a claim because Section 10(b) only applies to securities listed on U.S. exchanges, or transactions that occur within the U.S. See Morrison, 561 U.S. at 273 ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."). The Court's decision in *Morrison* sharply curtailed plaintiffs' ability to sue foreign issuers in the United States for losses incurred on transactions in foreign securities. For more information, see Jurisdictional Defenses under the Securities Act.

Insider Trading

In its landmark insider trading decision Chiarella v. United States, 445 U.S. 222 (1980), the Supreme Court laid out what it has since referred to as a traditional or classical theory of insider trading liability. Under this theory, Section 10(b) and Rule 10b-5 are violated "when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information." United States v. O'Hagan, 521 U.S. 642, 651–52 (1997). "Trading on such information qualifies as a 'deceptive device' under § 10(b) . . . because 'a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.'" O'Hagan, 521 U.S. at 652 (citing Chiarella, 445 U.S. at 228).

Further developing its insider trading jurisprudence, the Court addressed liability under Section 10(b) for those who receive "tips" of misappropriated, inside information in Dirks v. SEC, 463 U.S. 646 (1983). The Court held that "a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." Dirks, 463 U.S. at 660. Whether the insider's disclosure is a breach of duty depends largely on whether the disclosure is for personal advantage. The test is whether the insider personally benefits from the tip, either directly or indirectly. "Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach." Dirks, 463 U.S. at 662.

Subsequently, in *United States v. O'Hagan*, the Court held that Section 10(b) alternately allows the government to establish insider trading liability through a so-called "misappropriation theory." Under this standard, "a person commits fraud 'in connection with' a securities transaction . . . when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." O'Hagan, 521 U.S. at 652.

The Court revisited the requirement that a tipper must personally benefit from making a tip for the conduct to fall within the scope of Section 10(b) and Rule 10b-5 in Salman v. United States, 137 S. Ct. 420 (2016). The defendant in *Salman* "received lucrative trading tips from an extended family member, who had received the information from [the defendant's] brother-in-law." Salman, 137 S. Ct. at 423–24. The Court held that "*Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to 'a trading relative.'" Salman, 137 S. Ct. at 427. Citing *Dirks*, the Court explained that "when a tipper gives inside information to 'a trading relative or friend,' the jury can infer that the tipper meant to provide the equivalent of a cash gift . . . In such situations, the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds." Salman, 137 S. Ct. at 428.

For more information on insider trading, see Insider Trading Claims: Defenses.

Disgorgement in SEC Enforcement Actions

The Supreme Court has also recently addressed the remedies available in SEC enforcement actions. In a highly anticipated decision, Liu v. SEC, 140 S. Ct. 1936 (2020), the Court rejected the argument that the SEC lacked authority to seek disgorgement in a civil action. It held, however, that because such disgorgement is an equitable remedy rather than a punitive sanction, it is limited to net profits after legitimate business expenses are deducted. See Liu, 140 S. Ct. at 1949–50. The Court declined to reach the additional argument that the disgorgement award at issue was improper because, among other things, it failed to return funds to the victims, leaving that to the analysis on remand. See Liu, 140 S. Ct. at 1947–49.

SLUSA

SLUSA has raised a variety of issues that have percolated up to the Supreme Court. SLUSA precludes certain state law class actions involving "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). SLUSA defines covered security to include only securities traded on a national exchange or issued by investment companies. See Chadbourne & Parke LLP v. Troice, 571 U.S. 377, 380–81 (2014) (citing 15 U.S.C. §§ 78bb(f)(5)(E), 77r(b)(1)–(2)).

In Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006), the Court held that SLUSA precludes covered state law claims where the alleged fraud dissuades a potential buyer from purchasing a security or prevents an investor from selling. The Court reasoned that "[t]he requisite showing . . . is deception in connection with the purchase or sale of any security, not deception of an identifiable purchaser or seller." Merrill Lynch, 547 U.S. 71, 85. The Court noted that a narrow reading of SLUSA would be contrary to its purpose, which was to prevent certain state securities class actions from frustrating the objectives of various restrictions imposed on federal securities class actions. See Merrill Lynch, 547 U.S. 71, 86. Class actions brought by holders (as opposed to purchasers or sellers) "pose a special risk of vexatious litigation," and it would be "odd" if SLUSA did not preempt "that particularly troublesome subset of class actions." 547 U.S. 71, 86.

The Court subsequently considered whether SLUSA precludes state law class actions involving uncovered securities (e.g., certificates of deposit that are not traded on any national exchange) that were falsely represented as being backed by covered securities in Chadbourne & Parke LLP v. Troice, 571 U.S. 377 (2014). The Court held that SLUSA does not apply in such circumstances, explaining that "[a] fraudulent misrepresentation or omission is not made 'in connection with' such a 'purchase or sale of a covered security' unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'" Chadbourne & Parke LLP, 571 U.S. at 387. Because the plaintiffs did not "allege that the defendants' misrepresentations led anyone to buy or to sell (or to maintain positions in) *covered* securities," SLUSA did not apply. Chadbourne & Parke LLP, 571 U.S. at 381.

In Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund, 138 S. Ct. 1061 (2018), the Court held that SLUSA does not preclude state courts from hearing Securities Act claims because, "[b]y its terms," SLUSA "does nothing to deprive state courts of their jurisdiction to decide class actions brought under the [Securities] Act." Cyan, 138 S. Ct. at 1069. In the wake of *Cyan*, plaintiffs seeking to represent nationwide classes in Securities Act cases often file competing complaints in state and federal courts throughout the country. Defendants are grappling with the procedural challenges posed by this new landscape, which renders it more difficult to consolidate claims arising out of the same alleged conduct in a single forum.

Limitations Periods

The Supreme Court has also addressed certain statute of limitations issues that arise in securities cases. In Merck & Co. v. Reynolds, 559 U.S. 633 (2010), the Court addressed potential tolling of Section 10(b) claims and held that "the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation,' including scienter—irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." Merck & Co., 559 U.S. 633, 653.

In addition, in Credit Suisse Sec. (USA) LLC v. Simmonds, 566 U.S. 221 (2012), the Court addressed the two-year limitations period to bring suit under Section 16(b) of the Exchange Act, which imposes reporting requirements and trading restrictions on corporate insiders. See 15 U.S.C. § 78p(a), (b). The Court rejected the argument that the limitations period is tolled until the insider files the requisite public report; instead, the "2-year clock starts from 'the date [the] profit was realized.'" Simmonds, 566 U.S. 221, 226 (quoting 15 U.S.C. § 78p(b)). But the Court was divided four to four (Chief Justice Roberts took no part in the consideration or decision of the case) as to whether Section 16(b) establishes a period of repose that is not subject to equitable tolling. See Simmonds, 566 U.S. 221, 229–30. The

justices agreed, however, that even assuming the statute of limitations were subject to equitable tolling, such tolling would not continue beyond the time when a plaintiff becomes aware, or should have become aware, of facts underlying the disgorgement claim. Simmonds, 566 U.S. 221, 227.

Scope of Liability under the Securities Act

The Supreme Court has also clarified who may be liable for claims under Section 12 of the Securities Act (15 U.S.C. § 77l). In Pinter v. Dahl, 486 U.S. 622 (1988), the Court held that Section 12(a)(1), which imposes liability on anyone who offers or sells a security in violation of the registration requirements in Section 5 of the Securities Act, extends to the owner who passes title and to anyone who successfully solicits a purchase "motivated at least in part by a desire to serve his own financial interests or those of the securities owner." Pinter, 486 U.S. at 647. As a result of this decision, Section 12(a)(1) liability may extend to underwriters, broker-dealers, selling agents, and others, even if they never held title to the security.

Subsequently, in Gustafson v. Alloyd Co., 513 U.S. 561 (1995), the Court limited the scope of Section 12(a)(2) of the Securities Act, which creates liability when someone offers or sells a security "by means of a prospectus or oral communication" containing a material misstatement or omission. 15 U.S.C. § 77l(a)(2). In *Gustafson*, the Court held that the word "prospectus" as used in this provision "is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." Gustafson, 513 U.S. 561, 584. Accordingly, private contracts of sale—not held out to the public—are not covered. See 513 U.S. 561, 584. For more information on Section 12, see Section 12(a)(2) Elements and Defenses under the Securities Act.

The Supreme Court may soon also address whether purchasers of shares sold in a direct listing have standing to pursue claims under Sections 11 and 12(a)(2) of the Securities Act. In Pirani v. Slack Technologies, Inc., 13 F.4th 940 (9th Cir. 2021), the Ninth Circuit held that a plaintiff could pursue such claims arising out of a direct listing even though he could not establish that he purchased shares that were subject to the issuer's registration statement. The Ninth Circuit explained that because no shares in the direct listing could be sold until the issuer filed its registration statement and prospectus, all shares (whether registered or unregistered) were sufficiently traceable to the offering documents. *Pirani* was the first court of appeals to hold that a shareholder has standing to assert Section 11 and 12(a)(2) claims in the context of a direct listing. On August 31, 2022, the defendant in *Pirani* filed a petition for a writ of certiorari asking the Supreme Court to address "[w]hether Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading."

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Susan Saltzstein is co-deputy of Skadden's nationwide Securities Litigation Group. Her sophisticated litigation practice focuses on the representation of U.S. and global financial institutions, corporations and individual clients embroiled in complex securities, corporate and commercial litigation in federal and state courts.

Ms. Saltzstein's experience extends to class and derivative actions, investigations and corporate control contests. Bet-the-company litigation is one of the mainstays of her practice.

She has represented, among others: Federal Express in connection with securing dismissal of securities and derivative litigation; Nokia Corporation in its successful defense against securities litigation; Neuberger Berman in its successful defense against preliminary injunctions that had targeted a multibillion-dollar transaction; J.P. Morgan Chase in connection with a number of foreign exchange-related purported class action litigations and in its defense of its ERISA plan; Citigroup Inc. as part of the 17-member underwriting syndicate of Santander Consumer USA Holdings Inc.'s IPO in two securities class actions, as well as in connection with litigation related to its student loan business; Realogy in its successful defense against securities and derivative claims; Anadarko Petroleum Corporation in connection with securities and derivative litigation arising out of its operations; Portland General Electric Company and two officers of the company in a putative securities class action arising from alleged energy trading activity; Booz Allen Hamilton, Inc., in securities and derivative litigation arising out of a government investigation; Footlocker Inc. in its successful defense of a securities class action; Inovalon Holdings, Inc. in connection with securities and derivative litigation arising from its IPO; Covisint Corporation and Compuware Corporation in connection with securities class action litigation involving the spin-off of Covisint Corporation; UniCredit S.p.A. in its defense of multibillion-dollar, precedent-setting Bernie Madoff-related litigations; the former CEO of Bear Stearns Companies, Inc. in connection with the defense of securities class and derivative actions and arbitrations; Cheniere Energy Inc. in its successful defense of challenges to its shareholder vote and related issuance of shares as incentive compensation; and Nortel Networks S.A. in securing a favorable settlement regarding the allocation of $7.3 billion of asset-sale proceeds in the Nortel bankruptcy cases.

Ms. Saltzstein led the Skadden team that was honored, among other firms, for its Nortel-related legal work by *The American Lawyer* as the Grand Prize Winner for Disputes.

The American Lawyer named Ms. Saltzstein and her partner Marco Schnabl as Litigators of the Week for their work on behalf of UniCredit S.p.A. in connection with Madoff-related matters, which also was named among the top matters in the Litigation & Dispute Resolution category in the *Financial Times*' 2013 U.S. Innovative Lawyers report.

Ms. Saltzstein has extensive experience providing litigation advice to and representing members of public company boards of directors in litigation. She has advised clients on litigation-avoidance strategy and routinely consults clients concerning litigation-related corporate governance and disclosure issues. In this regard, she has participated in the successful representation of clients involved in diverse businesses such as financial services, telecommunications, health care, investment banking, hedge funds, private equity and retail.

Ms. Saltzstein has in the past served on the Attorneys' Advisory Committee of the Southern District of New York, a committee that had provided assistance to members of the judiciary serving on the Judicial Improvements Committee. In this role, she co-chaired the Motions Committee and helped draft procedure rules that have been implemented by district court judges in a pilot program directed at complex commercial disputes. Ms. Saltzstein has served as co-chair for numerous American Bar Association organizations and events, including the Section of Litigation Annual Conference (2010), the Litigation Institute for Trial Training (2011) and the ABA's Expert Committee (2017), as well as having previously served as co-chair of the Class and Derivative Action Committee and for three years as co-chair of the Securities Litigation Committee.

Ms. Saltzstein was one of three women securities litigators ranked by *Chambers USA* in its top band and has repeatedly been listed in its rankings, in which she is described by clients as "phenomenal at navigating a number of complex issues and [providing] great commitment to her clients." She also has been featured by *Securities Law360* as one of its Outstanding Women lawyers, and was named by *Benchmark Litigation* as a Litigation Star and one of its Top 250 Women in Litigation in 2022 and 2021. In addition, she was named a 2021 Securities MVP by *Law360*, has been named to *The Best Lawyers in America* and was selected for inclusion in the 2020 Lawdragon 500 Legends of Law list, which recognizes attorneys "whose contributions define justice and excellence in the legal profession."

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