This is your Release #17 (November 2014)

**Accountants’ Liability**

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This release updates and expands your *Accountants’ Liability* with the authors’ expert commentary and thorough analysis. Highlights of Release #17 include:

**Section 10(b) of the Exchange Act:** Supreme Court decisions since the passage of the Sarbanes-Oxley Act have continued to shape the contours of the private cause of action under section 10(b). For example, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Court limited liability for misrepresentations to the “maker” of the statement. See § 1:4.6[A], at note 105.3.

**Contract liability—third-party claims:** Although privity between the claimant and the accountant is generally required, a third-party intended-beneficiary claim may be viable where the accountant’s services are rendered directly to a nonparty to the contract. See § 3:4, at note 125.1.

**Negligence—statute of limitations:** As illustrated in a Ninth Circuit case, the statute of limitations is not tolled on the basis of concealment where the information is imputed to the client based upon the knowledge of its agent or agents (*USACM Liquidating Trust v. Deloitte & Touche*). See § 4:3.1, at note 332.2.

**Affidavit of merit:** According to the Third Circuit in *Nuveen Municipal Trust v. Withumsmith Brown P.C.*, the affidavit requirement should apply to a fraud claim where the complaint does not allege that the accountant “made any material representation other than those resulting from the failure to comply with GAAS and GAAP,” because the claim will require proof that the accountant deviated from professional stands of care; “the focus is deviation from a professional standard of care devoid of any claim label.” See § 4:3.3, at note 411.1. In Oklahoma, the state’s highest court struck down a provision requiring that the complaint in any professional malpractice action have an affidavit of the plaintiff attesting to consultation with and receipt of an appropriate opinion from a qualified expert; the legislature has enacted a new affidavit requirement. See § 4:3.3, at note 414.1.

*continued on reverse*
Fraud—federal preemption of state court class actions: The Supreme Court’s *Chadbourne & Parke LLP v. Troice* involved purchases of noncovered securities, with the seller’s misrepresentations relating to covered securities. The Court stated: “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.’” The consequence of the decision is that state court class actions attempting to impose liability under state law for misrepresentations or omissions of material fact in connection with the purchase or sale of noncovered securities will not be subject to removal and dismissal under the Uniform Standards Act. See § 5:1.2, at note 19.8.

Fraud—reliance presumption: In *Halliburton Co. v. Erica P. John Fund, Inc.*, the Supreme Court declined to modify or overrule the *Basic Inc. v. Levinson* presumption of reliance in cases where a plaintiff traded in a stock on an efficient market. See § 5:2.5[B][2], at note 281.1.

Breach of fiduciary duty—expert testimony: While expert testimony is often appropriate, the issues involved in a breach of fiduciary duty claim will not always be beyond the common knowledge and understanding of a layperson—for example, where a fiduciary receives a bribe with respect to a transaction within the scope of the fiduciary relationship. According to the Utah Court of Appeals in *White v. Jeppson*, if the plaintiff claims multiple breaches of fiduciary duty, a court “should carefully analyze the need for expert testimony on a claim-by-claim, element-by-element basis” rather than adopt a “blanket approach.” See § 7:2.2, at note 112.1.

Section 11 of the Securities Act: Although section 11 refers to misrepresentations of material fact, “matters of belief and opinion” may also fall under the provision. Several federal circuits have held that, to recover based upon a belief or opinion, the plaintiff must allege and prove both objective and subjective falsity. According to the Second Circuit, for example, “liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed.” See § 8:2.2[B], at note 31.2.

The Table of Cases and Index have also been updated.
FILING INSTRUCTIONS

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