Education Quarterly Reviews

Hunter, R. J. (Jr.), Shannon, J. H., & Amoroso, H. J. (2023). A Teaching Note on Misrepresentation and Fraud. *Education Quarterly Reviews*, 6(2), 101-117.

ISSN 2621-5799

DOI: 10.31014/aior.1993.06.02.742

The online version of this article can be found at:
https://www.asianinstituteofresearch.org/

Published by:
The Asian Institute of Research

The *Education Quarterly Reviews* is an Open Access publication. It may be read, copied, and distributed free of charge according to the conditions of the Creative Commons Attribution 4.0 International license.

The Asian Institute of Research *Education Quarterly Reviews* is a peer-reviewed International Journal. The journal covers scholarly articles in the fields of education, linguistics, literature, educational theory, research, and methodologies, curriculum, elementary and secondary education, higher education, foreign language education, teaching and learning, teacher education, education of special groups, and other fields of study related to education. As the journal is Open Access, it ensures high visibility and the increase of citations for all research articles published. The *Education Quarterly Reviews* aims to facilitate scholarly work on recent theoretical and practical aspects of education.

ASIAN INSTITUTE OF RESEARCH
Connecting Scholars Worldwide

ASIAN INSTITUTE OF RESEARCH
Connecting Scholars Worldwide

The Asian Institute of Research
Education Quarterly Reviews
Vol.6, No.2, 2023: 101-117
ISSN 2621-5799
Copyright © The Author(s). All Rights Reserved
DOI: 10.31014/aior.1993.06.02.742

A Teaching Note on Misrepresentation and Fraud

Richard J. Hunter, Jr.[1], John H. Shannon[2], Henry J. Amoroso[3]

[1] Professor of Legal Studies, Seton Hall University; Adjunct Professor of Business Law, University of Tulsa
[2] Professor of Legal Studies, Seton Hall University
[3] Associate Professor of Legal Studies, Seton Hall University

Correspondence: Richard J. Hunter, Jr. Phone: 908-285-8632, Email: hunterri@shu.edu

Abstract
In this Teaching Note, the authors conclude their series in the study of the common law causes of action that were available to a plaintiff in cases of misrepresentation and fraud. In Part I of this article, *Civil Fraud*, the authors describe the prima facie elements of proof, as well as the exceptions that were recognized relating to opinions, commendations, the "duty to speak," and statements relating to a matter of law, citing several of the major cases important in understanding each issue. In Part II of the article, *Securities Fraud*, the authors provide a discussion of securities fraud, with examples taken from prominent "real-world" cases which students may readily recognize from their studies in finance, accounting, business ethics, or other business-related courses.

Keywords: Fraud, Misrepresentation, Scienter, Reliance, Concealment, Commendations, Opinions, "Duty To Speak", Reliance, Securities Fraud, Insider Trading

Part I – Civil Fraud

1. Introduction

Chen (2022b) writes:

> "Fraud is an intentionally deceptive action designed to provide the perpetrator with an unlawful gain or to deny a right to a victim. Types of fraud include tax fraud, credit card fraud, wire fraud, securities fraud, and bankruptcy fraud. Fraudulent activity can be carried out by one individual, multiple individuals or a business firm as a whole."

There are two types of civil fraud: *fraud in the inducement* and *fraud in fact*.
Fraud in the inducement is a term used in cases of contract fraud and occurs when one of the contracting parties has used "deceit or trickery" to induce the other party to enter into an agreement for their advantage (see *Town*

North Nat'l Bank v. Broaddus, 1978). Fraud in the inducement makes a contract voidable, potentially releasing the innocent party from any contractual obligation. "Fraudulent inducement," also termed "fraudulent procurement," occurs "when a misrepresentation leads another party to enter into a transaction with a false impression of the risks, duties, or obligations involved" (Emerson, 2020, citing Black's Law Dictionary (10th ed.), 2014) in an attempt to get that party to act against their best interest. Once proof of fraudulent inducement has been made, the defrauded party may rescind the transaction, as well as seek monetary damages from the party who committed fraud (see, e.g., Winter & Clark, 2018).

Fraud in the inducement occurs *before* the contract is entered into and is part of the bargaining process creating an agreement. Fraud in the inducement often consists of misrepresenting essential facts with the intentional purpose of defrauding the other party.

In contrast, *fraud in factum* (fraud in fact) (*Guthrie v. Sulter*, 1996; *Sightler v. Remington College,* 2015) involves deceit by the offending party that can include such acts as:

- Forging the other party's signature;
- Altering a contract that has been entered into by the parties.

Fraud in the factum may be raised as a legal defense when one party enters into an agreement not realizing that it is a contract. The plaintiff may not understand the intent, content, or purpose of the contract due to false or incomplete information given to the plaintiff. Hunt, Hodge, and Thompson (2020, p. 75) write: "Fraud in the factum occurs when a person is misled as to the nature or content of the instrument being executed."

In addition to civil fraud, fraud may also amount to a crime under certain circumstances (Theoharis & Pirius, 2023), and may include mail fraud (Rotert, 2023), wire fraud (Frohock & Jiminez, 2020), computer and Internet fraud (also called "cybercrime") (Larson et al., 2021), counterfeiting (International Trademark Association, 2020), forgery (Legal Match, 2023), securities fraud (Rosenblum, 1991; Langevoort & Gulati, 2004); Dooner et al., 2021), loan fraud (Martin, 2023), and credit card fraud (Theoharius & Pirius, 2023).

Part I of this Teaching Note relates to issues of *civil fraud* that arise in contracting situations. Part II will provide a brief overview of securities fraud, which may contain both civil and criminal implications.

2. Fraud vs. Misrepresentation

The distinction between misrepresentation and fraud lies in the presence or absence of *scienter*, or the intent to deceive. Thus, misrepresentation without *scienter* is sometimes termed as an "innocent misrepresentation" to distinguish it from actionable fraud. US Legal (2023) notes: "Scienter is defined as a mental state embracing intent to deceive, manipulate, or defraud. Scienter means to have guilty knowledge. An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason."

A second major distinction lies in the fact that if a plaintiff can prove actionable fraud (as opposed to a misrepresentation), the plaintiff can recover punitive damages to punish the defendant for its intentional conduct.

The causes of action of misrepresentation and fraud are a hybrid of both contract and tort law, but which have evolved over the years as a contract action for a party who was dissatisfied with the bargain he or she had entered into. To establish a common law action in fraud, a plaintiff must prove four elements: *a false representation of a material fact; scienter; justifiable reliance; and damages* (generally, *United States v. Clevenger*, 1984).

3. Elements of Proof of Fraud

3.1. False Representation of a Material Fact

The first element of the cause of action for fraud is the requirement that the defendant make a false representation of a material fact through words, certain actions known as concealment, or through silence, where there is a duty to speak.

To be actionable, a representation of fact must be *material*. A material fact is defined as one that is important in inducing a party to enter into a contract. The test of materiality is whether the statement “would be important to a reasonable person”—an objective standard. This requirement of materiality is designed to prevent a party from using a trivial misrepresentation as an excuse to set aside a bargain that appears to be unwise or “bad” *in retrospect*!

According to the Restatement of Torts, Section 470(2), materiality exists whenever “the misrepresentation would be likely to affect the conduct of a reasonable man.” In a products liability case, for example, a statement is material if it significantly affects the manner in which the plaintiff used the product, thereby increasing its danger (see Reimann, 2021), and often relates to what are known as “marketing defects.” A marketing defect, involving inadequate warnings concerning risks or dangers, or inadequate instructions or labels relating to how to properly or safely use a product (Ausness, 2002) involving food, drugs, venetian blinds, or more recently, children’s toys, cribs (Hunter & Montuori, 2012), or car seats. A statement concerning *safety*, for example, would be such a material assertion.

3.1.1. Concealment

Active concealment occurs where a party, through conduct, conceals the true nature of a situation. Clear Counsel (2022) states: “To establish a prima facie case of fraudulent concealment, a plaintiff must offer proof that satisfies five elements:

1. the defendant concealed or suppressed a material fact;
2. the defendant was under a duty to disclose the fact to the plaintiff;
3. the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact;
4. the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact;
5. and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.”

Actions such as turning back the odometer of a car, adding oil to the crankcase of a car where the oil would have otherwise run out and the engine would have seized, painting over a crack in the ceiling or wall, and gluing together pieces of a set of china all amount to active concealment. This is often referred to as the "half-truths" rule since a party to a contract will often disguise the true and complete nature of a transaction.

There are several special issues concerning whether a defendant has made a false representation or statement of material fact rising to the level of fraud (*Huffstetler v. Our Home Life Ins. Co.,* 1914).

3.2. Misrepresentation of Fact

Relief may be granted for a misrepresentation of fact, and not for an erroneous statement of opinion. However, the distinction between fact and opinion is often difficult to parse. Statements or representations of a future fact, a prediction, or a statement of an opinion are generally not actionable as misrepresentations of fact. A seller may be expected to employ a certain amount of "*sales puffing*" (*Picard Chem. Profit Sharing Plan v. Perrigo Co.*, 1996; Hollander-Blumoff & Bodie, 2021), “*trade talk,*” or “*hyperbole*” (Garry, 2020), without incurring liability for fraud. However, a statement of opinion given by an expert (a professional) to an unsophisticated purchaser or a statement made in the context of a fiduciary relationship may give rise to a cause of action for fraud. An opinion may become one of fact, depending on the circumstances of the case.

The oft-cited case of *Vokes v. Arthur Murray* (1996) illustrates how the defendant, who made various statements concerning the plaintiff's dance aptitude and potential, committed actionable fraud (see Threedy, 2010).

3.2.1. Case Study: *Vokes v. Arthur Murray* (1996)

> The defendant, Arthur Murray, Inc., operated dancing schools throughout the nation through local franchised operators, one of whom was the defendant. The plaintiff, Audrey E. Vokes, a widow without family, wished to become "an accomplished dancer" to find "a new interest in life." In 1961, Mrs. Vokes was invited to attend a "dance party" at J. P. Davenport's "School of Dancing." Vokes attended the "dance party" over a period received elaborate praise from her instructor for her grace, poise, and potential as "an excellent dancer." The instructor sold her eight half-hour dance lessons for $14.50 each, to be utilized within one calendar month.
>
> Subsequently, over a period of less than sixteen months, Vokes bought a total of fourteen dance courses, which amounted to 2,302 hours of dancing lessons for a total cash outlay of $31,090.45, all at Davenport's school.
>
> These dance lesson contracts and the monetary consideration therefore of over $31,000 were procured from her by means and methods of Davenport and his associates which went beyond the unsavory, yet legally permissible, parameter of "sales puffing" and intruded well into the forbidden area of undue influence, the suggestion of falsehood, the suppression of truth, and the free exercise of rational judgment, if what plaintiff alleged in her complaint was true. From the time of her first contact with the dancing school in February 1961, she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums, to such extent that it would be not only inequitable, but unconscionable, for a Court exercising inherent chancery power to allow such contracts to stand.
>
> She was incessantly subjected to overreaching blandishment and cajolery. She was assured she had "grace and poise"; that she was "rapidly improving and developing in her dancing skill"; that the additional lessons would "make her a beautiful dancer, capable of dancing with the most accomplished dancers"; that she was "rapidly progressing in the development of her dancing skill and gracefulness", etc., etc. She was given "dance aptitude tests" for the ostensible purpose of "determining" the number of remaining hours of instructions would be needed by her from time to time.
>
> …. All the foregoing sales promotions, illustrative of the entire fourteen separate contracts, were procured by defendant Davenport and Arthur Murray, Inc., by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no "dance aptitude," and in fact had difficulty in "hearing the musical beat."
>
> The complaint alleged that such representations to her "were in fact false and known by the defendant to be false and contrary to the plaintiff's true ability, the truth of plaintiff's ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons." It was averred that the lessons were sold to her "in total disregard to the true physical, rhythm, and mental ability of the plaintiff." In other words, while she first exulted that she was entering the "spring of her life", she finally was awakened to the fact there was "spring" neither in her life nor in her feet.
>
> It is true that "generally a misrepresentation, to be actionable, must be one of fact rather than of opinion". But this rule has significant qualifications, applicable here. It does not apply where there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the parties do not in general deal at "arm's length" as we understand the phrase, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented.

> " * * * A statement of a party having * * * superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms."
>
> It could be reasonably supposed here that defendants had "superior knowledge" as to whether plaintiff had "dance potential" and as to whether she was noticeably improving in the art of terpsichore. And it would be a reasonable inference from the untended averments of the complaint that the flowery eulogists heaped upon her by defendants as a prelude to her contracting for 1944 additional hours of instruction in order to attain the rank of the Bronze Standard, thence to the bracket of the Silver Standard, thence to the class of the Gold Bar Standard, and finally to the crowning plateau of a Life Member of the Studio, proceeded as much or more from the urge to "ring the cash register" as from any honest or realistic appraisal of her dancing prowess or a factual representation of her progress.
>
> " * * * (W)hat is plainly injurious to good faith ought to be considered as a fraud sufficient to impeach a contract," and that an improvident agreement may be avoided" * * * because of surprise, or mistake, want of freedom, undue influence, the suggestion of falsehood, or the suppression of truth."

The plaintiff's complaint, which had originally been dismissed, was reinstated, and the case was returned to the trial court to allow Mrs. Vokes to prove her case for fraud.

3.3. Commendations

Statements of quality or value, otherwise known as *commendations*, using such adjectival phrases as "good," "adequate," "great," "successful," "the best," "the finest quality," etc., are generally not actionable as statements of fact. However, there may be circumstances where such statements *may* be actionable, as where the parties are not acting on equal footing or where one party has superior knowledge about the facts of a situation. In such a case, a court may find that the "opinion line has crossed into the law of fact."

3.3.1. Case Study: *Sellers v. Looper* (1972)

> This is an action for damages based upon fraudulent misrepresentation pertaining to a well on property the plaintiffs purchased from defendants. The trial court found for plaintiffs. On motion, the trial court found JNOV [judgment against the verdict] and plaintiffs appealed.
>
> The plaintiffs contend: Statements regarding quality, value or the like may be considered misrepresentations of fact where the parties are not on equal footing and do not have equal knowledge or means of knowledge "and the decision of whether a representation is of fact or of opinion is always left to the jury" and therefore the order setting aside the jury's verdict should not have been entered.
>
> * * * Defendant's argue that the representation of a "good well" was a mere inclusion of adjectival words of commendation or opinion and therefore, not actionable.
>
> In *Holland v. Lentz* (1964), we held:
>
> * * * It is recognized that statements of opinion regarding quality, value or the like, may be considered as misrepresentations of fact, that is, of the speaker's state of mind, if a fiduciary relationship exists between the parties, as for example, representations of value of a real estate broker to his principal; or where the parties are not on equal footing and do not have equal knowledge or means of knowledge.
>
> Prosser stated: * * * misrepresentation will not lie for misstatements of opinion as distinguished from those of fact * * *
>
> The evidence discloses that defendants owned a house and acreage located in Illinois Valley near the city of Cave Junction, Oregon. In May of 1969, defendants executed a listing agreement to sell the property with Mrs. McLean, a real estate broker. This agreement included information given by the defendants to Mrs. McLean. Mrs. McLean testified:

I asked the Loopers: Do you have a good well * * * and the comment came back, "Yes, we have a good well * * *."

On May 28, 1969, plaintiffs contacted Mrs. McLean.

Q: At the time you told them that there was a good well on the property, did you tell them that for the purpose of inducing them to buy the Looper's property?
A: A good well on any property is a tremendous inducement. If you have a good well, that's a selling point...
Q: At the time you told them that there was quote, a good well on the property, what did you mean to convey by that, what meaning did you mean to get across to the prospective buyers?
A: * * * that it was an adequate well, there was plenty of water * * *
Q: Plenty of water for what?
A: Adequate for household, and usually that includes a modest garden.

In the early evening of July 28, 1969, the parties met and inspected the house and "looked at the well and pumphouse." No specifications as to the depth of the well or how many gallons it would pump per hour were given the plaintiffs and the realtor did not have this information. The sale was later consummated.

On August 15, 1969, plaintiffs moved onto the property and on August 22, 1969, the well went dry. Plaintiffs drilled two additional wells but found no water.

We conclude that there was sufficient evidence to submit the case to the jury. A reasonable person could believe that a "good well" meant a well with adequate water for family household use and the plaintiffs relied on this representation.

The evidence shows that defendants knew the water in the well got low in the Fall of the year and they had to be careful in flushing the indoor toilet or the well would probably go dry. The plaintiffs were not on equal footing with the defendants and did not have equal knowledge of the adequacy or lack of adequacy of the water in the well. The jury returned a verdict for the plaintiffs and "These matters are ordinarily for the determination of the jury."
* * *"
Reversed With Instructions to Reinstate the Jury's Verdict.

3.4. Misrepresentation of law

Under the common law, in the absence of a fiduciary relationship (defined as one of "trust and confidence"), a statement concerning a matter of law was not actionable as fraud because of a curious legal maxim that "everyone was presumed to know the law" (McKean, 1927; *Maeker v. Ross*, 2014). Krauss (2023) adds: "[T]he law is presumed to be equally within the knowledge of both parties" (citing *Miller v. Osterlund*, 1923). Under the common law, a statement of the law governing a given set of facts was merely the expression of opinion by the speaker.

The case of *Puckett Paving v. Carrier Leasing* was decided on the basis of the common law rule. Note that in this case, the court stated that a different result might have been obtained had there been a fiduciary relationship between the parties (see Beck & Roberts, 2018).

3.4.1. Case Study: *Puckett Paving v. Carrier Leasing* (1976)

Carrier brought an action to recover four heavy-duty trucks from Puckett. The pleadings and the evidence show that Puckett was in possession of the vehicles under the terms of two certain leases providing for monthly payments in stated sums for 44 months.

Puckett had an option to purchase same for a stated price after all monthly payments had been made; that Puckett had made all monthly payments but refused to purchase the vehicles or to return them. Carrier elected to recover the vehicles rather than damages.

> Puckett filed an answer and cross claim alleging that the contracts were induced by fraud in that an agent of Carrier "assured defendant that the lease agreements entered into would be considered a lease by the IRS" but that the IRS considered the same to be a sale and not a lease, resulting in damage to Puckett. The trial Court ordered Puckett to return the vehicles.
>
> We affirm. Assuming such statements were made by an agent of Carrier to Puckett, they could only have been expressions of an opinion as to how the IRS had treated such agreements or would treat them in the future.
>
> "Where no fiduciary relationship exists, misrepresentations as to a question of law will not constitute remedial fraud, since everyone is presumed to know the law and therefore cannot in legal contemplation be deceived by erroneous statements of law, and such representations are ordinarily regarded as mere expressions of opinion."
>
> Affirmed.

As the common law has been called upon to adapt to new circumstances and contexts, exceptions have been recognized in many jurisdictions. Krauss (2023) states: "There are two exceptions, however. A general statement of law may be actionable when the speaker either 'is learned in the field and has taken advantage of the solicited confidence of the party defrauded,' or 'stands with reference to the person imposed upon in a fiduciary or other similar relation of trust and confidence'" (*Northernaire Prods., Inc. v. Cnty. of Crow Wing*, 1976, quoting *Stark v. Equitable Life Assurance Soc'y*, 1939).

Following the logic expressed by Krauss (2023), most courts today would hold that a professional who gives an opinion as to a matter of law in a professional setting, would be responsible for the truth of the statement made. Professionals such as lessors, architects, financial planners, real estate brokers, tax professionals—those professions which require a greater or more substantial knowledge of the law than possessed by a layperson—would fall within the rule of law found in the case of *Yorke v. Taylor*, 1969.

3.5. "Silence" as the Basis of Fraud: Duty to Speak

Generally, there is no "duty to speak" in a traditional "arms-length" business transaction (see Langevoort & Gulati, 2005). However, a "duty to speak" may be found in the following circumstances:

- In the sale of a home or other real property, many courts (most especially California and Colorado) require full disclosure of all material defects or important facts known by the defendant (see Garabedian, 1942);
- In a "fiduciary relationship" [such as between broker-client, partners in a business, etc.] there is a duty of full disclosure of all important financial facts or information that, for example, might impact on an individual's investment decision (Hunt, Hodge, & Thompson, 2020; Grower, 2021);
- To correct a prior misstatement or where a party gives a false impression by revealing some facts and withholding others.

In *Bergeron v. Dupont,* 1976), the court stated:

> "The master correctly ruled that a representation which was true when made could be fraudulent if the maker failed to disclose subsequent information which made the original representation false. While it is true that one who makes a representation believing it to be true and does not discover its falsity until after the transaction has been consummated has committed no fraud, both parties herein treat March 14, 1973, the date of closing, as the time at which the rights of the parties became fixed," resulting in a finding of fraud.

4. *Scienter*

The second element of proving fraud is the requirement of proof of *scienter*. Scienter may be shown where a defendant knew that a statement was false ("knowledge of falsity") or where the defendant had no knowledge of its truth or falsity of a statement but made a statement in any event ("reckless disregard of the truth"). Without the element of scienter, a defendant may be held liable for misrepresentation, but not for fraud (*Marion v. Bryn Mawr Trust Co.*, 2021).

5. "Justifiable or Reasonable Reliance" (Ledingham, Jr., 2010)

Justifiable reliance involves two elements of proof: That the *defendant intended* the plaintiff to rely on the statement and that the *plaintiff justifiably or reasonably relied on the statement.* Priebe (2001, p. 110) writes:

> "Justifiable reliance is a more subjective standard of reliance that takes into account the interactions between and experiences of the two parties involved. This standard of reliance is a 'fact-sensitive standard' that depends on 'the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.' The Restatement (Second) of Torts states that a 'recipient of a fraudulent misrepresentation can recover against its maker [if] … (a) he relies on the misrepresentation … and (b) his reliance is justifiable.' The Restatement provides that a person is justified in his or her reliance on a fraudulent misrepresentation unless the person knows that the representation is false or that its falsity is obvious to him."
> "The type of observation that is required depends upon the experiences and knowledge of the parties involved. The Restatement's example of a person who induces another to buy a horse, representing it to be sound, is an illustration of this required observation."

Justifiable reliance would not lie where the plaintiff knows the truth of a statement, or in the case of goods, where a reasonable inspection would have revealed the falsity of any assertion or statement, and the plaintiff had the opportunity to conduct such an inspection and fails to do so. In the case of an inspection, a plaintiff would not be required to engage in an inspection if such an activity would prove to be unduly burdensome or costly (see generally Kraus, 1994; *Ambac Assur. Corp. v. Countrywide Home Loans,* 2018).

The element of justifiable reliance creates the "over-the-top" TV pitchman who intentionally exaggerated just about every aspect of the product he was touting. Ironically, sometimes the more a person lies (misrepresents) the less likely a court would find justifiable reliance on the part of the plaintiff!

6. Damages

The plaintiff must prove that he or she suffered damage. In a case involving fraud and misrepresentation, damages may be awarded which reflect the difference between the value of the item *as received* and the value of the item *as represented* (so-called "benefit of the bargain" damages). In some cases, the plaintiff may choose to rescind the contract and seek damages under the remedy of cover by going into the marketplace in order to purchase a "reasonable substitute good" (see, e.g., UCC Section 2-712).

7. Section 402B of the Restatement of Torts

Section 402B of the Restatement of Tort provides a second theory of recovery in cases that involve the sale of goods:

> *"One engaged in the business of selling chattels, who, by advertising, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation…"*

It thus appears that the seller must be a "merchant" ["one engaged in the business of selling chattels"] and not one who engages in a casual sale (see *Blue Riv. Gems, Inc. v. S.V. & V. Diamond Corp.*, 2016). The scope of Section 402B would apply to all suppliers of chattels who have either:

1. Made the representation; or
2. Adopted a representation made by another.

Comment I to Section 402A, read in tandem with Section 402B, provides that an employee or family member of the purchaser who uses the product is also a consumer, as in "anyone who makes use of the chattel in the manner which a purchaser may be expected to use it."

Section 402B will provide an additional cause of action where *physical harm* has been caused to a consumer (broadly defined) of a product. Such harm may include lost wages or an award of profits as consequential damages, as well as damages for personal injury under certain circumstances.

As in common law actions for fraud or misrepresentation, the plaintiff under Section 402B must prove justifiable reliance. Justifiable reliance will not lie "where the misrepresentation is not known, or there is indifference to it, or it does not influence the purchase or a party's subsequent conduct" (Comment j). The same standards apply under Section 402B as in the cases of fraud and misrepresentation; that is, if a person is aware of the truth of any misstatement, that person cannot recover. Likewise, some courts have held that if a reasonably prudent person should have been aware of the facts or would have investigated further, that person cannot recover.

A statement, however, does not have to be the "sole inducement to purchase…," but only that it is a "substantial factor in the inducement" (Rolfson, 2022). This is generally a question of fact for a jury to determine, as are most actions filed under a theory of fraud (Nance, 2021).

Part II – Securities Fraud

8. What is Securities Fraud?

Pearce (2023) writes:

> "Securities fraud, also known as investment fraud or stock fraud, involves using false or misleading information to convince investors to make investment decisions that result in substantial losses. All forms of securities fraud aim to deceive investors into taking actions that benefit the perpetrator financially."

Chen (2022a) notes: "The perpetrator of the fraud can be an individual, such as a stockbroker or an organization, such as a brokerage firm, corporation, or investment bank. Individuals might also commit securities fraud through schemes such as insider trading." Chen (2023a) refers to securities fraud as a "white-collar crime."

At its core, securities fraud is the misrepresentation or omission of information designed to induce investors into trading securities (Buell, 2011). Perry (2021) writes:

> "According to the Federal Bureau of Investigation, the term 'securities fraud' covers a broad spectrum of activities characterized by the misrepresentation or omission of material information to investors in during the purchase or sale of securities. It can also extend to manipulation of national financial markets. Some of the activities the FBI designates as securities fraud include Ponzi and pyramid schemes, high yield investment fraud, advance fee schemes, insider trading, falsifying details in corporate filings, lying to auditors, and manipulating share prices."

Securities fraud may be actionable as common law fraud. However, Congress, the Securities and Exchange Commission (SEC), and individual states may provide for criminal and civil liability for securities fraud, as well

(see Keller & Gehlmann, 1988). Salvucci (2023) notes: “The trading of securities like stocks, commodities, derivatives, and bonds is overseen by the Securities and Exchange Commission (SEC), a government agency responsible for protecting investors and regulating the securities industry.”

The most extensive federal anti-securities fraud measure is found in Rule 10b-5, promulgated under Section 10(b) of the Exchange Act of 1934 (see Kramer, 2014).

The Securities Exchange Act of 1934, Section 10(b), states:

> *“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange… [to] use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement… any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”*

Securities fraud cases are also subject to the SEC’s Rule 10b-5, which states:

> *“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,*
>
> *• To employ any device, scheme, or artifice to defraud,*
> *• To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or*
> *• To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”*

Rule 10b-5 provides for civil liability, and in some cases, criminal liability (Couture, 2019), with proof of the following elements:

1. that the individual misrepresented a material fact;
2. that the individual did so knowingly, i.e., with *scienter;*
3. that the plaintiff reasonably relied on the individual’s material misrepresentation; and
4. that the plaintiff’s reliance on the material misrepresentation caused their loss.

An issuer of securities who misrepresents a material fact in a registration statement can be civilly liable under Section 11 of the Exchange Act of 1934. However, unlike finding liability under Rule 10b-5, which requires knowledge of the misrepresentation, Section 11 imposes a form of strict liability (liability without showing fault) on issuers. Accordingly, regardless of whether an issuer knows of the material misrepresentations, the issuer could still be liable for securities fraud if the registration statement contains a material misrepresentation.

8.1. Insider Trading (see King & Roell, 1988)

One of the most notable examples of securities fraud brought under Rule 10b-5 is *insider trading* (Hunter & Freese, 1989; Hunter, 1990). Nagy (2020) writes:

> “*Chiarella v. United States* (1980) occupies a special place in history. It was the first prosecution under the federal securities laws for the crime of insider trading. And the U.S. Supreme Court's iconic holding--regarding the circumstances under which insider trading constitutes securities fraud--not only profoundly changed the law in 1980 but also continues to define insider trading's contours right up to the present day.”

Professor Nagy (2020) provides an apt summary of the facts of *Chiarella*:

> "The defendant was employed by a financial printing firm hired to publish announcements of takeover bids. On several occasions he managed to deduce from code names the identities of the actual companies, and then used that confidential information to surreptitiously purchase stock in the acquisition targets. After settling a civil securities fraud action brought by the Securities and Exchange Commission, Chiarella was indicted in New York federal court for criminal securities fraud, found guilty by a jury, and unsuccessfully appealed to the Second Circuit. The Supreme Court, however, overturned his conviction."

8.1.1. The Misappropriate Theory

In *U.S. v. O'Hagan* (1997), the United States Supreme Court would extend *Chiarella* to include the misappropriation theory as a basis of Section 10b-5 liability, "which opened the application of Rule 10b-5 to wider range of insider trading."

The misappropriation theory was developed in cases where an individual trades stock in a corporation, in which they were *unaffiliated*, i.e., they were an "*outsider*," on the basis of *material non-public information* obtained through a breach of a fiduciary duty owed by an *insider* to the source of the information. The misappropriation theory does not require that a party owe a fiduciary duty to the company in whose stock they trade. The party's knowledge of the information alone is sufficient to create a form of derivative liability under Rule 10b-5 (see Hagen, 1998; Merwin, 1996; Diamond et al., 2021).

In *U.S. v. O'Hagan (1977)*, a partner in a large law firm purchased stock futures in a company that was involved in a tender offer based on inside information that he had learned from other partners at the firm working on the deal. Although the defendant had no *fiduciary duty* to the company in whose stock he traded, the Supreme Court upheld the defendant's conviction under Rule 10 b-5 on the grounds that he had nonetheless *used confidential information to trade securities* (see Quinn, 2003; Madden, 2008). Importantly, the Supreme Court held that the SEC did not exceed its rulemaking authority when it adopted Rule 14e-3(a) which "proscribes trading on undisclosed information in the tender offer setting, even in the absence of a duty to disclose" by misappropriating confidential information.

The Supreme Court reasoned that such insider trading is fraudulent because it is akin to embezzlement; that is, "the owner of the confidential information has exclusive use of such information, and the trader misappropriates that information by trading on it and not disclosing the use of the information to the owner of the information" (Wex (Definition Team), 2022).

After the decision in *O'Hagan*, the Securities and Exchange Commission (SEC) codified the misappropriation theory in Rule 10b5-1, which broadly prohibits trading on the basis of *material non-public information.*
8.2. Two Notorious Case Studies on Insider Trading

8.2.1. Martha Stewart

In 2003, Martha Stewart, the ubiquitous TV and media mogul, was charged by the SEC with obstruction of justice and securities fraud—including insider trading—for her part in the 2001 ImClone case. Stewart sold nearly 4,000 shares of biopharmaceutical company ImClone Systems she held based on information received from Peter Bacanovic, a broker at Merrill Lynch, through his assistant Douglas Faneuil. Bacanovic's "tip" or insider information came after ImClone Systems' chief executive officer (CEO), Samuel Waksal, who had sold all his shares of the company. This information was shared about the same time as ImClone was awaiting a decision of the Food and Drug Administration (FDA) on approval of its cancer treatment, Erbitux.

The SEC alleged that "Waksal secretly knew that the FDA was about to reject ImClone Erbitux application." Shortly after these trades, the FDA in fact rejected ImClone's drug, causing shares to fall 16% in one day. Stewart was charged with nine counts obstruction of a proceeding, conspiracy, and making false statements to federal investigators." The SEC alleged:

> "that Stewart and Bacanovic went on to lie when the Commission staff and criminal authorities questioned them about the facts surrounding Stewart's sale of ImClone stock. Stewart and Bacanovic fabricated an alibi for Stewart's trades, stating that she sold her ImClone stock because she and Bacanovic had decided earlier that she would sell if ImClone's stock price fell below $60 per share. In addition, Stewart told the government that she did not recall anyone telling her that day that any of the Waksals were selling their ImClone stock."

According to the SEC Release, dated June 4, 2003:

> "The Commission further alleges that Stewart and Bacanovic subsequently created an alibi for Stewart's ImClone sales and concealed important facts during SEC and criminal investigations into her trades. In a separate action, the United States Attorney for the Southern District of New York has obtained an indictment charging Stewart and Bacanovic criminally for their false statements concerning Stewart's ImClone trades."

The Commission sought, among other relief, an order requiring Stewart to *disgorge* the losses she had avoided through her trades, plus civil monetary penalties. The Commission also sought an order barring Stewart from acting as a director of, and limiting her activities as an officer of, any public company. Stewart had been Chairman and Chief Executive Officer of Martha Stewart Living Omnimedia, Inc.

On March 5, 2004, Stewart was found guilty on three counts of lying, but not on the charge of securities fraud. Baconovic was found guilty on four counts, as well (Hays & Eaton, 2004). Stewart served five months in a federal corrections facility (SEC Release, 2003-69, 2003; U.S. Securities and Exchange Commission, 2021).

8.2.2. Amazon

In September 2017, former Amazon.com Inc. financial analyst Brett Kennedy was charged with insider trading (SEC Release, 23931, 2017). The government alleged that Kennedy gave Maziar Rezakhani, a fellow University of Washington alumnus, information on Amazon's 2015 first-quarter earnings before the release of the information to the public. Rezakhani paid Kennedy $10,000 for the information. In a related case, the SEC said Rezakhani made $115,997 trading Amazon shares based on the tip from Kennedy.

On September 7, 2017, Kennedy "pleaded guilty today in U.S. District Court in Seattle to securities fraud involving insider trading, announced U.S. Attorney Annette L. Hayes. BRETT D. KENNEDY, 26, currently of Blaine, Washington, admitted that in April 2015, he provided non-public quarterly financial results to a friend who then purchased Amazon stock and sold it at a profit once the results were made public" (U.S. Attorney's Office, Western District of Washington, 2017). Day (2007) reported that Kennedy was sentenced to six months in prison and was required to pay a $2,500 fine.

8.3 Damages Available Under SEC Rule 10b-5

Generally, there are three main remedies available for violations of Rule 10b-5, which include compensatory damages, punitive damages, and recission (MDF Law, 2023). Since the purpose of civil damages for securities fraud lies in compensating the plaintiff for any losses incurred due to the defendant's wrongful act, compensatory damages would typically cover the "actual damages" that the plaintiff suffered from the purchase or sale of the security (see Burch, 2007).
The following are examples of compensatory damages:

- Gains or profits that the plaintiff "would have made" if the defendant had not engaged in the prohibited conduct;
- The purchase price and any transaction or brokerage fees paid by the plaintiff;
- The value of the plaintiff's security.

Compensatory damages may also include:

- Out-of-pocket damages, reflected in the difference between the contract or price paid by the plaintiff and the actual value of the securities at the time of the date of sale;
- Cover damages, which allows the defrauded seller of a security to recover the difference between the highest value of the security within a reasonable time after the plaintiff had discovered the fraud or when the fraud should have reasonably been discovered.

In addition, the plaintiff may be able to recover punitive or exemplary damages under certain circumstances to punish the defendant for outrageous, malicious, or egregious conduct in order to deter others from engaging in similar conduct (Burch, 2007).

In addition, a court may permit the party against whom fraud was committed to rescind any fraudulent transaction, returning the defendant and the plaintiff to the status that they were in before the fraudulent conduct had occurred. Rescission may involve voiding an agreement or, under certain circumstances, a plaintiff can elect that the defendant to fulfill the contract if that proves to be to the advantage of a plaintiff.

8.4. State Actions in the Area of Securities Fraud

State governments may impose civil and criminal liability on individuals engaged in securities fraud, as well (see Ash, 1988; Find Law, 2016).

State security laws are often referred to as "Blue Sky Laws." In addition to federal securities regulations, states may require issuers of securities to register with their state in order to guard against and regulate securities fraud committed in their jurisdiction (Mahoney, 2003). The SEC (2023) writes:

> "In addition to the federal securities laws, every 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. While these laws do vary from state to state, most state laws typically require companies making offerings of securities to register their offerings before they can be sold in a particular state, unless a specific state exemption is available. The laws also license brokerage firms, their brokers, and investment adviser representatives."

Interestingly, state securities laws antedated federal legislation. In the early 1900s, well before Congress had enacted the federal securities acts, many individual states had adopted legislation regulating the sale of securities. Segal (2020) writes: "The term 'blue sky law' is said to have originated in the early 1900s, gaining widespread use when a Kansas Supreme Court justice declared his desire to protect investors from speculative ventures that had 'no more basis than so many feet of 'blue sky''' (*Hall v. Geiger Jones Co.*, 1917).

Sarkar (2021) writes that:

> "Despite the differences from state to state, blue sky laws share certain features in their approach to prevent misinformation about investment returns and risks. The state laws provide for oversight of the sales process and create liability for fraudulent sales in two ways. First, the laws require the registration of securities that will be offered or sold within the state, unless the offerings fall within specified exemptions from registration…. These processes are administered by a state's securities agency or commission. The registration process for securities and securities transactions prevents fraudulent transactions by allowing state security commissions to review the securities offerings and ensure that the individuals transacting in the securities markets are qualified and regulated by the state."
>
> "Second, blue sky laws have antifraud provisions that create liability for any fraudulent statements or failure to disclose information as required…. The specific kinds of statements and acts that can form the basis of a fraud claim will depend on a state's statutes and case law. The cause of action available and remedies available to investors bringing private suits also differs from state to state, but may include rescission of the transactions, forcing the seller to give up profits, or other measures of damages."

In the 1933's, under the Roosevelt administration, Congress began regulating both securities and securities' exchanges. By that time, all states, with the exception of Nevada, had enacted their own blue sky laws. As a result, securities regulation consisted of a "patchwork" of individual state laws and federal legislation.

In an attempt to introduce a certain rationality into the regulatory environment, Congress enacted the *National Securities Market Improvement Act of 1966* (NSMIA) whereby certain securities listed on national stock exchanges, such as NASDAQ or NYSE, are exempt from state blue sky laws. Securities exempt by Rule 506 [Limitation on number of purchasers: There are no more than, or the issuer reasonably believes that there are no more than, 35 purchasers of securities from the issuer in offerings under this section in any 90-calendar-day period] under federal law are also exempt under state blue sky laws.

Di Trolio (2004, p. 1295) notes: "[T]hree distinct types of blue-sky laws remained in effect after 1996: antifraud provisions, provisions requiring the registration or licensing of certain persons engaged in the securities business, and provisions requiring the registration of securities."

9. Concluding Observations

In areas not related to securities fraud, the common law causes of action of misrepresentation and fraud were effective in combatting some of the more egregious types of fraud which led individuals to enter into contracts or to undertake actions that were based on false or misleading information. Yet, because of certain limitations placed on the nature of proof relating to definitional considerations, opinions, and commendations, it was often difficult to apply these theories in product cases.

These limitations would be specifically addressed in the creation of "strict liability in tort" as the preferred theory of establishing liability in products cases—focusing on the defects in manufacturing, design, or marketing in order to protect purchasers, users, and others who were harmed when defective products entered into the "stream of commerce" by manufacturers and other parties. The Teaching Note on Strict Liability in Tort, the last in this series, will describe this effort which has proven successful in fighting for the rights of injured parties when products prove to be defective.

References

Ambac. Assur. Corp. v. Countrywide Home Loans (2018). 31 N.Y. 3d 569. Court of Appeals of New York.

Ash, B. (1988). State regulation of insider trading—A timely resurgence? Ohio State Law Journal, 49: 393-416.

Ausness, R.C. (2002). Tort liability for the sale of non-defective products: An analysis and critique of the concept of negligent marketing. South Carolina Law Review, 53(4): 907-966.

Beck, D.J. & Roberts, A.B. (2018). Legal malpractice in Texas (Third ed.). Baylor Law Review, 70: 217-526.

Bergeron v. Dupont (1976). 359 A.2d 627. Supreme Court of New Hampshire.

Black's Law Dictionary (11th ed.) (2021). Thompson Reuters: Toronto, Canada.

Blue Riv. Gems Inc. v. S.V. & V. Diamond Corp. (2016). 55 Misc. 3d 450. Supreme Court of New York County.

Buell, S.W. (2011). What is securities fraud? Duke Law Journal, 61(3): 511-582.

Burch, E.C. (2007). Reassessing damages in securities fraud class actions. 66(2): 348-397.

Chen, J. (2022a). What is securities fraud? Definition, main elements, and examples. Investopedia (June 9, 2022), https://www.investopedia.com/terms/s/securities-fraud.asp

Chen, J. (2022b). What is fraud? Definition, types, and consequences. Investopedia (July 24, 2022), https://www.investopedia.com/terms/f/fraud.asp

Chiarella v. United States (1980). 445 U.S. 222. United States Supreme Court.

Clear Counsel (2023). Fraudulent concealment, clearcounsel.com, https://www.clearcounsel.com/fraudulent-concealment/

Couture, W.G. (2019). Prosecuting securities fraud under section 17(a)(2). Loyola University of Chicago Law Journal, 50: 669-694.

Day, M. (2017). Former Amazon analyst gets six-month for insider trading. The Seattle Times (December 8, 2017), https://seattletimes.com/business/amazon/former-amazon-analyst-gets-six-month-sentence-for-insider-trading/

Diamond, C.J. et al. (2021). SEC extends the misappropriation theory of insider trading beyond targets of insider trading to companies "economically linked" to such targets. White & Case, https://www.whitecase.com/insight-alert/sec-exteds-misappropriation-theory-insider-trading-beyond-targets-acquisitions
Di Trolio, S.A. (2004). Corporate governance and the Sarbanes-Oxley Act: Public choice theory, federalism, and the sunny side to blue-sky laws. William Mitchell Law Review, 30: 1279-1314.
Dooner, M. et al. (2021). Securities fraud. American Criminal Law Review, 58: 1431-1531.
Emerson, R.W. 92020). Franchise participants as proper patent opponents: Walker Process claims. Vanderbilt Journal of Entertainment and Technology Law, 22: 507-546.
Find Law (2016). State securities fraud laws. Find Law (June 20, 2016), https://www.findlaw.com/state/criminal-laws/securities-fraud.html
Frohock, C.M & Jiminez, M.D. (2020). Exactly what they asked for: Linking harm and intent in wire fraud prosecutions. Miami University Law Review, 74: 1037-1069.
Garabedian, C.B. (1942). Fraud—Fraudulent concealment in sale of realty. Boston University Law Review, 22(4): 607-612.
Garry, P.M. (2020). The erosion of common law privacy and defamation: Reconsidering the law's balancing of speech, privacy, and reputation. Wayne Law Review, 65: 279-324.
Grower, J.A.W. (2021), What does it mean to be a fiduciary? The Cambridge Law Journal, 80(1): 21-24.
Guthrie v. Suiter (1996). 934 S.W.2d 820. Court of Appeals of Texas, First District, Houston.
Hagen, WW. (1988). Insider trading under Rule 10b-5: The theoretical bases of liability. American Bar Association, 44(1): 13-41.
Hall v. Geiger Jones Co. (1917). 252 U.S. 539. United States Supreme Court.
Hays, C.L. & Eaton, L. (2004). The Martha Stewart Verdict: The overview, Stewart found guilty in lying in sale of stock. The New York Times (March 6, 2004),
https://www.nytimes.com/2004/03/06/business/martha-stewart-verdict-overview-stewart-found-guity-lying-sale-stock.html
Holland v. Lentz (1964). 239 Or. 332. Oregon Supreme Court.
Hollander-Blumoff, R. & Bodie, M.T. (2021). The market as negotiation. Notre Dame Law Review, 96(3): 1257-1317.
Huffstetler v. Our Home Life Ins. Co. (1914). Supreme Court of Florida.
Hunt, L.D., Hodge, C.T., & Thompson, B.T. (2020). Alternatives to tortious interference with inheritance. Texas Tech Estate Planning Community Property Law Journal, 13: 59-141.
Hunter, R.J. (1990). Insider trading revisited. Res Gestae (Indiana State Bar Association Journal): 33(8): 393-395.
Hunter, R.J. & Frese, P. (1989). The genesis of an ethical imperative: The SEC in transition (The ethical implications of statutory and administrative solutions to insider trading. [A comprehensive legislative, administrative, judicial and policy study]. Gonzaga University Law Review, 25(1): 9-64.
Hunter, R.J. & Montuori, M.A. (2012). The hand that truly rocks the cradle: A reprise of infant crib safety, lawsuits and regulation from 2007-2012. Loyola Consumer Law Review, 25: 229- 247.
International Trademark Association (INTA) (2020). Counterfeiting (Intended for a non-legal audience). International Trademark Association (August 31, 2020), https://www.inta.org/fact-sheets/counterfeiting-for-a-non-legal-audience
Keller, E. & Gehlmann, G.A. (1988). Introductory comments: A historical introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934. Ohio State Law Journal, 49(2): 329-352.
King, M. & Roell, A. (1988). Insider trading. Economic Policy, 6(1): 163-193.
Kramer, D.B. (2014). The way it is and the way it should be: Liability under Section 10(b) of the Exchange Act and rule 10b-5 thereunder for making false and misleading statements as part of a scheme to "pump and dump" a stock. University of Miami Business Law Review, 13(2): 243-297.
Kraus, J.S. (1994). Decoupling sales law from the acceptance-rejection fulcrum. Yale Law Journal, 104: 129-205.
Krauss, M.M. (2023). Common law fraudulent misrepresentation and negligent misrepresentation. Greenberg Traurig, LLP, https://www.studocu.com/row/document/the-university-of-the-south-pacific/contract-law-2/common-law-fraudulent-and-negligent-misrepresentation/37316818
Langevoort, D.C. & Gulati, G.M. (2004). The muddled duty to disclose under rule 10b-5. Vanderbilt Law Review, 57(5): 1639-1686.
Larson, M. et al. (2021). Computer crimes. American Criminal Law Review, 58: 611-669.
Ledingham, S.S. (2010). Aggregate reliance and overcharges: Removing hurdles to class certification for victims of mass fraud. New York University Law Review, 85: 289-327.
Legal Match (2023) Forgery laws: Forging a signature, charge, crime, and punishment. legalmatch.com, https://www.legalmatch.com/law-library/article/forgery-laws.html
Madden, T.M. (2008) *O'Hagan*, 10b-5, relationships and duties. Hastings Business Law Review, 4: 55-75.
Maeker v. Ross (2014). 219 N.J. 565. Supreme Court of New Jersey.

Mahoney, P.G. (2003). The origins of blue-sky laws: A test of competing hypotheses. The Journal of Law and Economics, 46(1): 229-251.
Marion v. Bryn Mawr Trust Co. (2021). 288 A.3d 76. Supreme Court of Pennsylvania.
Martin, A. (2023). 8 ways to spot personal loan scams. bankrate.com (January 17, 2023), https://www.bankrate.com/loans/personal-loans/personal-loan-scam-signs/
McKean, F.G. (1927). The presumption of legal knowledge. St. Louis Law Review, 12(2): 95-107.
MDF Law (2023). Civil damages for securities fraud claims. mdf.com, https://mdf-law.com/civil-damages-for-securities-fraud-claims/
Merwin, J.G. (1996). Misappropriation theory liability awaits a clear signal. American Bar Association, 51(3): 803-823.
Miller v. Osterlund (1923). 191 N.W. 919. Supreme Court of Minnesota.
Nagy, D.M. (2020). *Chiarella v. United States* and its indelible impact on insider trading law. Tennessee Law Journal, 15: 6-47.
Nance, D.A. (2021). Choice of law for burden of proof. North Carolina Journal of International Law, 46: 235-313.
Northernaire Prod. Inc. v. Cty. of Crow Wing (1976). 244 N.W.2d 279. Supreme Court of Minnesota.
Pearce, R. (2023). What is securities fraud? Definition, examples, & how to report. secatty.com (March 9, 2023), https://www.secatty.com/legal-blog/what-is-securities-fraud/
Perry, B. (2021). The elements of securities fraud claim. burfordperry.com (June 8, 2021), https://www.burfordperry.com/the=elements-of-securities-fraud-claim/
Picard Chem. Profit Sharing Plan v. Perrigo Co. (1996). 940 F. Supp. 1101. U.S. District Court for the Western District of Michigan, Southern Division,
Priebe, J.R. (2001). *Field v. Mans* and *In re Keim*: Excepting debts from bankruptcy discharge and the difference between "experienced horsemen" and "reasonable men." Arkansas Law Review, 54: 99-126.
Puckett Paving Company v. Carrier Leasing Corporation (1976). 225 S.E.2d 910. Supreme Court of Georgia.
Quinn, R. W. (2003). The misappropriation theory of insider trading in the Supreme Court: A (brief) response to the (many) critics of *United States v. O'Hagan*. Fordham Journal of Corporation and Financial Law, 8: 865-898.
Reimann, M. (2021). Product liability. In Comparative tort law (Bussari, M. & Sebok, A.J., eds), Chapter 23. Edward E. Elgar (Elgar) Publishers: Northhampton, Mass.
Restatement of Torts, Second (1979). American Law Institute: Washington, D.C.
Rolfson, L. (2022). What is the substantial factor test for causation? Legal Knowledge Base (February 19, 2022), https://legalknowledgebase.com/what-is-the-substantial-factor-test-for-causation
Rosenblum, R.H. (1991). An issuer's duty under rule 10b-5 to correct and update materially misleading statements. Catholic University Law Review, 40: 289-330.
Rotert, B.A. (2023). Was "varsity blues" actually a crime? The Supreme Court's crusade against the federal mail and wire fraud statutes. Boston College Law Review, 64: 415-457.
Salvucci, J. (2023). What is securities fraud? Definition, types & examples. thestreet.com (April 3, 2023), https://www.thestreet.com/dictionary/s/securities-fraud
Sankar, D. (2021). Blue sky law. Wex, https://www.law.cornell.edu/wex/blue_sky_law
Segal, T. (2020). Blue sky laws: Definition, purpose, how they're regulated. Investopedia (November 30, 2020), https://www.investopedia.com/terms/b/blueskylaws.asp
Sellers v. Looper (1972). 503 P.2d 692. Supreme Court of Oregon.
Sightler v. Remington College (2015). 2015 U.S. Dist. Lexis 94793. U.S. District Court for the Middle District of Florida, Orlando Division.
Stark v. Equitable Life Assurance Society (1939). 205 Minn. 138. Supreme Court of Minnesota.
Theoharis, M. (2023). Fraud: Laws and penalties. Criminal Defense Lawyer (Nolo),
https://www.criminaldefenselawyer.com/crime-penalties/federal/Fraud.htm
Threedy, D.L. (2010). Dancing around gender: Lessons from Arthur Murray on gender and contracts. Wake Forest Law Review, 45: 749-777.
Town North Nat'l Bank v. Broaddus (1978). 569 S.W.2d 489. Supreme Court of Texas.
United States v. Clevenger (1984). 733 F.2d 1356. U.S. Court of Appeals for the Ninth Circuit.
United States v. O'Hagan (1997). 521 U.S. 642. United States Supreme Court.
US Legal (2023). Scienter law and legal definition. USLegal.com,
https://defiitions.uslegal.com/s/scienter
U.S. Securities and Exchange Commission (2003). SEC charges Martha Stewart, broker Peter Bacanovic with illegal insider trading. sec.gov (June 4, 2003),
https://www.sec.gov/news/press/2003-69.htm
U.S. Securities and Exchange Commission (2017). *Securities and Exchange Commission v. Brett Kennedy, et al.* (No. 17-cv-01344) (W.D. Washington, filed Sept. 7, 2017), sec.gov,
https://www.sec.gov/litigation.;itreleases/2017/Ir23931.htm
U.S. Securities and Exchange Commission (2023). Blue sky laws.

investor.gov, https://www.investor.gov/introduction-investing/investing-basics/glossary/blue-sky-laws
U.S. Attorney's Office, Western District of Washington (2017). Former Amazon financial analyst pleads guilty to insider trading (Press Release). United States Department of Justice (September 7, 2017), https://www.justice.gov/usao-wdwa/pr/former-aazon-finabcial-analyst-pleads-guilty-insider-trading
Vokes v. Arthur Murray (1968). 212 So.2d 906. Florida District Court of Appeals.
Wex (Definition Team) (2022). Misappropriation theory of insider trading. Wex (Legal Information Institute), https://www.law.cornell.edu/wex/misappropriation_theory_of_insider_trading
Winter, T. & Clark, D. (2018). Federal Court approves $25 million Trump University settlement. NBCnews.com (February 5, 2018), https://www.nbcnews.com/politics/white-house/federal-court-approves-25-million-trump-university-settlement-n845181
Yorke v. Taylor (1954). 322 Mass. 368. Supreme Judicial Court of Massachusetts, Suffolk.