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Section 11 Liability Under the 1933 Securities Act for Misstatements and/or Ommissions In a Registration Statement

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Research Guides

Section 11 Liability Under the 1933 Securities Act for Misstatements and/or Ommissions In a Registration Statement

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Introduction

The Securities Acts of 1933 and 1934 provide comprehensive legislation for United States securities. The 1933 Act covers initial distributions of securities while the 1934 Act covers regulating the secondary markets. The focus of this research guide is on liability under Section 11 of the Securities Act of 1933.

At the beginning of the 1933 Act, Congress stated that its purpose in enacting the law was "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." 48 Stat. 74 (1933). To further this congressional intent, Congress provided for liability against those who violate its provisions.

Under Section 11, securities purchasers have "an express right of action for damages . . . when a registration statement contains untrue statements of material fact or omissions of material fact." 1 Thomas Lee Hazen, Treatise on the Law of Securities Regulation, §7.3 at 581 (4th ed. 2002). As noted below, any material errors in a registration statement creates strict liability on the part of the issuer. Along with the issuer, anyone involved with creating the registration statement is also subject to liability. The potential for liability on the part of many actors is why plaintiffs will find Section 11 a helpful and beneficial claim.

This research guide will explore the scope of a Section 11 claim. Plaintiffs can use this guide to explore the requisite factors needed for a successful claim. Defendants can use this guide to formulate their proper responses.

Please note, along with Section 11, the 1933 Act provides for liability under Sections 12, 15, and 17, which are beyond the scope of this research guide. Section 12 liability attaches when (1) an individual violates Section 5 by not complying with the requisite registration and prospectus provisions of the Act and (2) when a seller or offeror uses a prospectus or oral communication that contains material misstatements or omissions. Section 12 can be used along with Section 11 in a cause of action. Section 15 is a provision for controller liability. Section 17 is an anti-fraud provision but no private right of action exists under Section 17 (*see Maldonado v. Dominguez*, 137 F.2d 1 (1st Cir. 1998)).

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Primary Sources

U.S. Code

1. SECTION 11 (Securities Act of 1933, § 11, 15 U.S.C. § 77k)

   This is the provision that grants an explicit right of action against issuers and other actors for material misstatements or omissions in a registration statement. The following provisions are subsections of this statute or are sections that supplement it. A variety of

sources can be found by exploring an annotated code, which can be found in book form or through an online service such as Westlaw®.

2. DEFENDANTS -- (15 U.S.C. § 77k(a)(1))

The statute expressly lists possible defendants in a Section 11 cause of action. For more information on defining these defendants, see *infra* Defendants under the Case Law section of this web research guide. For additional information about defendants under a Section 11 action, see *infra* A.L.R. The possible defendants are:

A. ISSUERS

Issuers are held strictly liable under the Act. For more information, see *infra* Cases, Defenses. An Issuer's only statutory defenses are:

1. The purchaser knew of the inaccuracies (15 U.S.C. § 77k(a)).

2. The inaccuracies are immaterial (15 U.S.C. § 77k(a)).

3. The depreciation of value is from sources other than the material misrepresentation. (15 U.S.C. § 77k(e)).

4. Statute of limitations has run (15 U.S.C. § 77m).

B. SIGNERS

The appropriate signers are supplied in section 6 of the 1933 Act (15 U.S.C. § 77f(a)). They include the issuer, the issuer's principal executive, financial, and accounting officers, and a majority of the issuer's board of directors. *See infra*, Cases, Defendants for more details.

C. DIRECTORS OR PARTNERS

The due diligence defense will be the main defense that a director or partner will use to avoid liability. *See infra*, Statutory Defenses. For more information about director liability, see *infra* Articles.

D. EXPERTS (Accountants, Engineers, or Appraisers)

Anyone that the issuer used to help create the registration statement may be held liable for any misstatement or omission as well. The due diligence defense will be the main defense that an expert will use to avoid liability. *See infra*, Statutory Defenses. For more information about accountant liability, see *infra* Articles.

E. UNDERWRITERS

The due diligence defense will be the main defense that an underwriter will use to avoid liability. *See infra*, Statutory Defenses. For more information about underwriter liability, see *infra* Articles.

3. STATUTORY DEFENSES

A. Whistle Blowing Defense ((15 U.S.C. § 77k(b)(1) and (2))

This statutory defense is available for defendants other than issuers. Prior to a registration statement's effective date, a person must resign from or take steps to resign from the position that connects her with the registration statement. Along with resignation, she must advise the Commission and the issuer in writing that she has taken such action and is not responsible for the registration statement. If the resignation occurs after the effective date, advise the Commission and give reasonable public notice according to that sub-section.

B. Due Diligence Defense ((15 U.S.C. § 77k(b)(3) and ((15 U.S.C. § 77k(c))

a. Statutory Factors

This is a statutory defense that has been interpreted by case law and SEC regulations. The statute provides that for:

i. Non-expert portions of a registration statement, a defendant must conduct a "reasonable investigation" and have a "reasonable ground to believe … that the statements [in the registration statement] were true."

ii. Expert portions of registration statement, a defendant must conduct a "reasonable investigation" and have a "reasonable ground to believe … that the statements [in the registration statement] were true." The defendant may also show that the "registration statement did not fairly represent his statement as an expert."

b. Standard of Proof ((15 U.S.C. § 77k(c))

An important aspect of the due diligence defense is contained in the statute and not just in case law and SEC regulations. The statute explicitly defines the standard of reasonableness under a due diligence defense. The statute states, "In determining … what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that of a prudent man in the management of his own property."

4. RELIANCE (15 U.S.C. § 77k(a), last paragraph)

Plaintiffs must prove reliance if the stock was acquired after twelve months of the effective date of the registration statement and if the issuer has distributed an earnings statement for that period. However, reliance may be established without proof that the person actually read the registration statement. For information required in the earnings statement, see Rule 158 (17 C.F.R. § 230.158). For more information about reliance, *see infra* Cases, Elements, Reliance.

5. STATUTE OF LIMITATIONS (Securities Act of 1933 § 13, 15 U.S.C. § 77m)

A plaintiff has one year to bring an action after discovery of the misstatement of omission or if discovery should have been made after reasonable investigation. The maximum limit is three years to bring an action "after the security was bona fide offered to the public."

6. CLASS ACTION LIMITATIONS (Securities Act of 1933 § 16, 15 U.S.C. § 77p)

This section places limitations on class actions being brought in federal and/or state court. Any private class actions claiming fraud with more than fifty members must bring the action in federal court.

7. DAMAGES AVAILABLE (Securities Act of 1933 § 11(e), 15 U.S.C. §77k(e))

Plaintiffs have three alternatives to compute damages under section 11. Plaintiffs may recover "the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public)" and (1) the value at the time the suit was brought, or (2) the price when the plaintiff sold the security before the lawsuit, or (3) the price when the plaintiff sold the security after the lawsuit but before judgment. For more information about calculating damages, see *infra* Articles.

A court may also grant costs of lawsuit including attorney's fees

Section 11(g) places a limitation on the amount of damages. The statute provides, "In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public."
(15 U.S.C. §77k(g))

The 1995 Private Securities Litigation Reform Act (15 U.S.C. §77k(f)) also added limitations on damages under Section 11. When fraud is involved, only those defendants who are guilty of fraud are jointly and severally liable. When no fraud is involved, all the defendants are held jointly and severally liable except outside directors. Outside directors are liable only to the extent of their relative fault. This is a proportionate liability scheme. Subsection f also grants a right of contribution against joint defendants.

LEGISLATIVE HISTORY MATERIALS

1. 1 Securities Law Committee, Federal Bar Association, Federal Securities Laws Legislative History 1933-1982 (1983) (supplements up to 1990). Call Number: KF1439.F42v.1.

This work is a compilation of all the legislative history surrounding the enactment of the Securities Act of 1933. It includes such things as reports, hearings, testimonies, and congressional findings.

2. 1-3 Legislative History of the Securities Act of 1933 and Securities Act of 1934 (J.S. Ellenberger and Ellen P. Mahar eds., 1973).
Call Number: KF1066.A58 1973.

This is another work that compiles the legislative history surrounding the enactment of the Securities Act of 1933. This work is similar to the above and both are great sources when a legislative history argument is to be made.

SEC Regulations

1. Rule 175 (17 C.F.R. § 230.175)

This rule is a safe harbor for forward-looking statements. The rule stipulates when a forward-looking statement will not be found fraudulent. A defendant may use this regulation to argue that the averred misstatement is actually within the safe harbor and is not a material misrepresentation or omission. The availability of such argument will depend on the fact scenario, but be aware of its existence. Also remember that fraud is not an element under Section 11 (*see infra* Cases, Elements). Without the proper facts, this safe harbor might not be helpful.

2. Rule 176 (17 C.F.R. § 230.176)

This rule is the SEC's guidance for the statutory due diligence defense. The rule gives guidelines on what constitutes a reasonable investigation or reasonable grounds for believing that Section 11(c) has been met. Rule 176 is based on the *BarChris* case. *See infra* Cases, Defenses.

Case Law

The following cases interpret Section 11's scope. Courts have adjudicated the various factors needed for a Section 11 cause of action and defense. The following cases are examples of this endeavor. Use shepard's® or Keycite® on the following cases to find additional cases that might be more on point with the researcher's fact pattern.

1. Plaintiffs--Standing

15 U.S.C. § 77k(a)	Section 11 states that an action may be brought by "any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission)."
Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076 (9th Cir. 1999)	Section 11 allows standing for anyone who acquired a security containing a misstatement or omission. In this case, the court explained that "'any person' is quite broad." The court used the ordinary dictionary terms for "any person." The court noted that the only limitation is the person "must have purchase[d] 'such

	security.' Clearly, this limitation only means that the person must have purchased security under that, rather than some other, registration statement." The court held that persons who purchased securities in the aftermarket could assert a section 11 claim if they could trace the shares to the registered offering. *See also In re Sterling Foster & Co*, 222 F. Supp.2d 216, 245-48 (E.D.N.Y. 2002) (holding that securities purchased in secondary markets could be traced to a registration statement despite *Gustafson's* holding); *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000) (explaining that *Gustafson* could not limit section 11 actions to just initial purchasers); *Danis v. USN Communications, Inc.*, 73 F. Supp.2d 923 (N.D. Ill. 1999) (holding that aftermarket purchasers satisfied the tracing requirements).
In re Number Nine Visual Technology Corp., 51 F. Supp.2d 1 (D. Mass. 1999)	Plaintiff must be able to trace the securities purchased to the registration statement. *See* Elements *infra*.
Gustafson v. Alloyd Co., 513 U.S. 561 (1995)	The Supreme Court held that Section 12(a)(2) actions under the 1933 Act could only be brought by plaintiffs purchasing securities out of the public offering as opposed to the aftermarket. This raises the issue whether section 11 should also be limited to just the public offering and not aftermarket purchases. *See Hertzberg supra.*
Demaria v. Anderson, 318 F.3d 170 (2d Cir. 2003)	The court held that plaintiffs may have standing under section 11 even though they purchased the shares in the aftermarket. However, they must be able to trace the shares to the offering.

2. DEFENDANTS

Section 11 lists the categories of persons and entities who may be liable.	*See supra* Statutes for list of the possible defendants
Hagert v. Glickman, Lurie, Eiger & Co., 520 F. Supp. 1028, 1033 (D. Minn. 1981)	The court explained that "liability cannot be extended to those who do not fall into the specific categories of section 11."
Dorchester Investors v. Peak International, Ltd., 134 F. Supp.2d 569 (S.D.N.Y. 2001)	The court explained that if an individual or entity does not fall within one of the listed categories in section 11, they do not incur liability. In this case, a large shareholder did not sign the registration statement. The court held that section 11 was not applicable because the shareholder did not sign the registration statement as required under section 11(a)(1). The court went on to note that liability could attach to the shareholder as a controlling person under section 15 of the 1933 Act. However, section 11 could not be used to attach liability.
Pompano-Windy City Partners, Ltd. V. Bear Stearns & Co., Inc., 794 F. Supp. 1265 (S.D.N.Y. 1992)	This case describes the scope of signors as defendants. The court noted that for liability to attach, the person must sign the registration statement in dispute. In this case, the allegedly misleading statement was not incorporated by reference into the registration statement that was signed by the defendant.

3. Elements

15 U.S.C. § 77k(a)	Liability attaches when untrue statements of material fact or omissions of material fact are in a registration statement "when such part became effective."

A. Materiality

McMahan & Co. v. Wherehouse Entertainment, Inc., 900 F.2d 576 (2d	

Cir. 1990), *certiorari denied* 501 U.S. 1249 (1991)	The court explained that materiality is a question of fact.
TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).	The Supreme Court described materiality in terms of whether the "reasonable investor" would view the lack of disclosure "as having significantly altered the 'total mix' of information made available."
Cooperman v. Individual, Inc., 171 F.3d 43 (1st Cir. 1999).	An omission is actionable only if the 1933 Securities Act required the information to be disclosed.
In re Sterling Foster & Co., 222 F.Supp.2d 216 (E.D.N.Y. 2002).	The misstatements or omissions must be based on the written information within the registration statement. Section 11 does not apply when subsequent events make a registration statement misleading.
Cautionary Statements Rendering Misstatement Immaterial	Sufficient cautionary language will render the "alleged omission or misrepresentation immaterial." *In re Donald J. Trump Casino*, 7 F.3d 357, 371 (3d Cir. 1993). In *In re Worlds of Wonder*, 35 F.3d 1407 (9th Cir. 1994), the court applied the Bespeaks Caution Doctrine to section 11 actions. In *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865 (3d Cir. 2000), the court noted that cautionary language only applies to forward looking statements and not historical facts. The cautionary language must sufficiently disclose necessary facts to help the investor not rely on the predictions.

B. Reliance

15 U.S.C. § 77k(a), last paragraph	Reliance is presumed prior to one year after the effective date. If the plaintiff has acquired shares twelve months after the effective date and the issuer has issued an earnings statement, see Statutes, *supra*.
Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967).	The court held that a presumption of reliance exists for any person purchasing securities prior to the twelve-month cut off date. *See also Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971).

C. Tracing Securities to the Registration Statement

Courts have read section 11 to require a tracing requirement on the plaintiff.	For an example, see *In re Elscint Ltd.*, 674 F. Supp. 374, 380 (D. Mass. 1987).
In re American Bank Note Holographics, 93 F. Supp.2d 424 (S.D.N.Y. 2000).	The court held that the tracing requirements could be satisfied if the stock was purchased in the aftermarket. However, the court explained that a purchaser still must trace the purchased shares to the offering covered by the registration statement. *See also Lee v. Ernst & Young*, LLP, 294 F.3d 969 (8th Cir. 2002) (holding same position that after market purchasers could trace securities back to the registration statement). For questions on whether *Gustafson* limits section 11 actions to initial purchasers, *see supra* Plaintiffs, Standing.
Krim v. pcOrder.com, Inc., 210 F.R.D. 581, 587 (W.D. Tex. 2002).	The court strictly construed the tracing requirement doctrine. In that case, the plaintiff argued that 91% of the publicly traded shared could be traced to the public offering. The court explained that a high percentage is irrelevant because the plaintiff must actually trace the shares to the public offering. The court noted that an averment that the security "might have been, probably was, or most likely was, issued pursuant to a defective statement" was not enough.
Harden v. Raffensperger, Hughes &	

Co., 933 F. Supp. 763 (S.D. Ind. 1996).	The court explained that plaintiffs must show that the purchased securities are the "direct subject" of the registration statement.

D. Fraud and Scienter is Irrelevant

15 U.S.C. § 77k(a)	Statute only requires "an untrue statement of a material fact or omitted to state a material fact required to be stated therein."
Escott v. BarChris Construction Co., 283 F. Supp. 643 (S.D.N.Y. 1968).	The court explained that the "statute imposes liability for untrue statements regardless of whether they are intentionally untrue."
Haft v. Eastland Financial Corp., 755 F. Supp. 1123 (D.R.I. 1991).	The court noted that scienter is not required under a section 11 cause of action. The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).
Pleading with Particularity	Even though fraud is not required, courts vary on requiring the plaintiff to plead with particularity as required under Fed. R. Civ. Proc. 9(b). *In re NationsMart Corp.*, 130 F.3d 309 (8th Cir. 1997) (not requiring particularity in pleading). *But see Haft v. Eastland Financial Corp.*, 755 F. Supp. 1123 (D.R.I. 1991) (requiring particularity in pleading).

4. Defenses

A. Issuers are Strictly Liable

In re NationsMart Corp., 130 F.3d 309 (8th Cir. 1997).	The court explained that issuers are strictly liable for any misstatements in the registration statement. Section 11 liability is "virtually absolute" for issuers.
Issuer Defenses	Only defenses for issuers are statutory defenses, which are: (1) the purchaser knew of the inaccuracies, (2) the inaccuracies are immaterial, (3) the depreciation of value is not from inaccuracies, or (4) the statute of limitations has run. *See supra* Statutes.

B. Misstatement Had No Adverse Impact on Price

Akerman v. Oryx Communications, Inc., 810 F.2d 336 (2d Cir. 1987).	The court explained that a "defendant may, under section 11, reduce his liability by proving that the depreciation in value resulted from factors other than the material misstatement in the registration statement." In that case the court held that "the misstatement was barely material and that the public failed to react adversely to its disclosure." *See supra* Statutes.

C. Purchaser Knew of the Inaccuracies/Omissions

15 U.S.C. § 77k(a)	The statute provides that any person that has properly acquired a security may sue "unless it is proved that at the time of such acquisition he knew of such untruth or omission."

D. The Inaccuracies/Omissions are Immaterial

15 U.S.C. § 77k(a)	*See supra* Elements, Materiality.

E. Whistle Blowing

15 U.S.C. § 77k(b)(1) and (2)	*See supra* Statutes.

F. Due Diligence

15 U.S.C. § 77k(b)(3) and 15 U.S.C. § 77k(c)	*See supra* Statutes.
Rule 176 (17 C.F.R. § 230.176)	*See supra* SEC Regulations.
Escott v. BarChris Construction Co., 283 F. Supp. 643 (S.D.N.Y. 1968)	The court evaluated what constituted a "reasonable investigation." This case is the fountainhead for the due diligence defense in section 11 cases. The court gave a sliding scale on the level of investigation required depending on the category of the defendant. The categories discussed by the court included (1) Officers and Directors, (2) Outside Directors, (3) Underwriters, and (4) Accountants. The highest standard of care applied to insiders who signed the registration statement. The level of expertise of insiders will also factor into the level of investigation required. Insiders with an expertise in law or accounting have higher investigation requirements to satisfy a reasonable investigation than those without such expertise. The court also explained that non-expert defendants may rely on the expert's portion of the registration statement. A researcher should use shepard's® or Keycite® on this case to find recent cases that might be more on point with the researcher's fact pattern. Anytime a due diligence defense is used, a court will likely cite to the *BarChris* case.

G. Class Action Limitations

15 U.S.C. § 77p	*See supra* Statutes.

H. Statute of Limitations

15 U.S.C. § 77m	*See supra* Statutes.

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Secondary Sources

Treatises

1. 1Thomas Lee Hazen, Treatise on The Law of Securities Regulation § 7 (4th ed. 2002). Call Number: KF1439.H39 2002 v.1.

   This treatise provides a thorough examination of the 1933 Securities Act. Section 7 of the book is devoted entirely to Section 11 Liability. The entire treatise is very thorough and a researcher will gain a good overview of the 1933 Act and the liabilities arising under the Act.

2. Larry D. Soderquist, Understanding Securities Laws (4th ed. 2003). Call Number: KF1440.S62 2003.

   This is another treatise that covers the entire 1933 Act. This treatise is not as thorough as Hazen's but provides a good overview and quick resource into relevant case law.

3. Marc I. Steinberg, Securities Regulation: Liabilities and Remedies (2003). Call Number: KF1439.S737 2003.

   This is a great book for the issues surrounding causes of action under the 1933 Act. The author discusses the relevant statutes and cases.

Articles

1. Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Act*, 75 Wash. L. Rev. 429 (2000).

   This article critiques mandatory tracing requirements and recommends that courts should allow statistical evidence to establish that the securities were more likely than not issued in the registered offering. For tracing requirements, *see supra* Elements.

2. Joseph Reece, *Attorneys Beware: Increased Liability for providing Advice to Corporate Clients Issuing Securities*, 20 Akron L. Rev. 519 (1987).

   Joseph Reece explores the impact of Section 11 as well as other sections upon attorneys. The focus of the article was to "illustrate the trend and potential for liability being imposed upon members of the securities bar in situations that were most likely to occur in practice." *Id*. at 545. The article presents several issues that an attorney might face when advising clients. A researcher might find this helpful when an attorney is facing possible liability.

3. Allan Horwich, *Section 11 of the Securities Act: The Cornerstone Needs Some Tuckpointing*, 58 Bus. Law. 1 (2002).

The author provides a good overview of a Section 11 cause of action. The main purpose of the article was to point out problem areas of this claim. A researcher will find this article helpful for potential arguments in a Section 11 civil action.

4. The following articles address various issues surrounding particular defendants in a Section 11 civil action. A researcher for both plaintiffs and defendants will find these articles beneficial. The facts and circumstances for a viable Section 11 claim will vary depending on the type of defendant involved in the case.

a. DIRECTORS

i. Micalyn S. Harris & Karen L. Valihura, *Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service*, 53 Bus. Law. 479 (1998).

This article explores the risk of liability for attorneys who also act as directors of companies. The article goes through several practical questions that an attorney/director would have when deciding to be on a board of directors. The article explains that attorney/directors have added risks under the securities laws because they could be held to a different standard than a non-lawyer director.

ii. Larry D. Soderquist, *The Proper Standard for Directors' Negligence Liability*, 66 Notre Dame L. Rev. 37 (1990).

The author narrates case law from *BarChris* until 1990 on the role of negligence in a claim against directors. These cases give guidance to directors on what is their proper standard of behavior.

b. AUDITORS/ACCOUNTANTS

i. James W. Zisa, *Guarding the Guardians: Expanding Auditor Negligence Liability to Third-Party Users of Financial Information*, 11 Campbell L. Rev. 123 (1989).

James Zisa discusses how a CPA can be liable to third parties under Section 11 of the Securities Act. The article also suggests new ways of assigning risks and responsibilities of financial information on other persons rather than accountants.

ii. Raymond B. LaBella, Comment, *Watchdog or Mercenary: Will the SEC's New Rules Resurrect the Integrity of Auditing?*, 4 Fla. Coastal L. J. 81 (2002).

This article analyzes the impact of the Enron scandal on accountants. A researcher can use this article and its citations to help explore how the Sarbanes-Oxley Act could affect a Section 11 claim against accountants.

c. UNDERWRITERS

i. Jennifer O'Hare, *Institutional Investors, Registration Rights, and the Specter of Liability Under Section 11 of the Securities Act of 1933*, 1996 Wis. L. Rev. 217 (1996).

A researcher can use this article to get an overall understanding of when a party may be considered an underwriter resulting in Section 11 liability. The article focuses primarily on institutional investors as underwriters. However, a researcher could use these theories for other parties as well. The article is also beneficial in that it discusses relevant case law for determining whether a party is an underwriter.

ii. Joseph McLaughlin, *Some Challenges to Underwriters and Their Counsel in the Modern Capital Markets Environment*, 28 Wake Forest L. Rev. 61 (1993).

This article discusses how changes in capital markets affect the ability of underwriters to conduct due diligence. A researcher who has a potential underwriter as a party to a Section 11 claim should read this article. The article explores how SEC actions might change the way underwriters conduct due diligence to avoid liability.

iii. Stephen P. Ferris, *An Analysis and Recommendation for Prestigious Underwriter Participaton in IPOs*, 17 J. Corp. L. 581 (1992).

A researcher will find this article useful if an underwriter is a party in a Section 11 claim resulting from an initial public offering. The article analyzes underwriter due diligence requirements in an initial public offering. The article then gives some empirical evidence on underwriters' involvement in initial public offerings.

iv. Dana B. Klinges, note, *Expanding the Liability of Managing Underwriters Under the Securities Act of 1933*, 53 Fordham L. Rev. 1063 (1985).

This article discusses the scope of underwriter liability. The usefulness of this article comes from the numerous citations. The article gives citations to treatises, applicable SEC regulations, statutory law, and case law. The case law citations will help a researcher find a case with facts closely aligned to their own.

5. Paul C. Curnin & Christine M. Ford, *The Critical Issue of Standing Under Section 11 of the Securities Act of 1933*, 6 Fordham J. Corp. & Fin. L. 155 (2001).

The value of this article arises when a researcher is concerned about standing under Section 11. The article analyzes the procedural impact of the Private Securities Litigation Reform Act of 1995. The article also explores the relationship between Section 11's tracing requirements and standing. *See supra* Cases, Standing.

6. Donald C. Langevoort, *Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment*, 63 Law & Contemp. Probs. 45 (2000).

This article is a good overview of the disclosure requirements under the 1933 Act. A researcher will find this article beneficial when trying to decide if a defendant has complied with its disclosure requirements. The article also includes good citations to case law and secondary resources.

7. Paul Grier, *A Methodology for the Calculation of Section 11 Damages*, 5 Stan. J. L. Bus.& Fin. 99 (1999).

A researcher will find that this article is a good resource when calculating damages under Section 11. The author's overview of the article is beneficial. He explained that "Part I of this article describes the general framework for calculating Section 11 damages. Part II presents the simple approach often used for calculating Section 11 damages and illustrates its application with numerical examples. Part III discusses a more complicated methodology that produces more accurate estimates of Section 11 damages under all conditions. This part, also with the aid of numerical examples, compares the simple approach to the more complicated methodology and discusses the conditions under which the simple approach does and does not produce identical estimates of damages to the more complicated approach." *See supra* Statutes, Damages.

8. Phyllis A. Flora, *Securities Regulation -- Acquisition of Corporation by Merger Not an Acquisition of Securities under Section 11 of 1933 Act -- Versyss Inc. v. Coopers & Lybrand, 982 F.2d 653 (1st Cir. 1992), Cert. Denied, 113 S. Ct. 2965*, 27 Suffolk U. L. Rev. 1145 (1993).

This article will help a researcher when a merger is involved in a Section 11 action. Its primary focus is deciding whether a merger is a purchase or sell of securities within the meaning of section 11. The article supplies relevant case law in several circuits, which can be helpful in formulating arguments in a case.

Looseleaf Services

1. 1C Harold S. Bloomenthal & Samuel Wolf, (2003) Going Public and the Public Corporation (West) § 14. Call Number: KF 1439.R623 1986 v.1C.

   This looseleaf service is formulated like a treatise but is updated annually to reflect current law. This service is a multi-volume work and covers the 1933 Securities Act in great detail. The section devoted to liabilities under the Act is also comprehensive. A researcher will find this annually updated looseleaf service beneficial.

American Law Reports (A.L.R.)

The following annotations are valuable resources for Section 11 claims. The scope of coverage of the following annotations should be self-explanatory by reading the titles.

1. Richard J. Link, Annotation, *Persons Liable for False Registration Statement Under Sec. 11 of Securities Act of 1933 (15 U.S.C.A. sec. 77k)*, 114 A.L.R. Fed. 551 (1993).

   This annotation analyzes the types of defendants facing possible liability under Section 11. Many cases are cited to help a researcher find cases on point depending on the type of defendant involved.

2. Richard Cordero, Annotation, *Who May Maintain Action Under Sec. 11(a) of Securities Act of 1933 (15 U.S.C.A. sec. 77k(a)) in Connection with False or Misleading Registration Statements*, 111 A.L.R. Fed. 83 (1993).

   This annotation explores the plaintiff's side of a Section 11 cause of action. The annotation provides a great overview of the required elements to a Section 11 claim. This is also a great resource to find factual scenarious similar to the researcher's situation.

Encyclopedias

The following encyclopedias generally discuss a Section 11 claim. If a researcher needs an introduction to Section 11 liability, these are a good resources to read.

1. 69A Am. Jur. 2d *Securities Regulation* §§ 1540-1551 (1993).

2. 79A C.J.S. *Securities Reg. & Commodity Futures Trading* §§ 82-91 (1995).

SEC Releases

1. Exchange Act Release No. 6335, 1981 WL 31062 (Aug 06, 1981).

   This SEC release discussed what constitutes reasonable investigation and reasonable grounds for belief under Section 11. Some of this information can also be found at 46 Federal Register 42015 (Aug 18, 1981).

2. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Federal Register 5110-5132 (Jan 31, 2003).

   This SEC final rule explains the background of the Sarbanes-Oxley Act as it relates to disclosure obligations. The SEC discussed the audit committee's role in a Section 11 action. The SEC explained that "a person who is determined to be an audit committee financial expert will not be deemed an "expert" for any purpose, including without limitation for purposes of Section 11 of the Securities Act, as a result of being designated or identified as an audit committee financial expert pursuant to the new disclosure item." *Id*. at 5116 –5117. The SEC went on to note, "Our new rule provides that whether a person is, or is not, an audit committee financial expert does not alter his or her duties, obligations or liabilities." *Id*. at 5117. This SEC action is useful to a researcher trying to understand how the Sarbanes-Oxley Act affects Section 11.

Computerized Research

A. Westlaw

If a researcher has access to Westlaw®, the following search terms should be useful to bring up relevant law and secondary materials for a Section 11 claim.

1. Go to "Table of Contents" and then to "United States" and then to "Topical Secondary Sources & Forms" and then to "securities."

   This search query will bring up various treatises such as Due Diligence in Securities Transactions and Going Public and the Public Corporation.

2. Go to "Directory" and then to "Topical Materials by Area of Practice" and then to "Securities."

   This search query will bring up various databases on Westlaw® to help the researcher obtain relevant information.

3. Through “My Westlaw,” a research tab on “Securities” can be created to access a quick reference to numerous databases.

4. Topic and Key Number: Securities Regulation 25.62-62(4), 291-312.

5. For a sample complaint form for Section 11 enter citation “FEDPROF s 59:407.”

6. For a sample answer form for Section 11 enter citation “FEDPROF s 59:426.”

7. Enter “15 USC 77k” in the “Find” tab for annotations to such things as case law, articles, treatises, and forms.

8. Enter "15 USC 77k" in the "Key Cite" tab for over 4000 sources citing to Section 11. When the Section 11 citation references appear, go to "Locate" and limit the search to researcher's fact scenario.

B. Lexis

If a researcher has access to Lexis®, the following search terms should be useful to bring up relevant law and secondary materials for a Section 11 claim.

1. Under “Research System,” go to the “research task” tab and click “securities.”

   Lexis provides a query for numerous securities issues such as “Securities News and Legal Developments, Find a No-Action Letter, Find a Release, EDGAR searches, and Treatises.”

2. Under "Research System,” go to “Source” then go to “Area of Law—By Topic” and then click on “Securities.”

   This database will help a researcher find company information, NYSE rules, regulatory rules, cases, treatises, filings, and general news and information.

3. Enter “15 USC 77k” in the “Get a Document” tab for annotations to such things as case law, articles, treatises, and forms.

4. Enter "15 USC 77k" in the "Shepard's" tab for over 1200 cases citing to Section 11. When the Section 11 cases appear, go to "Focus" and limit the search to researcher's fact scenario.

C. Internet

The following websites are useful tools to access current information for SEC actions and securities news.

1. http://www.sec.gov/

   This government maintained website provides information for investors and issuers, upcoming regulations, news, links to EDGAR, Associations, and other useful information

2. http://www.law.uc.edu/CCL/index.html

   This law school maintained website provides such things as the text of Securities Act of 1933, Securities Exchange Act of 1934, the Investment Company Act of 1940, Rules under those Acts, certain regulations and forms, SEC news, and various securities associations.

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Interest Groups and Associations

Useful Resource

See generally http://www.law.uc.edu/CCL/index.html for a comprehensive list of the various associations and interest groups available for securities laws. The associations are listed under "Useful Resources."

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