

18.0 Introductory Comment

The instructions in this chapter apply only to actions brought under the Securities Exchange Act of 1934 (the “1934 Act”), 15 U.S.C. § 78j(b), for false or misleading representations in connection with the purchase or sale of securities (“Rule 10b-5 actions”). As stated in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341 (2005):

Section 10(b) of the Securities Exchange Act of 1934 forbids (1) the “use or employ[ment] . . . of any . . . deceptive device,” (2) “in connection with the purchase or sale of any security,” and (3) “in contravention of” Securities and Exchange Commission “rules and regulations.” 15 U.S.C. § 78j(b). Commission Rule 10b-5 forbids, among other things, the making of any “untrue statement of material fact” or the omission of any material fact “necessary in order to make the statements made . . . not misleading.” 17 C.F.R. § 240.10b-5 (2004).

The courts have implied from these statutes and Rule a private damages action, which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation. And Congress has imposed statutory requirements on that private action.

(Ellipses in original; citations omitted.)

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-40 (1975), the Supreme Court, relying chiefly on “policy considerations,” limited the Rule 10b-5 private right of action to plaintiffs who themselves were purchasers or sellers. As stated in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006), the policy the Court sought to promote in *Blue Chip Stamps* was that “[c]abining the private cause of action by means of the purchaser-seller limitation” minimizes the ill effects of vexatious private litigation brought to compel a substantial settlement. This limitation does not apply to government enforcement actions brought pursuant to Rule 10b-5. *Id.* at 81. The Supreme Court also limited the scope of liability under Section 10(b) of the 1934 Act to “primary violators,” holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-78 (1994), that Section 10(b) does not allow recovery for aiding and abetting because the text of the Act “does not . . . reach those who aid and abet a § 10(b) violation. . . . The proscription does not include giving aid to a person who commits a manipulative or deceptive act.” *Id.* at 177-78.

Rule 10b-5 forbids not only a defendant’s material misrepresentations or omissions but also “any device, scheme, or artifice to defraud,” as well as “any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” 17 C.F.R. § 240.10b-5(a), (c). Most private lawsuits under Rule 10b-5, however, involve “disclosure” claims, which Rule 10b-5(b) defines as “any untrue statement of a material fact or . . . omi[ssion] 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.” These instructions, therefore, focus on Rule 10b-5 disclosure claims. Moreover, the Supreme Court has stated that

“[p]ure omissions are not actionable under Rule 10b-5(b).” *Macquarie Infrastructure Corp. v. Moab Partners*, 601 U.S. 257, 260, 263 (2024) (indicating that “a pure omission occurs when a speaker says nothing” in circumstances where the failure to speak does not render affirmative statements misleading).

In *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018), the Ninth Circuit thoroughly discussed and applied many of the key concepts that appear in securities cases, such as falsity, omissions, and materiality. (The case also clarifies the circumstances for correctly applying the doctrine of incorporation-by-reference.)

Earlier editions of these instructions interspersed Rule 10b-5 instructions with instructions concerning Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k (the “1933 Act”), as well as instructions applicable to a claim by a customer of a brokerage firm that the customer’s broker engaged in excessive trading (“churning”) to run up commissions. In 2017, the Committee decided not to include 1933 Act instructions or churning instructions, nor instructions for claims arising out of insider trading or other federal securities statutes such as the Sarbanes-Oxley Act of 2002 (Pub. L. 107-204), because such claims are rarely tried to a jury. That decision continues in this edition.

In *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024), the Supreme Court held that when the SEC alleges that a defendant committed fraud in violation of the securities laws and seeks “money penalties,” the defendant has a Seventh Amendment right to trial by jury. Previously, these types of claims often were adjudicated by an administrative law judge. After this decision, the SEC may be bringing these types of cases in district courts to be resolved by a jury.

Revised September 2024