

18.10 Securities—Controlling Person Liability

Under the Securities Exchange Act of 1934, a defendant may be liable if during the period that someone else defrauded the plaintiff, the defendant had the authority to control that person or company.

The plaintiff [name] claims that the defendant [name] is a controlling person and is therefore liable under the securities laws. On this claim, the plaintiff [name] has the burden of proving by a preponderance of the evidence that the defendant [identify the alleged controlling person] possessed, directly or indirectly, the actual power to direct or cause the direction of the management and policies of [identify the alleged controlled person].

Comment

See Instruction 18.1 (Securities—Purpose and Selected Definitions) for the definition of “controlling person.”

Section 20(a) of the Securities Exchange Act of 1934 provides that “controlling persons” can be vicariously liable for 10b-5 violations. *See* 15 U.S.C. § 78t(a) (discussing liability of controlling persons); 17 C.F.R. § 230.405 (defining “control”); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990) (en banc) (holding that broker-dealer is “controlling person” within meaning of 1934 Act and could be liable for its stockbroker-employee’s conduct, even if broker-dealer and stockbroker contractually agreed that stockbroker would be independent contractor); *see also No. 84 Empl’r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003) (discussing traditional indicia of “control”).

See Instruction 18.11 (Securities—Good Faith Defense to Controlling Person Liability).

It may be necessary to supplement this instruction with instructions regarding respondent superior liability. *See* Instructions 4.4 (Agent and Principal—Definition); 4.5 (Agent—Scope of Authority Defined); 4.8 (Act of Agent is Act of Principal—Scope of Authority Not in Issue); 4.9 (Both Principal and Agent Sued—No Issue as to Agency or Authority); 4.10 (Principal Sued but Not Agent—No Issue as to Agency or Authority); 4.11 (Both Principal and Agent Sued—Agency or Authority Denied); and 4.12 (Principal Sued but Not Agent—Agency or Authority Denied).

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