

18.2 Securities—Rule 10b-5 Claim

The plaintiff [name] alleges that the defendant [name] defrauded [him] [her] [other pronoun] by [describe the plaintiff's 10b-5 claim]. This is referred to as “the plaintiff’s 10b-5 claim.”

To succeed on this claim, the plaintiff [name] has the burden of proving each of the following five elements by a preponderance of the evidence:

First, the defendant [name] [made an untrue statement of a material fact] [omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading] in connection with the [purchase] [sale] of securities;

> Second, the defendant [name] acted [knowingly] [knowingly or recklessly] [recklessly];

Third, the defendant [name] [used] [caused the use of] [an instrumentality of interstate commerce, such as mail, telephone, or internet] [a facility of a national securities exchange] in connection with the [purchase] [sale] of securities, regardless of whether the [instrumentality] [facility] itself was used to make an untrue statement or a material omission;

Fourth, the plaintiff [name] justifiably relied on [the defendant [name]’s untrue statement of a material fact] [the defendant [name]’s omission to state a necessary material fact] in [buying] [selling] securities; and

Fifth, the defendant [name]’s [misrepresentation] [omission] caused the plaintiff [name] to suffer damages.

If you find that the plaintiff [name] has proved each of these elements, your verdict should be for the plaintiff [name]. If, on the other hand, you find that the plaintiff [name] has failed to prove any of these elements, your verdict should be for the defendant [name].

Comment

See Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268, 1274 (9th Cir. 2017) (listing elements of claim).

See Instruction 18.1 (Securities—Purpose and Selected Definitions) for definitions of “security,” “10b-5 claim,” “misrepresentation,” “omission,” “in connection with,” and “instrumentality of interstate commerce.” National security exchanges include the New York Stock Exchange and the NASDAQ Stock Market. *See* Instruction 18.5 (Securities—Knowingly and Recklessly) for

definitions of “knowingly” and “recklessly.”

See 15 U.S.C. § 78j(b) (making it unlawful to use any deceptive device in connection with purchase or sale of security) and 17 C.F.R. § 240.10b-5 (making it unlawful to use any device to defraud, to make untrue statement or omission of material fact, or to engage in fraudulent act in connection with purchase or sale of security). In *Gray v. First Winthrop Corp.*, 82 F.3d 877, 884 (9th Cir. 1996), the Ninth Circuit confirmed that the elements described in this instruction are required to prove a 10b-5 claim.

A defendant “makes” a statement if the defendant has ultimate authority over the statement, including its content and whether and how to communicate it. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). A plaintiff must show that the defendant had control over the statement; a defendant’s significant involvement in the preparation of a prospectus containing an untrue or misleading statement is not enough to show that the defendant “made” that statement. *Id.* at 147-48.

A defendant also may be liable if the defendant disseminates a false statement with the intent to defraud. *Lorenzo v. SEC*, 587 U.S. 71, 74 (2019). Where a defendant does not “make” a statement but disseminates information that is “understood to contain material untruths,” such conduct can fall within the scope of a 10b-5 claim. *Id.* at 78; *see also id.* at 81 (“[U]sing false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud.”).

Defendants can claim the “safe harbor” protection for statements made about the future under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4, but where the statement about the future is a warning about a future risk, the statement is “implicitly” a “comment on the *present* state of affairs, because it suggests that the circumstance posing the risk has not yet occurred.” *Constr. Laborers Pension Tr. of Greater St. Louis v. Funko, Inc.*, 166 F.4th 805, 825 (9th Cir. 2026) (emphasis in original). Thus, a risk factor warning about an alleged future risk that has already occurred is false and can give rise to liability under Section 10(b) and Rule 10b-5. *Id.*

Before 2017, these instructions phrased the fourth element as requiring that “the plaintiff *reasonably* relied” on the misrepresentation. Several Ninth Circuit cases, however, use the phrase “justifiable reliance.” *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005) (“If [Plaintiff] justifiably relied on Defendants’ misrepresentation about the stock sale and, in turn, bought [company] stock based on this reliance, it incurred damages from Defendants’ fraud”); *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999); *Gray*, 82 F.3d at 884.

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