18.9 Securities—Damages

If you find for the plaintiff [*name*] on the 10b-5 claim, then you must consider and decide the amount of money damages, if any, to be awarded to the plaintiff [*name*]. You may award only actual damages in an amount that will reasonably and fairly compensate the plaintiff [*name*] for the economic loss [he] [she] [*other pronoun*] sustained. Your award must be based on evidence and not upon speculation, guesswork, or conjecture. The plaintiff [*name*] has the burden of proving damages by a preponderance of the evidence.

Comment

Section 10(b) claims for damages are governed by Section 28(a) of the 1934 Act, which limits all claims brought under the 1934 Act to actual damages. *See* 15 U.S.C. § 78bb(a) (providing that no person maintaining a suit for damages under the 1934 Act may recover "a total amount in excess of [his] actual damages"); *Randall v. Loftsgaarden*, 478 U.S. 647, 661-62 (1986).

"The usual measure of damages for securities fraud claims under Rule 10b-5 is out-of-pocket loss; that is, the difference between the value of what the plaintiff gave up and the value of what the plaintiff received. Consequential damages may also be awarded if proved with sufficient certainty. . . . The district court may apply a rescissory measure of damages in appropriate circumstances." *Ambassador Hotel Co., Ltd. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1030 (9th Cir. 1999) (citing *DCD Programs v. Leighton*, 90 F.3d 1442, 1449 (9th Cir. 1996)). The Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336 (2005), highlights the difficulty in framing an instruction premised on a theory that the price on the date of purchase was inflated because of a misrepresentation. *See* Comment to Instruction 18.8 (Securities—Causation). Comparable difficulties could arise when there are several different transaction dates or multiple plaintiffs, or when the lawsuit is brought as a class action. In such cases, computations based on average prices during the applicable trading period might prove necessary.

Because of the above-described complications, expert testimony is often used when calculating damages in 10b-5 actions. *See In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1014-15 (C.D. Cal. 2003); *In re Oracle Sec. Litig.,* 829 F. Supp. 1176, 1181 (N.D. Cal. 1993).

Revised September 2024