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# Blue Sky Regulation

Publication 142 Release 129 September 2022

## HIGHLIGHTS

**Highlights**

- Chapter 15—Civil Remedies

In this Release Chapter 15—Civil Remedies—has been revised and updated to include substantial new material and updated case law. The availability of civil remedies has always been an important part of the Blue Sky regulatory scheme, and the civil liability provisions in state securities laws play a major role in accomplishing investor protection goals by affording remedies for fraud and other misconduct that are more easily achieved than by common law actions. The rescission and damage remedies that are part of every state securities law are markedly preferable to what is otherwise available as a matter of the common law. Chapter 15 explores the scope and elements of civil liability and remedies available under these provisions and important substantive and procedural considerations in asserting them. The pursuit of civil remedies through class actions in state court, for example, is particularly significant as a result of federal legislation barring certain class actions arising under state law. Updated Chapter 15 includes new sections examining the impact of the federal Securities Litigation Uniform Standards Act ("SLUSA") on class actions asserting civil remedies under state Blue Sky Laws.

Overall, Chapter 15 addresses key elements of statutory civil remedies under Blue Sky Laws as well as remedies at common law or in equity, and defenses against civil liability claims. It has been particularly updated to reflect the 2002 Uniform Securities Act that has been adopted or which forms the basis for a significant number of state Blue Sky Laws, and which expands the original Uniform Securities Act civil liability and

remedy provisions to separately and specifically cover particular situations as, for example, the liability of an unregistered broker-dealer or agent, or an unregistered investment adviser and investment adviser representative, and to liability for investment advice generally. Specific attention to the 2002 Uniform Securities Act Section 509 has been added throughout updated Chapter 15.

Updated case law and analysis has been included throughout Chapter 15 on elements of liability and the statutory rescission remedy in Blue Sky Laws. For example, the necessity to prove causation or reliance in seeking recovery under Bluer Sky Law provisions that are modelled directly on the statutory remedy of rescission or damages as a rescission equivalent provided in the federal Securities Act of 1933 is newly examined in light of the express loss causation provision that is part of the federal remedy structure. Newly added case authority also addresses the question whether proof of reliance in the assertion of fraud-based claims under Blue Sky Laws is required. Most Blue Sky Law civil liability provisions do not prescribe any element beyond materiality of the false or misleading representation, or an omission on which the claim is based. Whether reliance or causation is required has been left to consideration by the courts.

The scope of liability under remedy provisions of Blue Sky Laws, and in particular the bases for joint and several liability of "controlling persons" has been given expanded consideration in updated Chapter 15. On controlling person liability specifically, new case authority addresses the practical meaning of control, and the "indicia" of control necessary to support liability. Material assistance in the commission of a violation, which is a basis for joint and several liability in some Blue Sky Laws is examined further as well. New California case law supplies practical insight for assessing sufficient assistance for imposition of liability, explaining, for example, how assistance may take the form of aiding in the preparation of offering documents relied upon by investors, communicating misrepresentations directly to investors, or otherwise playing a material, facilitating role in the act of selling or attempting to sell the securities by means of misrepresentations or omissions of material fact.

Expanded consideration of joint and several liability under remedy provisions of Blue Sky Laws in Chapter now includes greater attention to the right of contribution among persons liable. New material in Chapter 15 addresses the right of contribution and also the claim for indemnification that may exist. Some states broadly provide under the heading of joint and several liability, that both contribution and indemnification may be available. On the matter of indemnification, updated Chapter 15 highlights Pennsylvania as an example, and in particular the right under the Pennsylvania Blue Sky Law for a corporation's right of in-

demnification as well as contribution.

There is new material in Chapter 15 regarding defense against civil liability claims. A new section, for example, deals with the attempted enforcement of violative contracts, and provisions in Blue Sky Laws that bar actions to enforce a contract made in violation of the law, or the performance of which involves the violation of a rule or order. Another new section addresses the effect of rescission offers as barring actions, or extinguishing liability. Updated case law and broader consideration of the rescission offer provisions of both the original and 2002 Uniform Securities Acts has been added. There is additional new material as well relating the application of statutes of limitation to bar actions.

As noted earlier, Chapter 15 has been substantially updated in regard to the assertion of civil remedies in class actions. New sections of Chapter 15 address (1) Blue Sky Law class actions generally; (2) the impact of the federal Securities Litigation Uniform Standards Act ("SLUSA"); (3) securities class actions in state courts after the U.S. Supreme Court decision in Cyan, Inc. v. Beaver County Employees Retirement Fund; and (4) federal forum selection provisions impacting securities claims. SLUSA federalized the law of fraud relative to certain securities cases in cases brought as class actions. As a practical matter, no common law claims of fraud or deceit, or any Blue Sky Law claim based on alleged false or misleading statements in connection with the offer or sale of "covered securities" as defined in SLUSA may be brought as a class or "mass" action. All of the updated developments in the assertion of securities law remedies as class actions in state courts are essential to a full understanding of civil remedies under Blue Sky Laws, and newly updated Chapter 15 discusses the central points to support an understanding of what may or may not be the impact on class actions seeking remedies under them.

Finally, Chapter 15 has been updated to round-out consideration of the assertion of civil remedy claims with a new section addressing arbitration of claims for civil remedies.

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