**ANNOTATIONS AND COMMENTS**

Section 10 of the Securities Exchange Act of 1934 [15 USC § 78j] provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange… to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement…, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

With respect to the definition of “security,” *see SEC v. Edwards*, 540 U.S. 389, 124 S. Ct. 892, 157 L. Ed. 2d 813 (2004) and Exchange Act Section 3, 15 U.S.C. § 78c. The issue of whether a particular investment is a “security” is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

In *Gower v. Cohn*, 643 F.2d 1146, 1151 (5th Cir. Unit B May 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

“To succeed on a Rule 10b-5 fraud claim, a plaintiff must establish a false statement or omission of material fact; made with scienter; upon which the plaintiff justifiably relied; that proximately caused the plaintiff’s injury.” *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997) (citing *Bruschi v. Brown*, 876 F.2d 1526, 1528 (11th Cir. 1989)). “Scienter” is defined as “a mental state embracing intent to deceive, manipulate, or defraud.” *Aaron v. SEC*, 446 U.S 680, 686 n.5, 100 S. Ct. 1945, 1950 n.5, 64 L. Ed. 2d 611 (1980). In the Eleventh Circuit, “scienter” may also consist of “severe recklessness” by the defendant, *see, e.g., Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010); however, the Supreme Court has left open the question whether recklessness may satisfy the scienter requirement. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323, 179 L. Ed. 2d 398 (2011) (“We have not decided whether recklessness suffices to fulfill the scienter requirement.”); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3, 127 S. Ct. 2499, 2507 n.3, 168 L. Ed. 2d 179 (2007) (declining to decide issue because “whether and when recklessness satisfies the scienter requirement is not presented in this case”).

With respect to the causation element, “a plaintiff must prove both ‘transaction causation’ and ‘loss causation.’” *Robbins*, 116 F.3d at 1447. The former is merely “another way of describing reliance,” while the latter concerns “the link between the defendant’s misconduct and the plaintiff’s economic loss.” *Id*. Although some courts have held that, under a “fraud-on-the-market” theory, plaintiffs may establish loss causation if they show that the price of their security on the date of purchase was inflated due to the misrepresentation, *see id*. at 1448, the Eleventh Circuit has rejected such a view. Rather, “the fraud on the market theory, as articulated by the Supreme Court, is used to support a rebuttable presumption of reliance, not a presumption of causation.” *Id*. at 1448 (citing *Basic v. Levinson*, 485 U.S. 224, 241-42, 108 S. Ct. 978, 992, 99 L. Ed. 2d 194 (1988)).

In *Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001), the Eleventh Circuit held that in order for secondary actors, such as a law firm or accounting firm, to be liable under Rule 10b-5, “the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant [the secondary actor] at the time that the plaintiff’s investment decision was made.” In a case involving a secondary actor, the jury should be instructed that, in order to prove reliance, the plaintiff is required to prove that misrepresentations publicly attributable to the secondary actor were made to the plaintiff at the time the plaintiff’s investment decision was made.

A duty to correct “applies when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. The company then must correct the prior statement within a reasonable time.” *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331 (7th Cir 1995), (citing *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990)). *See also, In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1430-32 (3rd Cir. 1997) (noting that a duty to correct may also arise with forward-looking statements if they are based on assumptions that the speaker later learns were incorrect when made). The duty to update is a distinct doctrine; it may apply “when a company makes a forward-looking statement - a projection - that because of subsequent events becomes untrue.” *Stransky*, 51 F.3d at 1332. *See also, In re Intl. Bus. Mach. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2nd Cir. 1998).

There is a split among the courts whether there is a duty to update information disclosed to the public to insure the accuracy of statements and representations previously made in light of new information or developments. The Eleventh Circuit has not addressed whether there is a duty to update. In a case where the evidence suggests a change in information or other developments and a party determines there was a duty to update, the court will need to determine if, considering the current legal authority, a duty to update information instruction is required to be given and, if so, the form of instruction to be given. *See* Eric R. Smith, Thomas D. Washburne, Jr. & Uyen H. Pham, Duty to Update Previously Disclosed Information, Practical Law Company (2011), http://www.venable.com/files/Publication/d90ad0bd-0947-4956-aa70-1026f1ac03be/ Presentation/PublicationAttachment/cf3d0d7f-ca04-4b19-96e1-1510529d9821/Duty\_to\_ Update\_Previously\_Disclosed\_Information.pdf. *Compare In Re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410 (3rd Cir. 1997) (duty triggered where representation remained alive) and *Ill. State Bd. of Inv. v. Authentidate Holding Corp., et al.*, 369 F. App’x 260 (2nd Cir. 2010) (duty depends on significance of information and whether there were cautionary statements) *with Gallagher v. Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001) (no duty to update).