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They Toil Not, Neither Do They Spin: Civil Liability Under the Oregon Securities Law

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THEY TOIL NOT, NEITHER DO THEY SPIN: CIVIL LIABILITY UNDER THE OREGON SECURITIES LAW

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> We do not deem it advisable to lay down any hard and fast rule [regarding the scope of the Oregon Securities Law]. . . . Were we to do so, a certain class of gentlemen who . . . toil not neither do they spin . . . would lie awake nights endeavoring to conceive some devious and shadowy way of evading the law. It is more advisable to deal with each case as it arises.[1]

Under Oregon law,[2] persons who sell securities in violation of

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1. State v. Whiteaker, 247 P. 1077, 1079 (Or. 1926).

2. While this Article focuses on Oregon law, readers who have not already done so should familiarize themselves with the relevant federal statutory provisions and precedent—both because federal and state liability overlap to a significant degree, *see, e.g.*, Pincetich v. Jeanfreau, 699 F. Supp. 1469, 1477 (D. Or. 1988), and because numerous aspects of Oregon securities law are based upon or closely resemble federal law, *see, e.g.*, Karsun v. Kelley, 482 P.2d 533, 536 (Or. 1971) ("In 1967 the Oregon Blue Sky Law was amended by ORS 59.115(1)(b) to adopt substantially the same terms as set forth in . . . [15 U.S.C. § 77*l*(a)(2)]."); Loewen v. Galligan, 882 P.2d 104, 120 (Or. Ct. App. 1994) (adopting the standard for the materiality of an opinion set forth in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1094-95 (1991)), leading Oregon courts to frequently resort to cases construing the parallel federal provisions in order to construe and apply Oregon law, *see, e.g.*, Badger v. Paulson Inv. Co., 803 P.2d 1178, 1182 (Or. 1991) ("In situations involving Oregon laws in large measure drawn from a federal counterpart, it is appropriate to look for guidance to federal court decisions interpreting similar federal laws, even though those decisions do not bind us.").

For a brief overview of federal securities law, as well as a bit of historical context, see Paul Gonson, *The Complex Web: An Introduction to the Federal Securities Laws*, BUS. L. TODAY, July-Aug. 1995, at 11-14. For a more thorough introduction to federal securities law, see LARRY D. SODERQUIST, UNDERSTANDING THE SECURITIES LAWS (3d ed. 1997 & Supp. 2000), an excellent resource that is updated annually and available from the Practising Law Institute.

statutory registration requirements,[3] or by means of some misrepresentation or omission of material fact,[4] may be liable to any person or entity who buys securities from or through them. Likewise, persons who buy securities by means of some misrepresentation or omission of material fact may be liable to any person or entity who sells securities to or through them.[5] In addition to, or in lieu of,[6] suing the person who committed the material misrepresentation or omission, a plaintiff may sue one or more persons or entities who might be vicariously liable for the consequences of the misrepresentation or omission.[7]

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3. OR. REV. STAT. §§ 59.055 & 59.115(1)(a) (1999); *see infra* Part II.B. Oregon law imposes no statutory liability on persons who purchase unregistered securities. Hence, there is no parallel provision to section 59.055 for purchasers.

4. OR. REV. STAT. §§ 59.115(1)(b) & 59.135; *see infra* Part II.C.1.

5. OR. REV. STAT. §§ 59.127(1)(b) & 59.135; *see infra* Part II.C.2.

6. *See infra* note 207.

7. OR. REV. STAT. §§ 59.115(3) & 59.127(1)(b); *see infra* Part II.C.4.

An Oregon securities plaintiff might also have a statutory claim under the Oregon Racketeer Influenced and Corrupt Organizations Act (ORICO). Prior to 1995, "[a]ny person . . . injured by reason of any violation of" ORICO's basic liability provisions could pursue a claim for treble damages. OR. REV. STAT. § 166.725(7)(a) (1991); *see, e.g.*, Penuel v. Titan/Value Equities Group, Inc., 872 P.2d 28 (Or. Ct. App. 1994). However, ORICO was modified in 1995 to permit a securities purchaser or seller to bring a private civil ORICO action only if the defendant already had been convicted for the same activity and the defendant's right to appeal that conviction had expired. 1997 Or. Laws ch. 789, § 3 (codified as amended at OR. REV. STAT. § 166.725(7)(a)(A) (1999)); *see also* Gregory R. Mowe & Katherine A. McDowell, *Changing the Rules: Tracking Oregon's Trail of "Tort Reform,"* OR. ST. B. BULL., Aug.-Sep. 1995, at 18-19 (commenting on the "rolling back" effect of S.B. 326). As a consequence of this significant narrowing of the field of potential ORICO plaintiffs, and the corresponding dearth of reported post-1995 Oregon state court decisions applying ORICO to a claim also within the ambit of the OSL, this Article does not address the applicable ORICO provisions.

In addition to having statutory claims against primary and secondary wrongdoers, an Oregon plaintiff may well have one or more common law claims against the same parties arising out of the same acts or omissions. *See, e.g.*, Karsun v. Kelly, 482 P.2d 533, 536 (Or. 1971); Loewen v. Galligan, 882 P.2d 104, 117 (Or. Ct. App. 1994); Metal Tech Corp. v. Metal Tekniques Co., 703 P.2d 237, 245 (Or. Ct. App. 1985). Due to space and time constraints, this Article does not discuss in detail common law liability for material misrepresentations or omissions relating to the purchase or sale of securities. Instead, this Article uses Oregon common law, as it does federal securities law, as a basis for assessing the comparative advantages and disadvantages of prosecuting and defending securities fraud claims under the OSL.

Oregon plaintiffs seeking redress for the consequences of a material misrepresentation or omission relating to the purchase or sale of a security may seek relief simultaneously under statutory and common law. *See* OR. REV. STAT. § 59.365 ("Nothing in the Oregon Securities Law limits any [other] statutory or common-law right of a person to bring an action in any court for an act involved in the sale [or purchase] of securities . . . ."); Day v. Saunders, 528 P.2d 513 (Or. 1974) (recognizing a plaintiff's right to sue both for a violation of

This Article explores the contours of the civil liability provisions of the Oregon Securities Law (OSL),[8] as expressed in the statute itself, in the opinions of Oregon state and federal courts, and in the formal and informal opinions of the Oregon Department of Consumer and Business Services, and compares and contrasts civil liability under the OSL to civil liability under Oregon common law and under federal securities law. Before turning to this detailed analysis of the OSL in Part II, Part I briefly discusses significant recent developments in federal securities law and their impact on the OSL.

I. RECENT DEVELOPMENTS IN FEDERAL SECURITIES LAW AND THEIR IMPACT ON OREGON SECURITIES LAW

As I have described elsewhere,[9] a series of actions by the U.S. Supreme Court and by Congress in the mid-1990s reduced the number of avenues by which plaintiffs relying on federal law may pursue alleged wrongdoers for securities fraud, and imposed significant additional requirements on plaintiffs suing under federal securities law.[10] One significant consequence of these actions was to make state securities law a more attractive option than it had been (or, at least, had been perceived to be) for persons who believed they had been injured by some material misrepresentation or omission relating to the purchase or sale of securities, or who had suffered as a consequence of some other impropriety relating to the purchase or sale of securities.[11] More recent developments in federal securities

the OSL's anti-fraud provisions and for common-law fraud).

8. OR. REV. STAT. §§ 59.055, 59.115, 59.127, 59.135.

9. *See, e.g.*, Keith A. Rowley, *The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies*, 50 BAYLOR L. REV. 99, 103-06 (1998).

10. Namely, the Supreme Court's decisions in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (eliminating the implied private cause of action for aiding and abetting securities fraud), and *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (holding that Section 12(a)(2) of the 1933 Securities Act applies only to public offerings), and Congress's passage of the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (reforming a number of relevant provisions of both the 1933 Securities Act and the 1934 Securities Exchange Act).

11. *See, e.g.*, Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year's Experience*, *in* SECURITIES LITIGATION 955 (Jay B. Kasner & Bruce G. Vanyo eds., 1997); Melvin R. Goldman et al., *Trends in State Law Securities Actions in California Since Adoption of the Federal Reform Act*, in SECURITIES LITIGATION 523 (Jay B. Kasner & Bruce G. Vanyo eds., 1996); Bruce G. Vanyo et al., *Securities Class Action Litigation in State Courts*, *in* SECURITIES LITIGATION 207 (Jay B. Kasner & Bruce G. Vanyo eds., 1996). *See generally* Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme*

law have curbed both the importance of state securities registration laws and the availability of state courts as an alternative forum in which plaintiffs may pursue securities fraud claims.

A. The National Securities Market Improvement Act of 1996

For roughly the first sixty-three years of its existence, the 1933 Securities Act acknowledged the rights of individual states to regulate securities registration and offerings.[12] The National Securities Market Improvement Act of 1996 (NSMIA) amended the 1933 Securities Act to eliminate its provision allowing concurrent state regulation of several categories of securities offerings.[13] Most significantly, NSMIA defined a number of devices and transactions as "covered securities,"[14] and then provided, in relevant part, that

> [e]xcept as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof
>
> (1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that
>
> (A) is a covered security; or
>
> (B) will be a covered security upon completion of the transaction.[15]

NSMIA obviously affects the reach of the OSL's registration requirements and the liability certain sellers face for selling unregistered securities in Oregon. Indeed, the Oregon Legislature amended the OSL in the wake of NSMIA to create a new category of exempt securities—"federal covered securities"—that is coextensive with the

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Court Decisions on Federal and State Securities Regulation, 70 NOTRE DAME L. REV. 489, 505-16 (1995).

12. *See* 15 U.S.C. § 77r (1994) ("Nothing in [15 U.S.C. § 77a *et seq.*] shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.").

13. *See* Pub L. No. 104-290, 110 Stat. 3416 (1996) (codified as amended at 15 U.S.C. § 77r (Supp. IV 1998)).

14. *See* 15 U.S.C. § 77r(b) (defining "covered security" to include (1) any nationally-traded security, (2) any security issued by an investment company registered under the Investment Company Act of 1940, (3) any security sold only to "qualified purchasers," as that term is defined from time to time by the SEC, and (4) any security offered or sold in certain exempt offerings).

15. *Id.* § 77r(a).

definition of "covered securities" in NSMIA.[16] That said, many securities remain subject to the registration requirements of the OSL. Moreover, even those securities that are now exempt from registration as "federal covered securities" remain subject to the antifraud provisions of the OSL.[17]

B. The Securities Litigation Uniform Standards Act of 1998

In order to avoid the constraints imposed on private securities actions by the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[18] plaintiffs in its wake began shifting securities actions to state court.[19] Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[20] in order to prevent class action plaintiffs from bypassing PSLRA by filing cases in state court. SLUSA provided that:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging
>
> > (A) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

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16. OR. REV. STAT. § 59.015(5) (1999) ("'Federal covered security' means any security that is a covered security under section 18 of the Securities Act of 1933, as amended, and for which such Act provides that the director may require filing of a notice and payment of a fee."); *id.* § 59.049 (exempting federal covered securities from most of the registration requirements imposed on other securities sold in Oregon).

For a good overview of NSMIA, see Kevin A. Jones, Note, *The National Securities Market Improvement Act of 1996: A New Model for Efficient Capital Formation*, 53 ARK. L. REV. 153, 153-65 (2000); *see also* Robert G. Bagnall & Kimble Cannon, *The National Securities Markets Improvement Act of 1996: Summary and Discussion*, 25 SEC. REG. L.J. 3 (1997). For an excellent, if somewhat jaundiced, discussion of NSMIA's impact on Oregon securities regulation, see Heather J. Van Meter, Comment, *NSMIA and Oregon Securities Registration Laws: Is Oregon's Blue Sky Falling?*, 34 WILLAMETTE L. REV. 31 (1998).

17. *See* Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998).

18. *See supra* note 10.

19. *See* Shaw v. Charles Schwab & Co., 128 F. Supp. 2d 1270, 1272 (C.D. Cal. 2001) (reporting that the number of securities case filings in California state court went up five-fold in the wake of PSLRA's passage (citing H.R. CONF. REP. NO. 105-803, at 15 (1998))).

20. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. § 77p (Supp. IV 1998).

For a good discussion of the scope and anticipated effect of SLUSA, as well as a discussion of how SLUSA compliments the new regulatory scheme created by PSLRA, see Lisa L. Casey, *Shutting the Doors to State Court: The Securities Litigation Uniform Standards Act of 1998*, 27 SEC. REG. L.J. 141 (1999).

> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.[21]

SLUSA also entitled defendants to remove any covered class action brought in state court to federal court.[22]

C. *The Continuing Relevance of Oregon Securities Law*

NSMIA has marginalized the differences between the securities registration provisions of the 1933 Securities Act and those of the Oregon Securities Law, but did not affect the liability of persons who sell securities in violation of the registration provisions of the OSL. And, while SLUSA severely hampered the ability of plaintiffs to enforce the antifraud provisions of the OSL in class actions, SLUSA did not preempt class action shareholder derivative suits,[23] nor did it preempt many suits—class action or otherwise—"based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity)."[24] SLUSA also did not preempt named-plaintiff

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21. 15 U.S.C. § 77p(b).

Subject to certain exceptions, a "covered class action" is

(i) any single lawsuit in which

> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which

> (I) damages are sought on behalf of more than 50 persons; and
>
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 77p(f)(2)(A).

22. 15 U.S.C. § 77p(c). Congress reportedly sought to funnel securities fraud class actions into federal court because publicly-traded companies "cannot control where their securities are traded after an initial public offering. . . . As a result, companies with publicly-traded securities cannot choose to avoid jurisdictions which present unreasonable litigation costs." H.R. CONF. REP. NO. 105-803, at 15 (1998).

23. *See* 15 U.S.C. § 77p(f)(2)(B).

24. 15 U.S.C. § 77p(d)(1)(A).

(*i.e.*, nonclass action) suits brought under the OSL. In short, despite the increasingly complex federal regulatory scheme, "Congress, the courts, and the SEC have made explicit that federal regulation was not designed to displace state blue sky laws"[25]—including the OSL.

II. STATUTORY LIABILITY UNDER THE OREGON SECURITIES LAW[26]

The OSL imposes liability on any person[27] who sells a security in violation of the OSL's registration requirements or in violation of any applicable rule or order of, or any condition, limitation, or restriction imposed by, the Director of the Oregon Department of Consumer and Business Services.[28] Irrespective of whether the security at issue was required to be and was properly registered, the OSL also imposes liability on any person who sells or purchases a security by means of an untrue statement of material fact or an omission of material fact necessary to make those statements true.[29]

A. Key Concepts

The registration and antifraud provisions of the OSL apply only to devices or transactions that the OSL deems to be "securities" and are triggered by their unauthorized or unlawful sale or purchase.

1. The Meaning of "Security"

Subject to certain exceptions,[30] the OSL defines the term "secu-

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25. A.S. Goldmen & Co. v. New Jersey Bureau of Sec., 163 F.3d 780, 781 (3d Cir.), *cert. denied*, 528 U.S. 868 (1999).

26. The discussion here and elsewhere in this Article focuses solely on civil liability for violations of the applicable provisions of the Oregon Securities Law. It also focuses on the registration of securities, not of persons. *See infra* note 99. However, an unregistered person selling securities not otherwise exempt under the OSL, as well as any person selling unregistered securities not otherwise exempt under the OSL, also may face criminal liability. *See* OR. REV. STAT. § 59.991 (1999).

27. For purposes of the OSL, "person" includes corporations, partnerships, limited partnerships, joint stock companies, associations, syndicates, and other business entities. *See id.* § 59.015(14).

28. *See id.* §§ 59.055(1) & 59.115(1)(a); *see infra* Part II.B.

29. *See* OR. REV. STAT. §§ 59.115(1)(b), 59.127(1)(b) & 59.135; *see infra* Part II.C.

30. The OSL explicitly excludes the following from its definition of "security":

> (A) An insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or some other specified period;
>
> (B) A beneficial interest in a voluntary inter vivos trust unless the trust is created

rity" to mean:

> a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a pension plan or profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such title or lease, real estate paper sold by a broker-dealer, mortgage banker, mortgage broker or a person described in subsection (1)(b) of this section to persons other than persons enumerated in ORS 59.035(4), or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificates for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.[31]

> solely for the purpose of voting or is part of an attempt to evade the provisions of ORS 59.005 to 59.370; or
>
> (C) A beneficial interest in a testamentary trust.

OR. REV. STAT. § 59.015(19)(b).

31. OR. REV. STAT. § 59.015(19)(a).

Oregon courts may look to federal decisions to determine whether a particular device is a "security," because of the similarities between the definition of "security" in section 59.015(19)(a) and that contained in section 2 of the 1933 Act:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(a)(1) (1994). *See generally* Computer Concepts, Inc. v. Brandt, 801 P.2d 800, 804 n.7 (Or. 1990) ("The definition of 'security' under federal law is substantially the same as Oregon's . . . . For that reason, we may look to federal cases for guidance . . . .").

The definition of "security" in section 3 of the 1934 Securities Exchange Act is largely the same as that contained in section 2 of the 1933 Securities Act, although section 3 excludes "evidence of indebtedness" and "guarantees of" the various devices specified in the definition, describes oil, gas, and mineral interests somewhat differently, and explicitly excludes "currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." 15 U.S.C. § 78c(a)(10). Despite these differences, courts generally treat the definitions of "security" in the two acts

However, "[b]ecause the purpose of the Oregon Securities Law is remedial, there are few bright-line tests available to determine when a particular instrument or transaction involves a security. This determination must be made on a case-by-case basis."[32] Several categories of devices or transactions deserve additional discussion.

a. Notes

As do the comparable provisions of both the 1933 Securities Act and the 1934 Securities Exchange Act,[33] the OSL explicitly include "notes" in its definition of "security."[34] However, the Department of Consumer and Business Services has advised that "[t]here is no 'bright-line' test available under either Oregon or federal securities laws to help determine which notes are securities and which are not."[35] Lacking a bright line, the Department has suggested that the framework set forth by the United States Supreme Court in *Reves v. Ernst & Young*[36] may help resolve whether a particular note is or is not a "security" for purposes of the OSL.[37] The *Reves* Court identified four factors for determining whether a particular note is a "security" for purposes of federal securities law: (1) whether "the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and

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as functionally interchangeable. *See, e.g.*, Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 n.1 (1985); Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 698 (8th Cir. 1999).

For an enlightening examination of the statutory language, its evolution, and judicial application of the term "security," see Theresa A. Gabaldon, *A Sense of Security: An Empirical Study*, 25 J. CORP. L. 307 (2000). For a somewhat dated analysis of the same issues under state law, see Douglas M. Branson & Karl Shumpei Okamoto, *The Supreme Court's Literalism and the Definition of "Security" in the State Courts*, 50 WASH. & LEE L. REV. 1043 (1993). *See generally* 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 923-1038.19 (3d ed. rev. 1999); Gary S. Rosin, *Historical Perspectives on the Definition of a Security*, 28 S. TEX. L. REV. 575 (1987).

32. Fishing Club, Aug. 17, 1993, 1993 Ore. Sec. LEXIS 31, at *10.

33. *See supra* note 31.

34. MISS. CODE § 75-71-105(n) (2000).

35. Valley TV Coop., Sep. 25, 1997, 1997 Ore. Sec. LEXIS 19, at *2; *see also* Reves v. Ernst & Young, 494 U.S. 56, 62-63 (1990) (advising that "the phrase 'any note,'" in section 3(a)(10) of the Exchange Act, "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts").

36. 494 U.S. 56 (1990).

37. *Valley TV Cooperative*, 1997 Ore. Sec. LEXIS 19, at *2; *see also, e.g.*, Definition of a Note as a Security, June 23, 1993, 1993 Ore. Sec. LEXIS 11; College Funding, Inc., Feb. 24, 1993, 1993 Ore. Sec. LEXIS 37.

the buyer is interested primarily in the profit the note is expected to generate"; (2) whether there is "common trading for speculation or investment"; (3) the reasonable expectations of the investing public; and (4) "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary."[38] The Department has opined that instruments that satisfy most or all of these factors are securities for purposes of section 59.015(19).[39]

b. Stock

Some stock may not be a security for purposes of the OSL. In *United Housing Foundation, Inc. v. Forman*,[40] the Supreme Court rejected the argument that every issue of stock was, by definition, a "security" for purpose of federal securities law.[41] Instead, the Court admonished courts to consider whether (1) the purchaser receives the right to dividends, contingent upon an apportionment of profits; (2) the device is negotiable; (3) the device may be pledged as collateral; (4) the device confers voting rights in proportion to the number owned; and (5) the device may appreciate in value.[42] The Department of Consumer and Business Affairs has repeatedly indicated its willingness to follow *Forman* and exclude from the scope of the OSL stock that does not, to paraphrase *Forman*, possess the characteristics traditionally associated with stock.[43]

c. Options

An option to purchase a security is a security,[44] as may be an

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38. *Reves*, 494 U.S. at 66 (citations and parentheticals omitted).

39. *See, e.g.*, *Valley TV Cooperative*, 1997 Ore. Sec. LEXIS 19, at *4 ("Based on the limited information and analysis contained in your request, it appears that the notes contemplated in your letter meet at least the first, third and fourth factors set forth above in *Reves*. . . . Therefore, we must conclude that the notes as you have represented them are securities as defined pursuant to [section 59.015(19)(a)].").

40. 421 U.S. 837 (1975).

41. *Id.* at 848.

42. *See id.* at 851.

43. *Id.*; *see, e.g.*, Professional Veterinary Prods., Ltd., Mar. 26, 1998, 1998 Ore. Sec. LEXIS 5; Green Bay Packers, Inc., Nov. 3, 1997, 1997 Ore. Sec. LEXIS 22; Laguna Del Mar Trust 27500 Non-Equity Membership Program, Aug. 4, 1997, 1997 Ore. Sec. LEXIS 21; Ace Hardware Corp., May 13, 1997, 1997 Ore. Sec. LEXIS 10; Motor Pool Coop., Nov. 25, 1996, 1996 Ore. Sec. LEXIS 34.

44. *See* Foelker v. Kwake, 568 P.2d 1369, 1372 (Or. 1977) (en banc); *accord Brandt*, 801 P.2d at 803.

option to purchase foreign currency.[45] Whether the option has been exercised is irrelevant.[46]

d. Evidences of Indebtedness

"Evidence of indebtedness," a term taken from Section 2 of the 1933 Securities Act,[47] has been defined to mean a "contractual obligation to pay in the future for consideration presently received."[48] However, a simple loan is not a security for purposes of the OSL.[49] The Oregon Supreme Court has advised that "evidence of indebtedness," as used in the OSL, "contemplate[s] the presence of the investment process, that is, the investment of funds . . . with a view of receiving a profit through the efforts of others rather than the investor."[50]

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45. *See* Philadelphia Stock Exch., Inc. Foreign Currency Options, Feb. 19, 1996, 1994 Ore. Sec. LEXIS 18.

The Department of Consumer and Business Affairs has explicitly rejected the argument that, because the 1933 Securities Act and the 1934 Securities Exchange Act both include in their definitions of security "any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency," 15 U.S.C. §§ 77b(a)(1) & 78c(a)(10) (1994 & Supp. IV 1998); *see supra* note 32, the failure to include such language in section 59.015(19)(a) necessarily excludes, *inter alia*, exchange-traded foreign currency options from the scope of the OSL. *See Philadelphia Stock Exchange*, 1994 Ore. Sec. LEXIS 18, at *13-14.

46. As the Oregon Supreme Court has explained:

> The very nature of an option is to permit a future act, and, as we have noted, the legislature has manifested a consistent intention to regulate the sale of options. The system would be unworkable if it required registration by a seller only at the point when the buyer decides to exercise an already-purchased option. The question is whether an option, if exercised, would be a security.

Brandt, 801 P.2d at 803-04.

47. 15 U.S.C. § 77b(1).

48. United States v. Austin, 462 F.2d 724, 736 (10th Cir.), *cert. denied*, 409 U.S. 1048 (1972).

49. *See* Roach v. Mead, 709 P.2d 246, 249 (Or. Ct. App. 1985), *aff'd*, 722 P.2d 1229 (Or. 1986).

50. Sperry & Hutchinson Co. v. Hudson, 226 P.2d 501, 505 (Or. 1951) (quotation omitted); *see, e.g.*, Jost v. Locke, 673 P.2d 545, 553 (Or. Ct. App. 1983) (finding no "evidence of indebtedness" in arrangement whereby buyers would order valuable coins from the seller, Columbia Coin, who would then purchase and hold them on the buyer's behalf, where "each plaintiff contacted Columbia Coin in order to arrange a purchase of coins. . . , Columbia Coin offered no buy-back guarantee to its customers. . . [and], more than 95 percent of Columbia Coin's business involved transactions which were immediately completed; payment and coins changed hands at the time of sale.").

e. Investment Contract

In Oregon, as elsewhere, the most heavily litigated question relating to the definition of "security" is whether a particular device or transaction is an "investment contract." A device or transaction is an investment contract if the plaintiff made

(1) an investment of money (or money's worth),

(2) in a common enterprise,

(3) with the expectation of a profit,

(4) to be made through the management and control of others.[51]

In Oregon, as elsewhere, the two most commonly litigated elements of the foregoing test are whether the investment is a "common enterprise" and whether the plaintiff expects to profit "through the management and control of others."

i. "Common Enterprise"

A plaintiff may satisfy the "common enterprise" element of the *Pratt* test by establishing either horizontal or vertical commonality.[52] Horizontal commonality, in its strictest form, requires pooling two or more investors' assets into a single investment fund with profits or losses to be allocated in proportion to each investor's stake.[53]

51. Pratt v. Kross, 555 P.2d 765, 773 (Or. 1976); *accord* Computer Concepts, Inc. v. Brandt, 801 P.2d 800, 804-05 (Or. 1990); Almaden Plaza Assocs. v. United Trust Fund L.P., 860 P.2d 289, 290-91 (Or. Ct. App. 1993); MaxPro Corp., Jan. 17, 1995, 1994 Ore. Sec. LEXIS 19.

The Department of Consumer and Business Services has advised that "[t]he contextual setting of the definition of 'security' and hence the application of Oregon securities law contemplates an essentially passive expenditure of money (or money's worth) with an expectation of benefit, usually in the form of money or money's worth." Crossing Int'l Corp. Legends Retirement Community, Mar. 22, 1993, 1993 Ore. Sec. LEXIS 35, at *14.

The *Pratt* test modifies the comparable test under federal securities law, set forth in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) ("[A]n investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ."), in two ways: first, it recognizes nonmonetary investments; and second, it does not require that profit be derived solely from the effort of someone other than the investor. The *Howey* test, in turn, has been modified to relax the "solely from the effort of" the promoter or a third-party prong. *See, e.g.*, SEC v. Glenn W. Turner Enters., 474 F.2d 476, 482 (9th Cir.) (holding that the "efforts" referred to "are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise"), *cert. denied*, 414 U.S. 821 (1973); *accord* United Housing Found., Inc. v. Forman, 421 U.S. 837, 852 (1975); SEC v. Eurobond Exch., Ltd., 13 F.3d 1334, 1338 (9th Cir. 1994).

52. *See Brandt*, 801 P.2d at 805.

53. *See id.*

Vertical commonality, in its strictest form, requires "that the fortunes of the investor and the promoter be intertwined as to both profit and loss."[54]

In *Almaden Plaza Associates v. United Trust Fund L.P.*,[55] the parties had entered into an agreement whereby the plaintiff (Almaden) purchased an office building and then leased it back to the defendant (First Farwest) at a fixed, above-market rate for a period of years.[56] The Oregon Court of Appeals found that the fortunes of Almaden and First Farwest were insufficiently intertwined to satisfy vertical commonality because their agreement did not provide for any sharing of profits and losses between them:

> We do not consider the above-market rent feature of the lease one that results in an intertwining of the profits and losses of First Farwest and plaintiff. If First Farwest suffers losses, it may not be able to make its lease payments, in turn causing loss to plaintiff. However, if First Farwest is wildly successful, that extraordinary success will not inure to plaintiff; it will merely allow First Farwest to continue making the lease payments according to the lease agreement. Further, any success or failure of First Farwest does not necessarily affect the value of the property at the end of the lease term, when First Farwest could choose whether to purchase the building at the contract price. In the event First Farwest chose not to exercise the option, for whatever reason, the gain or loss in the value of the property belongs solely to plaintiff. There is no sharing of profits and, thus, no common enterprise here.[57]

In *Bergquist v. International Realty*,[58] by contrast, the Oregon Supreme Court found that a sale-leaseback arrangement *was* an investment contract where the funds of more than one investor were

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54. *Id.*; *accord Almaden Plaza Associates*, 860 P.2d at 291.

A less restrictive form of vertical commonality allows a plaintiff to establish the requisite commonality by proving that "the investment is interwoven with and dependent on the fortunes of others, so that the investor and the promoter can be said to conduct a common venture." *Brandt*, 801 P.2d at 805; *see, e.g.*, *Glenn W. Turner Enterprises*, 474 F.2d at 482 n.7 (defining vertical commonality where the "fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties"). The least restrictive form of vertical commonality requires the plaintiff only to prove her dependence on the promoter's expertise. *Brandt*, 801 P.2d at 805; *see, e.g.*, Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 671 (N.D. Ga. 1983).

55. 860 P.2d 289 (Or. Ct. App. 1993).

56. *See id.* at 290.

57. *Id.* at 292.

58. 537 P.2d 553 (Or. 1975).

pooled to purchase an apartment complex, which was then leased back to the defendant, in which each investor received an undivided fractional interest.[59] Having shown horizontal commonality, the plaintiffs were not required to also establish vertical commonality.[60]

In *Black v. Corporation Division*,[61] the Oregon Court of Appeals found both horizontal and vertical commonality present in an arrangement where (1) the funds in the plaintiffs' accounts were pooled by the defendant, along with the defendant's own funds, and used by the defendant to purchase "straddles" in treasury bills and commodity futures; (2) the defendant (Oxford) and his agents had complete discretion to make purchase and sale decisions; and (3) profits and losses distributed to the plaintiffs' accounts were the result of the pooled-fund transactions.[62]

ii. "Through the Management and Control of Others"

The plaintiff's expectation of profit must derive from the management or control of the seller or some other known third party.[63] That does not mean that the plaintiff must be entirely passive. The mere fact that the plaintiff is an employee of the venture in which she has invested will not defeat her claim that her investment is a se-

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59. *See id.* at 559.

60. *See id.*; *Almaden Plaza Associates*, 860 P.2d at 291.

61. 634 P.2d 1383 (Or. Ct. App. 1981).

62. *See id.* at 1388. As the court explained:

> Although the investors here did not expect to share "profits" pro-rata, the evidence supports the finding that the investors' funds were pooled together and with Oxford's funds, at least to the extent that Oxford used investors' funds as its own. . . .
>
> [C]ases holding such accounts not to be investment contracts are inapposite here. In most of those cases, the trader was not a common venturer but only an agent. . . .
>
> Regardless of the investors' expectations and of Oxford's and its agents' representations, Oxford and its agents were not mere agents or mere conduits between investors and the market. . . . The economic realities here are that Oxford did not execute the promised transactions but confirmed to its investors what were in fact unexecuted, sham transactions; investors in fact "shared" their success and loss with each other and with Oxford when it pooled the funds and used them for its own benefit beyond mere commissions.

Id.

63. *See, e.g.*, Marshall v. Harris, 555 P.2d 756, 761 (Or. 1976) (holding that "the sale of a 'fractional interest' in a racehorse is an 'investment contract' within the intended meaning of ORS 59.015(13)(a) when the purchaser expects to derive a profit to be created solely through the efforts of other persons").

curity.[64] Likewise, the mere fact that the plaintiff has the right to participate in certain decisions does not defeat her claim that her investment is a security.[65]

If the plaintiff's expectation of profit derives from market fluctuations over which the seller has no meaningful control, the device or transaction is not an investment contract.[66]

iii. Other Howey/Pratt *Factors*

The issue in *The ResidenSea Limited*,[67] on the other hand, was the applicability of the other two *Howey/Pratt* factors. The buyers were being offered exclusive and nonexclusive use and occupancy rights in a luxury cruise ship to be constructed for and operated by the offeror.[68] *Inter alia,* transfer of the rights was restricted, there would be no profit sharing either among the buyers or between the buyers and the offeror, and the buyers would receive no dividends from the offeror's operations.[69] The Department concurred with the offeror's position that "the membership interests d[id] not constitute investment contracts because there is no expectation of profit and the memberships are not marketed with a focus on investment intent."[70]

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64. *See* Pratt v. Kross, 555 P.2d 765, 773 (Or. 1976) ("[P]laintiff's employment by the partnership in a non-management position does not keep the transaction from being an investment contract. An investor who labors without having an opportunity to participate in management is just as helpless to govern what happens to his investment as is a purely passive investor." (citations omitted)).

65. For example:

> The investors in this land sale scheme did not anticipate playing a significant role in dividing the land, recruiting other investors, rezoning or resubdividing the land or obtaining purchasers for the property's ultimate resale. . . . Their only chance for participation was in the approval or disapproval of prices at resale. . . . When investors purchased their undivided interests in the property, they simultaneously executed an "Equal Acknowledgment Agreement," which conferred general management power on defendant. Considering these facts in light of the *Howey* test, or that test as modified by *Pratt*, we hold that the participatory undivided interests sold in this case constituted "investment contracts."

State v. Jacobs, 637 P.2d 1377, 1381 (Or. Ct. App. 1981).

66. *See, e.g.*, Jost v. Locke, 673 P.2d 545, 551 (Or. Ct. App. 1983) (holding that the purchase of precious coins from the seller was not an investment contract because the plaintiffs' profit, if any, would be realized because of an increase in the market price for gold, rather than the entrepreneurial and managerial efforts of the defendant).

67. The ResidenSea Ltd., June 11, 1997, 1997 Ore. Sec. LEXIS 12.

68. *See id.* at *1.

69. *See id.* at *1-2.

70. *Id.* at *3; *see also* Motor Pool Coop., Nov. 25, 1996, 1996 Ore. Sec. LEXIS 34 (opining that registration of cooperative's shares was unnecessary based on offeror's argument that, *inter alia,* buyers would have no reasonable expectation of profit); Crossing Int'l

iv. Analytical Alternative: The "Risk Capital" Test

Oregon courts have also recognized an alternative to the *Pratt* test: the "risk capital" test.

In *State* ex rel. *Healy v. Consumer Business Systems, Inc.*,[71] the defendant (CBS) sold franchise contracts, manager contracts, and representative contracts—the difference between the three levels being based on the amount of money a purchaser was willing to invest in the company—in order to raise capital to start its discount buying club business.[72] Franchisees, managers, and representatives were expected to solicit companies to participate in the discount buying club.[73] The Oregon Court of Appeals held that, despite the fact that the franchise investment at issue did not satisfy *Howey* because it required substantial effort on the part of the franchisees, the arrangement was nonetheless an investment contract because "a substantial portion of the initial capital which a franchisor uses to initiate its operations is being provided by the franchisees."[74] The court explained: "The 'risk capital' test protects the public by requiring those whose schemes fit within the conditions set down by the test . . . make potential investors aware of the fact that their capital will be risked *before the working foundations of the enterprise are firmly in place.*"[75]

Corp. Legends Retirement Community, Mar. 22, 1993, 1993 Ore. Sec. LEXIS 36 (opining that residency and prepaid rent contracts did not give rise to an expectation of profit).

71. 482 P.2d 549 (Or. Ct. App. 1971).

72. *See id.* at 550-51.

73. *See id.* at 551.

74. *Id.* at 554; *see also id.* at 555 ("Under the 'risk capital' test we are concerned with whether the franchisor is dependent upon the franchisees' capital to initiate his operations . . . .").

75. *Id.* (emphasis added).

The court in *Jet Set Travel Club v. Corporation Commissioner*, 535 P.2d 109 (Or. Ct. App. 1975), also applied the risk capital test, but found that the investment at issue did not qualify as an investment contract under the risk capital test because

> the initial capital used by Jet Set to initiate its operations was not provided by memberships sold in Oregon. Jet Set had been flying scheduled flights for a full year before any memberships were sold in Oregon.
>
> * * *
>
> The case at bar is different from [*State ex rel. Healy v. Consumer Bus. Sys., Inc.*] in that the memberships are nothing more than a sale of a right to use existing facilities. The requirements of the "risk capital" test are not fulfilled because the benefits of the membership have materialized and have been realized by other members prior to any capital raised by the sale of Oregon memberships.

Id. at 111-12.

f. Certificates of Deposit

In *Marine Bank v. Weaver*,[76] the Supreme Court held that bank certificates deposit were not securities for purposes of federal securities law.[77] The Department of Consumer and Business Services has declined to follow *Marine Bank*, "as a matter of state policy";[78] and, therefore, has held bank certificates of deposit to be securities for purposes of section 59.015(19)(a).

2. "Sale" of Securities

Subject to certain exceptions,[79] the OSL defines "sale" to in-

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76. 455 U.S. 551 (1982).

77. *See id.* at 558-59.

78. Prudential Sec. Corp./Bank CDs, Jan. 18, 1996, 1996 Ore. Sec. LEXIS 3, at *17. Interestingly, the Department's opinion in *Prudential Securities* describes this refusal to follow *Marine Bank* as "consistent," *see id.*—suggesting that the Department has so declined on numerous occasions. If that is the case, there is no evidence to support it in the "no-action" letters available on line. On three other instances, the Department has declared its intent to take no action with respect to securities for which one claimed exemption was rooted in *Marine Bank*. *See In re* Certificates of Deposit, Dec. 2, 1994, 1994 Ore. Sec. LEXIS 9; Stifel, Nocolaus & Co., Sep. 7, 1984, 1984 Ore. Sec. LEXIS 37; Farmer Savs. Bank, Jan. 25, 1984, 1984 Ore. Sec. LEXIS 107.

79. The OSL explicitly excludes from its definition of "sale": (1) a bona fide pledge or loan of securities, OR. REV. STAT. § 59.015(17)(b)(A) (1999); (2) a bona fide security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by the recipients for the dividend other than payments in connection with the elimination of fractional shares, OR. REV. STAT. § 59.015(17)(b)(B); *see, e.g.*, Summit Energy, Inc., Jan. 13, 1988, 1988 Ore. Sec. LEXIS 105; Plexus Resources Corp., May 18, 1984, 1984 Ore. Sec. LEXIS 61; Hi-Shear Indus. Inc., May 18, 1984, 1984 Ore. Sec. LEXIS 65; *see also* Freeport-McMoran Energy Partners Ltd., June 8, 1987, 1987 Ore. Sec. LEXIS 123 (refusing exclusion because "dividend" recipients were required, *inter alia*, to give value in order to receive the "dividend"); and (3) an act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, OR. REV. STAT. § 59.015(17)(b)(C).

With respect to the reorganization exclusion, the Department of Consumer and Business Affairs has opined:

> The crucial determination is not whether something is "judicially approved," but rather whether it is a "reorganization," for many things may be "judicially approved" which are not in fact "reorganization" within the definitional exclusion. We are of the mind that the word "reorganization" is a term of art referring to bankruptcy proceedings and other creditor disputes. The term "reorganization" has never been used, either by the courts or by legislatures, to describe settlement of class action litigation. If the Oregon legislature intended to encompass settlements of litigation within the exclusion, it could have added the term, "settlement."

In re Thomas et al. v. American Campgrounds, Inc. et al., July 29, 1974, 1974 Ore. Sec. LEXIS 12; *see, e.g.*, Liquidation of Texas Am. Syndicate, May 18, 1984, 1984 Ore. Sec.

clude every (1) contract of sale of, contract to sell, or disposition of, a security or interest in a security—including an option to purchase a security[80]—for value; (2) gift or delivery of securities with, or as a bonus on account of, a purchase of securities; and (3) gift of assessable stock by or for any issuer or promoter.[81]

In *Towery v. Lucas*,[82] the defendants argued that they were not liable to the plaintiff under the OSL because the securities, ownership of which gave the plaintiff standing to pursue his claims, were not "sold" to the plaintiff in a manner that satisfied sections 59.015(17) and 59.115(1)(b).[83] The parties had previously entered into a settlement agreement whereby they agreed to form a new corporation, SVMP, the shares of which would be held by the plaintiff and the defendants.[84] The defendants argued that there was no "sale" with respect to these shares because (1) the shares were issued to the plaintiff pursuant to the creation of SVMP, (2) the plaintiff had not given value for the shares, and (3) the settlement agreement constituted, at most, an offer to sell, rather than a sale.[85] The court of appeals rejected all three arguments and reversed the trial court's summary judgment in favor of the defendants.

> Whether a "sale" of securities within the meaning of the statute includes a transaction in which the parties agree to apportion the shares of a newly formed corporation is a question of legislative intent. We begin with the text and context of the statute. The statute defines "sale" broadly, including "every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value."
>
> In this case, the settlement agreement is a contract that expressly concerns the "disposition of" stock in SVMP. Stock is a "security or interest in a security." On its face, the settlement agreement falls within the statutory definition of a "sale" of securities.[86]

LEXIS 62. *But see* Crime Control, Inc., Aug. 21, 1986, 1986 Ore. Sec. LEXIS 65 (not disputing the application of the section 59.015(17)(b)(C) exclusion to the issuance of shares pursuant to a judicially-approved settlement); *see also* Corona Corp., June 28, 1988, 1988 Ore. Sec. LEXIS 70 (not disputing the application of the section 59.015(17)(b)(C) exclusion to a judicially-approved corporate reorganization outside of the bankruptcy concept).

80. *See supra* note 44 and accompanying text.

81. OR. REV. STAT. § 59.015(17)(a).

82. 876 P.2d 814 (Or. Ct. App. 1994).

83. *Id.* at 817.

84. *Id.* at 815-16.

85. *Id.* at 817-18. The OSL does not create liability for mere offers to sell. *See infra* note 155.

rities.[86]

With regard to the defendants' argument that the plaintiff did not give "value" for the SVMP shares because all of his obligations were consideration for settling the plaintiff's earlier dispute with the defendants, rather than being consideration for the SVMP shares, the court held: "The agreement . . . explicitly characterizes plaintiff's fulfillment of those obligations as a prerequisite to the issuance of the stock. At the very least, there is a dispute as to the meaning of ambiguous contractual terms, which presents a factual issue not properly resolved on summary judgment."[87]

As for the defendants' argument that the settlement agreement was, at most, an offer to sell securities, the court held:

> Defendants ignore the fact that the agreement is a contract that expressly disposes of securities for value and, therefore, falls within the statutory definition of a "sale" of securities. Defendants further ignore the undisputed fact that, on its face, the settlement agreement reflects more than an offer; it reflects an offer, which was accepted, memorialized in a written agreement and executed both by plaintiff and by the Lucas estate, whom defendants represented in the transaction.[88]

The issue in *Ainslie v. Spolyar*[89] was not whether a sale had occurred; but, rather, when a sale had occurred. *Ainslie I* involved an "all or nothing" offer, where "[t]here would be no sale unless there were completed subscriptions to all 40 units. Thus, the sale of any one unit could not occur until the sale of all units occurred."[90] Under the circumstances, the court found the sale occurred on the date the last subscription was completed—December 31, 1986—because "[u]ntil that date, the general partner did not have the power to accept any subscriptions."[91]

The timing of a sale is significant for at least two reasons implicated in *Ainslie I* and discussed at greater length elsewhere in this Article. First, whether a security is properly registered at the time of sale or is exempt from registration depends, at least in part, on when its sale takes place.[92] In *Ainslie I*, the registration statement

86. *Towery*, 876 P.2d at 817 (citations omitted).

87. *Id.* at 818.

88. *Id.*

89. 926 P.2d 822, 826 (Or. Ct. App. 1996) [hereinafter *Ainslie I*].

90. *Id.* at 827.

91. *Id.*

92. Every registration of securities . . . shall expire one year after the date of the

under which the sale was conducted expired on December 10, 1986.[93] The court determined that, under the offering's "all or nothing" terms, the sale was not actually accomplished until December 31, 1986.[94] Therefore, the securities sold on December 31, 1986 were unregistered at the time of sale, in violation of the registration provisions of the OSL.[95]

Second, whether a suit, brought under either the registration or the antifraud provisions of the OSL, is timely depends on when the sale took place.[96] In *Ainslie I,* the plaintiffs filed suit more than three years after they submitted their subscriptions but less than three years after the court determined that the sale had occurred under the offering's "all or nothing" provisions.[97] Therefore, the plaintiffs' suit was timely filed.[98]

B. Liability for Failing to Properly Register Under the OSL

Section 59.055 of the OSL makes it unlawful to sell or offer to sell an unregistered security in the state of Oregon, unless (1) the security is exempt under section 59.025; (2) the transaction is exempt under section 59.035; or (3) the security is a "federal covered security for which a notice has been filed and fees have been paid under section 59.049."[99] Section 59.055 does not explicitly afford

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> registration . . . . The director may establish a different expiration date for purposes of coordination with any national registration or notice filing system. When a registration . . . is amended, the registration . . . expires one year after the date of the initial registration . . . unless the amended registration . . . provides otherwise.

OR. REV. STAT. § 59.075(2) (1999).

93. *Ainslie I,* 926 P.2d at 824.

94. *Id.* at 827.

95. *Id.* ("Because the registration with the state expired on December 10, 1986, the sale of all units occurred at a time that they were not registered. The sales therefore violated the Law, and plaintiffs had the right provided in ORS 59.115(2) to rescind them."). See *infra* Part II.B for further discussion of the OSL's registration provisions and the recourse available to persons who purchase improperly unregistered securities.

96. *See* OR. REV. STAT. §§ 59.115(6) & 59.127(6) (both requiring, as a general rule, that any suit be brought within three years of the date of sale).

97. *Ainslie I,* 926 P.2d at 826-27.

98. *Id.* at 827 ("Because, under the express conditions in the offering memorandum, the sale of all units occurred on December 31, 1986, and because plaintiffs filed this case on December 29, 1989, within three years of that date, defendant's assignments of error concerning the statute of limitations fail."). See *infra* Parts II.B.4.b, II.C.3.b, and II.C.5.b for further discussion of the statutes of limitations applicable to transactions governed by the OSL.

99. OR. REV. STAT. § 59.055.

any private cause of action or remedy. Consequently, an injured buyer must look to section 59.115 for the authority to sue any person or entity who sold an unregistered security.[100]

1. Exemptions from Registration

The OSL exempts sales of securities from the reach of sections 59.055 and 59.115 based on the nature of the securities themselves, the nature of the transaction in which the securities are sold, or both. The Oregon Supreme Court has admonished Oregon courts to construe the OSL's registration exemptions narrowly, "to afford the greatest possible protection to the public."[101] The party claiming an exemption bears the burden of pleading and proving its applicability.[102] In the absence of a pleaded exemption, a purchaser need not plead or prove the inapplicability of any exemption.[103]

a. Exempt Securities

Section 59.025 exempts certain securities from registration, notwithstanding whether the transaction involved is otherwise ex-

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In addition to requiring registration of securities sold or offered for sale in the state of Oregon, the OSL also requires, subject to certain exemptions, the registration of all broker-dealers and salespersons who transact or offer to transact securities business in the state of Oregon, and all investment advisors who advise others about the purchase or sale of securities, or who manage a securities investment or trading account, in the state of Oregon. *See* OR. REV. STAT. § 59.165; *see also id.* § 59.015(1) (defining "broker-dealer"); *id.* § 59.015(4) (defining "federal covered investment adviser"); *id.* § 59.015(8) (defining "investment adviser representative"); *id.* § 59.015(18) (defining "salesperson"); *id.* § 59.015(20) (defining "state investment adviser"). The regulation of broker-dealers, salespersons, and investment advisers, except in their capacities as buyers and sellers of securities and as culpable collateral participants in the purchase or sale of securities, is beyond the scope of this Article.

100. *See* OR. REV. STAT. § 59.115; *cf.* Anderson v. Carden, 934 P.2d 562, 570 & n.3 (Or. Ct. App. 1997) (Butler, J., dissenting on other grounds) ("[A] seller may be held liable under [§ 59.115] if he 'sells a security in violation of the Oregon Securities Law,' which, in general, would include . . . [§ 59.055].").

101. Day v. Saunders, 528 P.2d 513, 514 (Or. 1974) (en banc); *accord* State v. Crooks, 734 P.2d 374, 376 (Or. Ct. App. 1987).

102. OR. REV. STAT. § 59.275; OR. ADMIN. R. 441-25-005(2) & 441-35-005(2) (2000); Marshall v. Harris, 555 P.2d 756, 762 (Or. 1976); *Day*, 528 P.2d at 514. As the Oregon Court of Appeals has explained: "Whether a security falls within the class of exempt securities is a fact peculiarly within the personal knowledge of the seller. It is not unreasonable to require the seller to present proof of the exemption." *Crooks*, 734 P.2d at 377.

103. *See* OR. REV. STAT. § 59.275 ("It is not necessary to negative any of the exemptions or classifications provided in the Oregon Securities Law in a complaint . . . brought under the Oregon Securities Law . . . .").

empt.[104] For example, the offer or sale of any security fully listed at the time of sale on the American, Midwest, New York, or Pacific Stock Exchange (or other exchange approved by the Oregon Department of Consumer and Business Services) need not comply with the registration requirements of the OSL.[105] Other exempt securities include those issued by regulated public utilities,[106] those issued by domestic nonprofit, religious, charitable, or benevolent corporations,[107] and unsecured, short-term promissory notes issued by commercial entities.[108] Unlike those transactions exempted by section 59.035, which excuse both the security and the broker-dealer or salesperson from registration, section 59.025 exemptions are generally available only to qualifying securities that are offered or sold by registered broker-dealers or salespersons working under the supervision of a registered dealer.[109]

Section 59.025 also empowers the Director of the Department of Consumer and Business Services to exempt from registration otherwise nonexempt securities.[110] Pursuant to that authority, the Director has expanded the exemption for employee benefit plans beyond the strict limits of section 59.025(12).[111]

Section 55.049, added to the OSL in 1997,[112] exempts "federal

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104. *Id.* § 59.025. The section 59.025 exemptions are self-executing. *See* OR. ADMIN. R. 441-25-005(1).

105. *Id.* § 59.025(4)(a).

106. *Id.* § 59.025(8).

107. *Id.* § 59.025(13)(a); *see, e.g.*, Rajneesh Found. Int'l v. Corp. Comm'r, 671 P.2d 1203, 1205-06 (Or. Ct. App. 1983).

108. OR. REV. STAT. § 59.025(7). This is the so-called "commercial paper" exemption. In *Crooks*, the Oregon Court of Appeals, lacking a definition of "commercial paper" in the OSL, elected to follow the lead of several federal circuits and the recommendation of the Oregon Corporation Commissioner and limited the scope of the commercial paper exemption to "only high grade negotiable paper of the type rated in the investor services such as Fitch, Moody, Standard and Poor." 734 P.2d at 376 & 376 n.3 (quoting ROBERT J. MCGAUGHEY, OREGON SECURITIES HANDBOOK 26 (1982)).

109. *See* OR. ADMIN. R. 441-25-005(1) (2000). There are two notable exceptions: (1) section 59.015 excludes those who effect the sale of securities covered by section 59.025(7) from the definition of "broker-dealer," OR. REV. STAT. § 59.015(1)(g), and, hence, from the need to register as a broker-dealer in order to avoid liability under section 59.165; and (2) section 59.015 excludes a person representing an issuer effecting sales exempted by section 59.035 from the definition of "salesperson," *id.* § 59.015(18)(b)(B), and, hence, from the need to register as a salesperson in order to avoid liability under section 59.165.

110. OR. REV. STAT. § 59.025(14).

111. *See* OR. ADMIN. R. 441-25-050.

112. *See* 1997 Or. Laws ch. 772, § 6 (codified as amended at OR. REV. STAT. § 59.049 (1999)). Section 59.049 was added to the OSL in the wake of the National Securi-

covered securities"[113] that are not otherwise exempt from registration under section 59.025 or 59.035, provided that the person selling or offering a federal covered security for sale first file a notice with and pay a statutory fee to the Director of the Department of Consumer and Business Services.[114]

b. Exempt Transactions

Section 59.035 of the OSL identifies certain sales, offerings for sale, solicitations, subscriptions, dealings in, and deliveries of securities which—due to the nature of the transaction, the nature of the parties, or both—are exempt from the OSL's registration requirements.[115] These transactions will not give rise to liability under section 59.055.[116]

One of the most commonly invoked exemptions is the so-called "isolated transaction" exemption, which exempts from registration sales by a nonissuer to a very small number of buyers.[117] In addition, a security offering is exempt from registration if, *inter alia*, the sale was made by an issuer, without public solicitation or advertisement, for no commission, and the issuer sold its securities during the

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ties Markets Improvement Act. *See* Van Meter, *supra* note 16, at 41-45 (discussing the origins and reach of section 59.049).

113. *See supra* note 14.

114. OR. REV. STAT. § 59.049(1)-(3). Section 55.049 exemptions appear to afford no protection to broker-dealers, salespersons, or others required by OSL to be registered or licensed themselves.

115. *Id.* § 59.035.

116. *Id.* § 59.055(2). Section 59.035 exemptions do not apply to otherwise exempt transactions in so-called "blank check" companies—including, but not limited to, issuers of "penny stock." OR. ADMIN. R. 441-45-010.

117. *Id.* § 59.035(2); *see, e.g.*, Creager v. Berger, 775 P.2d 918, 920 (Or. Ct. App. 1989).

The Oregon Supreme Court has allowed a seller to claim the isolated transaction exemption for two or fewer sales. *See* Tarsia v. Nick's Laundry & Linen Supply Co., 399 P.2d 28, 29-30 (Or. 1965). The Oregon Court of Appeals has not allowed a seller who made three sales within a relatively brief period to claim this exemption. *See* Redhouse v. Preferred Properties, 743 P.2d 1125, 1126 (Or. Ct. App. 1987). In *Marshall v. Harris*, the Oregon Supreme Court advised that the proper test for this exemption is "whether the sales in question are made within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that the sales promote the same aim and that the sales are not so detached and separated as to form no part of a single plan." 555 P.2d 756, 763 (Or. 1976). This exemption was less attractive when the OSL included solicitations and offers to sell in the definition of "sale." *See* OR. REV. STAT. § 59.015(11) (1981) (current version at OR. REV. STAT. § 59.015(17) (1999)); *see also infra* note 155 (discussing the 1985 amendment of the OSL to eliminate liability for mere offers to sell).

preceding twelve months to not more than ten persons who bought for their own account.[118] Likewise, commission-free offers and sales to existing shareholders, on a pro rata basis, also are exempt under certain circumstances.[119]

Section 59.035 empowers the Department of Consumer and Business Services to exempt from registration otherwise nonexempt transactions.[120] Pursuant to that authority, the Department has (1) adopted an "isolated issuer" exemption covering three or fewer sales, not involving a public offering, by or on behalf of an issuer during a 24-month period;[121] and (2) adopted an Internet solicitation exemption covering all offers for sale placed on the Internet except for offers originating from Oregon.[122]

2. Primary Liability for Selling Unregistered Securities

Section 59.115(1)(a) entitles a purchaser to sue a seller who "[s]ells a security, other than a federal covered security, in violation of the Oregon Securities Law or of any condition, limitation or restriction imposed upon a registration . . . under the Oregon Securities Law."[123] Section 59.115(1)(a), like its federal counterpart,[124] is,

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118. OR. REV. STAT. § 59.035(12)(a) (1999).

119. *Id.* § 59.035(3). To take advantage of this exemption, the issuer, within the past year, cannot have (1) had an effective OSL registration or (2) used this particular exemption. *See id.* § 59.035(3)(b).

120. OR. REV. STAT. § 59.035(15).

121. OR. ADMIN. R. 441-35-050 (2000); *see, e.g.*, Tigard Properties, Inc., June 27, 1996, 1996 Ore. Sec. LEXIS 10.

Unlike the section 59.035(12), exemption, which does not permit payment of commissions, *see* OR. REV. STAT. § 59.035(12)(a)(C), OAR 441-35-050 does not prohibit them. *See In re* Isolated Issuer Transaction, May 26, 1993, 1993 Ore. Sec. LEXIS 19, at *9. Unlike the section 59.035(12) exemption, which does not count out-of-state purchaser toward its 10-purchaser limit, *see* OR. REV. STAT. § 59.035(12)(b)(C), all purchasers, no matter where located, count toward the limit in OAR 441-35-050(2):

> The rule specifies that an isolated issuer transaction includes sales to three or fewer persons during any 24 month period. The rule is based upon a similar exemption found in Washington securities law, and similarly counts purchasers who are part of the same offering, regardless of where the sale occurs.

Isolated Issuer Transaction, 1993 Ore. Sec. LEXIS 19, at *8.

122. OR. ADMIN R. 441-35-060.

123. OR. REV. STAT. § 59.115(1)(a).

124. Section 12(a)(1) of the 1933 Securities Act provides that any person who offers or sells an unregistered, nonexempt security

> shall be liable . . . to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any

in essence, a "strict liability" statute.[125] As long as the plaintiff can establish that the security was unregistered at the time of the sale, the defendant will be liable,[126] unless the defendant can establish that the security or the transaction itself was exempt from registration.[127] The defendant's ignorance of his obligation to register the security is irrelevant.[128]

3. Secondary Liability for Selling Unregistered Securities

Section 59.115's reach is not limited to only those persons who actually sell unregistered securities. Section 59.115(3) also holds liable for registration violations

> [e]very person who directly or indirectly controls a seller liable under [§ 59.115(1)], every partner, limited liability company manager, including a member who is a manager, officer or director of such seller, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the sale . . . jointly and severally with and to the same extent as the seller . . . .[129]

A purchaser seeking to establish secondary liability for a registration violation under section 59.115(3) need not prove that the indirect seller knew that the law required the security to be regis-

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> income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. § 77*l*(a)(1) (Supp. IV 1998); *see supra* note 2.

125. The 1933 Securities Act

> imposes strict liability on offerors and sellers of unregistered securities. Recovery may be had under [§ 12(a)(1)] regardless of whether [the purchaser] can show any degree of fault, negligent or intentional, on the seller's part. There are three elements to a prima facie case: (1) the sale or offer to sell securities; (2) the absence of a registration statement covering the securities; and (3) the use of the mails or facilities of interstate commerce in connection with the sale or offer.

Swenson v. Engelstad, 626 F.2d 421, 424-25 (5th Cir. 1980) (citations, quotation, and footnotes omitted; second alteration in the original); *see* Pinter v. Dahl, 486 U.S. 622, 638 (1988).

126. *See* OR. REV. STAT. § 59.055(1) (1999); *see, e.g.*, Spears v. Lawrence Sec., Inc., 399 P.2d 348, 350 (Or. 1965) (holding that section 59.055 "imposes liability on the salesman, issuer or dealer without proof of any fact other than the making of the sale.").

127. *See* OR. REV. STAT. § 59.055(2)-(3). For an overview of the relevant exemptions, see *supra* Part II.B.1.

128. *See* State v. Jacobs, 637 P.2d 1377, 1382 (Or. Ct. App. 1981).

129. OR. REV. STAT. § 59.115(3); *see* Prince v. Brydon, 764 P.2d 1370, 1371 (Or. 1988) ("'Participate' and 'materially aids' are separate concepts, not synonyms. A person may participate without materially aiding or materially aid without participating.").

tered.[130] An indirect seller's knowledge "becomes an element of liability only in the form of an affirmative defense."[131]

a. "Control Person" Liability

"'[T]he power to control, whether or not the power is exercised, is the crucial factor' in determining whether a person controls a seller."[132] Evidence that a seller is a registered representative of the defendant, and is licensed only through the defendant, may be sufficient to establish that the defendant controls the seller for purposes of section 59.115(3).[133] Likewise, evidence that the seller acted with the actual, implied, or apparent authority of the nonseller defendant may establish the nonseller's liability under section 59.115(3),[134] but proof of such authority is not required to satisfy section 59.115(3).[135]

b. Liability for Participating in or Materially Aiding the Sale of an Unregistered Security

Whether an indirect seller has participated in or materially aided in the sale of unregistered securities "does not depend on one's knowledge of the facts that make it unlawful; it depends on the importance of one's personal contribution to the transaction."[136]

4. Defenses to Registration Liability

a. Standing

Section 59.115's protection extends only to purchasers.[137] A

130. *See* Collins v. Fitzwater, 560 P.2d 1074, 1077 (Or. 1977).

131. *Prince*, 764 P.2d at 1372; *see infra* Part II.C.5.c.

132. Castle v. Ritacco, 919 P.2d 1196, 1199 (Or. Ct. App. 1996) (quoting Badger v. Paulson Inv. Co., 779 P.2d 1046, 1050, *modified on other grounds*, 784 P.2d 125 (Or. Ct. App. 1989), *aff'd in part and rev'd in part*, 803 P.2d 1178 (Or. 1991)).

133. *See Castle*, 919 P.2d at 1199; Ince v. AMEV Investors, 857 P.2d 165, 166 (Or. Ct. App. 1993).

134. *See, e.g.*, *Badger*, 779 P.2d at 1052.

135. *See Castle*, 919 P.2d at 1200.

136. *Prince*, 764 P.2d at 1371; *see infra* Part II.c.4.

137. OR. REV. STAT. § 59.115(1) (1999) ("A person who sells a security is liable . . . to a purchaser of the security. . . ."); *see, e.g.*, High v. Davis, 584 P.2d 725, 736 (Or. 1978) (en banc) (holding that the plaintiff had no standing to challenge the validity of the sale of certain membership agreements as unregistered securities because the plaintiff "was not a party to the alleged transaction").

person who did not purchase a security lacks standing to sue the person who sold it for failing to properly register the security.[138] On the other hand, a person who did purchase a security has standing to sue the person who sold it even if the seller did not intend for the purchaser to buy the security.[139]

b. Limitations

A purchaser must bring any claim for a violation of the OSL's registration provisions within three years of the date of sale.[140]

What, exactly, makes one a "purchaser" is not clear. The term is undefined in the OSL and has not been the subject of any reported Oregon case. Construing an analogous provision of the 1933 Securities Act, a federal district court held that a plaintiff did not have to be an owner to be considered the purchaser, but had to have "sufficient control or authority to effectuate a tender of the securities." Monetary Mgmt. Group of St. Louis v. Kidder, Peabody & Co., 604 F. Supp. 764, 768 (E.D. Mo. 1985). The plaintiff in *Monetary Management Group* purchased the bonds in question for a customer, and the court found this sufficient to establish the plaintiff as the purchaser and as the proper party to bring an action for rescission. *Id.* at 767. A Texas Court of Appeals, construing the analogous provision of the Texas Securities Act, TEX. REV. CIV. STAT. ANN. art. 581-33A(2) (1996), found "sufficient indicia of ownership" where the plaintiff "negotiated with the control persons for the purchase of [the] stock and was the record holder of the stock," despite uncertainty as to the source of the funds to make the purchase. Summers v. WellTech, Inc., 935 S.W.2d 228, 233 (Tex. App. 1996, no writ).

138. *See, e.g.*, *High*, 584 P.2d at 736 (holding that nonpurchaser lacked standing to allege that the sale of unregistered securities was void under the precursor to section 59.055).

139. *Cf.* Fakhrdai v. Mason, 696 P.2d 1164, 1167 (Or. Ct. App. 1985) ("Neither do we think that the fortuity that plaintiff was a different victim from the one contemplated by the original scheme aids defendants. Under the allegations of the complaint, defendants helped launch the injurious device. To hold that they escape liability because it hit someone other than the one at whom it was originally aimed would violate the Blue Sky Law's protective purpose.").

140. *See* OR. REV. STAT. § 59.115(6); Ainslie v. Spolyar, 926 P.2d 822, 826 (Or. Ct. App. 1996) [*Ainslie I*]; Loewen v. Galligan, 882 P.2d 104, 115 (Or. Ct. App. 1994); *supra* notes 96-98 and accompanying text.

The OSL

> does not expressly determine *when* a sale occurs. . . . ORS 59.015(15) defines "sale" and "sell" to include a number of kinds of agreements or transfers, but it does not establish when any of those agreements or transfers occurs. Defendant, citing cases from other jurisdictions, argues that a sale occurs when the purchaser commits to buy, not when it makes the last of a series of installment payments. Plaintiff cites cases that suggest a contrary conclusion. However, the answer in this case does not depend on a general rule but on the terms of the offering memorandum and related documents.
>
> The Classic offering expressly provided that it was an "all or nothing" offering. There would be no sale unless there were completed subscriptions to all 40 units. Thus, the sale of any one unit could not occur until the sale of all units occurred. The essential question, thus, is when a subscription became complete.

Limitations may be tolled during the pendency of a class action filed prior to the expiration of the three-year limitations period.[141]

> Unlike some of the cases on which defendant relies, a subscription to the Classic offering was not complete when the subscriber filled out the necessary forms and made a down payment. Rather, it was complete only when the subscriber delivered the full $45,500 capital contribution to the escrow agent; however other offerings might be structured, *this* offering did not permit installment payments. In addition, this was not a case in which units were sold over a period of time, the sale occurring as to each when the subscription became complete. Although plaintiffs signed the subscription documents at different times and paid capital contributions over an extended period, the offering memorandum did not permit the general partner to accept any of those subscriptions, or to use any of the capital contributions, until it was able to accept every subscription and to use all of the capital contributions.
>
> The conditions that allowed Classic to sell the units and to use the capital contributions did not occur until December 31, 1986, when the final payment was made on the last half unit. Until that date, the general partner did not have the power to accept *any* subscriptions; thus, under the terms of the offering memorandum, its purported acceptance of subscriptions in August could not be not effective until the date of the final payment. Before December 31, *all* subscriptions were simply offers to purchase units; on that date they became actual purchases. The sale of all units, therefore, occurred on December 31.
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> . . . .
>
> Because, under the express conditions in the offering memorandum, the sale of all units occurred on December 31, 1986, and because plaintiffs filed this case on December 29, 1989, within three years of that date, defendant's assignments of error concerning the statute of limitations fail. Because the registration with the state expired on December 10, 1986, the sale of all units occurred at a time that they were not registered.

Ainslie I, 926 P.2d at 827 (emphasis added).

By comparison, claims for violations of section 12(a)(1) of the 1933 Securities Act must be brought within one year of their occurrence, but in any event within three years of the first bona fide offer of the security to the investing public. *See* 15 U.S.C. § 77m (1994); *see, e.g.*, Stitt v. Williams, 919 F.2d 516, 521 (9th Cir. 1990) (barring section 12(a)(1) claim because it was filed more than three years after the securities were first offered); Toombs v. Leone, 777 F.2d 465, 468 (9th Cir. 1985) (barring section 12(a)(1) claim because it was filed more than one year after the sale of unregistered securities on the basis of which the plaintiff sued). Equitable tolling may not extend the date on or before which a section 12(a)(1) plaintiff must sue. *See* Gardner v. Investors Diversified Capital, Inc., 805 F. Supp. 874, 878 (D. Colo. 1992); *see also* SEC v. Seaboard Corp., 677 F.2d 1301, 1308 (9th Cir. 1982) (reading the "[i]n no event . . . more than three years" language in section 77m to preclude equitable tolling of section 11 and section 12(a)(2) claims). Thus, the OSL generally affords Oregon plaintiffs a more generous period of time within which to discover and bring suit over the sale of unregistered and nonexempt securities than they are afforded by section 12(a)(1).

141. OR. R. CIV. P. 32(O); *see infra* notes 198-199.

c. Other Defenses to Primary Liability (or Lack Thereof)

In contrast to the OSL's antifraud provisions,[142] neither the purchaser's knowledge that the securities are unregistered nor the seller's lack of knowledge that the securities are unregistered is a defense to liability under section 59.115.[143] Likewise, equitable defenses such as estoppel, laches, waiver, *in pari delicto*, ratification, and unclean hands, which may apply to common law or statutory claims arising out of a defendant's material misrepresentations or omissions regarding a securities transaction, do not apply to claims arising out of a defendant's violation of the registration provisions of the OSL.[144] Therefore, in the absence of a standing or limitations defense, a primary violator will be strictly liable.

d. Additional Defense(s) to Secondary Liability

In addition to the standing and limitations defenses available to those sued for primary violations of the OSL's registration provi-

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142. *See infra* Parts II.C.3.c.i-ii.

143. *See* Hall v. Johnston, 758 F.2d 421, 422 (9th Cir. 1985) (applying Oregon law). *Compare* OR. REV. STAT. § 59.115(1)(b) (1999) (imposing fraud liability on a seller only where the purchaser did not know of the seller's untruth or omission and where the seller, assuming she pleaded the issue, is unable to prove that she did not know, nor in the exercise of reasonable care could have known, of the untruth or omission); *see infra* text accompanying note 155.

144. *See Hall*, 758 F.2d at 423 (applying Oregon law); *see also* Stimmel v. Shearson, Hammill & Co., 411 F. Supp. 345, 347 n.1 (D. Or. 1976) (summarily dispensing with the defendant's equitable defenses to the plaintiffs' claims that they were sold securities by an unregistered salesperson, in violation of section 59.165).

As the Ninth Circuit explained:

> The state of Oregon has an independent interest in requiring disclosure of information that it deems necessary to help purchasers make informed investment decisions. This interest is met by requiring registration of securities, and by excluding from the state those securities that do not satisfy the statutory standards. This interest is wholly separate from the interest of the purchaser in seeing that registration requirements are met. Implying equitable defenses runs counter to Oregon's interest in regulating the information available to prospective securities purchasers in Oregon.
>
> . . . . The state's interest in enforcing securities registration requirements is [also] distinct from its interest in enforcing antifraud provisions. Unlike securities fraud provisions, registration provisions do not require a showing of materially deceitful acts or omissions as a prerequisite to a finding of liability. The state's interest in enforcing securities registration through civil liability is served by strictly requiring sellers to comply with that requirement rather than by scrutinizing the seller's and purchaser's respective conduct.

Hall, 758 F.2d at 423 (citations omitted).

sions,[145] section 59.115(3)—like its federal counterpart, section 15 of the 1933 Securities Act[146]—excuses an indirect seller from liability if she "did not know, and, in the exercise of reasonable care, could not have known, of the existence of [the] facts on which the liability is based."[147] The indirect seller seeking to take advantage of this defense bears the burden of pleading and proving it.[148]

In addition, while not truly a defense, an indirect seller found liable under section 59.115(3) has the right to contribution from any other persons who are jointly and severally liable with the indirect seller[149]—whether they have been so adjudicated or not.

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145. *See supra* Parts II.B.4.a-b.

146. Section 15 provides:

> Every person who, by or through stock ownership, agency, or otherwise, . . . controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o (1994).

147. OR. REV. STAT. § 59.115(3).

According to the Oregon Supreme Court, the drafters of the 1999 version of section 59.115(3)

> took pains to make clear that the relevant knowledge is of "the existence of the facts," not of the unlawfulness of a sale. These provisions may place upon persons besides a seller's employees or agents who materially aid in an unlawful sale of securities a substantial burden to exonerate themselves from liability for a resulting loss; but this legislative choice was deliberate.

Prince v. Brydon, 764 P.2d 1370, 1372 (Or. 1988).

148. *See* Adams v. American W. Sec., 510 P.2d 838, 839 (Or. 1973).

149. OR. REV. STAT. § 59.115(3).

An indirect seller may also be entitled to indemnity:

> Although ORS 59.115(3) specifically provides for contribution among those found jointly and severally liable under that statute, the statute is silent on the question of indemnity. Defendant argues that as a matter of public policy, indemnity should not be allowed under ORS 59.115 because the statute's deterrence function would be impaired if those found liable could shift the entire burden to another. However, in our view, there is no public policy which would prohibit nonculpable directors who have incurred liability under ORS 59.115 from seeking indemnity from those actually responsible for the wrongful issuance of unregistered securities. The deterrence function of the Blue Sky Law is inoperable when the conduct involved is nonculpable, because nonculpable conduct cannot be deterred.

Collins v. Fitzwater, 560 P.2d 1074, 1078 (Or. 1977); *see also* Black & Co. v. Nova-Tech, Inc., 333 F. Supp. 468, 471 (D. Or. 1971) ("[B]y including a right of contribution in ORS 59.115(3), the legislature did not intend to exclude the right of indemnity.").

C. Statutory Liability for Material Misrepresentations or Omissions in the Sale or Purchase of Securities

Irrespective of the exemptions contained in sections 59.025, 59.035, and 59.049,[150] the OSL makes it unlawful, *inter alia*,

> for any person, directly or indirectly, in connection with the purchase or sale of any security or the conduct of a securities business or for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:
>
> (1) To employ any device, scheme or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; [or]
>
> (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person . . . .[151]

While section 59.135 prohibits the foregoing acts or omissions, it does not explicitly afford any private cause of action or remedy.[152] Consequently, an injured buyer may have to look to section 59.115 (liability of sellers and related persons or entities) and an injured

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150. *See* Pratt v. Kross, 555 P.2d 765, 767 (Or. 1976) (holding that the registration exemptions of the OSL do not exempt a security or a transaction from the OSL's anti-fraud provisions); *accord* Chester v. McDaniel, 504 P.2d 726, 728-29 (Or. 1972) (en banc); *see also* Creager v. Berger, 775 P.2d 918, 920 (Or. Ct. App. 1989) (holding that the applicability of the "isolated transaction" registration exemption, OR. REV. STAT. § 59.035(2), was "irrelevant" for purposes of the plaintiff's securities fraud claim).

See *supra* Part II.B.1 for a brief discussion of the exemptions granted by sections 59.025, 59.035, and 59.049.

151. OR. REV. STAT. § 59.135 (1999).

Section 59.135(1)-(3) is similar to SEC rule 10b-5(b), promulgated under section 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. § 78j(b) (1994), and declaring it unlawful for any person

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5(b) (2000). *See generally* Held v. Product Mfg. Co., 592 P.2d 1005, 1007 (Or. 1979) (remarking on the similarity between section 59.135 and Rule 10b-5).

152. *See* Anderson v. Carden, 934 P.2d 562, 565 (Or. Ct. App. 1997).

seller to section 59.127 (liability of purchasers and related persons or entities).[153]

1. Seller's Primary Liability Under Section 59.115(1)(b)

Irrespective of the exemptions contained in sections 59.025, 59.035, and 59.049,[154] section 59.115 imposes liability on those who sell securities by means of (1) an untrue statement of a material fact or (2) an omission of a material fact necessary to make those statements that were made, in light of the circumstances in which they were made, not misleading, (3) unless the seller can prove (a) that she did not know, nor could she have known in the exercise of rea-

153. *See Held*, 592 P.2d at 1007-08 (declining to recognize an implied private cause of action under section 59.135); Nesbit v. McNeil, 896 F.2d 380, 387 (9th Cir. 1990) (noting that section 59.115 "allows recovery of damages and fees by a buyer of securities from a seller who violates [section 59.135]"), *abrogated on other grounds by* Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson, 501 U.S. 350 (1991); Rolex Employees Ret. Trust v. Mentor Graphics Corp., Nos. 90-726-CR (LEAD), 90-931-FR, 1991 WL 45714, at *3 (D. Or. Mar. 26, 1991) ("Under O.R.S. 59.135, it is illegal for any person to defraud another person in connection with the purchase or sale of any security. A private right of action does not exist under this section independently, but rather may only be maintained through O.R.S. 59.115(1)(a).").

Robert McGaughey suggests that the addition, as part of the 1987 OSL amendments, of specific references to "action[s] under . . . ORS 59.135" to the OSL's anti-fraud limitations provisions, *see* OR. REV. STAT. §§ 59.115(6) & 59.127(6) (1999), implicitly recognizes a private right of action under section 59.135. *See* ROBERT J. MCGAUGHEY, OREGON SECURITIES LAW HANDBOOK 121 (1991). The Oregon Court of Appeals, writing several years later, appears to disagree:

> ORS 59.135 . . . establishes that certain conduct is unlawful, specifically as relevant to this case, making untrue statements of material fact or omitting material information in connection with a sale of securities. When the legislature enacted the statute, however, it did not prescribe any consequences of that unlawful conduct; there is no express provision for a civil right of action for damages in ORS 59.135. The civil remedy for violation of the securities laws, including ORS 59.135, was provided in ORS 59.115. . . .

Anderson, 934 P.2d at 565. *But cf.* Granewich v. Harding, 945 P.2d 1067, 1075 n.11 (Or. Ct. App. 1997) (remarking, in dicta, that "individuals can be held liable under ORS 59.135 for aiding and abetting fraud and deceit with respect to the offer or sale of securities"), *rev'd in part on other grounds*, 985 P.2d 788 (Or. 1999). This is not simply a game of semantics. As the *Anderson* court cautioned:

> The relationship between ORS 59.135, which defines prohibited conduct, and ORS 59.115, which provides a civil remedy for that unlawful conduct, bears careful scrutiny, because the two statutes are not identical. Said another way, the civil remedies afforded by ORS 59.115 are not necessarily as broad as the prohibited conduct described in ORS 59.135; some conduct that is prohibited by one statute may not give rise to a damages action under the other.

Anderson, 934 P.2d at 565.

154. *See supra* note 150.

sonable care, of the untruth or omission, or (b) that the buyer actually knew of the untruth or omission before purchasing the securities.[155]

a. Form of Misrepresentation

Silence can be a form of misrepresentation for purposes of section 59.115(1)(b),[156] as can an incomplete statement, where what remains unsaid is material.[157] An opinion may rise to the level of a material misrepresentation if the speaker did not actually hold the

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155. OR. REV. STAT. § 59.115(1)(b); *see, e.g.*, Loewen v. Galligan, 882 P.2d 104, 114-17 (Or. Ct. App. 1994).

Section 59.115(1)(b) parallels section 12(a)(2) of the 1933 Securities Act, codified as amended (by PSLRA) at 15 U.S.C. § 77*l*(a)(2) (Supp. IV 1998). *See* Badger v. Paulson Inv. Co., 803 P.2d 1178, 1182 (Or. 1991) ("ORS 59.115 is an offspring of federal security laws and regulations going back to the 1930s."). Section 12(a)(2), in relevant part, makes liable any person who

> offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

15 U.S.C. § 77*l*(a)(2). The language of section 59.115(1)(b) is also similar to section 59.135(2) of the OSL and to SEC rule 10b-5(b), both discussed above. *See supra* note 151 and accompanying text.

Section 59.115(1)(b) is broader than section 12(a)(2) in two important ways. First, section 59.115(1)(b) does not limit its reach to only those securities sold "by the use of any means or instruments of transportation or communication in interstate commerce or of the mails." Second, section 59.115(1)(b) does not limit its reach to only those securities sold "by means of a prospectus or oral communication."

Section 59.115(1)(b) is, at the same time, narrower than section 12(a)(2) because section 59.115(1)(b) does not hold liable those who merely offer to sell a security. Prior to 1985, the Oregon Securities Law also prohibited fraudulent offers to sell. *See* OR. REV. STAT. §§ 59.115(1) & 59.135 (1981); *see, e.g.*, Everts v. Holtmann, 667 P.2d 1028, 1033 (Or. Ct. App. 1983). However, the statute was subsequently amended to eliminate liability for mere offers. *See* 1985 Or. Laws ch. 349, § 13; *see, e.g.*, Towery v. Lucas, 876 P.2d 814, 818 (Or. Ct. App. 1994) ("Oregon Laws 1985, chapter 349, section 13, amended the statute to exclude from its coverage mere offers to sell securities . . . ."); *see also* Newman v. Comprehensive Care Corp., 794 F. Supp. 1513, 1526 (D. Or. 1992) ("While Oregon securities law should be construed analogously to . . . section 12 of the 1933 Act, the language of O.R.S. 59.115(1)(b) differs significantly from § 12(2). Unlike section 12, O.R.S. 59.115 refers only to sellers, not also to offerors. Therefore, O.R.S. 59.115 only refers to persons who pass title.") (citations omitted)).

156. *See* Sano v. Bjelland, 796 P.2d 1240, 1242 (Or. Ct. App. 1990).

157. *See* Myer v. E.M. Adams & Co., 511 P.2d 841, 844 (Or. 1973) (en banc).

opinion at the time she expressed it or if she expressed it knowing that it was misleadingly incomplete.[158]

b. Materiality

For purposes of the OSL, an omission or misrepresentation is actionable only if it is material.[159] An omission or misrepresentation is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to buy or sell, or how to vote, the securities at issue.[160]

For example, in *Foelker v. Kwake*,[161] the Oregon Supreme Court upheld the trial court's determination that misrepresentations regarding the value of inventory and accounts receivable and the ownership of inventory were material to the plaintiff, who was induced to invest money in exchange for shares of both an existing company and a planned start-up.[162] In *Loewen v. Galligan*,[163] the

158. *See Loewen*, 882 P.2d at 120-21 (adopting the standard for the materiality of an opinion set forth in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1094-95 (1991)).

159. *See* OR. REV. STAT. § 59.115(1)(b) (1999); *Loewen*, 882 P.2d at 114-17.

Materiality is also a requisite of liability under section 12(a)(2) of the 1933 Securities Act, *see supra* note 155, and section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 promulgated thereunder, *see supra* note 151, as well as Oregon common law fraud, *see infra* note 166. Materiality is not, *per se*, an element of negligent misrepresentation; however, the plaintiff must suffer an injury due to her justifiable reliance on the defendant's misrepresentation. *See generally* RESTATEMENT (SECOND) OF TORTS § 552(1) (1977). Oregon courts have been reluctant to recognize the tort of negligent misrepresentation, and will permit such a claim only where the plaintiff can establish that she had a "special relationship" with the defendant such that the defendant owed her a duty "beyond the common law duty to exercise reasonable care to prevent foreseeable harm." Conway v. Pac. Univ., 924 P.2d 818, 822 (Or. 1996).

160. *Everts*, 667 P.2d at 1032; *accord Loewen*, 882 P.2d at 119.

The standard for materiality under section 12(a)(2) and section 10(b)/rule 10b-5 is the same as under the OSL. *See, e.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Azrielli v. Cohen Law Offices, 21 F.3d 512, 518 (2d Cir. 1994); Grossman v. Novell, Inc., 120 F.3d 1112, 1119 (10th Cir. 1997) (all holding that a fact may be considered material if there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell shares). Indeed, the OSL's materiality standard derives from the comparable federal standard. *See Everts*, 667 P.2d at 1032 (quoting *TSC Industries*); *see supra* note 158. The materiality standard for common law fraud is somewhat different. For purposes of Oregon common law fraud, "[a] misrepresentation is material where it would be likely to affect the conduct of a reasonable man with reference to a transaction with another person." Millikin v. Green, 583 P.2d 548, 550 (Or. 1978); *accord* Myers v. MHI Invs., Inc., 606 P.2d 652, 656 (Or. Ct. App. 1980).

161. 568 P.2d 1369 (Or. 1977) (en banc).

162. *See id.* at 1373.

163. 882 P.2d 104 (Or. Ct. App. 1974).

court found that representations made in proxy materials about the board's assessment of the fairness of a proposed merger were material to the plaintiffs, who were being asked to vote their shares in favor of the merger.[164]

Materiality is a mixed question of law and fact that can be answered as a matter of law only when reasonable persons could not differ about the importance of the misrepresentations or omissions.[165]

c. No Reliance Required

Unlike common law fraud,[166] negligent misrepresentation,[167] and rule 10b-5,[168] section 59.115(1)(b) does not require that the

164. *Id.* at 120.

165. *See id.* at 119; Towery v. Lucas, 876 P.2d 814, 818 (Or. Ct. App. 1994); *Everts*, 667 P.2d at 1032-33.

166. To recover on a claim of common law fraud, an Oregon plaintiff must prove that (1) the defendant made a representation or omission (2) of a material fact or opinion (3) that was false, or that had the effect of making those statements which were made false; (4) the defendant either knew the representation to be false at the time or made it without knowledge of its truthfulness; (5) the defendant intended the plaintiff to act upon the representation; (6) the plaintiff was ignorant of the falsity of the representation; (7) the plaintiff relied upon the representation's truthfulness; (8) the plaintiff was entitled to so rely; and (9) the plaintiff suffered some injury proximately caused by the plaintiff's rightful reliance on the defendant's misrepresentation (or omission). *See, e.g.*, Webb v. Clark, 546 P.2d 1078, 1080 (Or. 1976); Metal Tech Corp. v. Metal Teckniques Co., 703 P.2d 237, 244 (Or. Ct. App. 1985); Myers v. MHI Invs., Inc., 606 P.2d 652, 655 (Or. Ct. App. 1980).

167. *See supra* note 159; *see, e.g.*, Onita Pac. Corp. v. Trustees of Bronson, 843 P.2d 890, 896 (Or. 1992); Nofziger v. Kentucky Cent. Life Ins. Co., 758 P.2d 348, 352 (Or. Ct. App. 1988).

168. The elements of a cause of action under section 10(b) of the 1934 Act and rule 10b-5 are: (1) a misrepresentation or omission (2) of a material fact, (3) made knowingly or without knowledge of the truth thereof (4) by a person who owes the plaintiff a duty to disclose, (5) on which the plaintiff relied, (6) resulting in damage to the plaintiff. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 499-50 (1976); Paracor Fin., Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996). However, where a plaintiff alleges a fraudulent omission, "positive proof of reliance is not a prerequisite to recovery." Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972) ("All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of [this] decision."); *accord* Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 964 (9th Cir. 1990). "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens*, 406 U.S. at 153-54.

For a detailed discussion of the elements of and principal defenses to liability under section 10(b) of the 1934 Securities Exchange Act and rule 10b-5 promulgated thereunder, which is the principal avenue available to private litigants under federal securities law, see Keith A. Rowley, *Cause of Action for Securities Fraud Under Section 10(b) of the 1934 Securities Exchange Act and/or Rule 10b-5*, 9 CAUSES OF ACTION 2D 271 (1997).

buyer prove reliance on the seller's misrepresentation or omission.[169] That is to say, section 59.115(1)(b) does not require the plaintiff to show that she would not have purchased the stock if she had known of the alleged adverse material facts.

d. No Scienter Required

Section 59.115(1)(b) does not require the buyer to prove scienter—that is, prove that the seller knew the representation was false or made it without regard to its truth or falsity[170]—as is required to prove common law fraud[171] or a rule 10b-5 violation.[172] Rather, as is the case with section 12(a)(2),[173] the seller's lack of scienter is an affirmative defense to a section 59.115(1)(b) claim.[174]

A plaintiff suing under section 12(a)(2) of the 1933 Act need only prove (1) an offer or sale of a security, (2) by the use of any means of interstate commerce, (3) through a prospectus or oral communication (4) which includes an untrue statement of material fact or omits to state a material fact, (5) that plaintiff did not know to be false. *See* 15 U.S.C. § 77*l*(a)(2) (Supp. IV 1998); Cook v. Avien, Inc., 573 F.2d 685, 693 (1st Cir. 1978); Gridley v. Sayre & Fisher Co., 409 F. Supp. 1266, 1272-73 (D.S.D. 1976); Thiele v. Shields, 131 F. Supp. 416, 419 (S.D.N.Y. 1955). Reliance is not an element of a section 12(a)(2) claim. *See* Metromedia Co. v. Fugazy, 983 F.2d 350, 361 (2d Cir. 1992); Sanders v. John Nuveen & Co., 619 F.2d 1222, 1225 (7th Cir. 1980). Indeed, some courts have gone so far as to hold that a section 12(a)(2) plaintiff need not have *read* the allegedly misleading prospectus prior to purchasing the securities in question, *see* Caviness v. DeRand Resources Corp., 983 F.2d 1295, 1305 (4th Cir. 1993), or, indeed, have *received* the prospectus prior to purchase, *see In re* TCW/DW North Am. Gov't Income Trust Sec. Litig., 941 F. Supp. 326, 337 (S.D.N.Y. 1996); Klein v. Computer Devices, Inc., 591 F. Supp. 270, 277 (S.D.N.Y. 1984).

For a detailed discussion of the elements of and principal defenses to liability under section 12(a)(2), see Keith A. Rowley, *Cause of Action for Securities Fraud Under Section 12(2) of the 1933 Securities Act*, 11 CAUSES OF ACTION 2D 1 (1998).

169. *See Everts*, 667 P.2d at 1033.

170. *See* Fakhrdai v. Mason, 696 P.2d 1164, 1167 & 1167 n.2 (Or. Ct. App. 1985).

171. *See supra* note 166. Common law negligent misrepresentation does not require proof of scienter because, if scienter were present, the defendant's actions would be fraudulent, not negligent.

172. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); *see, e.g.*, Vucinich v. Paine, Webber, Jackson, & Curtis, Inc., 739 F.2d 1434, 1435 (9th Cir. 1984); Pegasus Fund, Inc. v. Laraneta, 617 F.2d 1335, 1341 (9th Cir. 1980). *See generally supra* note 168.

For an excellent discussion of scienter under federal securities law, see William H. Kuehnle, Commentary, *On Scienter, Knowledge, and Recklessness Under the Federal Securities Law*, 34 HOUS. L. REV. 121 (1997).

173. *See supra* note 168.

174. *See infra* notes 204-205 and accompanying text.

e. No "Duty" Required

Furthermore, section 59.115(1)(b) does not require that the seller owe the purchaser any duty to disclose in order for an omission of material fact to be actionable, but rather implies such a duty in every securities offering or sale.[175]

2. Purchaser's Primary Liability Under Section 59.127(1)(b)

Irrespective of the exemptions contained in sections 59.025, 59.035, and 59.049,[176] section 59.127 imposes liability on those who purchase securities (1) by means of an untrue statement of material fact or (2) an omission of a material fact necessary to make those statements that were made, in light of the circumstances in which they were made, not misleading, (3) unless the purchaser can prove that, before purchasing the securities, (a) she did not know, nor could she have known in the exercise of reasonable care, of the untruth or omission, or (b) the seller actually knew of the untruth or omission.[177]

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175. By contrast,

> Rule 10b-5 is violated by nondisclosure only when there is a duty to disclose. The parties to an impersonal market transaction owe no duty of disclosure to one another absent a fiduciary or agency relationship, prior dealings, or circumstances such that one party has placed trust and confidence in the other. A number of factors are used to determine whether a party has a duty to disclose: (1) the relationship of the parties, (2) their relative access to information, (3) the benefit that the defendant derives from the relationship, (4) the defendant's awareness that the plaintiff was relying upon the relationship in making his investment decision, and (5) the defendant's activity in initiating the transaction.

Paracor Fin., Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996) (quotations and citations omitted). Likewise, Oregon courts will not recognize a claim for negligent misrepresentation absent a special relationship between the plaintiff and defendant giving rise to a duty on the defendant's part not to make any misrepresentations on which the plaintiff could justifiably rely. *See supra* note 159.

176. *See supra* note 150.

177. OR. REV. STAT. § 59.127(1)(b) (1999); *see, e.g.*, Loewen v. Galligan, 882 P.2d 104, 119-22 (Or. Ct. App. 1994).

Liability for the wrongful acts or omissions of buyers of securities is a fairly unique feature of current Oregon law. Neither the 1933 Securities Act nor the 1934 Securities Exchange Act explicitly address fraud by a purchaser, although some federal courts have implied liabilities of buyers under both section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1994), and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2000). *See, e.g.*, American Gen. Ins. Co. v. Equitable Gen. Corp., 493 F. Supp. 721, 744-47 (E.D. Va. 1980); Rude v. Cambell Square, Inc., 411 F. Supp. 1040, 1049-50 (D.S.D. 1976); *see also* Schatz v. Rosenberg, 943 F.2d 485, 491-92 (4th Cir. 1991) (refusing to hold buyer's attorneys liable for buyer's alleged primary violations of section 12(a)(2) of the 1933 Act and section 10(b) of the 1934 Act).

a. "Purchase" of Securities

While the OSL defines "sale,"[178] it does not define "purchase." Nor have Oregon courts been called on with any frequency to decide whether a particular transaction constituted a "purchase" of securities.[179] Lacking any clear statutory or judicial guidance, it is logical to assume that "purchase" and "sale" are mirror images—so that any transaction constituting a sale from the seller's standpoint would, likewise, constitute a purchase from the purchaser's standpoint.[180]

b. Materiality

For purposes of section 59.127, an omission or misrepresentation is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to sell the securities at issue.[181] Materiality is a mixed question of law and fact that can be answered as a matter of law only when reasonable persons could not differ about the importance of the misrepresentation or omission.[182]

Likewise, prior to the 1975 amendments to the Oregon Securities Law, 1975 Or. Laws ch. 300, § 2, Oregon law did not impose statutory liability on buyers of securities. *See* Held v. Products Mfg. Co., 592 P.2d 1005, 1007-08 (Or. 1979). *See generally* Wendell M. Basye, *A Glimpse of Oregon's Blue Sky Legislation: The Revision of 1967*, 47 OR. L. REV. 403, 411 n.49 (1967) ("Although the 1967 act broadened the basic anti-fraud provisions to include both purchases and sales, OR. REV. STAT. § 59.135 (1967), it did not expressly provide for a remedy in the civil liabilities section of the law [*id.* § 59.115] in the case of a defrauded seller.").

178. OR. REV. STAT. § 59.015(17)(a) (1999); *see supra* notes 81-88 and accompanying text (discussing the contours of "sale").

179. *See supra* notes 79-81 and accompanying text.

180. *Cf.* TEX. REV. CIV. STAT. ANN. art. 581-33 cmt. at 75 (West Supp. 2001) (discussing Texas's analogue to section 59.127 and advising that the term "buys" for purposes of Texas's buyer's liability provision "is to be construed like the corresponding phrase for sales"). *See generally* Anderson v. Carden, 934 P.2d 562, 571 n.5 (Or. Ct. App. 1997) ("ORS 59.127 authorizes sellers to maintain an action against purchasers in the same manner and for the same reasons as ORS 59.115 permits purchasers to maintain an action against the seller. ORS 59.127(1)(b) is the counterpart of ORS 59.115(1)(b).").

181. *See Loewen*, 882 P.2d at 119; *see also* Bebee v. Pacific Realty Trust, 578 F. Supp. 1128, 1133 (D. Or. 1984) (discussing Oregon law); *supra* notes 158-160 and accompanying text (discussing materiality in the context of seller's liability under section 59.115).

182. *Loewen*, 882 P.2d at 119.

c. No Reliance Required

Unlike common law fraud and negligent misrepresentation,[183] section 59.127(1)(b) does not require the seller to prove she relied on the purchaser's misrepresentation or omission.[184] That is to say, section 59.127(1)(b) does not require the plaintiff to show she would not have sold the stock if she had known of the alleged adverse material facts.

d. No Scienter Required

Section 59.127(1)(b) does not require the seller to prove the purchaser knew the representation was false or made it without regard to its truth or falsity[185]—as does a common law fraud action.[186] Rather, as is the case with a section 59.115(1)(b) claim,[187] the purchaser's lack of scienter is an affirmative defense to a section 59.127(1)(b) claim.[188]

e. No "Duty" Required

Furthermore, like section 59.115(1)(b), section 59.127(1)(b) does not require that the purchaser owe the seller any duty to disclose in order for an omission of material fact by the purchaser to be actionable.[189] Rather, section 59.127(1)(b) implies such a duty in every securities purchase.

3. Defenses to Primary Securities Fraud Liability[190]

a. Standing

Section 59.115(1)(b)'s protection, like that of section

183. *See supra* notes 166-167.

184. *See* Everts v. Holtmann, 667 P.2d 1028, 1033 (Or. Ct. App. 1983) (discussing the parallel provision of section 59.115).

185. *See* Fakhrdai v. Mason, 696 P.2d 1164, 1167 & 1167 n.2 (Or. Ct. App. 1985).

186. *See supra* note 171.

187. *See infra* notes 204-205 and accompanying text.

188. *See infra* Part II.C.3.c.ii.

189. *See supra* text accompanying note 175.

190. In addition to the statutory defenses discussed here, one or more common law affirmative defenses might be available to a section 59.115(1)(b) or section 59.127(1)(b) defendant. *See generally* Charles G. Stinner, Note, *Estoppel and In Pari Delicto Defenses to Civil Blue Sky Law Actions*, 73 CORNELL L. REV. 448 (1988) (discussing the viability of estoppel and *in pari delicto* defenses under state blue sky laws).

59.115(1)(a)[191] and section 12(a)(2)[192] extends only to purchasers. Persons who did not buy the security thus lack standing to sue the person who sold it.[193] Likewise, section 59.127(1)(b)'s protection extends only to sellers. Therefore, persons who did not sell the security should lack standing to sue the person who purchased it.[194]

b. Limitations

A plaintiff must bring a section 59.115(1)(b) or section 59.127(1)(b) claim within three years after the plaintiff purchased or sold, respectively, the securities, or within two years of the date on which the plaintiff knew, or should have known through the exercise of reasonable diligence, of the existence of her claim, whichever period expires last.[195]

Whether a plaintiff should have known of the defendant's alleged fraud "depends on a two-step analysis. First, it must appear

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191. *See supra* Part II.B.4.a.

192. *See, e.g.*, Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 517 (5th Cir. 1985) (holding that nonpurchasers lack standing to sue under section 12(a)(2)).

193. *See supra* note 137.

On the other hand, persons who did buy the security have standing whether or not they were the intended recipients of the seller's misrepresentation or omission. *See* Fakhrdai v. Mason, 696 P.2d 1164, 1167 (Or. Ct. App. 1985). This is not true at common law. *See* Metal Tech Corp. v. Metal Teckniques Co., 703 P.2d 237, 245 (Or. Ct. App. 1985) ("In order for defendants other than Ford to recover for the alleged misrepresentations, they must show that T. Prentice made the representations to Ford with the intention that they should be communicated to and acted on by the [other plaintiffs]."); *see also* Karsun v. Kelly, 482 P.2d 533, 536 (Or. 1971) ("[I]n an action for fraud evidence of misrepresentations made by defendant to other persons is not ordinarily admissible as evidence that misrepresentations were made by defendant to plaintiff.").

194. OR. REV. STAT. § 59.127(1) (1999) ("A person who purchases a security is liable . . . to the person selling the security . . . .").

195. OR. REV. STAT. §§ 59.115(6) & 59.127(6).

By comparison, claims under section 12(a)(2) of the 1933 Securities Act, section 10(b) of the 1934 Securities Exchange Act, or rule 10b-5 must be brought no more than three years after the cause of action accrued, but in any case within one year of the date on which plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the existence of her claim. *See* 15 U.S.C. § 77m (1994) (limitations for section 12(a)(2) claim); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991) (limitations for section 10(b) or rule 10b-5 claim).

The statute of limitations for common law fraud claims runs for two years from the date the plaintiff discovered or should have discovered the fraud. *See* OR. REV. STAT. § 12.110(1) (1999); *see, e.g.*, Loewen v. Galligan, 882 P.2d 104, 117 (Or. Ct. App. 1994). Claims of negligent misrepresentation are also subject to a two-year limitations period, with limitations tolled until the plaintiff discovers or should have discovered the misrepresentation. *See* OR. REV. STAT. § 12.110(1); *see, e.g.*, Widing v. Schwabe, Williamson & Wyatt, 961 P.2d 889, 895 (Or. Ct. App. 1998).

that plaintiffs had sufficient knowledge to call for an inquiry. Second, if plaintiffs had that knowledge, it must also appear that a reasonably diligent inquiry would disclose the securities violation."[196] The question of when plaintiffs discovered or, through reasonably diligent inquiry should have discovered, facts sufficient to trigger the two-year "discovery" limitations period "is normally a question for the jury unless only one conclusion can reasonably be drawn from the evidence."[197]

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196. *Loewen*, 882 P.2d at 115 (citing Mathies v. Hoeck, 588 P.2d 1 (Or. 1978)).

Under parallel federal law, the plaintiff need not have actual knowledge of the defendant's fraud for limitations to begin to run. *See* Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 517 (5th Cir. 1985). Rather, limitations will begin to run "with the disclosure of facts that would have caused a reasonable person to suspect the possibility of a misrepresentation or misleading omission." Berry v. Valence Tech., Inc., 175 F.3d 699, 703 (9th Cir. 1999) (quotation omitted). A plaintiff who is aware of facts that would require a reasonable person to inquire further has an affirmative duty to make diligent inquiry to discover fraud. *See, e.g.*, Jensen v. Snellings, 841 F.2d 600, 607 (5th Cir. 1988); Corwin v. Marney, Orton Invs., 843 F.2d 194, 197 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988).

> Courts apply an objective standard to determine whether a plaintiff has satisfied his duty to exercise reasonable diligence to discover fraud. Under this standard, a plaintiff must diligently pursue discovery of the claim. A potential plaintiff is not permitted a "leisurely discovery of the full details of an alleged scheme," nor are investors "free to ignore 'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions in his securities transaction." An investor who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation and is charged with the knowledge of all facts such an investigation would have disclosed.

Reed v. Prudential Sec., Inc., 875 F. Supp. 1285, 1289 (S.D. Tex. 1995) (quoting *Jensen*, 841 F.2d at 607) (citations omitted), *aff'd*, 87 F.3d 1311 (5th Cir. 1996). For example, numerous courts have held that a sharp drop in the price of stock triggers an investor's duty to make diligent inquiry to discover the existence of possible fraud. *See id.* (collecting cases).

The discovery rule for common law fraud and negligent misrepresentation

> does not contemplate that a plaintiff's actual or inquiry knowledge must extend to all of the particulars of his or her ultimate injury. Rather, the rule delays the running of the limitation period only until the plaintiff knows or should know that some harm has been incurred and that a claim exists. The statute is not delayed until the plaintiff is or should be aware of the full extent of his or her damage or of all the details relevant to the claim.

Widing, 961 P.2d at 894-95 (citing Duyck v. Tualatin Valley Irrigation Dist., 742 P.2d 1176 (1987)).

197. *Loewen*, 882 P.2d at 115. *See generally* Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc., 908 P.2d 300, 308 (Or. 1995) (en banc) ("The protection afforded by Oregon's securities laws includes the right to a jury trial."), *modified on other grounds on rehearing*, 932 P.2d 1141 (Or. 1997).

In *Loewen*,

> AmNet sent its shareholders of record quarterly and annual reports and shareholder communications. It sent persons on a special mailing list, including

Limitations may be tolled during the pendency of a class action filed prior to the expiration of the primary limitations period.[198] Once the class action terminates, a plaintiff must file suit within whatever time remained against the original limitations period when the class action commenced.[199]

c. Other Statutory Defenses

Unlike a section 59.115(1)(a) defendant, whose only statutory defenses are standing[200] and limitations,[201] section 59.115(1)(b) and

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> the Loewens, copies of AmNet press releases and SEC filings. By March, 1987, plaintiffs' investments in AmNet had plummeted by almost 70 percent. On June 9, 1987, the business section of The Oregonian published a story about the Guenther lawsuit. It was Loewen's practice to read that part of The Oregonian. Later that month, Galligan sent plaintiffs a letter describing the allegations in the Guenther lawsuit. In July, 1987, AmNet sent proxy materials to plaintiffs that more fully described the claims in Guenther. It was Loewen's practice to review material that was received from AmNet. In August, 1987, he attended AmNet's annual shareholders' meeting. At that meeting, a confrontation occurred between Galligan, Guenther and other dissatisfied shareholders over the 1984 transactions.
>
> In November, 1987, [plaintiff] Loskot received and responded to an advertisement from a shareholder group called "The Committee to Restore Stockholder Value to American Network, Inc." It discussed the lawsuits that were pending against AmNet, its officers and directors and PTI. Plaintiff Altorfer received and read AmNet press releases. No later than February, 1988, Leland and Elvira Loewen had received and discussed a press release that explained the allegations in the Guenther and Numrich lawsuits.
>
> After February, 1988, AmNet's losses continued until it merged with ITT in May, 1988. The proxy statement for that merger described in detail the Guenther and Numrich lawsuits. Loewen testified that he reviewed that statement. In June, 1988, Loewen attended a settlement conference in the Numrich and Guenther lawsuits. By August 2, 1988, the date that the class action in Guenther was decertified, plaintiffs no longer owned AmNet stock. They had lost more than 90 percent of their investments in AmNet. We conclude that by that time, at the latest, plaintiffs were or should have been aware of other shareholder lawsuits that asserted claims similar to those in this action.
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> . . . .
>
> The only conclusion that reasonably can be drawn from the evidence in the summary judgment record is that plaintiffs discovered or should have discovered, through reasonably diligent inquiry, the facts on which this action is based no later than the August 2, 1988. Therefore, plaintiffs had two years from August 3, 1988, to file their claim against AmNet.

Id. at 116 (footnote omitted). Because the plaintiffs did not, in fact, bring suit against AmNet until October 17, 1990, the court of appeals affirmed the trial court's summary judgment dismissing the plaintiff's claims against AmNet. *See id.*

198. OR. R. CIV. P. 32(O); *see, e.g.*, *Loewen*, 882 P.2d at 115.

199. *See Loewen*, 882 P.2d at 115.

200. *See supra* Part II.B.4.a.

59.127(1)(b) defendants have two additional statutory defenses.

i. Plaintiff's Actual Knowledge

A section 59.115(1)(b) or 59.127(1)(b) defendant may avoid liability if she can prove that the plaintiff actually knew of the material falsehood or omission.[202] The burden is on the defendant to prove the plaintiff's actual knowledge, rather than on the plaintiff to prove his own lack of knowledge or sufficient diligence in seeking the truthfulness of the defendant's misrepresentation or omission. The OSL imposes no duty of inquiry on the plaintiff.[203]

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201. *See supra* Part II.B.4.b.

202. *See* OR. REV. STAT. §§ 59.115(1)(b) & 59.127(1)(b) (1999).

A section 12(a)(2) plaintiff who actually knows of the defendant's alleged fraud may be precluded from recovering damages allegedly caused by that fraud. *See* 15 U.S.C. § 77*l*(a)(2); Mayer v. Oil Field Sys. Corp., 803 F.2d 749, 755 (2d Cir. 1986); Haralson v. E.F. Hutton Grp., Inc., 919 F.2d 1014, 1032 (5th Cir. 1990); *accord* Wright v. Nat'l Warranty Co., 953 F.2d 256, 262 (6th Cir. 1992); *In re* TCW/DW N. Am. Gov't Income Trust Sec. Litig., 941 F. Supp. 326, 337 (S.D.N.Y. 1996). The burden of pleading and proving her lack of actual knowledge rests on the section 12(a)(2) plaintiff. *See, e.g.*, Junker v. Crory, 650 F.2d 1349, 1359 (5th Cir. 1981); Gilbert v. Nixon, 429 F.2d 348, 356 (10th Cir. 1970); *In re* Gap Stores Sec. Litig., 79 F.R.D. 283, 306 (N.D. Cal. 1978). It is less clear whether the plaintiff's actual knowledge of the defendant's fraud precludes her from recovering under section 10(b) and rule 10b-5. *Compare, e.g.*, Ray v. Karris, 780 F.2d 636, 643 (7th Cir. 1985) (holding that plaintiffs failed to maintain derivative action under rule 10b-5 where they knew "at least the essential facts" of the defendants' fraudulent scheme before the scheme was consummated); Cent. Microfilm Serv. Corp. v. Basic/Four Corp., 688 F.2d 1206, 1219 (8th Cir. 1982); Horowitz v. Pownall, 105 F.R.D. 615, 621 (D. Md. 1985) ("Simple logic dictates that actual knowledge of the fact allegedly omitted defeats a fraud claim based upon that omission."), *aff'd*, 800 F.2d 386 (4th Cir. 1986) *with, e.g.*, Travis v. Anthes Imperial Ltd., 473 F.2d 515, 521 (8th Cir. 1973) (finding that the fact that the sale of securities took place when plaintiffs were aware of all facts, including defendants' misrepresentations, was not fatal to plaintiffs' section 10(b) claim where defendants' misrepresentations allegedly induced plaintiffs to retain their stock until, by reason of de facto merger, defendants controlled the relevant market and could dictate the price of their stock); Kohn v. Am. Metal Climax, Inc., 458 F.2d 255, 269 (3d Cir. 1972) ("[I]t is [not] a defense to a finding of material violations of 10b-5 to say that some stockholders 'discovered' the misrepresentations . . . and thus were not misled . . . ."); Stewart v. Bennett, 359 F. Supp. 878, 881 n.9 (D. Mass.) (holding that section 10(b) affords no defense on the ground of either plaintiffs' knowledge), *supplemented on other grounds*, 362 F. Supp. 605 (D. Mass. 1973).

The plaintiff's ignorance of the falsity of the defendant's misrepresentation is an element of common law fraud. *See* Webb v. Clark, 546 P.2d 1078, 1080 (Or. 1976); Metal Tech Corp. v. Metal Teckniques Co., 703 P.2d 237, 244 (Or. Ct. App. 1985); Myers v. MHI Invs., Inc., 606 P.2d 652, 655 (Or. Ct. App. 1980). Because it is an element of the claim, the plaintiff bears the burden of pleading and proving her lack of knowledge.

203. *See* Towery v. Lucas, 876 P.2d 814, 819 (Or. Ct. App. 1994) ("ORS 59.115(1)(b) imposes an obligation of inquiry on defendants who seek to avoid liability for their untrue statements. The statute imposes no such obligation in buyers who were induced to purchase securities on the basis of those untruths."). Similarly, section 12(a)(2) imposes

ii. Defendant's Lack of Knowledge

Sections 59.115(1)(b) and 59.127(1)(b) excuse a defendant from liability for a material misrepresentation or omission if she can show that the defendant did not, and could not by the exercise of reasonable care, know of the untruth or omission.[204] The burden is on the defendant to prove her own reasonable diligence and lack of

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no duty of inquiry on the plaintiff. *See Wright*, 953 F.2d at 262.

> Indeed, a purchaser who is actually ignorant that a seller's representation is inaccurate or incomplete may recover even though the full truth is apparent from materials in her possession. *Casella v. Webb*, 883 F.2d 805, 809 (9th Cir. 1989). The concept of a plaintiff's constructive knowledge has no place in section 12(2) actions.

Haralson, 919 F.2d at 1032 n.10.

Authorities are split on the availability of a due diligence defense to liability under section 10(b) and rule 10b-5. *Compare, e.g.*, Edwards & Hanly v. Wells Fargo Sec. Clearance Corp., 602 F.2d 478, 485-86 (2d Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); Straub v. Vaisman & Co. Inc., 540 F.2d 591, 597-98 (3d Cir. 1976); Warren v. Reserve Fund, Inc., 728 F.2d 741, 747 (5th Cir. 1984); Weir v. Merrill Lynch Pierce Fenner & Smith, Inc., 586 F. Supp. 63, 65 (S.D. Fla. 1984) (all recognizing some form of "due diligence" defense) *with, e.g.*, Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1048 (7th Cir. 1977); Holdsworth v. Strong, 545 F.2d 687, 694 (10th Cir. 1976) (both holding that the plaintiff's diligence is irrelevant and/or that there is no "due diligence" defense). Once the defendant raises the plaintiff's diligence as a defense to section 10(b)/rule 10b-5 liability, the plaintiff bears the burden of negating her own recklessness. *See, e.g.*, Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1015-16 (2d Cir. 1989). Mere negligence on the plaintiff's part will not defeat the defendant's liability. *See* Citizens & Southern Securities, 733 F. Supp. 655, 666 (S.D.N.Y. 1990). In order to defeat a due diligence defense, the plaintiff need only prove that she acted "reasonably" in the underlying transaction. *See Straub*, 540 F.2d at 598.

204. *See* OR. REV. STAT. §§ 59.115(1)(b) & 59.127(1)(b) (1999); *see, e.g., Towery*, 876 P.2d at 819. Because the defendant's lack of scienter is an affirmative defense, "evidence of false statements by the defendant to other persons may be admissible on that issue." Karsun v. Kelly, 482 P.2d 533, 536 (Or. 1971) (en banc). However, if the defendant elects not to plead the affirmative defense of lack of scienter, the plaintiff may not present evidence of the defendant's false statements to others. *See id.* at 536-37.

Section 12(a)(2) excuses from liability any defendant who "sustain[s] the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." 15 U.S.C. § 77*l*(a)(2) (Supp. IV 1998); *see, e.g.*, Ambrosino v. Rodman & Renshaw, Inc., 972 F.2d 776, 787-88 (7th Cir. 1992); Alton Box Board Co. v. Goldman, Sachs & Co., 560 F.2d 916, 918 (8th Cir. 1977). A section 10(b)/rule 10b-5 defendant can avoid liability by proving, by a preponderance of the evidence, that any misrepresentation or omission he made was not made knowingly, intentionally, with the intent to defraud, or with reckless disregard for its truth or falsity. *See, e.g.*, *In re* Worlds of Wonder Sec. Litig., 814 F. Supp. 850, 870 (N.D. Cal. 1993), *aff'd in part, rev'd in part on other grounds*, 35 F.3d 1407 (9th Cir. 1994), *cert. denied*, 516 U.S. 868, *and cert. denied*, 516 U.S. 909 (1995); Koehler v. Pulvers, 614 F. Supp. 829, 848 (S.D. Cal. 1985); Pachter v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 444 F. Supp. 417, 422 (E.D.N.Y. 1978), *aff'd*, 594 F.2d 852 (2d Cir. 1978).

actual knowledge, rather than on the plaintiff to prove the defendant's actual knowledge or lack of diligence.[205]

4. Secondary Liability for Securities Fraud

Both sections 59.115 and 59.127 hold certain collateral participants jointly and severally liable for a seller's or purchaser's, respectively, material misrepresentations or omissions.[206] As a general rule, a collateral participant may be held liable under one of these provisions only if the plaintiff has secured a finding of liability against a primary violator in the same action or a related action.[207]

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205. *See* Wicks v. O'Connell, 748 P.2d 551, 555 (Or. Ct. App. 1988); Fakhrdai v. Mason, 696 P.2d 1164, 1167 & 1167 n.2 (Or. Ct. App. 1985).

206. OR. REV. STAT. §§ 59.115(3) & 59.127(3).

207. *See* Metal Tech Corp. v. Metal Teckniques Co. Inc., 703 P.2d 237, 242-44 (Or. Ct. App. 1985) (conditioning the collateral participant's liability under section 59.115(3) on the primary violator being held liable under section 59.115(1)(b)): *accord* Rolex Employees Retirement Trust v. Mentor Graphics Corp., Nos. 90-726-CRT (LEAD), 90-931 FR, 1991 WL 45714, at *4 (D. Or. 1991).

This is an aberrant rule. Conceptually, "joint and several" liability implies that one may sue *any* jointly and severally liable defendant for the wrongful acts of *all* jointly and severally liable defendants. *See, e.g.*, Kowaleski v. Kowaleski, 361 P.2d 64, 66 (Or. 1961) ("The proposition that unless the servant is liable the master cannot be liable is an over generalization and inaccurate statement of the law . . . . It means merely that if the principal is sought to be held liable on the theory of respondeat superior he is not answerable in damages unless the agent was negligent . . . ."); Wiebe v. Seely, 335 P.2d 379, 390 (Or. 1959) ("[W]here liability of a principal for the tort of his agent is charged on the theory of respondeat superior, . . . it is not necessary to join the agent at all. . . . Liability of the principal . . . does not necessarily depend upon a judgment against the agent, but upon the fact of the agent's negligence. . . . [P]roof of that fact may be sufficient to establish the liability of the principal where the agent is not made a party, though he might have been . . . ."). Practically, most other jurisdictions permit a plaintiff to sue a jointly and severally liable collateral participant without also suing the jointly and severally liable primary violator. *See, e.g.*, SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1170 n.47 (D.C. Cir. 1978) (reciting that, in an action against a control person, "the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint"); Kemmerer v. Weaver, 445 F.2d 76, 78-79 (7th Cir. 1971) (holding that an action against controlling persons may continue despite the dismissal of suit against the primary violator); Keys v. Wolfe, 540 F. Supp. 1054, 1062 (N.D. Tex. 1982) ("Nothing in the language of section 20(a) compels the presence of the controlled person whose misdeeds are sought to be attributed to the defendants charged to be controlling persons, and nothing in familiar and conceptually related attribution principles such as conspiracy membership, agency, or aider and abettor, demands a visiting of actual liability upon an active wrongdoer as a condition to an attribution of that liability."), *rev'd on other grounds*, 709 F.2d 413 (5th Cir. 1983); *see also* Ernest L. Folk, III, *Civil Liabilities Under the Federal Securities Acts: The* BarChris *Case (Part II)*, 55 VA. L. REV. 199, 217-18 (1969) (analogizing control person liability under the 1933 Act to the common law of master and servant and pointing out that, at common law, "[a] master answers vicariously for a servant's wrong, not for his adjudicated liability").

a. Control Person Liability

Section 59.115(3) provides that "[e]very person who directly or indirectly controls a seller liable under [section 59.115(1)] . . . is also liable jointly and severally with and to the same extent as the seller . . . ."[208] Section 59.127(3) provides similarly for those who control a purchaser liable under section 59.127(1).[209] The OSL's control person liability provisions parallel both section 15 of the 1933 Securities Act[210] and section 20(a) of the 1934 Securities Exchange Act,[211] and may be interpreted and applied accordingly.[212]

For purposes of both sections 59.115(3) and 59.127(3), "control" means "possess[ing], directly or independently, the power to direct or cause the direction of the management and policies of a [seller or purchaser], whether through the ownership of voting secu-

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208. OR. REV. STAT. § 59.115(3). A person who sells securities in concert with another person may be liable both as a primary violator and as a collateral participant if she controls or is an officer or director of the other person. *See Metal Tech,* 703 P.2d at 243.

209. OR. REV. STAT. § 59.127(3).

210. 15 U.S.C. § 77o (1994); *see supra* note 146.

211. Section 20(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a) (1994).

Section 15 of the 1933 Act and section 20(a) of the 1934 Act, despite somewhat different wording, are analogous provisions that should be interpreted similarly. *See, e.g.*, Pharo v. Smith, 621 F.2d 656, 672-73 (5th Cir. 1980), *modified on other grounds*, 625 F.2d 1226 (5th Cir. 1980).

212. *See* Badger v. Paulson Inv. Co., 803 P.2d 1178, 1182 (Or. 1991) ("The 'controlling person' statute, ORS 59.115(3), was drawn from Section 20(a) of the Securities Exchange Act of 1934. In situations involving Oregon laws in large measure drawn from a federal counterpart, it is appropriate to look for guidance to federal court decisions interpreting similar federal laws, even though those decisions do not bind us." (footnote omitted)).

In the wake of the PSLRA, *see supra* note 10, joint and several liability for control persons under federal law may now be available only if the control person "knowingly committed a violation of the securities laws." *Compare* 15 U.S.C. § 78u-4(g)(2)(a) (Supp. IV 1998) *with id.* §§ 77o & 78t(a) (1994). In the absence of a knowing violation, federal law may afford a plaintiff only proportionate liability against a control person. *See* Glen Shu, Comment, *Take a Second Look:* Central Bank *After the Private Securities Litigation Reform Act of 1995*, 33 HOUS. L. REV. 539, 569 (1996); Marc I. Steinberg & Christopher D. Olive, *Contribution and Proportionate Liability Under the Federal Securities Laws in Multidefendant Securities Litigation After the Private Securities Litigation Reform Act of 1995*, 50 SMU L. REV. 337, 349-50 (1996). If this proves to be the case, the OSL could now afford an Oregon plaintiff greater relief than could its federal progenitors.

rities, by contract, or otherwise."[213]

The plaintiff bears the burden of establishing control. As a general rule, a plaintiff should plead and prove that the defendant (1) exercised active control over the day-to-day affairs of the controlled person or entity, and (2) had the power to control and influence the particular transactions that gave rise to the underlying securities violations.[214] It is sufficient for the plaintiff to prove that the defendant had the "power of control."[215] The plaintiff need not prove that the defendant actually used that power.[216]

The OSL does not require the plaintiff to prove the control person acted with knowledge of the underlying violations or reckless disregard for the truthfulness of the primary violator's acts or omissions.[217] If the plaintiff can prove the controlled person violated ei-

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213. OR. REV. STAT. § 59.015(2) (1999); *see, e.g.*, Badger v. Paulson Inv. Co. Inc., 779 P.2d 1046, 1050 (Or. Ct. App. 1989).

SEC Rule 405 defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405(f) (2000); *Pharo*, 621 F.2d at 670. For an excellent discussion of control person liability under federal securities law, discussing, *inter alia*, the likely outcome of a control-person analysis under a number of sample fact patterns, see Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 NOTRE DAME L. REV. 263 (1997).

214. *See, e.g.*, Abbott v. Equity Group, Inc., 2 F.3d 613, 620 (5th Cir. 1993); Metge v. Baehler, 762 F.2d 621, 631 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057, *and cert. denied*, 474 U.S. 1072 (1986). Thus, for example, in *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945 (5th Cir. 1981), the Fifth Circuit found that a twenty-four percent shareholder, who was also an officer and director, and was involved in the day-to-day supervision of the types of activities that gave rise to the plaintiff's claims, was a "control person" under section 20 of the 1934 Act, 15 U.S.C. § 78t(a). *Id.* at 958. However, the court went on to note that "effective day-to-day control" may not be required. *Id.* at 958 n.24.

215. *See, e.g.*, *Badger*, 779 P.2d at 1050 (finding ample evidence to support the jury's verdict that the alleged controlling person had the power to control the primary violator "by virtue of the employment relationship between them"); *see* Computer Concepts, Inc. v. Brandt, 905 P.2d 1177, 1181 (Or. Ct. App. 1995) (quoting Ince v. AMEV Investors, Inc., 857 P.2d 165, 166 (Or. Ct. App. 1993)).

216. *See Badger*, 779 P.2d at 1050; *Brandt*, 905 P.2d at 1180-81 (quoting *Ince*, 857 P.2d at 166); *see also, e.g.*, *G.A. Thompson & Co.*, 636 F.2d at 958 (noting that neither 17 C.F.R. § 230.405(f) nor 15 U.S.C. § 78t(a) "appears to require participation" by the control person "in the wrongful transaction"); *Metge*, 762 F.2d at 631 (collecting cases). *But see, e.g.*, *In re* Browning-Ferris Indus. Inc. Sec. Litig., 876 F. Supp. 870, 911 (S.D. Tex. 1995) (requiring the plaintiff to demonstrate that the alleged control person actually participated in or induced the alleged primary violation).

217. *See, e.g.*, Arthur Children's Trust v. Keim, 994 F.2d 1390, 1398 (9th Cir. 1993) ("To establish the liability of a controlling person, the plaintiff does not have the burden of establishing that person's scienter distinct from the controlled [person]'s scienter."); *accord* Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th Cir. 2000).

ther section 59.115(1) or 59.127(1) and the defendant was a "control person" under the statute, then judgment against the control person will be proper in the absence of a viable affirmative defense.[218]

b. Liability for Participating in or Materially Aiding an OSL Violation

"Section 59.115(3) also provides that "[e]very person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller . . . ."[219] Section 59.127(3) provides similarly for those who participate in or materially aid a purchase giving rise to liability under section 59.127(1).[220]

A collateral participant's liability is not based on her knowledge that her acts are illegal.[221] Rather, "liability as a participant or a provider of material aid depends on the extent and importance of the defendant's involvement" in the suspect transaction.[222] For example, rendering legal advice to the seller during an offering constitutes material aid.[223]

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218. *See, e.g.*, Foelker v. Kwake, 568 P.2d 1369, 1373 (Or. 1977) (holding that, for purposes of establishing control person liability, it was "sufficient" for the plaintiff to show that "the defendant was an officer of the corporation, unless the defendant sustains the burden of proof that he or she did not and could not reasonably have had knowledge of the facts on which liability was based.").

219. OR. REV. STAT. § 59.115(3); *see, e.g.*, Ainslie v. First Interstate Bank of Oregon, N.A., 939 P.2d 125, 137 (Or. Ct. App. 1997) [*Ainslie II*] ("Liability premised on a defendant's status as a participant or one who materially aids in a sale can be derivative from the unlawful activities of the seller or other principals in the sale.").

220. OR. REV. STAT. § 59.127(3).

221. *See* Prince v. Brydon, 764 P.2d 1370, 1372 (Or. 1988) ("[T]he relevant knowledge is of 'the existence of the facts,' not of the unlawfulness of the sale."). *Accord* Granewich v. Harding, 945 P.2d 1067, 1082 n.6 (Or. Ct. App. 1997), *rev'd in part on other grounds*, 985 P.2d 788 (Or. 1999). That said,

> although proof of direct unlawful activity by a defendant or its participation in the seller's unlawful acts themselves, as distinct from the sale generally, is not essential to establish its liability as a participant or material aider, proof of that kind can nevertheless be relevant to the question; the extent and importance of the defendant's involvement in a sale can be shown by evidence of its connection with unlawful activities as much as with any other aspects of the sale.

Ainslie II, 939 P.2d at 137.

222. *Ainslie II*, 939 P.2d at 137; *see also Prince*, 764 P.2d at 1371 ("Whether one's assistance in the sale is 'material' depends on the importance of one's personal contribution to the transaction.").

223. Ainslie v. Spolyar, 926 P.2d 822, 828 (Or. Ct. App. 1996) [*Ainslie I*]. *See generally* Towery v. Lucas, 876 P.2d 814, 819 (Or. Ct. App. 1994) ("'Every person,' as used in [section 59.115(3)], includes attorneys, and no privilege for statements of attorneys who participate or materially aid in an unlawful sale of securities has been recognized by the

A plaintiff may be required to show "more than the mere preparation and execution of documents" in order to establish a defendant's liability as a participant or a provider of material aid.[224] However, a defendant who actually draws up the papers necessary to consummate the sale or purchase on the basis of which the plaintiff sues "participates or materially aids" in the sale or purchase for purposes of sections 59.115(3) or 59.127(3), respectively.[225] As the Oregon Supreme Court has explained: "Typing, reproducing, and delivering sales documents may all be essential to a sale, but they could be performed by anyone; it is a drafter's knowledge, judgment, and assertions reflected in the contents of the documents that are "material" to the sale."[226] Moreover, a person who prepares documentation that contains material misstatements and omissions is a "person, directly or indirectly, in connection with the purchase or sale of any security" who, among other things, has "engage[d] in any act, practice or course of conduct which operates . . . as a fraud," in violation of ORS 59.135(3)."[227]

Neither the 1933 Act nor the 1934 Act contains a similar provision. As a consequence, the U.S. Supreme Court has held that no private cause of action exists for aiding and abetting a violation of section 10(b) and rule 10b-5.[228] The Ninth Circuit has followed

courts.").

224. *See* Fakhrdai v. Mason, 696 P.2d 1164, 1166 (Or. Ct. App. 1985).

225. *See* Anderson v. Carden, 934 P.2d 562, 566 (Or. Ct. App. 1997); *Towery*, 876 P.2d at 819; *Fakhrdai*, 696 P.2d at 1167.

226. *Prince*, 764 P.2d at 1371; *see also Fakhrdai*, 696 P.2d at 1166 ("[S]omething more than the mere preparation and execution of documents is required to find liability for 'participating' or 'materially aiding' under [section 59.115(3)].").

227. *Anderson*, 934 P.2d at 566.

228. *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994). *See generally* Steven A. Meetre, *Textualist Statutory Interpretation Kills Section 10(b) "Aiding and Abetting" Liability*, 63 DEF. COUNS. J. 58 (1996); Steinberg, *supra* note 11, at 491-501 (chronicling the Supreme Court's adherence to "strict statutory construction" in section 10(b) and rule 10b-5 cases, beginning, prominently, with *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and culminating in *Central Bank of Denver*).

For many years prior to *Central Bank of Denver*, "suits against aiders and abettors of violations under the federal securities laws had been the most widely used theory to hold nonprivity parties responsible for such violations." Lewis D. Lowenfels & Alan R. Bromberg, *A New Standard for Aiders and Abettors Under the Private Securities Litigation Reform Act of 1995*, 52 BUS. LAW. 1, 1 (1996). Indeed, "all 11 federal courts of appeals that had considered the question had already determined that aiders and abettors could be liable under Section 10(b)." Bettina M. Lawton & Catherine Botticelli, *New Weapon in the SEC's Arsenal: Secondary Liability After* Central Bank, BUS. L. TODAY, July-Aug. 1995, at 34; *see* suit.[229] While it is true that Oregon courts look to federal decisions for guidance on securities matters,[230] an Oregon court is not bound by *Central Bank of Denver* because the *Central Bank of Denver* Court specifically found that no private aiding and abetting cause of action existed because the 1934 Act contained no language providing one,[231] whereas the OSL does contain such language.

5. Defenses to Secondary Securities Fraud Liability

Collateral participants have the same basic array of statutory defenses at their disposal as do primary violators, although the exact contours of the defenses may not be the same.

a. Standing

Only purchasers can sue those who control, materially aid, or participate with sellers under section 59.115(3).[232] Only sellers can sue those who control, materially aid, or participate with purchasers under section 59.127(3).[233]

b. Limitations

As a general rule, claims against collateral participants under sections 59.115(3) or 59.127(3) must be brought within three years of the date on which the plaintiff bought or sold the security.[234] The Oregon Court of Appeals has been inconsistent in applying the statutory "discovery" exception to claims against collateral participants.

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also Steinberg, *supra* note 11, at 489 (observing that the *Central Bank of Denver* decision "swept away decades of lower court precedent that nearly universally recognized the propriety of" aiding and abetting liability under both section 10(b) and rule 10b-5). The Ninth Circuit was among those that recognized aider and abettor liability prior to *Central Bank of Denver*. *See, e.g.*, Lenne v. Diaman-Thuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991); *accord* Newman v. Comprehensive Care Corp., 94 F. Supp. 1513, 1522 (D. Or. 1992).

229. *See, e.g.*, McGann v. Ernst & Young, 102 F.3d 390, 393 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997); *see also, e.g.*, *In re* ZZZZ Best Sec. Litig., 864 F. Supp. 960, 967 (C.D. Cal. 1994). Indeed, the Ninth Circuit "one-upped" the Supreme Court by reading *Central Bank of Denver* to foreclose conspiracy liability, as well as aiding and abetting liability, for securities fraud. *See In re* GlenFed, Inc. Sec. Litig., 60 F.3d 591, 592 (9th Cir. 1995).

230. *See supra* note 2.

231. *See Central Bank of Denver*, 511 U.S. at 191.

232. *See supra* note 137.

233. *See supra* note 194.

234. *See* OR. REV. STAT. §§ 59.115(6) & 59.127(6) (1999).

In *Loewen v. Galligan*,[235] the court held that the "discovery" exception only applies to claims under section 59.115(1)(b); and, therefore, "plaintiffs had three years to bring their claim . . . alleging a violation of ORS 59.115(3)."[236] In *Anderson v. Carden*,[237] decided three years later, the court held that the two-year "discovery" exception applies to claims brought against defendants who allegedly participated in or materially aided a fraudulent sale (or purchase) of securities as well as to primary violators.[238]

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235. 882 P.2d 104 (Or. Ct. App. (1994).

236. *Id.* at 115.

237. 934 P.2d 562 (Or. Ct. App. 1997).

238. *Accord Ainslie II*, 939 P.2d 125, 138 (Or. Ct. App. 1997); *see Anderson*, 934 P.2d at 569.

As the *Anderson* court explained:

> ORS 59.115(3) provides a remedy against nonsellers who, among other things, "participate or materially aid" in the unlawful sale.
>
> . . . .
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> . . . ORS 59.115(3) itself does not establish a standard of conduct the violation of which may result in an action for damages. By its terms, it expands the class of potentially liable persons from whom damages may be obtained for a seller's violation of the securities laws. Thus, it is incorrect to say that one may be sued for a "violation" of ORS 59.115(3); one may be sued under ORS 59.115(3) for participating in a sale of securities that occurred in violation of one of the substantive provisions of the Oregon Securities Laws, such as ORS 59.135.
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> . . . .
>
> Under ORS 59.115(6) (1985), the general three-year statute of limitations does not apply to "[a]n action for a violation of ORS 59.135." It is clear that plaintiffs have brought such an action. They have alleged that defendants are liable, under ORS 59.115(3), for violations of ORS 59.135. It necessarily follows, therefore, that their action is not subject to the three-year statute of limitations and, instead, is subject to the exception requiring actions to be commenced within two years of discovery of the facts on which the action is based.

Id. at 566.

Anderson attempts to distinguish *Loewen* on the grounds that (1) the issue in *Loewen* was the tolling effect of the class action and (2) *Loewen*, although decided earlier, was applying a later version of what is now section 59.115(6). *See id.*at 567. The argument is not convincing. In the first place, *Loewen* directly confronts the question of which types of claims are subject to the two-year discovery exception and which claims are not. *See Loewen*, 882 P.2d at 115 ("The text of ORS 59.115(6) plainly provides that the statute of limitations for a violation of any subsection of ORS 59.115, other than ORS 59.115(1)(b), is three years. Therefore, plaintiffs had three years to bring their claim against defendants, except AmNet, alleging a violation of ORS 59.115(3)."). Second, while it is true that the two courts applied two different versions of the section 59.115 limitations provision, the later version considered by the *Loewen* court did not remove any class of claims from the effect of the discovery exception; rather, it made explicit what a number of Oregon cases (including *Anderson*) argued was implicit: that claims under section 59.115(1)(b) should be treated the same for limitations purposes as claims under section 59.135. *Compare* OR. REV. STAT. § 59.115(6) (1985) ("No action or suit may be commenced . . . more than three

In any event, limitations may be tolled during the pendency of a class action filed prior to the expiration of the primary limitations period.[239]

c. Defendant's Lack of Knowledge

Sections 59.115(3) and 59.127(3) provide a statutory defense for a secondary violator who pleads and proves that she did not know, and in the exercise of reasonable care could not have known, of the facts on which her liability is based.[240] The burden is on the defendant to prove her own reasonable diligence and lack of actual knowledge.[241] A collateral participant who fails to act with the requisite diligence may not invoke the protection of this affirmative defense.[242]

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years after the sale except an action for a violation of ORS 59.135, which may be commenced within three years after the sale or two years after the person bringing the action discovered or should have discovered the facts on which the violation of ORS 59.135 is based, whichever is later. . . .") (applied in *Anderson*) *with* OR. REV. STAT. § 59.115(6) (1987) ("[N]o action or suit may be commenced . . . more than three years after the sale. An action . . . for a violation of subsection (1)(b) of this section or ORS 59.135 may be commenced within three years after the sale or two years after the person bringing the action discovered or should have discovered the facts on which the action is based, whichever is later. . . .").

The Oregon Supreme Court, which denied review of both *Loewen* and *Anderson*, had the opportunity to resolve this disagreement about whether the discovery exception applies to claims against collateral participants. To date, it has chosen not to do so.

239. *See supra* notes 198-199 and accompanying text; *see, e.g.*, *Loewen*, 882 P.2d at 115 (holding that the plaintiffs' claims against the collateral defendants were time-barred when they were brought more than three years after the last sale, even after suspending limitations for nearly fourteen months during the pendency of a related class action).

240. OR. REV. STAT. §§ 59.115(3) & 59.127(3) (1999). The control person liability provisions of the 1933 Securities Act and the 1934 Securities Exchange Act provide a similar, but somewhat different, defense based on the control person's "good faith." *See* 15 U.S.C. §§ 77*l* & 78t(a) (1994 & Supp. IV 1998) (each allowing a control person to avoid vicarious liability by proving that she "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action"). Exactly what constitutes "good faith" under federal law has been the subject of much debate, and considerable disagreement among (and even within) the circuits. *See* Rowley, *supra* note 9, at 178-79 n. 343 and sources cited therein.

241. *See* Wicks v. O'Connell, 748 P.2d 551, 555 (Or. Ct. App. 1988); Fakhrdai v. Mason, 696 P.2d 1164, 1167 & 1167 n.2 (Or. Ct. App. 1985). Likewise, federal law places the burden on a control person seeking to avoid vicarious liability of proving her good faith. *See, e.g.*, Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990) (applying section 20(a) of the 1934 Exchange Act); Safeway Portland Employees' Fed. Credit Union v. C.H. Wagner & Co., Inc., 501 F.2d 1120, 1124 (9th Cir. 1974) (applying section 15 of the 1933 Securities Act).

242. *See, e.g.*, Badger v. Paulson Inv. Co., 779 P.2d 1046, 1050-51 (Or. Ct. App. 1989), *modified on other grounds*, 784 P.2d 125 (Or. Ct. App. 1989), *aff'd in part and rev'd*

It is neither necessary nor sufficient for the secondary violator to prove she did not know the sale or purchase was illegal; the key is whether she knew or should have known the *facts* that made the sale or purchase illegal.[243]

d. Plaintiff's Actual Knowledge

Presumably, the defense afforded a primary violator by sections 59.115(1) and 59.127(1) who can prove the plaintiff knew of the falsity or omission[244] is also available to a person being sued as secondarily liable for a primary violation of one of those provisions. However, section 59.115(3) does not explicitly mention the plaintiff's knowledge or lack thereof, and there are no published opinions on point.

That said, federal law, to which Oregon courts look for guidance in interpreting and applying the OSL,[245] permits a control person—one class of persons covered by sections 59.115(3) and 59.127(3)—to avoid liability by proving that she "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."[246]

D. Purchasers' Remedies

Whether a purchaser has succeeded in establishing a violation of the OSL's registration requirements, a fraudulent sale of securities, or both, section 59.115 affords her the following remedies in addition to those available at common law or in equity.[247] Because

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in part on other grounds, 803 P.2d 1178 (Or. 1991).

243. *See* Prince v. Brydon, 764 P.2d 1370, 1372 (Or. 1988); Ainslie v. Spolyar, 926 P.2d 822, 828 (Or. Ct. App. 1996).

244. *See supra* Part II.C.3.c.i.

245. *See supra* note 2.

246. 15 U.S.C. § 78t(a) (1994). There is no comparable federal defense to liability for materially aiding a primary violation of federal securities law because federal securities law no longer recognizes aiding and abetting liability. *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994); *supra* notes 228-229 and accompanying text.

247. The rights and remedies provided by the OSL are in addition to any other statutory or common law rights and remedies available to the purchaser. *See* OR. REV. STAT. § 59.365 (1999). Nonetheless, while a purchaser may elect to sue, under both the OSL and common law, she is entitled to only one recovery for her same loss. *See, e.g.*, Morgan v. Turley, 768 P.2d 933, 933 (Or. Ct. App. 1989) (holding that the plaintiffs' OSL, ORICO, and common law claims were "alternative rather than cumulative," entitling plaintiffs "to judgment only for the largest of the three amounts"), *clarified on other grounds*, 776 P.2d

secondary liability under section 59.115(3) presumes a primary violation of section 59.115(1), a successful plaintiff is entitled to the same remedies against a secondary violator as the plaintiff would recover if the defendant were a primary violator.[248]

1. Rescission

A purchaser who still owns the securities is entitled to have the transaction rescinded and, upon making a tender of the securities, to recover the consideration paid for the securities, plus interest from the date of payment, less "any amount received on the security."[249] Tender is a necessary precondition to recovering consideration paid.[250]

2. Statutory Damages

A purchaser who no longer owns the securities is entitled to recover (1) damages " in the amount that would be recoverable upon a tender"—that is, the consideration paid for the security, plus interest thereon from the date of payment, less any amount the purchaser re-

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586 (Or. Ct. App. 1989).

That said, the remedies provided by section 59.115 for the registration violations prohibited by section 59.055 have no common law parallel. *See* Lamb v. Young, 441 P.2d 616, 618-19 (Or. 1968) ("The right to the return of the purchase price from the seller of unregistered stock is a statutory right not existing at common law."). This should come as no surprise because, but for the existence of statutory registration requirements, the seller's failure to register would give rise to no wrong to be remedied.

248. *See* Badger v. Paulson Inv. Co., 803 P.2d 1178, 1186 n.11 (Or. 1991) (noting that the damages available under section 59.115(3) are the same as those recoverable under section 59.115(1)). *See generally* Metal Tech Corp. v. Metal Teckniques Co., 703 P.2d 237, 246 (Or. Ct. App. 1985) (observing that section 59.115(2) "clearly provides for a successful plaintiff's recovery of the full consideration paid for the security, plus interest, on his tender of the security, *without regard to whom the consideration was paid*" (emphasis added)).

249. OR. REV. STAT. § 59.115(2)(a) (1999); *see, e.g.*, Castle v. Ritacco, 919 P.2d 1196, 1199 (Or. Ct. App. 1996); *Metal Tech*, 703 P.2d at 243. Interest awarded is "equal to the greater of the rate of interest specified in [ORS § 82.010] for judgments and decrees for the payment of money or the rate provided for in the security if the security is an interest-bearing obligation." OR. REV. STAT. § 59.115(2)(a).

Recission is mandatory under section 12(a)(2) of the 1933 Securities Act, 15 U.S.C. § 771(a) (Supp. IV 1998), in all cases where the plaintiff still owns the security at the time suit is filed. *See, e.g.*, Randall v. Loftsgaarden, 478 U.S. 647, 655 (1986); Commercial Union Assurance Co. v. Milken, 17 F.3d 608, 615 (2d Cir. 1994). Recission is a remedial option for a successful section 10(b) plaintiff. *See, e.g.*, Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974); Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. (1975), *cert. denied*, 429 U.S. 816 (1976).

250. *See Metal Tech*, 703 P.2d at 242.

ceived on the security—(2) less the value of the security when the purchaser disposed of it, and interest on that amount from the date the purchaser disposed of the security.[251]

3. Prejudgment Interest

Section 59.115 explicitly includes prejudgment interest as part of the recovery due a plaintiff who still owns the security at the time she brings suit.[252] Prejudgment interest is implicit for a plaintiff

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251. OR. REV. STAT. § 59.115(2)(b).

The statutory damages recoverable under section 59.115(2)(b) are somewhat different from those available to those section 12(a)(2) plaintiffs who no longer own the securities that are the subject of their claim and to all claimants under section 10(b). Whereas the OSL's statutory damage remedy is based on disgorgement by the seller of the consideration it received from the purchaser, damages under sections 12(a)(2) and 10(b) are based on the difference between the value the purchaser paid for the security and the value of the security the purchaser received. *See, e.g.*, *Randall*, 478 U.S. at 661-62; Affiliated Ute Citizens v. United States, 406 U.S. 128, 155 (1972).

In addition to a cash price paid for a security, "consideration paid" for purposes of section 12(a)(2) may include, *inter alia*, the value of (1) shares of some other tangible or intangible property given in exchange for shares of the security at issue, *see, e.g.*, Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138, 1144 (E.D.N.C. 1986), *aff'd*, 822 F.2d 56 (4th Cir. 1987); (2) capital advanced to the issuer of the security in consideration for stock or stock options, *see, e.g.*, Mecca v. Gibraltar Corp. of Am., 746 F. Supp. 338, 348-49 (S.D.N.Y. 1990); (3) a controlling interest in a going concern ceded in exchange for securities, *see, e.g.*, Wigand v Flo-Tek, Inc., 609 F.2d 1028, 1036-37 (2d Cir. 1979); or (4) a legal claim foresworn in exchange for securities, *see, e.g.*, Foster v. Fin. Tech., Inc., 517 F.2d 1068, 1071 (9th Cir. 1975).

The measure of damages for common law securities fraud—and, presumably, for negligent misrepresentation, as well—"is the difference between the amount paid for the stock and its value at the time of purchase." *Metal Tech*, 703 P.2d at 245.

252. OR. REV. STAT. § 59.115(2)(a). Interest awarded is "equal to the greater of the rate of interest specified in [ORS 82.010] for judgments and decrees for the payment of money or the rate provided for in the security if the security is an interest-bearing obligation." *Id.* § 59.115(2)(a). Section 82.010 provides, in relevant part, that "the rate of interest on judgments for the payment of money is nine percent per annum." *Id.* § 82.010(2)(a)-(d).

Prejudgment interest is available to successful plaintiffs under section 12(a)(2). *See, e.g.*, Kaufman & Enzer Joint Venture v. Dedman, 680 F. Supp. 805, 813-14 (W.D. La. 1987); Monetary Mgmt. Grp. of St. Louis, Inc. v. Kidder, Peabody & Co., 615 F. Supp. 1217, 1223 (E.D. Mo. 1985). Unlike section 59.115(2), which mandates prejudgment interest, the amount of prejudgment interest awarded to a successful section 12(2) plaintiff is a matter of judicial discretion. *See, e.g.*, *Commercial Union*, 17 F.3d at 615; Sharp v. Coopers & Lybrand, 649 F.2d 175, 193 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982). In exercising that discretion, a court may consider a number of factors, including: (1) the need to fully compensate the wronged party for actual damages suffered, *see, e.g.*, Osterneck v. Ernst & Whinney, 489 U.S. 169, 176 (1989); (2) the degree of personal wrongdoing on the part of the defendant, *see, e.g.*, *id.*; (3) whether the defendant has been unjustly enriched, *see, e.g.*, Ballay v. Legg Mason Wood Walker, Inc., No. 88-6867, 1990 WL 48195, at *1 who no longer owns the security because she is entitled to recover "damages in the amount that would be recoverable upon a tender."[253]

4. Attorneys' Fees and Costs

Prior to 1997, a successful section 59.115 plaintiff was entitled to recover costs and reasonable attorneys' fees, including appellate costs and fees, as a matter of course.[254] Senate Bill 126[255] amended section 59.115 to (1) delete any explicit reference to court costs, (2) make any award of attorneys' fees to a successful plaintiff solely at the court's discretion,[256] and (3) permit courts to award attorneys'

(E.D. Pa. Apr. 13, 1990); (4) whether the plaintiff delayed unduly in bringing or prosecuting the action, *see, e.g.*, *Osterneck*, 489 U.S. at 176; (5) the availability of alternative investment opportunities to the plaintiff, *see, e.g.*, *id.*; (6) the remedial purpose of the statute involved, *see, e.g.*, *Commercial Union*, 17 F.3d at 615; (7) considerations of fairness and the relative equities of the award, *see, e.g.*, *Osterneck*, 489 U.S. at 176; and (8) such other general principles as are deemed relevant by the court, *see, e.g.*, *Commercial Union*, 17 F.3d at 615.

253. OR. REV. STAT. § 59.115(2)(b) (1999). In other words, the purchaser is entitled to recover the damages she would have recovered if she still owned the security.

254. *See* OR. REV. STAT. § 59.115(2) (1988) ("The purchaser may recover . . . costs and reasonable attorney fees at trial and on appeal . . . ."), *superseded as amended by* OR. REV. STAT. § 59.115(10) (1999); Green v. Holz, 882 P.2d 1137, 1139 (Or. Ct. App. 1994) ("Attorney fees are available for the fraudulent sale of securities claim made under ORS 59.115."). Despite the fact that the pre-1995 statute used the term "may," successful purchasers were presumptively entitled to recover costs and attorney fees. *See, e.g.*, Computer Concepts, Inc. v. Brandt, 918 P.2d 430, 430-31 (Or. Ct. App. 1996) ("Because plaintiffs prevailed on the securities claim, they are entitled to attorney fees under [pre-amendment section 59.115(2)].").

255. 1997 Or. Laws ch. 772, § 9.

256. *See* OR. REV. STAT. § 59.115(10) (1999) ("[T]he court *may* award reasonable attorney fees to the prevailing party . . . ." (emphasis added)).

Section 11(e) of the 1933 Act, 15 U.S.C. § 77k(e), appears to authorize a successful section 12(2) plaintiff to recover attorneys' fees at the trial court's discretion. *See, e.g.*, Guthrie v. Downs, Nos. 88-CV-75006-DT, 89-CV-71525-DT, 1991 WL 354939, at *6 (E.D. Mich. Aug. 7, 1991) ("Plaintiffs are, however, entitled under Section 12(2) . . . to recover their costs of bringing these actions and reasonable attorney fees."), *aff'd*, 972 F.2d 350 (6th Cir. 1992). *But see, e.g.*, Junker v. Crory, 650 F.2d 1349, 1364 (5th Cir. 1981) ("Section 11(e) of the 1933 Act provides for a discretionary award of attorney's fees to the prevailing plaintiff in any suit brought under the Act, if the court determines that the defense advanced is frivolous, without merit, or brought in bad faith. *Absent such a finding, attorneys fees may not be awarded under Section 11(e).*" (emphasis added)).

Attorneys' fees are generally unavailable to a prevailing plaintiff on a common law fraud or negligent misrepresentation claim, *see, e.g.*, McGann v. Boyd, 862 P.2d 577, 579 (Or. Ct. App. 1993) (fraud); Zidell v. Greenway Landing Dev. Co., 749 P.2d 1210, 1212 (Or. Ct. App. 1988) (negligence), *overruled on other grounds by* Newell v. Weston, 965 P.2d 1039 (Or. Ct. App. 1998), unless the amount in controversy is $5,500 or less and the fees to successful section 59.115 defendants under certain circumstances.[257]

5. *Punitive Damages*

The OSL does not provide for punitive damages.[258]

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plaintiff made a written pre-suit demand on the defendant, as provided for by OR. REV. STAT. § 20.080, *see, e.g.*, Farmer v. George, 720 P.2d 1328, 1329-30 (Or. Ct. App. 1986) (holding that an action based on fraudulent misrepresentations is an "action for damages for an injury or wrong to the person or property, or both, of another," within the meaning of section 20.080; and, therefore, that the plaintiff was entitled to recover his attorneys' fees because he made a conforming pre-suit written demand). Section 20.080 provides, in relevant part:

> In any action for damages for an injury or wrong to the person or property, or both, of another where the amount pleaded is $5,500 or less, and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant not less than 10 days before the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 10 days after the transfer of the action under ORS 46.461. However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 10 days after the transfer of the action under ORS 46.461, an amount not less than the damages awarded to the plaintiff.

OR. REV. STAT. § 20.080(1). A prevailing plaintiff also may recover reasonable attorneys' fees incurred in responding to a baseless defense. *See* OR. REV. STAT. § 20.105 (authorizing an award of reasonable attorneys' fees to a prevailing plaintiff if the court finds that the defendant asserted a defense for which "there was no objectively reasonable basis"). *See generally* Mattiza v. Foster, 803 P.2d 723, 726-30 (Or. 1990) (outlining the procedure a court should follow to determine whether to award attorneys' fees under section 20.105).

257. *See* OR. REV. STAT. § 59.115(10)-(11) (authorizing Oregon courts to award reasonable attorney fees to prevailing defendants, as well as prevailing plaintiffs, except where the action in which the defendant prevails is a class action pursuant to OR. R. CIV. P. 32).

Under certain circumstances, federal courts may award attorneys' fees to a section 12(2) defendant forced to defend groundless or meritless suits. *See, e.g.*, Zissu v. Bear, Stearns & Co., 627 F. Supp. 687, 694-95 (S.D.N.Y. 1986) (awarding defendants' fees where plaintiff's proof at trial "was so replete with blatant contradictions and unsubstantiated allegations"). Given the broad remedial purposes of the federal securities laws, however, a court will abuse its discretion by awarding attorneys' fees to a defendant when the plaintiff had "good cause" to institute the lawsuit, even though she did not prevail on the merits. *See, e.g.*, Aid Auto Stores, Inc. v. Cannon, 525 F.2d 468, 471-72 (2d Cir. 1975). An Oregon court may award reasonable attorneys' fees to a prevailing defendant if the court finds that the plaintiff asserted a claim for which "there was no objectively reasonable basis." OR. REV. STAT. § 20.105.

258. Punitive damages are, likewise, unavailable to plaintiffs who successfully prosecute a claim under section 12(a)(2) of the 1933 Securities Act, 15 U.S.C. § 77*l*(a)(2) (Supp. IV 1998); *see* Hill York Corp. v. Am. Int'l Franchises, Inc., 448 F.2d 680, 697 (5th Cir. 1971); *see also* Hunt v. Miller, 908 F.2d 1210, 1216 n.13 (4th Cir. 1990), or under section

6. Injunctive Relief

The OSL empowers the Director of the Department of Consumer and Business Services to seek an injunction to enforce the provisions of the OSL.[259] No such right is given to any private party.

E. Sellers' Remedies

Section 59.127 affords a seller the following remedies in addition to those available at common law or in equity.[260] As is true under section 59.115,[261] because secondary liability under section 59.127(3) presumes a primary violation of section 59.127(3), a successful plaintiff is entitled to the same remedies against a secondary violator as the plaintiff would recover if the defendant were a primary violator.

1. Rescission

If the purchaser still owns the securities, the seller is entitled,

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10(b) of the 1934 Securities Exchange Act, 15 U.S.C. § 78j(b) (1994), or rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2000); *see* 15 U.S.C. § 78bb(a) (Supp. IV 1998); *Hunt*, 908 F.2d at 1216 n.13; Green v. Wolf Corp., 406 F.2d 291, 302-03 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). However, section 78bb(a) does not prevent a plaintiff from recovering punitive damages on a pendent state law claim. *See Hunt*, 908 F.2d at 1216 n.13; Young v. Taylor, 466 F.2d 1329, 1337-38 (10th Cir. 1972).

Punitive damages are available at common law to a plaintiff who establishes that he was defrauded intentionally. *See, e.g.*, Howmar Materials, Inc. v. Peterson, 14 P.3d 631, 635 (Or. Ct. App. 2000). However, misrepresentations made negligently, rather than fraudulently, will not support punitive damages, *see, e.g.*, Badger v. Paulson Inv. Co., 803 P.2d 1178, 1186 (Or. 1991), in the absence of "aggravated misconduct . . . . over and above the negligent conduct that produced the injuries," Boger v. Norris & Stevens, Inc., 818 P.2d 947, 949 (Or. Ct. App. 1991).

259. OR. REV. STAT. § 59.255(1).

In some cases, injunctive relief may be available to a section 12(2) plaintiff. *See, e.g.*, Deckert v. Independence Shares Corp., 311 U.S. 282, 287-90 (1940); Hoxworth v. Blinder, Robinson & Co. Inc., 903 F.2d 186, 194-197 (3d Cir. 1990). As a general rule, a party requesting a preliminary injunction must show either: "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping [sharply] in [its] favor." MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir. 1993), *cert. denied*, 510 U.S. 1033 (1994) (quotation omitted). The first showing represents a continuum in which "the required degree of irreparable harm increases as the probability of success decreases." *MAI Systems*, 911 F.2d at 516; *accord* Am. W. Airlines, Inc. v. Nat'l Mediation Bd., 119 F.3d 772, 777 (9th Cir. 1997).

260. *See supra* note 247.

261. *See supra* note 248.

upon tender to the purchaser of the consideration the latter paid for the security, to have the transaction rescinded and to recover the securities, plus interest from the date of the sale.[262]

2. Statutory Damages

Alternatively, if the purchaser still owns the securities but the seller elects not to seek rescission, the seller is entitled to recover (1) the value of the securities, (2) plus interest from the date of purchase, (3) plus any amount the purchaser received on the securities since the date of purchase, (4) less the consideration the purchaser originally paid for the securities.[263]

If the purchaser no longer owns the securities, the seller is entitled to recover (1) the value of the securities when the purchaser disposed of them, (2) plus interest from the date the purchaser disposed of it, (3) less the consideration the purchaser originally paid for the securities.[264]

3. Prejudgment Interest

Section 59.127 explicitly includes prejudgment interest as part of the recovery due a seller, regardless of whether the purchaser still retains the securities.[265]

4. Attorneys' Fees and Costs

Section 59.127 allows the court, in its discretion, to award attorneys' fees to a successful plaintiff solely at the court's discretion.[266] Section 59.127 also permits the court to award attorneys' fees to successful defendants under certain circumstances.[267]

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262. OR. REV. STAT. § 59.127(2)(a); *see, e.g.*, Ristau v. Wescold, Inc., 852 P.2d 271, 274 (Or. Ct. App. 1993), *rev'd on other grounds*, 868 P.2d 1331 (Or. 1994).

263. OR. REV. STAT. § 59.127(2)(b).

264. *Id.* § 59.127(2)(c).

265. *Id.* § 59.127(2)(a)-(c).

266. *See id.* § 59.127(9) ("[T]he court may award reasonable attorney fees to the prevailing party . . . ."); *see also supra* notes 254-255 and accompanying text.

267. *See* OR. REV. STAT. § 59.127(9)-(10) (authorizing courts to award reasonable attorney fees to prevailing defendants, as well as prevailing plaintiffs, except where the action in which the defendant prevails is a class action pursuant to OR. R. CIV. P. 32).

5. Statutorily Unavailable Remedies

As previously discussed, neither punitive damages[268] nor injunctive relief[269] is available to a private plaintiff suing under the OSL.

F. Pre-Suit Rescission Offers

The OSL does not require a plaintiff seeking to sue for damages or rescission to afford the defendant the opportunity to make good on the plaintiff's economic damages or rescind the subject transaction before the plaintiff files suit. However, if the defendant makes a qualifying rescission offer under either section 59.125[270] or section 59.131,[271] the plaintiff may not sue for the violation that is the subject of the rescission offer unless: (1) she accepts the offer on its terms but does not receive the full consideration promised by the offer in a timely fashion;[272] or (2) she rejects the offer in writing within thirty days of its receipt.[273]

The formal requisites of a rescission offer to a buyer or to a seller are set forth in detail in sections 59.125 and 59.131, respectively. To date, no published decision of any Oregon court—state or federal—specifically addresses either the validity of a rescission offer made pursuant to either section 59.125 or 59.131, or the consequences, under the current version of the OSL, of a defendant's failure to make a rescission offer or a plaintiff's failure to accept one.[274]

III. CONCLUSION

The relevant provisions of the Oregon Securities Law provide

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268. *See supra* note 258.

269. *See supra* note 259.

270. OR. REV. STAT. § 59.125 (governing rescission offers to purchasers otherwise entitled to sue under section 59.115).

271. *Id.* § 59.131 (governing rescission offers to sellers otherwise entitled to sue under section 59.127).

272. *Id.* §§ 59.125(3)(a) & 59.131(3)(a).

273. *Id.* §§ 59.125(3)(b) & 59.131(3)(b).

274. Indeed, the only readily-accessible published source discussing these provisions is Michelle Rowe, *Rescission Offers Under Federal and State Securities Law*, 12 J. CORP. L. 383 (1987), which provides a well-written, if somewhat dated, discussion of federal and state law regarding the timing, consideration, disclosure, and procedural aspects of rescission offers and their effect on the parties' relative positions in subsequent litigation. There is also a brief, but again dated, discussion of rescission offers under the OSL in MCGAUGHEY, *supra* note 153, at 148-49.

Oregon plaintiffs with additional protections beyond those afforded by Oregon common law or federal securities law; and they do so on what are, generally speaking, more generous terms.

As an initial matter, a plaintiff suing under the OSL must do so within three years of the challenged sale or purchase[275] or, in some cases, within two years of her actual or constructive discovery of the basis for her claim, whichever period expires later.[276] The comparable limitations periods for common law fraud and negligent misrepresentation claims are two years,[277] subject to equitable tolling by operation of the discovery rule.[278] A plaintiff suing under federal securities law must do so within three years after her cause of action accrued, but in any case within one year after she actually or constructively discovered the basis for her claim—even if the one-year discovery period expires before the three-year default limitations period.[279]

A plaintiff suing under the OSL need not prove she relied on the defendant's misrepresentation or omission in order to have the purchase rescinded or to recover damages.[280] A plaintiff suing for fraud or negligent misrepresentation must do so,[281] as must one suing under section 10(b) of the 1934 Securities Exchange Act and/or rule 10b-5 promulgated thereunder.[282] Likewise, a plaintiff suing under the OSL,[283] like one suing for negligent misrepresentation,[284] need not prove the defendant's knowledge or state of mind at the time of the transaction, whereas a plaintiff suing for common law fraud[285] or under rule 10b-5[286] must prove that the defendant acted with requisite scienter.

A plaintiff alleging common law fraud may recover punitive damages unavailable to one suing under the OSL, the Oregon com-

275. *See supra* notes 140, 195 & 234 and accompanying text.

276. *See supra* notes 195-197 and 235-238 and accompanying text.

277. *See supra* note 195.

278. *See supra* note 196.

279. *See supra* note 195.

280. *See supra* notes 169 and 184 and accompanying text.

281. *See supra* notes 166-167 and accompanying text.

282. *See supra* note 168. Reliance is not an element of a claim under section 12(2) of the 1933 Securities Act. *See id.*

283. *See supra* notes 170 and 185 accompanying text.

284. *See supra* note 171.

285. *See supra* note 171 and accompanying text.

286. *See supra* note 172 and accompanying text.

mon law of negligent misrepresentation, or federal securities law.[287] A plaintiff suing under the OSL may recover attorneys' fees (and costs?) at the court's discretion,[288] as may one suing under the comparable provisions federal securities law.[289] A plaintiff suing for fraud or negligent misrepresentation, by comparison, generally is not entitled to recover attorneys' fees or costs,[290] although an award of punitive damages to a successful fraud plaintiff may take into account her attorneys' fees and costs.

Control person liability under the OSL is—or, at least, should be—coterminous with control person liability under federal securities law,[291] although some have suggested reading the applicable federal statutes to permit imposing only proportionate liability on a control person who did not knowingly violate federal securities law,[292] whereas the OSL imposes joint and several liability without regard to the control person's knowledge or state of mind.[293] The OSL's other theories of "secondary" liability—namely, liability for participating in or materially aiding an OSL violation—have no federal counterpart.[294] Anyone is potentially subject to liability for participating in or materially aiding an OSL violation, regardless of their job title or status,[295] whereas control person liability is, by definition, limited to particular classes of persons or entities, based on their relation to the "primary" violator or to the "primary" violation.[296] As a consequence, a plaintiff suing under the OSL may be able to hold persons accountable who are now beyond the reach of federal securities law.

Finally, and not to be overlooked, the OSL also creates liability for those who offer or sell unregistered securities that are not exempt from the OSL's registration provisions.[297] In so doing, the OSL provides Oregon plaintiffs who did not purchase their unregistered securities from or in response to an offer made by "any means

287. *See supra* note 258 and accompanying text.
288. *See supra* notes 254-256 and 266 and accompanying text.
289. *See supra* note 256.
290. *See id.*
291. *See supra* notes 235-237 and accompanying text.
292. *See supra* note 237.
293. *See supra* notes 237 and 241-242 and accompanying text.
294. *See supra* note 252-255 and accompanying text.
295. *See supra* note 243 and accompanying text.
296. *See supra* notes 233 and 238 and accompanying text.
297. *See supra* Part II.B.

or instruments of transportation or communication in interstate commerce or of the mails"[298] an opportunity for relief that is not available to them under federal law.[299]

298. *See* 15 U.S.C. § 77l(a)(1).

299. *Cf.* Ayers v. Wolfinbarger, 491 F.2d 8, 16 (5th Cir. 1974) (holding that sales of stock in an Alabama financial corporation to Alabama residents did not require registration under section 5 of the 1933 Act, 15 U.S.C. § 77e, and therefore could not give rise to liability under section 12(1), *id.* § 77*l*(a)(1), where no means or instruments of transportation or communication in interstate commerce or of the mails were used to sell the stock).