
Contents

Acknowledgments	ix
About the Author	xi
Introduction: Client Fraud and Its Consequences for Professionals and Their Firms	1
Chapter 1: Actions by the Client	9
A. Malpractice Claims: Generally	11
1. Elements of a Malpractice Claim	12
2. Duty of Professional Care in Client-Fraud Cases	13
3. Expert Testimony in Malpractice Cases	15
B. Defenses to Malpractice Claims in Client-Fraud Cases	18
1. <i>In Pari Delicto</i>	19
a. <i>In Pari Delicto</i> Generally	20
b. Corporate “ <i>Delicto</i> ”: Role of Agency Law	22
c. The Adverse Interest Exception	24
d. The Sole Actor Rule: An “Exception” to the Adverse Interest Exception	28
e. Separate Acts of Wrongdoing	30
f. <i>In Pari Delicto</i> Asserted by Insiders	32
g. Other Arguments for Limiting the <i>In Pari Delicto</i> Defense	33
2. Contributory or Comparative Fault	36
3. <i>In Pari Delicto</i> or Contributory Negligence?	41
4. Statutes of Limitations	42
a. Malpractice Limitations Periods	42

b. The Discovery Rule and the Adverse Domination Doctrine	44
c. Fraudulent Concealment	46
5. Certificates of Expert Review	46
6. Causation	47
a. Proximate Causation	48
b. Intervening Causes	50
c. But-For Causation	50
7. Damages	51
a. Identifying Actual Damages to the Client	51
b. Fee Disgorgement or Forfeiture	54
C. Other Claims by Clients in Addition to Malpractice	55
1. Breach of Contract	56
2. Breach of Fiduciary Duty	57
3. Aiding and Abetting and Fraud	57

Chapter 2: Actions by the Client’s Trustee or Receiver	59
A. Bankruptcy and Receivership in Client-Fraud Cases	60
1. General Principles	60
2. Impact on Likelihood of Professional Liability Claims	64
B. Trustee Standing	66
1. Standing to Pursue Estate Claims	66
2. Standing to Pursue Creditor Claims	68
C. Defenses to Malpractice and Related Claims Brought by Trustee or Receiver	73
1. Statutes of Limitations	73
2. <i>In Pari Delicto</i> and “Innocent Successor” Theory	75
a. <i>In Pari Delicto</i> in the Receivership Context: <i>Scholes v. Lehmann</i>	75
b. In Pari Delicto in the Bankruptcy Context: Bankruptcy Code § 541	78
c. The “Wagoner Rule”	80
3. Bankruptcy-Related Defenses	81

a. Judicial Estoppel for “Unscheduled” or Undisclosed Claims	81
b. Res Judicata from Bankruptcy Plans and Orders	82
c. Release and Exculpation Provisions	83
D. Trustee Damages: “Deepening Insolvency”	84
E. Federal Bankruptcy Jurisdiction and Abstention	88
1. Scope of Bankruptcy Jurisdiction	89
2. Abstention	91
a. Mandatory Abstention	92
b. Permissive Abstention	96
F. Settlements in Bankruptcy Cases	98

Chapter 3: Actions by Nonclients Under Securities and Racketeering Statutes	101
A. Securities Fraud Claims Against Professionals	103
1. Overview of Securities Fraud Claims	103
2. Statute of Limitations for Section 10(b) Claims	106
3. Elements of a Securities Fraud Claim	107
a. False or Misleading Statement	107
b. The “in Connection with” Requirement and the Birnbaum Rule	119
c. Fraudulent Intent: “Scienter”	121
d. Reasonable Reliance	125
e. Loss Causation	127
f. Damages	130
4. <i>In Pari Delicto</i> Defense	134
5. Procedure in Securities Fraud Cases	135
a. Service of Process and Personal Jurisdiction	135
b. Class Actions	135
c. Motions to Dismiss	140
d. Stay of Discovery	142
e. Settlements and Bar Orders	142
6. The SLUSA Statute	143
7. State “Blue Sky” Securities Claims	147
B. RICO Claims Against Professionals	148

1. RICO: Generally	149
2. Elements of RICO § 1962(c)	150
3. Private Civil Actions under RICO § 1964(c)	152
4. RICO's Inapplicability to Private Civil Securities Fraud Claims	153
5. State RICO Statutes	154
Chapter 4: Actions by Nonclients Under Common Law	157
A. The Privity Rule and Its Exceptions	158
1. Client Privity	158
2. Intended Beneficiaries	162
3. Statements to Nonclients: Opinion Letters	164
B. Aiding and Abetting Claims	169
1. Primary Violation	169
2. Actual Knowledge	172
3. Substantial Assistance	173
4. Proximate Cause	175
5. Pleading and Proof in Aiding and Abetting Cases	176
C. Civil Conspiracy	177
D. Defenses to Common-Law Claims	179
Chapter 5: Actions Among Codefendants and Other Potentially Responsible Parties	181
A. Contribution	183
B. Indemnification	190
C. Direct Tort Claims by Potentially Responsible Parties	194
Chapter 6: Criminal, Regulatory, and Disciplinary Proceedings	197
A. Criminal Investigations and Proceedings	198
B. SEC Investigations and Proceedings	204
C. Professional Discipline	207
Table of Cases	211
Index	243

Acknowledgments

I am grateful to the many colleagues, friends, and family who contributed to this book, whether in content or in spirit. Particular thanks are due to my colleagues at Williams & Connolly. Edward Bennett, George Borden, Ellen Oberwetter, and John Williams made special contributions to one or more chapters of the book, and their contributions are cited in those chapters, with my thanks. Others reviewed and provided helpful comments on drafts of portions or all of the manuscript, including John Villa, Robert Cary, Stephen Farina, Emmet Flood, and Richard Olderman. My colleagues' contributions immeasurably improved the quality of the book, but the author alone is to blame for the opinions it expresses and any errors it may contain.

Karey Hart and Christopher Bellacicco provided invaluable research assistance, as did Williams & Connolly Special Project Attorneys Cindy Coldiron, Paul Mitchell, Anthony Caruso, and Steve Coran. Richard Olderman oversaw much of the research, for which I am particularly grateful. I also wish to thank Natalie Yeager, Deddeh Ansumana Jones, Susan Gerard, and Emmilee Racek for cite-checking the manuscript and Caitlin Lietzan, Tony Minerva, Alicia Julian, and Matthew Foley for their oversight and assistance throughout the cite-checking process. My assistant, Wendy Thomas, helped with many of the logistics, including formatting the manuscript.

The ABA has been nothing but helpful and encouraging. Special thanks are due to Peter Henning, Chair of the ABA Criminal Justice Section Book Board, to the members of that Board and of the Section of Litigation Book Publishing Board, who agreed to cosponsor this book, and to Kimberly Rosenfield, Sarah Forbes Orwig (who persuaded me to write this book in the first place), Marisa L'Heureux, and everyone else at the ABA who contributed.