CLAIMS EXAMPLES:

A. Employment Practices Liability

1. Wrongful Termination: McKenzie vs. Miller Brewing Co., et al

A former Miller Brewing Company executive was awarded $26.6MM by a Wisconsin state jury for wrongful termination where his employment was terminated after a female colleague complained about his recounting of a racy episode of the Seinfeld television show at the office.[1] The jury found that the incident was not sexual harassment.[1] Miller argued that it made its decision to fire the executive due to his poor performance.[2] However, the jury did not afford this explanation any credibility.[3]

2. Sexual Harassment: McIntre vs. Manhattan Ford, Lincoln-Mercury, Inc.

A $6.6MM jury verdict was awarded to a woman for her claim that she was subjected to two and a half (2 ½) years of sexual harassment.[4] The verdict was reduced to $3.7 million by the trial judge.[5] The plaintiff presented evidence as to seventeen (17) separate incidents of harassment and alleged a daily barrage of abusive language.[6] The trial court, in refusing to vacate the award of punitive damages in its entirety, stated that "the amounts previously awarded to plaintiffs in Title VII cases have not been a sufficient deterrent in view of the significantly increasing number of employment claims."[7]

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[1] Ibid.
[2] Ibid.
[3] Ibid.
[4] Ibid, pg. 3
[5] Ibid.
[6] Ibid.
[7] Ibid.

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3. Disability Discrimination/ADA:

a) Burch vs. Coca-Cola Co.

A recovering alcoholic's ADA claim was dismissed and the jury verdict vacated on appeal, after a jury had awarded the employee $109,000 in back pay, $700,000 in front pay, $300,000 in compensatory damages and $6MM in punitive damages.[8] The Fifth Circuit dismissed the case holding that an employee's claim of frequent inebriation falls short of the permanent impairment requisite of the ADA.[9] The ADA is designed to remove barriers, the Court held, for permanently disabled workers.[10] Although the employee was not held to have met the ADA's threshold requirements of a permanent impairment in this case, the Court limited its decision and stated that it did not hold that an alcoholic was precluded from stating a claim under the ADA.[11]

b) Wal-Mart Stores, Inc.

The EEOC filed suit on behalf of a paraplegic applicant for employment at Wal-Mart who was turned down despite his qualifications for several open positions.[12] The claimant alleged that the store personnel manager indicated that there were "no openings for a person in a wheelchair."[13] The jury awarded $8,399 in back pay, $75,000 in compensatory damages and $3.5MM in punitive damages.[14]

[8] Ibid, pg. 1
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Sedgwick First & Kaufman, Borgeest & Ryan, Employment Practices Liability: Settlements and Verdicts – A Summary of Reported Settlements and Verdicts in Excess of Two Million Dollars (For the Period of January 1, 1992 to January 1, 1998). Pg. 20 (Case #90).
[13] Ibid.
[14] Ibid.

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c) Hutchins, Wheeler and Dittmar

The law firm fired the Executive Director, where he worked for a year, after it was learned that he had multiple sclerosis.[15] The claimant alleged that the firm did not provide reasonable accommodations for his disability, increased his workload and did not place his desk closer to the elevator.[16] The firm claimed that it did not discriminate against the claimant, alleged that the claimant did not notify the firm of what he needed to make his job easier and that he could have altered his schedule to accommodate his condition.[17] The jury awarded $2.5MM in punitive damages.[18]

4. Class Action EPLI Complaints

a) Race Discrimination: Shoney's, Inc.

Class action suit brought by African-Americans alleging they were denied employment or promotions between 1985 and 1993.[19] The suit was settled for $105MM.[20]

b) Gender Discrimination and Sexual Harassment: Publix Supermarkets

Class action suit by 150,000 past and present female employees at management and non-management levels who sued the company for keeping them in low-paying jobs.[21] The case settled for $81.5MM.[22]

[15] Ibid, pg. 21 (Case #96).
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid, pg. 2 (Case #6).
[20] Ibid.
[21] Ibid, pg. 2 (Case #9).
[22] Ibid.

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5. Third Party Discrimination / Harassment

a) Third Party Race Discrimination: Denny's, Inc.

A race discrimination lawsuit was brought by African American patrons in a Denny's restaurant where they alleged that they were given inferior service as compared to white customers due to their race.[23] The African American plaintiffs made several claims including claims for public accommodation discrimination and discrimination in the making of private contracts. The total damages resulting from this case were $46 million.[24]

b) Third Party Harassment

A woman filed a harassment claim against the employee of a gas station attendant and the employee who allegedly made lewd gestures and unwanted sexual advances when she stopped by the station to gas up her car and use the restroom. She logged a complaint with the company that owned the gas station regarding the employee's conduct and demanded that the employee be fired. When the employee was not fired nor was any disciplinary action taken against him, she sued the employer alleging that the company was advised of this employee's conduct but did nothing to prevent future actions. The case is still ongoing.

c) Third Party Discrimination

A hearing impaired woman customer filed a claim against a retail store and certain of its employees for discriminatory and wrongful treatment at one of its stores. The customer was hearing impaired and asked one of the store's employees for help. When the customer indicated that she could not hear the employee's response to her question, the employee answered in an exaggerated and extremely loud voice and afterwards mimicked their prior conversation to other employees to humiliate, embarass and cause anguish to the customer. When the customer approac

[23] Jeffrey P. Klenk, Emerging Coverage Issues, Professional Liability Underwriting Society, Mar

[24] Phil Norton, The PLUS Session on Employment Practices Liability, New York City, March 2, cases of Significance Section.

employee to get her name, the employee allegedly made discriminatory statements to the customer regarding her "deafness." The customer commenced an action against the company that owned the store and the employee on the basis that their actions were not only egregious but were specifically targeted at discriminating against disabled people. The case is still pending.

6. Age Discrimination: Kar Products

   A former sales manager sued the company he was fired from alleging his wrongful termination was due to his age.[25] The company alleged the plaintiff was fired due to poor performance but the jury came to a $2.3MM verdict.[26]

7. Whistleblowing: Ryder Commercial Leasing and Services

   A tire maintenance worker was constructively discharged from Ryder.[27] He alleged he was severely harassed in retaliation for confronting his supervisor regarding thefts made by the supervisor and another supervisor.[28] The company conducted an investigation after the plaintiff had reported the problem to corporate headquarters and terminated the two supervisors.[29] When the plaintiff asked for his old job back, Ryder refused because it did not want to set a bad precedent for subordinates to make allegations of stealing by supervisors to get them fired.[30] A jury verdict was rendered in favor of the plaintiff for $4.53MM (which included $4.0MM in punitive damages).[31]

8. Retaliation: Steve Foley Cadillac, Inc.

   An auto technician alleged he was wrongfully terminated in retaliation for his filing of a Worker's Compensation Claim.[32] The defendant

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[25] Sedgwick First & Kaufman, Borgeest & Ryan, Employment Practices Liability: Settlements and Verdicts – A Summary of Reported Settlements and Verdicts in Excess of Two Million Dollars (For the Period of January 1, 1992 to January 1, 1998). Pg. 20 (Case #121).
[26] Ibid.
[27] Ibid, pg. 17 (Case #77).
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid, pg. 24 (Case #113).

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firm contended that he was fired for failing to give proper notice and for taking leave without proper authorization.[33] A jury ruled in favor of the plaintiff and a $2.56MM verdict was awarded.[34]

B. SEC/Shareholder (Private Companies)

1. D's and O's – owe a fiduciary duty to shareholders of the company. Can be sued for breach of duty of loyalty (not acting in the best interests of shareholders) and breach of duty of care (not acting as a prudent man would in a like situation) to the corporation and its shareholders. [Refer to Van Gorkom vs. Trans Union case to illustrate].

The following examples illustrate the types of shareholder derivative claims a private company and its directors and officers can face.

a) A plastics manufacturer is privately held and owned by ten shareholders. A few of the shareholders run the company but some are only passive investors. The passive investors become angry when they discover that the directors and officers have spent the company's money lavishly on new corporate headquarters including the purchase of two paintings costing over one-and-a half million dollars and various perks such as management's use of limousines to get to work. To make matters worse, these expenditures are made while the company has fallen on tough times financially. The passive shareholders sue on the basis that the directors and officers have "wasted and mis-used corporate assets."

b) The president of a privately held oil company learns of a great investment in an oil field during his work for the company. Instead of investing in it on behalf of the company, he invests in it himself through a partnership with two other individuals. The oil field end up being rich in oil and generates tremendous profits. The other shareholders of the oil company bring a derivative action on behalf of the company against the president for misappropriation of a corporate opportunity (i.e. breach of duty of

[33] Ibid.
[34] Ibid.

loyalty). Defense costs amount to hundreds of thousands of dollars before the case is settled for $1.3MM with the president admitting no wrongdoing.

c) A privately held manufacturer of a food preserver is in business for 20 years and is successful. The President/CEO retires and a new President/CEO is hired. Unbeknownst to the shareholders, shortly after taking over, the President and Board decide to invest in a riverboat gambling casino because they believe it is a good opportunity despite the fact that they have no real experience in this area. They make this decision after learning of this opportunity within two days without consulting experts. A year after buying the business, the net losses resulting therefrom force the company into bankruptcy. The shareholders sue alleging that the directors and officers did not act prudently and breached their duty of care to the corporation and its shareholders.

2. Even though private companies are not subject to the securities laws to the same extent as public companies, they are still subject to the anti-fraud provisions of the Securities Act of 1933 ('33 Act) and the Securities Exchange Act of 1934 ('34 Act) and there is a private cause of action right under Section 10(b)(5) of the '34 Act. The following examples illustrate the types of suits alleging securities laws violations that a private company and its directors and officers can face.

   a) The shareholders of a closely held family owned manufacturer of wiring devices and electrical products enter into a shareholders agreement whereby they agree that if any shareholder wants to sell their shares, it first must be offered to the company at a price not to exceed the book value of the company. Years pass after the agreement and over the course of time, several of the shareholders sell back their shares to the company at a negotiated price below the book value of the company as conveyed to the selling shareholders by the company and its management. Later on, the selling shareholders sue asserting various allegations including violations of Rule 10(b)-5 of Section 10(b) of the '34 Act regarding misstatements or misleading statements made by the President. These misstatements or omissions were related to the company's

failure to provide financial data and other information about the company, the misrepresentation of the book value of the company and the misrepresentation that the selling shareholders had to sell all or none of their stock. The plaintiffs alleged that they relied upon these misrepresentations (i.e. misleading statements or omissions) made by the company and its President in deciding to sell their stock and thus would not have sold their shares or would have sold their shares at a higher price if these misrepresentations were not made.

b) A software technology company completes a private placement and raises $5MM in capital from outside investors. In the private placement memorandum, the company and its directors and officers assert that their product is state of the art. They fail to disclose that some recent testing of the product has shown that there may be some glitches in it. After the placement is completed, the extent of the problem is greater than initially thought. Eight months after the private placement, the company burns through the $5MM in trying to fix the glitch and ends up filing for bankruptcy. The outside investors sue under the anti-fraud provisions of the '33 Act alleging that the company and its directors and officers made misrepresentations in the private placement memorandum used in connection with the sale of stock.

c) The company's co-founder and President and some other executives of a closely-held, deep-discount and drug store chain altered the company's financial statements to inflate earnings. The co-founder and President also embezzled $10MM to support another one of his businesses which was financially fledgling. After this, several creditors/lenders sue when the company cannot repay debts owed to them. Several directors and officers are sued and many are convicted of fraud and some sent to jail. However, the company's other co-founder and Chairman, who was unaware of the financial chicanery, was also sued but was sued for "sleeping at the switch" (i.e. for not discovering the fraud which had gone on for a long time). Although coverage did not exist for those who committed fraud, the co-founder and Chairman did have coverage due to the fact the policy provided severability as respects the

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fraud/dishonesty exclusion.

d) An office supply company is owned by three shareholders. Two run the company and are involved in the day to day operations and one is a silent shareholder who is not a director or officer. The two managers/shareholders approach the silent shareholder and offer a price of $2MM to buy his third of the company. The deal is agreed upon and three months later the silent shareholder finds out the other two shareholders have entered into an agreement to sell the entire company for $18MM (which would have equated to $6MM for his third). He alleges the other two shareholders had known about the transaction before he sold his shares and had a duty to disclose the same before he agreed to sell his 1/3 of the company. Thus, he alleges violations of the federal securities laws on the basis of this non-disclosure.

3. Public companies have a tremendous exposure to suits alleging violations of federal and state securities laws. The following examples illustrate suits against a public company and its directors and officers.

   a) Medstone

   Medstone consummated its initial public offering in June of 1988 whereby the company sold 1.15 million shares of common stock at $13 per share. In the year following the offering, Medstone made numerous statements highlighting the potential prospects of its gallstone lithotripsy system and hence the price of Medstone stock escalated to almost $40 per share by August of 1988. In the fall of 1988, the Chief Executive Officer, Earl Payne, resigned and shortly thereafter, he and his family sold approximately 66% of their holdings for $6.5 million. At the same time, the President, Richard Penfil, and his family sold approximately 25% of their holdings for about $2.5 million. In August of 1989, Richard Penfil resigned as President, and he and his family sold almost all of their remaining shares of Medstone common stock for $4.5 million. Shortly thereafter, on October 20, 1989, the FDA announced that they would not approve the use of Medstone's lithotripsy system to treat patients with gallstones. A week following the FDA's

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announcement, Medstone's stock fell to as low as $6 per share and a securities class action suit was filed.

The plaintiff, Kaplan, brought a suit against Medstone International, certain of its directors and officers and the securities underwriter alleging that the defendants made material false and misleading statements and omitted material information in the company's initial public offering prospectus and post-prospectus public statements involving the prospect of Medstone's shockwave lithotripsy system for treatment of kidney stones and gallstones. The District Court ruled in favor of the defendants by granting in full Medstone's motions for summary judgment but the case was appealed. The United States Court of Appeals, Ninth Circuit, reversed the decision in part and affirmed the decision in part relative to several issues including the issue of scienter (or knowledge and intent to defraud or recklessness) which was mainly determined by insider trading.

With respect to the post-prospectus statements and the alleged violations of Section 10b of the Securities and Exchange Act of 1934, the plaintiff must prove (1) that the misleading or omitted statements were material and that the plaintiff relied on the alleged misstatements and (2) that the defendant intended to defraud or deceive investors or exhibited a recklessness that is only one step from intent (basically referred to as scienter). In the Medstone case, the U.S. Court of Appeals found that some of the statements made were material and that the defendant relied upon such statements. More importantly, due to the evidence created by the Payne and Penfil insider stock sales which were at large amounts and at sensitive times, the U.S. Court of Appeals found that there was a genuine issue of material fact as to the knowledge and intent (or scienter) or Payne and Penfil, which must be left for a jury to decide based on the facts of the case. Even more enlightening is the fact that two other officers named in the suit, David Radlinski, Medstone's Chief Financial Officer and Freeman Rose, Medstone's Chief Executive Officer after Earl Payne retired, did not sell their holdings in Medstone throughout the class period. The appeals court used this information in large part to affirm summary judgment for Radlinski and Rose on the issue of

scienter, that is, that they had no knowledge that any statements made were false or misleading. As you can see, this case strongly suggests that insider trading will be weighed heavily in determining a director's or officer's liability in a securities suit. Despite the higher pleading standards requirement incorporated into the 1995 Private Securities Reform Act, insider trading and accounting fraud have been the two types of allegations made by plaintiffs' attorneys to meet the new, higher pleading standards.[35]

b) IMP, Inc.

IMP, Inc. is a supplier of high-integration analog and mixed signal CMOS integrated circuits to the communication, computer and industrial markets.[36] During Fiscal 1995, the company experienced flat revenues ($15MM), minimal profits ($0.03 per share) and its stock price generally languished ($5.00 – $8.00 per share).[37] Insiders sold little stock during this period.[38] In the shareholders class action suit that followed two years later, it was alleged that demand for IMP's products were weakening but management devised a plan to alter that perception and mislead investors.[39]

The company had a policy that backlog of sales should only include those orders which were non-cancellable or cancellable with penalties and backlog should only include products that would be shipped within six (6) months.[40] However, IMP began permitting customers to order products that they could delay or even cancel shipments of these orders without incurring any penalties.[41] Due to this change, IMP was able to report that backlog [which it represented was the amount of product to be shipped within six (6) months] was increasing significantly and

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[35] Joseph A. Grundfest, Michael A. Perino, Paul Lomio, Erika V. Wayne, Rilla Reynolds, Securities Class Action Litigation in Q1 1998: A Report to NASDAQ from the Stanford Law School Securities Class Action Clearinghouse, pg. 2.
[36] Securities Class Action Alert, August 1998 Volume II, Issue 8, pg. 2.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.

demand for its products was strong.[42] Thus, in the 1996 Annual Report, IMP reported its backlog grew from $8MM at the end of Fiscal Year 1995 to $42MM at the end of Fiscal Year 1996.[43] The company and its directors and officers made numerous statements about continuing strong demand for its products despite the fact that IMP knew it could not ship all of the products included within its backlog figures within six (6) months or that such orders could be cancelled or rescheduled for shipment beyond the next six (6) months without penalty.[44] The company and its directors and officers indicated that its strong Fiscal Year 1996 results were due to robust demand for its products and reassured investors that it was on track to meet forecasts of strong earnings growth for Fiscal Year 1997.[45] When the company's financial results did not meet such expectations, the company's stock price plummeted ($1.91 per share at 7/22/96) and the class action securities suits ensued.[46]

The lead plaintiff's counsel was Milberg, Weiss, Bershad, Hines and Lerach and the case against IMP, Inc. and certain directors and officers was settled for $9.5MM.[47]

C. Other

The following examples illustrate other types of claims which private companies and their directors and officers can face.

a) Negligent Misrepresentation:

A telecommunications company agrees to sell its assets to another company for $10MM. After the sale is consummated, the buyer learns that the telecommunications company had been in danger of losing two of its largest customers due to some recent disputes over service and fees. The buying company takes over and loses these two customers a few months after the sale as the previous problems are too much to overcome. The buyer sued the selling company for fraud and

[42] Ibid.
[43] Ibid.
[44] Ibid, pg. 3.
[45] Ibid.
[46] Ibid, pg. 4.
[47] Ibid.

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negligent misrepresentation on the basis that the seller knew of the extent of these problems prior to closing the sale but failed to disclose the same. The case is defended and ultimately settled.

b) Negligent Misrepresentation:

A manufacturer of leather coats sold its goods to a regional retail chain. In its advertisements, the retail chain asserted that all of its coats were made with genuine leather. A news magazine report aired indicating that some of the coats sold by the retail chain were only partially made with leather and a large part of these coats were made with synthetic leather. As a result of the negative publicity, the regional chain's business suffered and they sued the coat manufacturer alleging that it negligently misrepresented that its coats were made with genuine leather. The coat manufacturer contended that all of the coats were at least partially made with genuine leather and that no misrepresentation was made since they never indicated that the coats were 100% made with genuine leather. The coat manufacturer spent $200,000 in defense costs before the case was dropped.

c) Anti-Trust:

A privately held HVAC firm with other firms in the same business were sued in a class action by various customers for price-fixing and anti-trust violations. Various companies and their respective directors and officers were named alleging that they had conspired to put anti-competitive measures in place thereby driving up the price for HVAC equipment and service. The case is defended and ultimately settled with each HVAC firm contributing to the overall settlement.

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