

One Minute Memo[®]



Supreme Court Rejects Amgen's Bid to Raise Bar for Investors in Securities Class Actions

On Wednesday, February 27, 2013, the United States Supreme Court rejected a bid to raise the bar for securities class action cases. In *Amgen Inc., et al. v. Connecticut Retirement Plans and Trust Funds*, the Court, in a 6-to-3 decision, affirmed the Ninth Circuit's ruling that securities fraud class actions need only plausibly allege - not prove - that purportedly misleading statements are material in order to win class certification. Justice Ruth Bader Ginsburg delivered the opinion of the court, Justice Samuel Alito concurred separately, and Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy dissented.

The plaintiff sued Amgen under SEC Rule 10b-5, alleging false statements about the safety of the company's anemia treatment products. The plaintiff then moved for class certification by invoking the fraud-on-the-market presumption to establish that the element of reliance was common to the class. The fraud-on-the-market presumption allows class members to avoid having to show they each relied on the defendants' statements, because it assumes that, in an efficient market, the price of a traded security quickly reflects all available information, and that a buyer of that security is therefore presumed to have relied on the truthfulness of that public information.

Amgen opposed class certification on the grounds that the alleged false statements could not have been material because the truth about the safety of the products at issue had already been disclosed to the market at the time of the transactions. Where the alleged statements were immaterial and no buyer could claim to have relied on them, Amgen argued that the fraud-on-the-market presumption is inapplicable. Amgen further argued that individualized issues predominated over common questions because each purported class member would need to prove that he or she relied on the alleged misstatements.

The district court granted class certification and the Ninth Circuit affirmed. On certiorari, the Supreme Court addressed 1) whether a securities fraud plaintiff alleging fraud on the market must establish materiality of the alleged misstatements in order to obtain and class certification; and 2) whether the district court in such a case must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory prior to certification based on that presumption.

The majority first held that establishing the materiality of alleged fraudulent statements cannot be required at the class certification stage: "Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.... The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class." The question of whether alleged misrepresentations are material, and can support invocation of the fraud-on-the-market, is better reserved for summary judgment or trial, according to the majority.

On the second question, the high court held that the district court properly declined to consider rebuttal evidence concerning materiality at the class-certification stage. While defendants may of course argue that alleged statements were not material, as materiality is an essential element under Rule 10b-5, those arguments will not be resolved until later, at summary judgment or trial.

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The dissent, which would have reversed the Ninth Circuit, urged that a plaintiff could not invoke the fraud-on-the-market presumption absent materiality, because if the allegedly misleading statement is immaterial, then it is not incorporated into the price of the security at issue at the time of the transaction. Without such a presumption, individualized questions of reliance will predominate over common questions of reliance.

The Supreme Court's ruling in the Amgen case represents a tough break for companies and their directors and officers, who, in certain Circuits, will now lose the early opportunity to defeat potential 10b-5 class actions at class certification stage. However, while the decision resolves a marked Circuit split on the issue, it does not alter the substantive law of such claims, including the requirement of materiality. It merely shifts the timing of when materiality is determined to later in the case, unfortunately after significantly more defense costs are incurred. Ultimately, a lack of materiality will continue to dispose of a 10b-5 class action on the merits.

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