

1st Thoughts On Supreme Court's Amgen Ruling

Law360, New York (February 27, 2013, 7:43 PM ET) -- Today, in a 6-to-3 decision, the Supreme Court of the United States held in *Amgen Inc., et al. v. Connecticut Retirement Plans and Trust Funds* that a securities fraud plaintiff need not prove the materiality of an alleged fraudulent statement in order to invoke the fraud on the market presumption of reliance to obtain 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 moved for class certification, 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 assumes that the market price of a security traded in an efficient market reflects all public information, and therefore a buyer of the security is presumed to have relied on the truthfulness of that public information in purchasing the security.

Amgen opposed class certification on the grounds that individualized issues predominated over common questions because each purported class member would need to prove that he or she relied on the alleged statements in purchasing the security. Amgen contended that the alleged fraudulent statements could not have been material because the truth about the safety of Amgen's anemia products had already been disclosed to the market at the time of the transactions.

Because, according to Amgen, the alleged misstatements were immaterial, by definition, they would not affect Amgen's stock price in an efficient market, and thus, plaintiff could not invoke the fraud-on-the market presumption of reliance and no buyer could claim to have relied upon the alleged misstatements.

The district court granted class certification and the Ninth Circuit affirmed. The Supreme Court granted certiorari, thereafter. The particular questions presented by the Supreme Court's grant of certiorari were, first, whether, in a misrepresentation case under SEC Rule 10b-5, a securities fraud plaintiff alleging fraud on the market must establish materiality of the misstatements in order to obtain class certification and, second, whether in such a case the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.

On the first question, the majority held that establishing the materiality of the alleged fraudulent statement cannot be required at the class certification stage. The court explained that "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 majority emphasized that the plaintiffs' failure to prove materiality would end the case entirely for all putative class members; it would not result in a predominance of individual issues. Thus, the objective question of whether the alleged

misrepresentations were material is a common question for purposes of determining whether common issues of fact or law predominate under Rule 23. Whether the statements at issue are material, and can support the invocation of the fraud-on-the-market presumption of reliance, is better reserved for summary judgment or trial, according to the court's majority.

On the second question, the Supreme Court held that the district court properly refused to consider rebuttal evidence concerning materiality in connection with plaintiff's invocation of the fraud-on-the-market presumption of reliance at the class-certification stage. Evidence to rebut materiality does not disprove commonality because materiality is an objectively determined fact that is either present or absent for the whole class.

Thus, the majority concluded that the plaintiff need not prove, at the class-certification stage, that the fraudulent statements were material. Defendants may of course continue to argue that the statements at issue were not material, as materiality remains an essential element under SEC Rule 10b-5, but those arguments will be resolved later, at summary judgment or otherwise.

Interestingly, in Justice Alito's concurrence, he noted that Amgen did not request an overruling of the fraud on the market doctrine; however, recent evidence and commentary suggests the doctrine is not based on sound economic footing. In light of that evidence and commentary, revisiting the fraud on the market doctrine may be warranted, according to Justice Alito.

The dissenting justices urged that the fraud-on-the-market presumption is not merely a liability issue concerning materiality. Traditionally, an investor plaintiff has to plead and prove actual reliance on the allegedly misleading statement, and attempting to do so, can often result in individualized issues of reliance predominating over common questions. As such, a plaintiff often seeks to invoke the fraud-on-the-market presumption of reliance to attempt to show that the question of reliance is a common one.

A plaintiff can invoke the fraud-on-the-market presumption if the alleged misleading statement is incorporated into the price of the security at issue. If the allegedly misleading statement is immaterial, it is not incorporated into the price of the security at issue. Absent materiality, therefore, a plaintiff cannot invoke the fraud-on-the-market presumption. Without such a presumption, individualized questions of reliance will predominate over common questions of reliance.

The dissent, therefore, would have reversed the Ninth Circuit. Justice Scalia's dissent, in addition, also emphasized that class certification often prompts defendants to settle to avoid costs and risks of litigation, but the majority's reasoning risks allowing all fraud-on-the-market cases to impose those costs and risks, no matter the alleged misrepresentation.

From a securities plaintiff's perspective, today's holding will delay the burden of proving materiality to a later stage in the case — summary judgment or trial — in those jurisdictions that formerly required materiality to be proven at the class certification stage in order to invoke the fraud-on-the-market presumption of reliance. As Justice Scalia's dissent stated, securities plaintiffs may perceive an advantage to this delay if it results in the certification of a class otherwise previously subject to challenge for failure to prove materiality.

Nonetheless, while today's ruling permits plaintiffs to invoke the fraud-on-the-market presumption at class certification without proving materiality (so long as the stock in question is traded on an efficient market and the statements at issue are public), a lack of materiality will always dispose of a 10b-5 class action on the merits. Accordingly, the holding largely addresses when an unmeritorious case can be disposed of based on materiality. A majority of the court held that such disposition should wait until summary judgment, as opposed to class certification.

The Supreme Court's holding affirmed the Ninth Circuit, resolving an existing split between the First, Second and Fifth Circuits and the Third, Seventh and Ninth Circuits.

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