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LITIGATION

Amgen's impact remains to be seen

By Eric S. Waxman and Virginia Milstead

In a case closely watched by the federal securities class action bar, *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 2013 DJDAR 2521 (Feb. 27, 2013), the U.S. Supreme Court held that for purposes of seeking certification of a class asserting claims under Section 10(b) and Rule 10b-5 of the Securities Exchange Act, a plaintiff need not prove the materiality of alleged misleading statements to invoke a presumption that the proposed class uniformly relied on those statements. The court further concluded that a district court is not required to consider evidence rebutting the presumption of reliance at the class certification stage, at least insofar as that evidence solely disproves the materiality of the statements at issue.

In so ruling, the court resolved a split amongst the circuits. While the Supreme Court's decision did not mark a major shift in the case law, it is significant in terms of depriving defendants of an additional mechanism to halt weak cases that might otherwise have squeaked through the motion to dismiss phase.

In *Amgen,* the plaintiff alleged that Amgen made misleading statements to the public in connection with the safety of its anemia drugs. Claiming that the price of Amgen's common stock dropped when the purported fraud was revealed, the plaintiff brought suit on behalf of a class of Amgen shareholders under Section 10(b) and Rule 10-b-5. To satisfy its obligation to prove it relied on the statements at issue in deciding to purchase or sell Amgen stock, the plaintiff invoked the so-called fraud-on-the-market presumption, a theory first adopted by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988).

According to the fraud-on-the-market presumption, "if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities." As the Supreme Court noted in *Amgen,* "materiality is an essential predicate of the fraud-on-the-market theory" because "immaterial information, by definition, does not affect market price." The presumption endorsed by *Basic* is significant for purposes of class certification because it relieves a plaintiff from having to prove actual reliance. Without the presumption of reliance, individual issues of reliance would predominate, making certification impossible under Federal Rule of Civil Procedure 23(b)(3).

As materiality is a requirement for the fraud-on-the-market presumption to apply in the first instance, in opposing class certification before the district court, Amgen argued that for the presumption to apply, the plaintiff must prove the materiality. Because the statements at issue were immaterial, it was not reasonable to presume that the class members relied on them, and individual issues of reliance would predominate. Amgen further argued that, because the presumption is rebuttable, the district court should consider evidence rebutting the presumption. The district court rejected both arguments and certified a class. The 9th U.S. Circuit Court of Appeals affirmed. The Supreme Court affirmed in a 6-3 decision.

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Despite acknowledging that "the fraud-on-the-market theory cannot apply absent a material misrepresentation," the court declined to find that proof of materiality is needed to ensure that the questions "common to the class will 'predominate over any questions affecting only individual members.'" The court noted that materiality can be proved by "evidence common to the class." That renders materiality a common question for purposes of Rule 23(b)(3). The court also placed weight on the fact that a finding on materiality at the class certification stage would be outcome dispositive because "materiality is an essential element of a Rule 10-b-5 claim." As a consequence, the court found that there was "no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating."

Regarding Amgen's effort to rebut the presumption, the court concluded that Amgen's rebuttal evidence merely showed that the statements at issue were not material. Therefore, whether Amgen rebutted the presumption was also a common question. The court concluded that the district court was not "required" to consider the rebuttal evidence, and that such evidence could be left for summary judgment or trial.

Implications for future litigants

First: Although the court's decision is interesting, its significance remains to be seen. While it deprives the defense bar of a new tool to defeat federal securities class actions at an early stage, it simply returns the law to where it was before the circuit split. The decision did not change the requirements for proving a Section 10(b) and Rule 10b-5 claim or for invoking the fraud-on-the-market presumption. In fact, it reaffirmed them. Thus, a plaintiff invoking the fraud-on-the-market presumption must still prove its applicability — with evidence of materiality — in order to prevail on the merits at summary judgment or trial. A court's decision to apply the presumption at the class certification stage does not imply a finding of materiality and is not binding on later stages of the litigation.

Amgen also does not foreclose litigation about the applicability of the fraud-on-the-market presumption at the class certification stage. Other elements of the fraud-on-the-market presumption — the efficiency of the market and the public dissemination of the statements — still must be proven for class certification. Unlike materiality, if those requirements fail, the claim itself will not fail. Instead, the presumption will be unavailable, and the plaintiff will be required to prove that each class member individually relied on the statements.

Market efficiency may be particularly fertile ground for opposing class certification in the future. Significantly, both Justice Samuel Alito, in a concurring opinion, and Justice Clarence Thomas, in a dissenting opinion, raised questions about the validity of the fraud-on-the-market presumption. Both justices reasoned that the presumption is premised on the economic theory that in an efficient market, stock prices reflect all publicly available information. Economists question the validity of this theory. By raising the issue, the justices have opened the door to further scrutiny.

Second: the *Amgen* decision also leaves open questions for the future. Whether rebuttal evidence may be appropriate at the class certification stage in some instances remains unanswered. In *Amgen*, the rebuttal evidence demonstrated immateriality, but the fraud-on-the-market presumption can also be rebutted by showing that, even if the misstatements at issue were material, the "truth" simultaneously entered the market through other sources and corrected any distortion of price. See, e.g., *In re Apple Computer Sec. Litig.,* 886 F.2d 1109, 1116 (9th Cir. 1989). In this situation, unlike in *Amgen*, a plaintiff's claim may not be foreclosed entirely, but the fraud-on-the-market presumption will be rebutted. Without the presumption, individual issue of reliance predominate. The court in *Amgen* did not address whether class certification would be appropriate in those circumstances.

Similarly, while acknowledging that a court's "class certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim,'" as Justice Thomas pointed out in his dissent, the very theory essential to demonstrating that individual issues do not predominate depends on a finding of materiality. The majority refused to permit that inquiry because a finding against materiality would dispose of the merits and therefore create a license to engage in "free ranging merits inquiries at the certification stage." Thus, while "some overlap with the merits" is permitted, that inquiry apparently stops if it is so powerful as to be "outcome dispositive." While the majority found that it was not "necessary" to examine materiality in order to "determine the propriety of certification," as Justice Thomas pointed out, "[w]ithout materiality, there is no fraud-on-the-market presumption, questions of reliance remain individualized, and rule 23(b)(3) certification is impossible." Thus, whether the court's ruling undermines its prior decision in *Wal-Mart Stores, Inc. v Dukes*, 131 S. Ct. 2541 (2011), which allowed some inquiry into the merits at the class certification stage, remains to be seen.

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