# First Circuit Affirms Dismissal of Securities Class Action Against Biogen Inc.

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On May 12, 2017, the U.S. Court of Appeals for the First Circuit affirmed dismissal of the putative securities class action *In re Biogen Inc. Securities Litigation*, No. 16-1976. The action was filed in the U.S. District Court for the District of Massachusetts shortly after Biogen announced that it was revising its full-year 2015 financial guidance downward principally due to slowing growth of the company's multiple sclerosis drug, TECFIDERA. Following that July 2015 announcement, Biogen's share price fell 22 percent (representing an approximately $20 billion market cap decline).

The action alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act against Biogen and certain of its current and former officers. Citing adjective-laden statements from 10 anonymous "confidential witnesses," the plaintiffs alleged that the defendants intentionally misled the investing public regarding the impact on TECFIDERA sales resulting from the company's October 2014 announcement that a patient treated with the drug had died from complications associated with the rare neurological disease progressive multifocal leukoencephalopathy (PML).

The district court dismissed the case with prejudice for failure to meet the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA). In a 72-page opinion, the court observed that the plaintiffs' complaint and brief "gloss[ed] over" Biogen's repeated public disclosures about the impact of the PML event on TECFIDERA's performance and held that the "[d]efendants' warnings about the PML death fall far short of reckless conduct." Weighing competing inferences, the district court held that far more compelling than any inference of fraud is that the "defendants were, at worst, overly optimistic in attempting to predict the PML death's effect on revenues." The district court also held that nearly all of the alleged misstatements were immaterial as a matter of law or protected by the PSLRA's safe harbor provisions for forward-looking statements.

The First Circuit affirmed, holding that the complaint failed to meet the rigorous pleading standards for allegations of scienter under the PSLRA. In that regard, the First Circuit observed that the statements attributed to confidential witnesses "are so lacking in connecting detail that they cannot give rise to a strong inference of scienter" and that "[t]he statements do not even begin to quantify the magnitude of the sales decline at the company level," nor do they "explain with any precision whether the sales decline resulted from higher discontinuations, fewer new starts, changes in the market, or some combination of these factors." The First Circuit concluded that "the confidential witness statements are consistent with the defendants' public disclosures," which "repeatedly returned to the PML incident as one factor impacting TECFIDERA's performance."

This is the second time in recent years that the First Circuit has affirmed dismissal of a putative securities class action against Biogen. In 2008, the court affirmed dismissal of a putative securities fraud class action filed just days after a different Biogen drug was temporarily and voluntarily withdrawn from the market. *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35 (1st Cir. 2008). That case, which the First Circuit described as one that is "paradigmatic of securities fraud cases against drug development companies," was similarly dismissed for failure to plead the requisite strong inference of scienter.