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# The Supreme Court's Decision in *Amgen* Reshapes the Securities Class Certification Battlefield


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On February 27, 2013, the U.S. Supreme Court issued one of the most highly anticipated securities law decisions in recent years in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. __ (2013). The Court's decision clarified whether a plaintiff who brings a securities fraud class action under Section 10(b) of the Securities Exchange Act of 1934 and U.S. Securities and Exchange Commission Rule 10b-5 has an obligation to prove that the defendant's alleged misrepresentations and omissions are material in order to obtain class certification – and whether a defendant in such a case can rebut the "fraud-on-the-market" presumption of reliance by showing the lack of materiality of any alleged misrepresentation or omission. In a 6-3 majority opinion written by Justice Ginsburg, the Court ruled that a 10b-5 plaintiff need not prove materiality at the class certification stage and that a defendant is not entitled to rebut the fraud-on-the-market presumption in this fashion, thus resolving an important split among U.S. Courts of Appeals on the issue in favor of securities class action plaintiffs.

The *Amgen* decision is a high-profile victory for the plaintiffs' bar and makes it easier for plaintiffs to obtain certification of securities fraud "stock-drop" class actions in various jurisdictions. The impact on securities cases will be most apparent in the First, Second, Third, and Fifth Circuits, where prior to the issuance of the *Amgen* decision, federal district courts had considered evidence of materiality at the class certification stage.

**Circuit Split: Rule 23 and *Basic***

In order to certify a class action under Federal Rule of Civil Procedure 23(b)(3), the district court must find *inter alia* that "questions of law or fact common to class members predominate over any questions affecting only individual members." In order to meet this requirement with respect to the essential element of reliance, Rule 10b-5 plaintiffs make use of the fraud-on-the-market presumption, which was established in the Supreme Court's landmark decision in *Basic v. Levinson*, 485 U.S. 224 (1988). In that case, the Supreme Court held that 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 *Amgen* Court acknowledged, the fraud-on-the-market theory "facilitates class certification by recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations when shares are traded in an efficient market."

In the years following *Basic*, defendants argued in various cases that a class could not be certified unless the plaintiffs could prove that the alleged misrepresentation or omission was material, since materiality is presumed in the fraud-on-the market theory. And, before *Amgen*, various Courts of Appeals had taken starkly different positions concerning whether federal district courts must require 10b-5 plaintiffs to prove – and/or allow defendants to present evidence rebutting – that the alleged misstatements were material before certifying a securities fraud class action based on the *Basic* fraud-on-the-market presumption.

Specifically, the First, Second, and Fifth Circuits had sided with the defense bar by finding that plaintiffs must prove, and defendant may present evidence rebutting, materiality before class certification. The Third Circuit adopted a modified approach, holding that while the plaintiff need not prove materiality before class certification, the defendant may present rebuttal evidence on the issue.

In stark contrast, the Seventh Circuit and the Ninth Circuit, in *Amgen*, sided with the plaintiffs' bar by holding that district courts cannot consider materiality at the class certification stage. The Seventh Circuit, in *Schleicher v. Wendt,* reasoned that *Basic* does not require a showing of materiality as a condition to class certification because "whether a statement is materially false is a question common to all class members and therefore resolved on a class-wide basis after certification." 618 F. 3d 679, 687 (7th Cir. 2010). Likewise, the Ninth Circuit in *Amgen*, after discussing the approach taken in other circuits, adopted the reasoning of the Seventh Circuit as the more reasoned approach.

**A Win For the Plaintiffs' Bar**

In the Supreme Court's majority opinion, written by Justice Ginsburg and joined by Chief Justice Roberts, and Justices Breyer, Sotomayor, Kagan, and Alito, the Supreme Court resolved this circuit split by affirming the Ninth Circuit's decision and holding that under the plain language of Rule 23(b)(3), plaintiffs are not required to prove, and the district court need not consider rebuttal evidence tending to disprove, materiality at the class-certification stage.

Focusing on the Rule 23(b)(3) predominance requirement, the majority reasoned that a showing of materiality was not necessary because the question of materiality is an objective one that can be proved at a later stage of the litigation through evidence common to the class. Consequently, it held that materiality is a common question for purposes of Rule 23(b)(3). Moreover, since materiality is an essential element of a securities fraud claim, the majority reasoned that there was "no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating" because "failure of proof on the common question of materiality ends the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class." Likewise, in holding that the district court need not consider rebuttal evidence aimed to prove that the misrepresentations and omissions alleged were immaterial, the majority reasoned that "a definitive rebuttal on the issue of materiality would not undermine the predominance of questions to the class."

In so ruling, the majority rejected Amgen's contention that "policy considerations" militate in favor of requiring precertification proof of materiality. Amgen had argued that since an order granting class certification has such dire consequences for the defendant, absent a requirement to evaluate materiality at the class certification stage, the issue may never be addressed by a court, as many defendants are compelled to settle soon after a class is certified. The majority, however, found that materiality does not differ in this respect from other essential elements of a Rule 10b-5 claim, such as loss causation, which are not adjudicated at the class-certification stage. Moreover, the majority found such policy considerations concerning *Basic* unpersuasive because, among other things, Congress has addressed settlement pressures through passage of the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998, and in doing so did not seek to undo the fraud-on-the-market presumption. Finally, the majority concluded that rather than conserve judicial resources, requiring or allowing proof of materiality at the class certification stage would be redundant and wasteful, as "materiality might have to be shown all over again at trial" if a class is certified.

**Conclusion**

By eliminating defendants' ability to challenge the *Basic* presumption on materiality grounds at the pre-certification stage, *Amgen* is an unquestionable victory for the plaintiffs' bar. The *Amgen* decision makes clear that while the fraud-on-the-market presumption must be established at the precertification stage, the district court may not consider proof of lack of materiality as part of the Rule 23 inquiry or engage in "free-ranging merits inquiries at the certification stage." Thus, *Amgen* overrules case law in the First, Second, and Fifth Circuits, which had either expressly held or stated in *dicta* that plaintiffs relying on the fraud-on-the-market presumption must prove materiality at the class certification stage. *Amgen* also nullifies case law in the Second and Third Circuits that had allowed defendants to rebut materiality at the class certification stage.

While there is no question that the *Amgen* decision will be viewed favorably by the securities class action plaintiffs' bar, the securities fraud class action landscape remains complex and the ultimate impact of the decision on new filings remains to be seen. Perhaps most intriguingly, the *Amgen* majority acknowledged that the Court had not been asked to "revisit" the validity of the fraud-on-the-market presumption itself, which was criticized by the dissenters. And Justice Alito, who was a member of the majority, wrote in a brief concurring opinion that "reconsideration of the *Basic* presumption may be appropriate" at some future time, in light of recent economic evidence suggesting that the presumption may rest on a "faulty economic premise." Thus, while the *Amgen* decision certainly reshapes the class certification battlefield in favor of 10b-5 plaintiffs, it may not be the last word from the Supreme Court on *Basic* or the fraud-on-the-market presumption.

If you have any questions regarding this case or this alert, please contact one of our authors or any member of **Venable's Class Action Defense Group**.