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Applicability of *Amgen* Decision Should be Very Narrow

When the Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes* in 2011, defense lawyers hailed the case as a game-changer that would level the class action playing field in an arena that traditionally favored plaintiffs with various presumptions promoting class certification. Trying to limit its impact, plaintiff lawyers argued that Dukes was limited to employment cases, but we have since seen it relied upon in all manner of antitrust, advertising and other consumer protection class certification settings.

Is the shoe now on the other foot with the Supreme Court's recent plaintiff-friendly decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*? In a majority opinion authored by Justice Ginsburg, the court ruled that plaintiffs need not prove materiality to invoke a fraud-on-the-market theory of classwide reliance in a securities class action. The fraud-on-the-market theory holds that an efficient stock market will reflect all publicly-available and material information about a given security, so classwide reliance on material statements may be presumed in cases pled under Section 10-b(5) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. The problem with the materiality question in these cases is that it is both an element of the claim (therefore a merits issue ineligible for resolution on class certification) and also a predicate for invoking fraud-on-the-market to demonstrate that reliance is a common issue (and therefore seemingly crucial to class certification decision-making).

The question that made its way to the Supreme Court in *Amgen* is not whether fraud-on-the-market remains valid – and many have argued that it is not – but the relatively narrow question of when is the appropriate time to decide the materiality issue given its overlapping significance to class certification and the underlying merits? Federal circuits had split on this question, with some holding that plaintiffs must prove the materiality of challenged statements at the class certification stage in order to invoke the fraud-on-the-market theory that raises a presumption of class-wide reliance. See e.g. *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2d Cir. 2008). Other circuits held that since materiality is a Section 10(b) claim element, it need not (or cannot)

be adjudicated at certification. See e.g. *Schleicher v. Wendt*, 618 F.3d 679 (7th Cir. 2010).

Amgen resolves the split and holds that since materiality is an element of securities fraud claims and is subject to an objective standard, this element presents a question common to all class members that should not be decided at the class certification stage. If materiality cannot be established later at trial, that failure disposes of the case with no surviving individual claims. By contesting materiality at class certification, defendants would be attempting to adjudicate the common issue in what the court called a forbidden "mini-trial." The decision emphasized that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage" and that "merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether Rule 23 prerequisites are satisfied." *Amgen* also mentions that predominance does not necessarily require that each claim element be susceptible to classwide proof in order to certify a class – an observation not necessary to the holding (that materiality was susceptible to common proof) and merely consistent with prevailing law that class damages need not be established by common proof. For further analysis, see "The Supreme Court's Decision in *Amgen* Reshapes the Securities Class Certification Battlefield," Venable Client Alert (March 1, 2013), available at http://www.venable.com/the-supreme-courts-decision-in-amgen-reshapes-the-securities-class-certification-battlefield-03-04-2013/

Although *Amgen* relates to a unique issue presented by security class actions, expect to see it cited by class action lawyers in antitrust, RICO, advertising and other consumer protection cases. One likely misapplication will be attempts to foreclose meaningful analysis of the reliance issues presented by materiality, causation and injury elements in these other settings. Yet, several antidotes are already plain. First, fraud-on-the-market theories are relegated to securities cases and routinely rejected in consumer fraud contexts. See e.g., *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008). Absent the presumption of an efficient market relying on all publicly available information, the materiality of a challenged representation or practice might still vary for differently situated purchasers or customers in a given antitrust or consumer protection class action.

Second, remember that even though materiality was a claim element overlapping with the certification issues presented in *Amgen*, it remained a common issue for the class because it was subject to an objective standard and if proof fails, no individual class member could recover. That litmus test will usually yield a contrary result in consumer cases. A good example is the transaction or loss causation element of a RICO, Clayton Act or state consumer fraud claim. These causation elements are often closely examined at the certification stage to determine whether common proof of injury-in-fact exists. Another example is when a class certification motion misclassifies "pattern or practice" allegations as a common issue presented for trial. Courts addressing these issues at class certification are not engaging in a "free-ranging merits inquiry" of the type forbidden by Amgen and

earlier cases. Answering the question about whether a pattern or practice exists is necessary to seeing whether common proof is available and, unlike the materiality issue in a 10b-5 case, individual claims can survive a finding that no pattern or practice exists. The same holds true if a court finds that some plaintiffs cannot show causation – other individual cases survive.

Amgen's litmus test should generate negative results in most consumer class actions, so its impact outside the securities fraud arena should be limited.

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