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LITIGATION

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Supreme Court Decides *AMGEN* – Allows Plaintiff Class to be Certified Without Separate Materiality Inquiry

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On February 27, 2013, the Supreme Court handed down its decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, No. 11-1085 (U.S. Feb. 27, 2013). In a six to three decision, the Court held that plaintiffs asserting claims for violations of Section 10(b) of the Securities Exchange Act of 1934 need not, at the class certification stage of a proceeding, prove that alleged misrepresentations were material in order to avail themselves of the fraud-on-the-market presumption in establishing predominance under Federal Rule of Civil Procedure 23(b)(3). The Court further held that defendants could not rebut the fraud-on-the-market presumption at the class certification stage solely by establishing that such misrepresentations were immaterial (*e.g.*, through the "truth-on-the-market" defense).

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The decision further clarifies the requirements for obtaining class certification in securities fraud cases and resolves a split among the circuits, including by setting aside governing precedent in the Second Circuit, among others. In *Amgen*, the Supreme Court held that so long as plaintiffs establish that alleged misrepresentations were public statements made in an efficient market, they may rely on the fraud-on-the-market presumption and need not separately establish materiality to fulfill the predominance requirement for class certification. The question of materiality can require complicated expert testimony, and this decision narrows the instances in which materiality can be addressed in purported class actions and eases the burden on plaintiffs seeking to proceed as a class.

Securities Fraud Class Actions and the Fraud-On-The-Market Presumption Of Reliance

To bring a viable claim under Section 10(b), a plaintiff must plead and prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Amgen*, slip op. at 3-4 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317 (2011)). To certify a class seeking damages for alleged violations of Section 10(b), plaintiffs must also establish that the purported class meets the requirements of Rule 23(a) and (b)(3), including the requirement under Rule 23(b)(3) that "questions of law or fact common to class members *predominate* over any questions affecting only individual members." *Id.* (emphasis added).

If each individual member of a purported class bringing securities fraud claims were required to establish direct reliance on an alleged misrepresentation (for example, by establishing that the investor heard or read a challenged statement and traded based on that statement), individual questions would predominate over class-wide issues, and no securities fraud class could be certified in a vast majority of cases. In *Basic Inc. v. Levinson*, however, the Supreme Court adopted the "fraud-on-the-market" presumption, holding that the market price of a stock traded on an efficient market incorporates all publicly available information and, therefore, it may be *presumed* that an investor indirectly relies on alleged public misrepresentations through its reliance on the integrity of the price set by the market when it buys or sells securities. 485 U.S. 224, 246-47 (1988). To invoke the fraud-on-the-market presumption, the Supreme Court has previously held

that a plaintiff must allege and prove at least that the alleged misrepresentations were publicly known, that the stock traded in an efficient market, and that the relevant transactions took place between the time the misrepresentations were made and the time the truth was revealed. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011). Until now, it has been a matter of debate as to whether or not, at class certification, plaintiffs also had to prove that the alleged misrepresentation was material in order to invoke the fraud-on-the-market presumption, and whether or not defendants could rebut the presumption of reliance by establishing that an alleged misrepresentation was immaterial. *See Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1176 (9th Cir. 2011). Amgen establishes that plaintiffs do not have to prove materiality to invoke the presumption and that defendants cannot rebut the presumption and thus defeat class certification by establishing that the alleged misrepresentations were immaterial. For example, defendants cannot argue that "truth on the market" precludes a finding of predominance under Rule 23(b)(3) because the alleged misrepresentations could not have been material. *Amgen*, slip op. at 25.

Background on *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*

In 2007, Lead Plaintiff Connecticut Retirement Plans and Trust Funds ("Plaintiff") filed its suit against Amgen Inc. ("Amgen") and certain of its officers and directors ("Defendants") for violations of Section 10(b) of the Securities Exchange Act of 1934, alleging that Defendants withheld safety and efficacy concerns related to two of Amgen's major products, Epogen and Aransep, from investors. *Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 2009 WL 2633743, at **1-3 (C.D. Cal. Aug. 12, 2009). Defendants conceded in their answer to the Complaint that Amgen's securities traded in an efficient market. *See Amgen*, slip op at 6. In opposition to Plaintiff's motion for class certification, however, Defendants argued that the fraud-on-the-market presumption was not available to the plaintiffs absent proof of materiality and that the misrepresentations alleged were immaterial because the truth had been disclosed to the market at the time the challenged statements were made. Defendants reasoned that, if the alleged misrepresentations were *im*material, they would not have affected the stock price, and if they did not impact the stock price, the putative class members could not and did not rely on the alleged misrepresentations when transacting in Amgen securities.

On August 12, 2009, the Central District of California granted Plaintiff's motion for class certification. The court held that to trigger the fraud-on-the-market presumption at class certification, Lead Plaintiff "need only establish that an efficient market exists." Lead Plaintiff need not prove materiality at class certification, the District Court reasoned, because materiality is ultimately a merits question unsuited to evaluation at the class certification stage. *Amgen*, 2009 WL 2633743, at **9-12.

On appeal, the Ninth Circuit affirmed the class certification order and held that (i) Lead Plaintiff need not prove materiality at class certification to establish that common issues of law and fact will predominate inquiry into the reliance element of Section 10(b) and (ii) Defendants could not rebut the fraud-on-the-market presumption at the class certification stage with evidence showing that the market was aware of the purported truth about the alleged misrepresentations (the "truth-on-the-market" defense). All that a plaintiff need prove at class certification to invoke the fraud-on-the-market presumption, the Ninth Circuit held, was that the market for the securities was efficient and that the alleged misrepresentations became public. *Amgen*, 660 F.3d at 1173, 1177.

The Ninth Circuit's ruling was based on three rationales.

First, the Ninth Circuit ruled that materiality is a "merits issue" in a Section 10(b) claim and should only be resolved "at trial or by summary judgment motion," while market efficiency and the public nature of alleged misrepresentations are not merits issues. *Amgen*, 660 F.3d at 1175, 1177. *Second*, the Ninth Circuit ruled that deferring proof of materiality would not be problematic, as an eventual showing of immateriality would have the effect of disposing of every plaintiff's claim on

the merits. *Id*. at 1175. The Ninth Circuit stated that this outcome followed from the Supreme Court's decision in *Wal Mart Stores, Inc. v. Dukes*, where it was explained that "'[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" 131 S. Ct. 2541, 2551 (2011) (citation omitted). *Third*, the Ninth Circuit was skeptical that materiality was a predicate of the fraud-on-the-market presumption at all. The Ninth Circuit stated that the footnote in the *Basic* decision, which set forth materiality among the predicates for the presumption (footnote 27), was *dicta*, and merely explained what the Sixth Circuit did in that case. According to the Ninth Circuit, a more accurate statement of the predicates of the fraud-on-the-market presumption was to be found in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), where the Court said:

> It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke Basic's rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that the relevant transaction took place "between the time the misrepresentations were made and the time the truth was revealed."

Id. at 2185 (citation omitted).

The Ninth Circuit also rejected Defendants' truth-on-the-market argument, stating simply that "the truth-on-the-market defense is a method of refuting an alleged misrepresentation's *materiality*," and because "a plaintiff need not prove materiality at the class certification stage to invoke the presumption," "the district court correctly refused to consider [Defendants'] truth-on-the-market defense at the class certification stage." *Amgen*, 660 F.3d at 1177.

The *Amgen* Decision

The Supreme Court affirmed the Ninth Circuit's decision and adopted much of the Court of Appeals' reasoning. The Court held that the only question before it was whether or not the predominance inquiry of Rule 23(b)(3) was satisfied. *Amgen*, slip op. at 9. "As to materiality, [the Court held] the class is entirely cohesive: It will prevail or fall in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Id*. at 3. The Court further stated that "even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class." *Id*. at 25. Accordingly, the predominance requirement was satisfied for the purposes of class certification, and the question of materiality was left to be addressed at summary judgment or trial.

The Court dismissed arguments that had been raised by the defendants and various *amici* that the *in terrorem* effect of class certification weighed in favor of addressing the materiality question at the certification stage by noting that the Court had previously refused to add requirements to certification. *See id*. at 19 (*citing Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185-86 (2011)). The Court also noted that Congress had addressed such concerns through its enactment of the PSLRA and SLUSA and had declined to undo the use of the fraud-on-the-market theory in that context. *Id*. at 19-20.

Justice Alito concurred in the decision, noting that reconsideration of the fraud-on-the market presumption might be appropriate but had not been requested by petitioners. Justices Scalia and Thomas authored dissenting opinions, and Justice Kennedy joined Justice Thomas's dissent.

Impact of the Supreme Court's Decision

The *Amgen* decision will preclude defendants from raising materiality as a bar to finding predominance under Rule 23(b)(3) where efficiency is otherwise conceded. But that is not the end of the story. Materiality issues may still be raised in the Rule 23(b)(3) context when determining whether or not an efficient market exists (an issue conceded by the defendants in *Amgen*) because stock-price reactions to material and immaterial information constitute evidence of market efficiency or lack of the same. Similarly, an examination of materiality is appropriate outside of the predominance requirement, including in connection with a motion to dismiss, summary judgment, trial and even potentially at the class certification stage under Rule 23(c). *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 37-41 (2d Cir. 2009). In any case, there may be at least four votes on the Court today to re-examine the holding of *Basic* and re-evaluate whether the fraud-on-the-market presumption properly reflects the reality of the marketplace. Thus, while Amgen is significant because it forecloses arguing materiality as a separate component of the fraud-on-the-market presumption at the class certification stage, courts will no doubt have other materiality issues to decide in future securities fraud cases.

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