Litigation Alert

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Securities Defendants Win One and Lose One at the U.S. Supreme Court

On Wednesday, the U.S. Supreme Court issued two separate securities opinions that show the Court's careful cabining of exceptions to the five-year limitation period Congress adopted in Section 2462 in SEC enforcement actions but unwillingness to raise the level of proof at the class certification stage in private securities actions.

Gabelli v. SEC

In *Gabelli v. SEC* (No. 11-1274), the Supreme Court held that the "discovery rule" (under which the statute of limitations for bringing an action is tolled until the underlying harm is discovered) does not apply to SEC enforcement proceedings seeking civil penalties. The Supreme Court reasoned that the Government does not need to be protected from self-concealing wrongs in light of its broad investigative powers. Therefore, the Supreme Court held that there must be some limit to when penalties may be sought, and that the five-year bar under 28 U.S.C. §2462 provides that limit. However, the Supreme Court did not consider, and left open the possibility, that the statute of limitations to seek penalties may be tolled where there has been intentional concealment by the defendants.

While the facts in *Gabelli* only addressed monetary penalties in SEC enforcement actions, the Supreme Court's decision will likely have broader implications. Some federal courts have found that remedies sought by the SEC—such as officer-and-director bars and Section 304 reimbursement— amount to penalties in certain circumstances. These remedies could therefore be subject to the five-year statute of limitations. Moreover, because § 2462 is not limited to SEC enforcement actions, but applies to many different federal penalties statutes, this decision impacts the enforcement decisions of numerous federal agencies. With the five-year anniversary of various key events of the financial crisis looming in 2013, the *Gabelli* decision means that these agencies, including the SEC, will have to make some quick charging decisions in order to preserve a claim for penalties. While disgorgement will still be an available remedy for older conduct, these agencies' power to seek monetary penalties, and potentially other equitable relief, is now limited to a five-year window.

Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds

In *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds* (No. 11-1085), the Supreme Court held that plaintiffs need not establish the materiality of a purported misstatement at the class certification stage in order to invoke the "fraud-on-the-market" theory in securities fraud cases. The Court also held that in such cases, federal district courts are not required to allow defendants to present evidence rebutting the applicability of the fraud-on-the-market theory (where that evidence solely went to materiality) before certifying a plaintiff class.

The Court concluded that proof of materiality should not be required at class certification because even if conclusively established, it would have no bearing on whether the class had been properly certified. Similarly, the Court rejected Amgen's argument that it should have been allowed to introduce evidence to rebut materiality because even if it had done so, the rebuttal evidence would not affect whether the class could be certified under Rule 23.

The *Amgen* decision puts significant pressure on corporate defendants, who are faced with substantial defense costs and damages exposure once a class is certified, and may force them to consider earlier settlements.

However, the Court is not done with Rule 23 for this term. In November, it heard oral argument in *Comcast v. Behrend* (No. 11-864), which presents the question of whether a district court, when faced with expert testimony on the existence of class-wide damages, can certify a class without first determining whether that expert's opinions are admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). And while the case itself arises under the Sherman Act, the decision will impact securities class actions as well.

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