Davis Polk

Life Sciences Securities Litigation Activity in Q3 2017

October 18, 2017 | Client Update | 3-minute read

We **previously highlighted** the increased activity and some emerging patterns in securities litigation against life sciences companies during the first half of 2017. This report, the first in a series of regular updates, includes a summary of notable decisions, settlements, and new filings involving securities claims against life sciences companies during the third quarter of 2017. The details are set forth in the case-by-case digest that is accessible via the link below.

New securities litigations continued to be filed at a rapid clip during the third quarter of 2017. A recognizable cast of plaintiffs' firms brought suits against life sciences companies, filing new cases mainly in federal courts in the Northeast (Connecticut, Massachusetts, New York, and New Jersey) and in California. Most of those cases follow typical patterns, alleging misstatements or omissions related to clinical trials or FDA approval status, though some also involve claims that companies failed to disclose manufacturing defects or price-rigging schemes.

As those new cases were filed, others were settled. Most of the settlements were in the range of $3 million to $7 million. One notable outlier was the $210 million settlement of the Salix Pharmaceuticals securities litigation, which involved claims that the company misrepresented its wholesale inventory levels. A federal court in New York approved that settlement in August.

Although courts often dismiss securities cases against life sciences companies—most commonly based on the plaintiffs' failure to allege an actionable false statement or that a defendant acted with "scienter" (i.e., intent to mislead)—it also is not uncommon for these cases to survive past the motion-to-dismiss phase. Some noteworthy takeaways or reminders from decisions issued this quarter include the following:

- Even statements of opinion about the likelihood of FDA approval may support a securities claim where the speaker omits known material facts that undercut that opinion, such that the opinion does not fairly align with the information in the speaker's possession;
- Optimistic statements about feedback from the FDA that contain appropriate caveats and cautionary language may undercut a plaintiff's effort to establish scienter, and thus not be actionable;
- Companies do not have a legal obligation to disclose each detail of every communication with the FDA; only intentionally or recklessly omitted facts that render other disclosures misleading are actionable; and
- Forward-looking statements may not be protected under the PSLRA's safe-harbor provisions if the statements are undermined by facts or information in the speaker's possession at the time of the statements.

Please click on the link below to find summaries of notable decisions, settlements, and filings in the third quarter. If you would like to discuss any questions or issues regarding securities litigation against life sciences companies, any of the Davis Polk partners identified in the column on the right and at the end of the digest would be happy to discuss them.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Bruce K. Dallas
+1 650 752 2022
bruce.dallas@davispolk.com

Alan F. Denenberg
+1 650 752 2004
alan.denenberg@davispolk.com

Michael S. Flynn
+1 212 450 4766
michael.flynn@davispolk.com

Deanna L. Kirkpatrick
+1 212 450 4135
deanna.kirkpatrick@davispolk.com

Edmund Polubinski
+1 212 450 4695
edmund.polubinski@davispolk.com

Neal Potischman
+1 650 752 2021
neal.potischman@davispolk.com

James P. Rouhandeh
+1 212 450 4835
rouhandeh@davispolk.com

Richard D. Truesdell, Jr.
+1 212 450 4674
richard.truesdell@davispolk.com

Brian S. Weinstein
+1 212 450 4972
brian.weinstein@davispolk.com

Related materials

Read the full update