

Securities Regulation Daily Wrap Up, TOP STORY—2ndCir: Press Release Contained No Omissions Rendering It False or Misleading, (Feb. 4, 2013)

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By Rodney F. Tonkovic, J.D.

A 2nd Circuit panel agreed with a district court's holding that a press release contained no omissions that would render it false or misleading. The additional allegations offered by the plaintiff-appellant on appeal failed to cure this deficiency. The panel accordingly affirmed the district court's judgment dismissing the plaintiff-appellant's amended complaint with prejudice and denying leave to amend (*Kleinman v. Elan Corp., plc*, February 1, 2013, Hall, P.).

The action was brought by an investor on behalf of purchasers of stock in Elan Corporation (Elan), a neuroscience-based biotech company. The action arose out of the joint development by Elan and Wyeth Inc. of bapineuzumab, which was intended to treat Alzheimer's. According to the complaint, the companies released a press release in June 2008 that omitted several facts that were necessary to prevent the press release from being misleadingly optimistic. Generally, the press release announced "statistically significant and clinically meaningful benefits in important subgroups" that supported the companies' decision to move forward to Phase 3 studies.

Six weeks after the press release was issued, the companies, as planned, presented the entire Phase 2 results at a scientific conference. The investor maintained that these complete results showed that the June press release was false and misleading, due to a number of omissions. Among other alleged omissions, the full results indicated that positive results were the result of post-hoc analysis, that there were severe adverse consequences and three deaths, and that the trial ultimately failed by a "large margin." The day after the complete results were released, the price of Elan's American Depositary Receipts fell by forty-two percent.

Omissions. The circuit court concluded that, in the context of the presentation of the full details, there was nothing omitted from the June press release that rendered it false or misleading to a reasonable investor. The court observed that the complaint did not allege that anything in the June release was literally false. The release's headline, "Encouraging Top-line Results," for example, was not identified as misleading. The investor asserted that "top-line" results are defined as an entire study population and that this usage was thus misleading. The court stated that, even if that were correct, given the context of the statements, no reasonable investor could have understood the headline to mean anything other than the positive subgroup results discussed in the release.

Release not misleading. None of what was allegedly omitted from the June press release, the court continued, was necessary to make the release not misleading. For example, the investor argued that the release failed to disclose the methodology of the post-hoc analysis. The press release, the court stated simply remarked that a post-hoc analysis was used without specifying the methodology, and this was not misleading. "At bottom," the court wrote, the investor "simply has a problem with using post-hoc analysis as a methodology in pharmaceutical studies." "Our job," the court continued, "is not to evaluate the use of post-hoc analysis generally in the scientific community." Therefore, the press release's disclosure that the only positive results from the Phase 2 study stemmed from post-hoc analysis was accurate.

The court remarked that the investor's remaining allegations warranted little discussion. For example, the full results disclosed that none of the deaths that occurred in the test group had been linked to the drug. Also, it was only the investor's view that the tests failed by "a large margin;" the release itself stated that the results "did not attain statistical significance."

In sum, the court wrote, the June press release stated generally what eventually came out at the later conference. There was nothing revealed in the complete results that rendered the June press release false or misleading to a reasonable investor. The circuit court accordingly affirmed the dismissal of the amended complaint with prejudice and further agreed with the decision to deny leave to amend.

The case is No. 11-3706-cv.

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Companies: Elan Corp., plc; Pfizer, Inc.

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