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Amgen Ruling Placed Cert. Bar Too Low, Ex-SEC Officials Say

By **Eric Hornbeck**

Law360, New York (August 17, 2012, 6:04 PM ET) -- A group including former U.S. Securities and Exchange Commission officials urged the U.S. Supreme Court on Wednesday to overturn the Ninth Circuit's lowered materiality bar during class certification of securities cases, arguing the decision will frighten defendants into settling weak cases.

"This is an important case because if plaintiffs are able to bypass any challenge to the price impact and therefore materiality of the misstatements they allege until after a class is certified, the ability of defendants to prevail in any kind of securities fraud case is going to be greatly diminished," Joshua D. Yount of Mayer Brown LLP, who represents the commissioners, told Law360 on Friday.

Last November, the Ninth Circuit joined the Seventh Circuit in holding that plaintiffs in a securities fraud action need only plausibly allege — not prove — materiality in order to certify a class. The holding clashed with earlier rulings by the Second, Third and Fifth circuits, all of which pegged materiality as an issue appropriately decided at the class certification stage.

The case involves allegations by several pension funds that Amgen Inc. concealed from investors the results of a clinical study that led to a U.S. Food and Drug Administration black box warning on its drugs and ultimately a drop in the drugmaker's stock price.

A dozen SEC officials and professors urged the high court to disavow the Ninth Circuit standard in an amicus curiae brief filed with the high court Wednesday, arguing because nearly all securities class actions are settled if a class is certified, that materiality will never actually be tested if it doesn't have to be proven until trial.

"The Ninth Circuit's decision unleashes the in terrorem power of class certification to compel settlement of even questionable claims without any meaningful inquiry into materiality or price impact and, therefore, into an important aspect of the propriety of presuming reliance," the brief said.

The Ninth Circuit decision also undermines the fraud-on-the-market theory underlining securities class actions, which assumes that a plaintiff relied on a company's material misrepresentation because it is incorporated into the stock price, by expanding the private right of action implied in Section 10(b) of the Securities Exchange Act of 1934, according to the brief.

"The Ninth Circuit's expansive interpretation of the fraud-on-the-market doctrine untethers the class certification determination from even the most cursory consideration of materiality," the brief said.

The Ninth Circuit decision "strikes at the heart" of the Supreme Court's 1988 decision in Basic Inc. v. Levinson, which gave rise to the fraud on the market doctrine, the amici argued.

The brief was filed on behalf of former SEC commissioners Paul S. Atkins, Charles C. Cox, Stephen J. Friedman, Joseph A. Grundfest, Philip R. Lochner Jr. and Aulana L. Peters; former SEC general counsel Brian G. Cartwright; and professors Richard A. Epstein of New York University, Allen Ferrell of Harvard University, Amanda Rose of Vanderbilt University and Kenneth E. Scott of Stanford Law School.

Oral arguments before the high court are scheduled for Nov. 5.

The brief was filed by Timothy S. Bishop, Joshua D. Yount and Frank M. Dickerson of Mayer Brown LLP.

The case is Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, case number 11-1085, in the U.S. Supreme Court.

--Additional reporting by Ian Thoms. Editing by Andrew Park.