

Eleventh Circuit Reiterates Loss Causation not a Given at Pleading Stage

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Securities class action plaintiffs and defendants often disagree about the degree of difficulty to plead loss causation at the motion to dismiss phase. The US Court of Appeals for the Eleventh Circuit recently shed some light on this debate, affirming the dismissal of a securities class action and signaling that loss causation is not a given at the pleading stage.

MiMedx shareholders filed a securities class action under Section 10(b) of the Securities Exchange Act of 1934, alleging that the value of their stock fell when the truth about MiMedx's alleged misstatements and omissions came to light. The district court dismissed the complaint with prejudice for failure to adequately plead loss causation and because the plaintiff lacked standing. The plaintiff then appealed to the Eleventh Circuit.

To survive a motion to dismiss, a plaintiff must adequately plead that alleged fraud **caused** investor losses (i.e., loss causation). Typically, plaintiffs will point to some public announcement – a “corrective disclosure” – which reveals the alleged fraud and is followed by a stock drop. Plaintiffs routinely argue that complaints should not be dismissed on loss causation grounds because causation raises factual issues more appropriately addressed at summary judgment.

But in its 2013 decision in [Meyer v. Greene, 710 F.3d 1189 \(11th Cir. 2013\)](#), the Eleventh Circuit rejected that argument. There, the court held that the announcement of a government investigation was insufficient in itself to plead loss causation. In doing so, the Eleventh Circuit emphasized that the loss causation element of securities fraud claims is critical to “ensuring that the federal securities laws do not become a system of investor insurance that reimburses investors for any decline in the value of their investments,” but only those losses “actually attributable to a given misrepresentation.” *Id.* at 1196 (cleaned up). Now, 10 years later, the Eleventh Circuit again affirmed dismissal of a securities class action for failure to plead loss causation in [MacPhee v. MiMedx Gp., Inc., 2023 WL 4418636 \(11th Cir. July 10, 2023\)](#).

Summary

The plaintiff accused MiMedx Group and several of its executives of manipulating financial information and misleading investors about revenue growth. The court rejected various loss causation arguments advanced by the plaintiff. First, the court determined that several of the defendants' public statements did not “correct” the alleged fraud where the plaintiff concurrently alleged that those statements were themselves false or misleading. Second, it found that analyst commentary earlier in the putative class period that simply reiterated publicly available information could not have revealed any fraud. Third, it found that the plaintiff did not suffer any loss following the announcement of federal investigations and whistleblower lawsuits, where the plaintiff sold its company stock before the results of those proceedings became public.

Background

MiMedx is a biopharmaceutical corporation that develops products to assist with wound care and sports-related injuries. Between 2012 and 2017, MiMedx reported extraordinary growth, meeting and exceeding its sales targets in all but one quarter.

MiMedx's tremendous growth quickly drew questions from regulators and the press, leading to a number of government investigations and a lawsuit between 2014 and 2017 relating to sales practices, channel stuffing and revenue recognition models. Subsequently, investment analysts and short sellers published reports questioning the company's sales practices.

Scrutiny into MiMedx's financials only increased in February 2018. In that month alone, short-seller analysts accused MiMedx of selling suppliers excess product in order to hit company sales targets. The Wall Street Journal reported improper payments MiMedx made to doctors, and Bloomberg disclosed that the Department of Justice was investigating MiMedx's sales and distribution practices.

Also in February 2018, MiMedx announced that it was postponing its 2017 Form 10-K and launching a third audit committee investigation “into current and prior-period matters relating to allegations regarding certain sales and distribution practices at the Company.” However, MiMedx continued to project an optimistic outlook, stating that “based on information available to date ... the outcome of such investigation should not have a material impact on revenue guidance for 2018.”

Crucially, the lead plaintiff sold all of its stock in MiMedx by February 26, 2018.

MiMedx continued to publicly deny any wrongdoing until June 7, 2018, when the company announced that it needed to restate six years of financials to make material corrections.

The decision

The Eleventh Circuit upheld the dismissal of the suit, holding that while the plaintiff did have standing to bring its claims, it had failed to adequately plead loss causation for a number of reasons.

First, the court rejected the plaintiff’s claim that a series of company statements made between 2015 and 2017 partially revealed the fraud before MiMedx’s disclosure in June 2018. The plaintiff tried to use these statements “both ways” by asserting that the statements were both corrective disclosures **and** misleading when made because they did not reveal the “true scope” of the fraud. Contrary to the plaintiff’s characterization, the court held that “MiMedx did not correct any ‘falsehood’ in any of these alleged disclosures.” Instead, the statements continued to “misled investors about the true extent of the fraud,” and the market continued to “digest this misinformation.” As such, they did not function as corrective disclosures.

Second, the court held that certain articles and analyst reports could not be partial corrective disclosures because they only repeated information that was already publicly available. The court elaborated that the analyst reports introduced no “new” information to the market and therefore could not have been “corrective.” The court further observed that, “if the opposite were true, then every investor who suffers a loss in the financial markets could sue under § 10(b) using an analyst’s negative analysis of public filings as a corrective disclosure.”

Third, the court held that the announcement of investigations and the initiation of other litigation against MiMedx did not qualify as partial corrective disclosures because the plaintiff sold its stock before the investigations or litigations could bear results. The Eleventh Circuit in its prior *Meyer* decision left open the possibility that an investigation could “qualify as a partial corrective disclosure for purposes of opening the class period when the investigation is coupled with a later finding of fraud or wrongdoing.” However, the court in *MacPhee* held that it need not resolve the question left unresolved in *Meyer* because the plaintiff “sold all of its MiMedx stock ... before the later finding of fraud or wrongdoing.”

Notably, in contrast to the district court’s ruling, the Eleventh Circuit held that the plaintiff did in fact have Article III standing to bring its claims. The element in dispute for standing purposes was traceability – whether the injury was likely caused by the defendant and “not the result of the independent action of some third party not before the court.” As the Eleventh Circuit explained, in considering the traceability of a plaintiff’s injury to the defendant’s actions, the court is “concerned with something less than the concept of ‘proximate cause.’”

The district court found that the plaintiff lacked standing for the same reason it failed to plead loss causation – i.e., the plaintiff’s investment losses were not traceable to the defendants’ alleged misstatements because the plaintiff sold its stock before the fraud was revealed. But the Eleventh Circuit clarified that Article III standing requires an analysis separate and apart from loss causation, so the district court erred when it “equated a failure to adequately allege an element of a cause of action ... with the nonexistence of a ‘Case’ or ‘Controversy’ for purposes of Article III standing.”

The Eleventh Circuit further explained that “for purposes of a standing analysis, a court will generally accept the allegations that a defendant’s actions were wrong and then ask whether a particular plaintiff’s rights were violated by them.” Applying this broader test and taking the plaintiff’s allegations at face value, the court held that the plaintiff’s allegations that MiMedx’s misstatements caused harm to the value of its shares “sufficiently satisfy” the test for traceability for Article III standing.

Implications

The Eleventh Circuit’s decision contains some important takeaways:

- Courts in the Eleventh Circuit will continue to seriously consider loss causation arguments at the motion to dismiss

stage.

- Defendants to securities fraud claims should carefully analyze when the plaintiff purchased and sold stock. If the plaintiff sold all of its holdings before the relevant truth about the fraud was fully revealed, consider making a loss causation argument.
- The reiteration of already public information is insufficient to plead loss causation in the Eleventh Circuit. For a disclosure to truly be “corrective,” it must reveal some “new” information to the public.
- Other circuits have varying approaches to evaluating loss causation. We will monitor whether other circuits elect to follow the approach in *MacPhee*.
- Standing and loss causation “are not the same.” As the *MacPhee* court explained, the constitutional requirements for standing are broader and less stringent than the pleading standards for securities fraud claims under the Exchange Act.

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