



U.S. SUPREME COURT HOLDS STATISTICALLY INSIGNIFICANT INFORMATION CAN BE “MATERIAL” UNDER FEDERAL SECURITIES LAWS

On March 22, 2011, in a unanimous 9-0 decision, the U.S. Supreme Court in *Matrixx Initiatives, Inc. v. Siracusano* ruled on the question of whether a plaintiff can establish that an issuer has violated prohibitions against making “material misstatements or omissions” under the federal securities laws when the information in question was “statistically insignificant.”

In its opinion, the U.S. Supreme Court:

- Rejected the defendant’s argument that statistical significance is a threshold requirement of materiality and the only reliable indication of causation under the federal securities laws;
- Declined to adopt a “bright-line” standard of statistical significance in favor of a case-by-case analysis; and
- Reiterated its holding in *Basic Inc. v. Levinson* that the materiality requirement is satisfied when there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”

Background

Matrixx Initiatives, Inc., a pharmaceutical company (Matrixx), had failed to publicly disclose the existence of a limited number of communications and reports suggesting that its leading product, Zicam Cold Remedy (Zicam), had been shown to lead to loss of smell (a condition known as “anosmia”). Instead, Matrixx reported optimistic guidance on the future growth potential of Zicam and omitted specific disclosure of existing liability suits associated with this product.

In addition, Matrixx issued press releases publicly dismissing national news reports concerning a Food and Drug Administration (FDA) investigation into the link between Zicam and anosmia (even though at that time it had not conducted its own independent study to discredit those conclusions). Ultimately, the FDA later issued a warning against the use of Zicam and Matrixx removed this product from the market.

No “Bright-Line Rule” Adopted by the Supreme Court

The plaintiffs in this action filed a securities fraud class action in federal court against Matrixx, claiming that Matrixx violated §10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5 by failing to publicly disclose the link between Zicam and anosmia.



The Supreme Court rejected the defendant's argument that a "bright-line" standard of statistical significance should be used to determine materiality under anti-fraud provisions of the federal securities laws, noting in its opinion that the FDA and medical experts (for example) do not insist upon statistical significance when assessing causation.

The Court emphasized that the question is instead "whether a reasonable investor would have viewed the nondisclosed information 'as having significantly altered the 'total mix' of information made available,'" encouraging companies to consider the source, content and context of reports when assessing disclosure duties under the federal securities laws.

On the facts presented in this matter, because the reports were made by medical experts and revealed a plausible connection between Matrixx's leading product and anosmia, the Court found that these reports would have been significant to a reasonable investor in altering the cumulative information available to him or her.

Guidance

In light of *Matrixx*, issuers assessing the materiality of certain information in the context of their disclosure obligations under the federal securities laws should, as the Court notes, remain cognizant of the source, content and context of the information (irrespective of whether such information is "statistically significant") and whether it feels a reasonable investor would view that information as significantly altering the "total mix" of information available to him or her.

—[*Asher J. Friend*](#) and [*Brooke L. Longon*](#)



Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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