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INSIGHT: Life Sciences Companies Targeted in Securities Class Actions

March 7, 2019

There's no indication the high number of class action securities claims filed against life sciences companies will abate in 2019. Three Dechert LLP attorneys offer best practices companies should consider to reduce the risk of being targeted.

In 2018, life sciences companies were, once again, popular targets of securities class action lawsuits. Prudent life sciences companies should continue to take heed of the results of the decisions and filings in 2018 to ensure that they are aware of the recent developments in the law as well as filing trends.

Last year, plaintiffs filed a total of 86 class action securities lawsuits against life sciences companies. While the filings in 2018 represented a 2 percent decrease from the previous year, it was still more than a 3.5 times increase from only five years prior.

Trends

Of these cases, the following trends emerged:

- Consistent with historic trends, the majority of suits were filed in the Second, Third and Ninth Circuits, with a decrease in suits filed in the Third Circuit, and the District of New Jersey in particular. The Third Circuit managed to remain in the top three because the District of Delaware saw an increase in filings of 250 percent due to merger litigation.
- Three law firms were associated with more than half of the filings against life sciences companies: Glancy Prongay & Murray LLP, Pomerantz LLP, and The Rosen Law Firm.
- A roughly equal number of claims was filed in the first half of 2018 as in the second half, with 26 complaints filed in the first quarter alone.
- Approximately 60 percent of the life sciences companies named in class action securities fraud complaints had a market capitalization of $500 million or over.

Additional Developments

An examination of the types of cases filed in 2018 reveals continuing trends from previous years, with some additional developments:

- Approximately 20 percent of the claims involved alleged misrepresentations regarding product efficacy and safety, with many of these cases involving alleged misrepresentations regarding negative side effects related to leading product candidates impacting the likelihood of FDA approval.
- Approximately 14 percent of the claims arose from alleged misrepresentations regarding regulatory hurdles, such as the timing of FDA approval or the sufficiency of applications submitted to the FDA.
- Approximately 30 percent of the claims alleged unlawful conduct in both the United States and abroad, including illegal kickback schemes, anti-competitive conduct, and inadequate internal controls.
- About a third of the claims involved alleged misrepresentations of material information made in connection with proposed mergers, sales and other transactions.

In addition to an increase in filings, courts throughout the country issued a large number of decisions in 2018 involving life sciences companies, including:

- Claims that arose in the development phase, such as cases involving products failing clinical trials that are required for FDA approval or products not approved by the FDA, all of which resulted in dismissal.
- Claims that were independent of or arose after the development process, which defendants also tended to have success dismissing.
- Claims based on the financial management of life sciences companies, which generally split between plaintiff- and defendant-friendly outcomes.

Things Won’t Slow Down

Given the numbers from 2018 and recent years’ filings, there is no indication that the filing of securities claims against life sciences companies is going to slow down any time soon.

The decisions in 2018 resulted in mixed outcomes, with 40 opinions decided in favor of defendants, 10 opinions denying motions to dismiss, and 15 opinions in which defendants’ motions to dismiss were granted in part and denied in part. Accordingly, in 25 of the 65 decisions in 2018 that Dechert reviewed, the plaintiffs’ claims were allowed to proceed.

Factors to Consider

These numbers illustrate how life sciences companies remain attractive targets for class action securities fraud claims. As such, the following is a list of practices that life sciences companies should consider in order to reduce the risk of being targeted in a securities fraud claim.

- Be alert to events that may negatively impact the drug product lifecycle and be diligent regarding disclosure obligations.
- Review internal processes relating to communications and disclosure about products, including those that are in the developmental stage. Ensure that such processes are well documented and that disclosure decisions are appropriately vetted.
- Ensure that public statements and filings contain appropriate "cautionary language" or "risk factors" that are specific and meaningful, and cover the gamut of risks throughout the entire drug product lifecycle.
- Be aware that while remaining silent on an issue does not in and of itself create liability, such omissions must not make any actual statements that that the company makes misleading.
- Be aware that opinion statements should not conflict with information that would render the statements misleading.
- Develop and publish employee guidelines tailored to specific areas of business operations. Communications by the R&D and marketing departments become subject to particular scrutiny.
- Develop and publish an insider trading policy to minimize the risk of inside trades during periods that might help class action lawyers later develop a theory.

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The authors would like to thank associates Neema Hakimianpour, Jeffrey Masters, Hayoung Park, and Susie Park for their invaluable assistance with the preparation of this article.