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3rd Circ. Revives State-Law Fraud Claims By Merck Opt-Outs

By **Rachel Graf**

Law360 (September 12, 2019, 5:34 PM EDT) -- The Third Circuit on Thursday revived fraud claims brought under state law by investors that opted out of class actions involving Merck & Co. Inc.'s statements about cholesterol drugs.

Two of the three judges on the Third Circuit panel determined 16 institutional investors that opted out of class actions aren't barred from bringing their own state law claims just because the lawsuits "share similar substantive allegations" with the class actions.

The two appellate court judges said a New Jersey federal judge was wrong to characterize the institutional investors' approach as "procedural gamesmanship" in her dismissal order.

"The right to exclude oneself from a class action, even if not actually exercised by most class members, should not be discounted or derided as 'gamesmanship,'" according to the Third Circuit opinion.

The dispute stems from alleged misrepresentations by Merck and Schering-Plough Corp., which have since merged, about the effectiveness of their anti-cholesterol drugs Vytolin and Zetia around 2007, which ultimately caused shares of the companies to plunge when the truth came out.

Investors sued Merck and Schering-Plough in separate class actions that ended with the companies paying \$688 million **to settle**.

The opt-out investors then **brought their own lawsuits** against Merck and its subsidiary. The individual lawsuits revolved around the same alleged misconduct as the class actions did but included an additional fraud claim brought under New Jersey state law.

U.S. District Judge Freda Wolfson dismissed their claims last year after finding they were barred by the Securities Litigation Uniform Standards Act, which largely prevents investors from bringing state law securities fraud claims through "covered class actions." The judge dedicated a large part of the order to analyzing

whether the individual actions constituted "covered class actions," and ultimately decided they were.

SLUSA's definition of "covered class actions" includes groups of lawsuits concerning the same issues in the same court that are filed on behalf of at least 50 people and "joined, consolidated, or otherwise proceed as a single action for any purpose."

In her dismissal order, Judge Wolfson said the individual actions were similar enough to the class actions to group them together, creating a "covered class action" barred by SLUSA.

But the Third Circuit judges said they were hard-pressed to think of an instance in which cases that never overlapped could "proceed as a single action."

"To be clear, we do not read the single action requirement to mean that cases must be coextensive with one another but rather that they be at least partially coordinated, which would seem invariably to require that they coincide for some period," according to the opinion.

U.S. Circuit Judge Patty Shwartz dissented from the majority, saying the wording in SLUSA suggests "covered class actions" should be defined broadly. SLUSA says "covered class actions" include lawsuits that are "joined, consolidated, or otherwise proceed as a single action for any purpose." Here, "otherwise" suggests the lawsuits don't have to be formally consolidated to be a "covered class action," while "any" suggests the lawsuits can proceed together "for whatever reason," according to the dissent.

The majority's interpretation of SLUSA could result in "absurd or bizarre results," according to the dissent.

"Under plaintiffs' interpretation, an opt-out action filed thirty minutes after a class action settles would not be SLUSA-precluded, but the identical opt-out action filed thirty minutes before a class action settles would be SLUSA-precluded simply because such an opt-out action would be pending in a court contemporaneously with the class action," Judge Shwartz said.

Counsel for the parties didn't respond Thursday to requests for comment.

U.S. Circuit Judges Patty Shwartz, Cheryl Ann Krause and Stephanos Bibas sat on the panel for the Third Circuit.

The investors are represented by Daniel Hume, Karina Kosharsky, Ira Press and Meghan Summers of Kirby McInerney LLP.

Merck is represented by Daniel Juceam, Daniel Kramer and Theodore Wells Jr. of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is North Sound Capital LLC et al. v. Merck & Co. Inc. et al., case number 18-2317 before the U.S. Court of Appeals for the Third Circuit.

--Editing by John Campbell.

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