

Blog Entry: Plaintiffs' Securities Claims Denied Class Treatment for Failure to Satisfy Predominance Requirement

MAY 25, 2017

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On May 15, 2017, the United States District Court for the Southern District of New York denied class treatment to a proposed class action alleging violations of Section 10(b) of the Securities Exchange Act of 1934. In its opinion, the district court held that the plaintiffs failed to satisfy Rule 23(b)(3)'s predominance requirement because their "omission" claims were actually alleged misrepresentations not subject to a presumption of class-wide reliance.

In *Youngers v. Virtus Inv. Partners Inc.*, shareholders of Virtus Opportunities Trust brought suit against various defendants arising out of their marketing of a family of funds. In marketing materials, the defendants had allegedly represented the performance of an investment strategy that was, in actuality, based on a "back-tested" simulation of trading. These back-tested results were, according to plaintiffs, marketed as if they were based on real market trading results.

The plaintiffs moved for class certification based on their claims under Section 10(b) of the Securities Exchange Act. In moving for class certification, the plaintiffs contended that they were entitled to a class-wide presumption of the "reliance" element under Section 10(b) - namely, that the court should presume that all class members relied on the plaintiffs' alleged misrepresentations, a frequently litigated element class actions alleging violations of Section 10(b).

The district court disagreed. Relying on the Supreme Court's decision in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), the district court held that plaintiffs' Section 10(b) claim was one of a misrepresentation, not an omission. Only in cases involving omissions is "positive proof of reliance not a prerequisite to recovery."^[1] But where a claim involves an affirmative misrepresentation, or where "the omissions merely exacerbate the misleading nature of the alleged conduct," a presumption of reliance does not apply. Here, the district court held that the plaintiffs' allegation of wrongdoing - that a statement in prospectuses about results of the trading strategy - was not an omission, but an allegation of a "positive statement." Ultimately, the district court held that allowing a presumption of class-wide reliance would convert a case primarily about misrepresentations into an omission that merely served to "exacerbate and bolster the misrepresentation claims."

The case is *Youngers v. Virtus Inv. Partners Inc.*, No. 15CV8262, 2017 WL 2062986 (S.D.N.Y. May 15, 2017).

[1] The district court held that the plaintiffs were not entitled to a fraud-on-the-market presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) because the mutual fund shares were not traded on an efficient market.