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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Case Study: In Re MIVA Inc. Securities Litigation

Law360, New York (September 24, 2009) -- The Supreme Court's decision in *Dura Pharmaceuticals Inc. v. Broudo*[1] requires plaintiffs in a securities fraud class action to prove that the claimed losses were caused by defendants' alleged misrepresentation or omission.

Although not sufficient standing alone to establish loss causation, plaintiffs must show as a necessary prerequisite that they purchased the shares of stock at issue at prices that were artificially inflated due to the defendants' alleged misstatements or omissions about the issuer or its future prospects.[2]

Litigants often resort to expert testimony as a means to attempt to establish stock price inflation existed during the class period.

In a recent and significant decision, the Honorable Magistrate Judge Douglas N. Frazier recently ruled in defendants' favor at summary judgment in *In re MIVA Inc. Securities Litigation*[3] based on *Dura* and defendants' successful attack on plaintiffs' expert testimony.

In so ruling, the court rejected the opinions of a well-known plaintiffs' expert, Dr. Scott D. Hakala.

The court accepted defendants' argument that the alleged stock inflation to which Dr. Hakala testified was insufficiently linked to any actionable misstatement or omission.

Overview of the Claims

Plaintiffs in MIVA had originally pointed to 11 public statements regarding the company that they alleged led to their purchases of shares at artificially inflated prices and sought to certify a class of investors who purchased MIVA shares from Sept. 3, 2003, through May 4, 2005.

Through a series of decisions, the court, however, dismissed as nonactionable nine of the 11 statements and held that the earliest possible date on which an actionable misstatement was possible was Feb. 23, 2005.[4]

In certifying a class, the court conformed the length of the class period to the dates associated with the two remaining alleged misstatements, resulting to a certified class of investors who purchased shares from Feb. 23, 2005, to May 4, 2005.[5]

Thus, to recover under *Dura*, the plaintiffs were required to show that MIVA's stock price was inflated as a result of the two remaining alleged misstatements, which occurred on Feb. 23 and March 16, 2005, respectively. Their sole attempt to meet that standard was through the testimony of their expert, Hakala.

Testimony of Plaintiffs' Expert

Plaintiffs relied on a report from Hakala for purposes of attempting to prove loss causation and damages. Hakala's report discussed the results of an event study[6] he conducted to analyze the effect of the allegedly misleading statements on the company's stock price.

Although this was the stated purpose of the study, Hakala failed to analyze the stock price reaction on one of the two days on which an alleged misstatement occurred.

Moreover, his own analysis revealed that the stock price actually declined significantly in the wake of the other supposedly inflationary misstatement.[7]

Of most importance to the court's recent ruling, Hakala's event study failed to link the alleged inflation to the only alleged misstatements that had survived the motion to dismiss. Dr. Hakala instead testified that inflation was caused by other statements and that the actionable statements preserved the inflation.

After taking Hakala's deposition, the defendants moved to exclude his opinions as inadmissible under *Daubert v. Merrell Dow Pharmaceuticals Inc.*[8] or, in the alternative if his testimony was deemed admissible, they moved for summary judgment based on the fact that his testimony necessarily meant there was no genuine issue of material fact possible on the elements of loss causation and damages and that defendants were, therefore, entitled to judgment as a matter of law.

The Court's Ruling on Loss Causation and Damages

Recognizing that *Dura* places on plaintiffs the burden of proving "a causal connection between the material misrepresentation and the loss," the court determined that Hakala's opinions entitled defendants to summary judgment.[9]

The court held that, even if Hakala's report was deemed admissible, the plaintiffs had failed to provide any evidence of loss causation or damages attributable to the two remaining statements alleged to have been misleading.[10]

The court focused on the fact, as noted above, that Hakala's event study indicated that the "true value" of the company's stock at the start of the class period was 73.56 percent of its trading price and that this true value continued unchanged through to the end of the class period.

Hakala's analysis further indicated that this same true value remained constant during the period that began over a year prior to the first potentially actionable statement and months after the second such statement was made.[11]

Accordingly, the court determined that plaintiffs through Hakala's opinions had provided no evidence that the alleged misstatements at issue in the case had any inflationary impact on the company's stock price during the class period and, thus, they cannot be said to have contributed to the losses suffered by plaintiffs at the end of that period.[12]

The court also rejected the argument made by plaintiffs that Hakala's report showed that the two alleged misstatements helped to maintain the pre-existing price inflation and, thus, could still form the basis of a claim.

Rather, the court noted that "Dr. Hakala presented no empirical data to support his statement" that the two purportedly actionable statements contributed to maintaining the inflation in the stock price.[13] To carry their burden under *Dura*, plaintiffs were required to "tie the fraudulent statement to the loss." [14]

Hakala, however, "provided no analysis as to how much inflation may be attributable to either or both of the allegedly fraudulent statements" and "fail[ed] to analyze the effect of each particular misrepresentation." [15]

The court also expressed "concerns" regarding each of the two remaining alleged misstatements.

With regard to the first alleged misstatement on Feb. 23, 2005, the court stated that "[i]t strains logic that an allegedly fraudulent statement had any material causal connection which inflated the price of the ... stock when the actual price declined especially as there was no change in the inflationary component of the stock." [16]

It was Hakala's opinion that the stock price would have fallen even more if the allegedly fraudulent statements on Feb. 23 were not made.

But the court held that Hakala had provided no data or analysis to show exactly how much the stock price would have declined if this statement had not been made or what economic loss was attributable to that particular statement.[17]

Similarly, with regard to the second alleged misstatement on March 16, 2005, the court was concerned due to the fact that this alleged misrepresentation was not even included in Hakala's event study.

Hakala had testified that he failed to include this date because the information released on that date was repetitive of prior statements and contained no new information which meant in Hakala's view that the statement did not have the potential to move the stock price.[18]

Hakala's conclusion that the statement at issue — MIVA's Form 10-K for the Fiscal Year 2004 — was not significant enough to be included in the study indicated that he did not consider this statement to be a "material event." [19]

By that logic, "an opinion of an investor who reviewed that filing would not be swayed nor would the market change based upon that filing." [20]

Accordingly, the court concluded that "the [p]laintiffs have failed to show that the 10-K filing of March 16, 2005, would have caused an economic loss for an investor." [21]

Conclusion

There are many lessons to be learned from the MIVA decision. Most important is that the decision recognizes that courts are required under *Dura* to parse out any stock price inflation attributable to the alleged misstatement from inflation caused by other factors.

--By Todd R. David, Susan E. Hurd and Elizabeth P. Skola, Alston & Bird LLP

Todd David is a partner with Alston & Bird in the firm's Atlanta office and co-chair of the firm's litigation practice. Susan Hurd is a partner with the firm in the Atlanta office. Liz Skola is an associate in the firm's Atlanta office.

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[1] 544 U.S. 336, 342 (2005).

[2] *Id.* at 342-43. While inflated purchase price is a necessary prerequisite for a claim of securities fraud, *Dura* requires more than inflation alone because a "lower [stock] price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Id.* at 343. A plaintiff, therefore, must prove that the loss is causally connected to the alleged misrepresentation.

[3] No. 2:05-cv-00201-JES-DNF (M.D. Fla. Aug. 25, 2009).

[4] In re MIVA Inc. Securities Litigation, No. 2:05-cv-00201-JES-DNF (M.D. Fla. Mar. 15, 2007).

[5] In re MIVA Inc. Securities Litigation, No. 2:05-cv-00201-JES-DNF (M.D. Fla. Mar. 12, 2008).

[6] An event study is a statistical regression analysis often used in academic literature to attempt to isolate stock price movements caused by new company-specific information from those movements due to information about the broader economy and industry. See, e.g., In re Williams Sec. Litig., 496 F. Supp. 2d 1195, 1272 (N.D. Okla. July 6, 2007).

[7] In re MIVA Inc. Securities Litigation, No. 2:05-cv-00201-JES-DNF, slip op. at 10-11 (M.D. Fla. Aug. 25, 2009).

[8] 509 U.S. 579 (1993).

[9] In re MIVA Inc. Securities Litigation, No. 2:05-cv-00201-JES-DNF, slip op. at 11 (M.D. Fla. Aug. 25, 2009) (quoting *Dura*, 544 U.S. at 342).

[10] *Id.* at 14.

[11] *Id.* at 10.

[12] *Id.* at 12-13.

[13] *Id.* at 12.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 13.

[17] *Id.*

[18] *Id.* at 13-14.

[19] *Id.* at 14.

[20] *Id.*

[21] *Id.*