

7th Circ. Rejects Securities Suit Over Zimmer Hip Implant

By **Jamie Santo**

Law360, New York (May 21, 2012, 9:52 PM ET) -- The Seventh Circuit on Monday refused to reinstate a securities suit aimed at orthopedic implant maker Zimmer Holdings Inc. and its allegedly faulty Durom Cup hip implant, ruling that even a proposed amended version of the suit failed to meet the heightened pleading standards for fraud.

Lodged by a union pension fund in August 2008, the putative class action alleged Zimmer and its top executives defrauded investors by making misleading statements about the high failure rate one surgeon experienced with the Durom Cup and downplaying manufacturing difficulties at its Dover, Ohio, plant, causing stock values to drop.

According to the appeals court's opinion written by Easterbrook, the plaintiffs argued the scienter could be inferred because the defendants — Zimmer CEO David C. Dvorak and Chief Financial Officer James T. Crine — had financial incentives to make the company look good. The Seventh Circuit, however, disagreed.

“A similar assertion could be made about every firm in the world, but the fact that managers benefit from higher stock prices does not imply that any particular manager committed fraud,” the appeals court wrote. “Quite the contrary. Managers usually do best when a firm has long-term success.”

U.S. District Court Judge Sarah Evans Barker rejected the initial complaint in December 2009, finding it didn't withstand scrutiny under the heightened pleading requirements applicable in securities fraud litigation.

She allowed the plaintiff 45 days to refile, but determined that the amended version failed to remedy the original's deficiencies and denied the motion to refile.

The panel of Chief Judge Frank H. Easterbrook and U.S. Circuit Judges Kenneth F. Ripple and Michael S. Kanne affirmed the lower court's decisions.

Plaintiff Plumbers and Pipefitters Local Union 719 Pension Fund alleged that misrepresentations and omissions made by Zimmer led to a 4 percent drop in stock value in 2008 after the company predicted 10 percent growth at the beginning of the year, according to the initial complaint.

Barker had ruled that the suit's claims failed to demonstrate that the omitted information was materially relevant to shareholders and lacked particularity in showing how the alleged transgressions affected stock price.

According to the Seventh Circuit, the problems with Zimmer's Durom Cup — one American surgeon, Dr. Dorr, experienced a 20 percent failure rate with the hip replacement product — came years after the product had been introduced in Europe with a 1 percent failure rate.

Zimmer did not try to hide the failures the surgeon had encountered, the appeals court said.

“Dorr made a public announcement, and so did Zimmer, which added (what was anyway evident) that lower sales and more products liability litigation might ensue,” the opinion said.

The appeals court also found little to the claims alleging that executives knew of problems at the company's Ohio factory and should have announced them earlier.

“Quality control is an issue at all medical companies,” the opinion said. “Knowing of 'problems,' which are common, differs from knowing that a facility must be closed and some of its products recalled.”

Even the details added to the proposed amended complaint fail to make this point, the appeals court said.

“Plaintiffs point to many other supposedly false statements and a host of detail that supposedly shows that one or another statement was knowingly false,” the Seventh Circuit said. “We agree with the way the district court addressed them, and its judgment is affirmed.”

The Carpenters Pension Fund of West Virginia also served as a plaintiff in the appeals case.

The plaintiffs are represented by Sanford Svetcov, Susan K. Alexander, Willow E. Radcliffe, Luke O. Brooks and S. Ashar Ahmed of Robbins Geller Rudman & Dowd LLP, Irwin B. Levin, Richard E. Shevitz and Scott D. Gilchrist of Cohen & Malad LLP and Howard S. Susskind of Sugarman & Susskind PA.

The defendants are represented by Marc J. Sonnenfeld, Troy S. Brown, Karen Pieslak Pohlmann and Jill Baisinger of Morgan Lewis & Bockius LLP and Paul Alan Wolfla and Matthew T. Albaugh of Faegre Baker Daniels.

The circuit case is Plumbers and Pipefitters Local Union 719 Pension Fund et al. v. Zimmer Holdings Inc. et al., case number 11-1471, in the U.S. Court of Appeals for the Seventh Circuit.

--Editing by Elizabeth Bowen.

All Content © 2003-2012, Portfolio Media, Inc.