

Litigation Alert: Ninth Circuit Issues Key Ruling on Pleading of Loss Causation in Securities Class Actions

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Loos v. Immersion Corp., et. al., Case No. 12-15100, ---F.3d--- (9th Cir. 2014)

On August 7, 2014, the Ninth Circuit issued a key opinion on the pleading of loss causation in securities class actions, ruling for the first time that the mere announcement of an internal investigation, standing alone, is insufficient to establish loss causation. The Ninth Circuit affirmed as well that earnings releases announcing disappointing financial results were also insufficient by themselves to meet the loss causation requirement. The decision in *Loos v. Immersion Corp., et. al.* has significant ramifications for companies that disclose an internal investigation or announce financial results falling short of market expectations, and for the securities fraud litigation those companies may consequently face.

Background

Defendant Immersion Corp. and certain of its officers and directors were named as defendants in a series of shareholder class actions filed in late 2009, claiming that defendants had made various false and misleading statements regarding the company's financial condition. Pursuant to Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, securities fraud plaintiffs are required to plead the element of loss causation, i.e., that the alleged misrepresentations by defendants were a "substantial cause" of losses suffered by shareholders, and that such losses were not attributable to other factors such as changing market or industry conditions.

Plaintiffs attempted to satisfy this element by pointing to a number of purported "corrective disclosures" made by Immersion consisting of: 1) various earnings releases announcing financial results that fell short of market expectations; and 2) an announcement of an internal investigation into historical revenue transactions. Each of these disclosures was followed by a decline in Immersion's stock price, which plaintiffs alleged caused damage to members of the shareholder class.

The district court rejected plaintiffs' arguments, dismissing plaintiffs' complaint with prejudice for failure to plead loss causation, as well as for failure to properly plead scienter.

The Ninth Circuit's Opinion

On appeal, the Ninth Circuit affirmed the district court's decision, agreeing that mere announcement of disappointing earnings does not "reveal any information from which revenue accounting fraud might reasonably be inferred," and thus could not support a finding of loss causation. The opinion followed prior Ninth Circuit precedent that required "a securities fraud plaintiff to allege that the market 'learned of and reacted to th[e] fraud, as opposed to merely reacting to reports of the defendant's poor financial health generally.'"

The Ninth Circuit also ruled for the first time that announcement of an internal investigation by a Company is not sufficient by itself to establish loss causation, as "announcement of an investigation does not 'reveal' fraudulent practices to the market. Indeed, at the moment an investigation is announced, the market cannot possibly know what the investigation will ultimately reveal." In so ruling, the Ninth Circuit agreed with the Eleventh Circuit's reasoning in *Meyer v. Greene*, 2013 WL 656500 (11th Cir. Feb. 25, 2013), which held that the disclosure of an SEC informal inquiry and subsequent private order of investigation could not serve as a corrective disclosure for purposes of loss causation, as they did not "reveal to the market that a company's previous statements were false or fraudulent."

Implications of the *Immersion* Decision

Securities class action lawsuits are frequently filed following a Company announcement of an internal investigation or investigation by government regulators, often without regard to whether there has been any announcement of wrongdoing. The Ninth Circuit has joined a growing body of courts at the appellate and district court level that has rejected the notion that such announcements can satisfy the loss

causation requirement, thus potentially bolstering the defense of such actions at the pleading stage and beyond. The *Immersion* decision will also be helpful authority for defendants in securities fraud cases where plaintiffs attempt to satisfy loss causation by asserting that the announcement of unfavorable financial results by itself is a veiled disclosure of fraud.

The Immersion defendants are represented by Fenwick attorneys [Susan Muck](#), [Felix Lee](#), [Jennifer Bretan](#) and [Marie Bafus](#). Jennifer Bretan argued the Ninth Circuit appeal during oral argument.

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