

Securities MVP: Fenwick & West's Susan Muck

By Ed Beeson

Law360, New York (November 25, 2014, 4:12 PM ET) --



From winning a Ninth Circuit opinion that will give public companies peace of mind when disclosing an internal investigation to striking a settlement with shareholders of a snack-food giant that left almost everyone satisfied, Susan Muck of Fenwick & West LLP has earned her spot among Law360's Securities MVPs.

As different as they were, the victories in both cases are testaments to the strengths of Muck, a San Francisco-based litigator who for nearly 30 years has defended companies hit by shareholder class actions and other securities matters.



Susan Muck

But after the Ninth Circuit's ruling, her work also may have enabled some executives to sleep a bit better at night.

The appellate court's decision came down in August and brought to a conclusion a five-year long effort by Silicon Valley technology manufacturer Immersion Corp. to beat back claims it had lied about its sales figures in a way that inflated its stock value. The allegations stemmed from a 2009 disclosure Immersion made that its audit committee was investigating certain revenue transactions, after which the company's stock price plunged 34 percent.

But while Immersion later said it would have to restate more than three years' worth of financial reports, the appeals court in a 20-page opinion said the mere announcement of an investigation was not sufficient to lead to a finding of loss causation as such a disclosure does not on its own "reveal" fraudulent practices.

To Muck, who also concentrates her practice on conducting internal investigations for companies, this is a hugely important finding as it gives companies some cover from the fear that announcing an internal inquiry, no matter how it ultimately turns out, will trigger an immediate shareholder suit.

"From a common-sense standpoint, that kind of disclosure itself shouldn't be the basis of any class action," she said, adding that in her experience, most internal investigations wind up finding no foul.

Still, Muck said she and her team were taken aback when the panel's decision came out. That's because they had expected the appellate judges to affirm a lower court's dismissal of the suit on the grounds that plaintiffs failed to show scienter of the defendants — not to take a stand on an issue of broader concern, she said.

"We were surprised by the decision," she said. "But we were obviously pleased."

Pleased might be a way of describing the response all parties had to another big piece of litigation that Muck, a West Virginia native who received her law degree from the University of Virginia, brought to a close during the past year.

She and her colleagues at Fenwick represented Diamond Foods Inc., the maker of Pop-Secret Popcorn and Kettle brand potato chips, in a shareholder class action filed over issues surrounding the company's crushed attempt at buying Procter & Gamble Co.'s Pringles potato chip line.

It was a high-stakes piece of litigation for the company, Muck recalled, and it took a bit of ingenuity, followed by lots of hard work, to resolve.

For one, Diamond Foods at the time was in a precarious financial situation, given its heavy debt load and the severe sales drop that had hit its key walnut business. The company also had burned through its insurance coverage and was paying out-of-pocket to defend itself, Muck said. She said that while she had no hesitation to bring the lawsuit to trial, an even faint prospect of losing was a risk too steep to bear.

The plaintiffs also had their own considerations to think about. They had to worry Diamond Foods essentially would become "judgment proof" if they lost trial — in other words, too poor to pay up, Muck said.

They had another consideration to keep in mind: U.S. District Court William Alsup, who was overseeing the case, is a judge whom Muck said "will not hesitate to reject a settlement" he felt was collusive or did not give adequate redress to investors.

"We knew we had a very high burden to meet. We and the plaintiffs," Muck said.

Against that backdrop, Muck and her Fenwick team had to come up with viable settlement terms that all would accept. It was here that she had to reach deep into her playbook. Recalling a once-common practice of cash-and-equity shareholder settlements that she said have since fallen into disuse, Muck and her team offered the plaintiffs a sum of cash, plus an even larger amount of Diamond Foods stock.

It was difficult to get the plaintiffs to agree to, and it took several sessions before a magistrate judge to get the details worked out, Muck said. But in the end, they were able to announce an accord: \$11 million in cash that was kicked in by the company's insurer, plus 4.45 million shares of Diamond Foods' common stock.

As for why the plaintiffs would be pleased, here it is: When the proposed deal was first announced in September 2013, the stock portion of the settlement was worth \$85 million. But by the time Judge Alsup gave his preliminary approval in December — and not without first saying he would have preferred an all-cash deal — the shares were worth \$109 million.

Now, as of Tuesday, the shares are worth about \$131 million.

"The marketplace really seemed to like the deal," Muck said.

Investors apparently liked the parallel settlement Muck had negotiated for Diamond Foods with the U.S. Securities and Exchange Commission in January for \$5 million to resolve claims around an alleged accounting scheme without admitting or denying wrongdoing.

"It is very satisfying," Muck said of her work on the cases. "If you're going to work this hard, it has to be rewarding. Otherwise, you wouldn't do it."

--Editing by Christine Chun.

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