Meta Case Brings Customer-Facing Statements Issue To Fore

By **Samuel Groner** (April 10, 2025)



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Much has been written about Facebook Inc. v. Amalgamated Bank, the securities litigation against Meta Platforms Inc. arising from the Cambridge Analytica user data scandal and the U.S. Supreme Court's decision to accept certiorari and then, after oral argument, dismiss it as improvidently granted in November.[1]

Now that the case has returned to the U.S. District Court for the Northern District of California and is moving forward, it is worth revisiting an issue that arose in that case that has received less attention than the certiorari issue but may be just as significant.

Specifically, what types of statements are not made "in connection with the purchase or sale of any security" and therefore are not covered by Section 10(b) of the Securities Exchange Act?[2] U.S. Securities and Exchange Commission Rule 10b-5 parrots Section 10(b) in stating that it is unlawful for any person to make an untrue statement of material fact in connection with the purchase or sale of any security, but, like Section 10(b), does not provide further guidance about whether particular types of statements satisfy that requirement.[3]

In the Facebook case, the district court initially analyzed whether statements in Facebook's privacy policies were potentially actionable under Section 10(b) and Rule 10b-5, but, as described below, the same issue arises in relation to other customer-directed statements as well.

The Facebook Decision

When a company or its executives make a statement directly to shareholders — such as during an earnings call, or in SEC filings like Forms 8-K, 10-Q or 10-K — there is typically little debate about whether that statement was made in connection with the purchase or sale of any security. How about, though, when the statement is directed to the company's customers rather than to its shareholders?

That was one of the issues that the Northern District of California faced in the Facebook case. The plaintiffs alleged not only that Facebook's risk disclosures in its SEC filings were false or misleading, but also that statements contained in Facebook's privacy policies, which govern Facebook's relations with its users, were materially false or misleading.[4]

In evaluating whether a privacy policy statement can be actionable under Section 10(b) and Rule 10b-5(b), the district court examined whether privacy policies "are the types of documents that a reasonable investor would look at while making purchasing decisions."[5]

The district court, in its 2019 decision in the case, found that they are, analogizing them to detailed drug advertisements in sophisticated medical journals — which the U.S. Court of Appeals for the Second Circuit found to be actionable in 1998 in In re: Carter-Wallace Inc. Securities Litigation[6] — and distinguishing them from "simple" and "passive" advertisements that the U.S. Court of Appeals for the Ninth Circuit in 2017 found to be nonactionable in In re: Lifelock Inc. Securities Litigation.[7]

Carter-Wallace and Lifelock

In Carter-Wallace, the Second Circuit held that it was possible that detailed drug ads using technical language and published in sophisticated medical journals could constitute statements made in connection with a securities transaction, because ads of that nature explaining the attributes of a new drug could be "highly relevant" to those evaluating the stock of the company marketing the drug.[8]

The court explained that the fact that the information was found in an ad in a specialized medical journal, rather than in a publication specifically addressed to market participants, was not relevant because the journal in question was used by analysts studying the prospects of drug companies. The court further explained that an analyst might even find the ad more informative than a corresponding nontechnical statement to financial market professionals.[9]

The decisions by the U.S. District Court for the District of Arizona and the Ninth Circuit in the Lifelock case are particularly instructive on this issue.

In Lifelock, the plaintiffs alleged that the defendants' advertisements about the capabilities of LifeLock's customer alert and credit monitoring services were materially false or misleading in violation of Rule 10b-5(b). The district court dismissed the complaint in 2015, holding that those challenged statements did not meet the "in connection with" element, and contrasting the nonactionable advertisements with a company's annual reports, press releases and investment prospectuses, which are the typical sources of statements made "in a manner reasonably calculated to influence the investing public."[10]

The Ninth Circuit agreed and affirmed in 2017, explaining that one of the challenged advertisements was merely a descriptive chart indicating LifeLock's "Types of Protection," and holding that the idea that a chart of that nature had any potential to influence investors was "facetious."[11]

Other Relevant Case Law

A number of other district courts have reached similar conclusions to those reached by the district and appellate courts in the LifeLock case. For example, in Howard v. Arconic Inc., the U.S. District Court for the Western District of Pennsylvania was faced with whether statements in customer brochures were made in connection with the purchase or sale of securities.[12]

The Arconic case arose from the tragic fire at the Grenfell Tower in London in 2017. One of Arconic's architectural products formed part of the tower's exterior cladding system. The plaintiffs claimed that Arconic violated the federal securities laws by failing to disclose alleged sales of the product for unsafe uses, and that one of the places where Arconic failed to make those disclosures was in customer brochures that it disseminated through its website.

The district court dismissed the claims in 2019, ruling that the plaintiffs had not adequately pled that the statements in Arconic's product brochures were made in connection with the sale of securities, and therefore that the statements could not form the basis for Rule 10b-5 liability.

The court agreed with Arconic's argument that it was implausible that statements in "customer-facing publications" like the ones at issue "would have made a significant

difference to any reasonable investor's decisionmaking." That is because:

1. "The goal of the brochures [was] to persuade a customer to purchase Arconic's products, not its stocks";

2. The information in Arconic's brochures was not directly communicated to investors nor designed to be directly communicated to investors; and

3. Market professionals, in evaluating Arconic's stock, would not plausibly have used the brochures in the same way they would have used a detailed advertisement in a technical journal or an investment research report.[13]

Similarly, in Lindblom v. Mobile Telecommunications Technologies Corp., the U.S. District Court for the District of Columbia held in 1997 that statements in press releases that described how a two-way paging system was supposed to work included where the service was available and sought to explain why "it ought to be of value to business people" were not made in connection with the purchase or sale of any security, because the statements did not mention any financial data or relate the product to the company's profitability.[14]

As the court explained, the company "was not selling stock. It was selling or attempting to sell a paging system that was not performing to expectations. If purchasers of any commodity were entitled to complain of having been deceived by [the company]'s press releases it would be customers who subscribed to its flawed paging system," not shareholders.[15]

Takeaways

These cases suggest that companies should be aware that courts may determine that consumer-facing communications may be within the scope of the federal securities laws if they are the sorts of communications that investors, despite not being the intended audience, may nevertheless rely on due to the nature or substance of the communication.

For example, courts may rule that advertisements in technical or scientific journals containing information that may affect the company's potential or actual profitability may be more likely to have some connection to the purchase or sale of securities than advertisements in a newspaper describing a product's capabilities.

Among the potentially relevant factors for public companies to consider when evaluating a claim that a consumer-facing statement or other statement outside of typical investor-facing channels was made in connection with the purchase or sale of securities include the following:

- Who was the intended audience?
- What was the goal or objective of the statement?
- Was the statement directly communicated to investors?
- Do market professionals typically review the type of document containing the statement?
- How detailed is the information in the statement?

- How sophisticated is the publication in which the statement appears?
- Does the statement provide financial data or relate to the company's profitability?

These and other cases also suggest that securities plaintiffs may attempt to assert that statements in the following forums were made in connection with the purchase or sale of securities:

- Advertisements;
- E-commerce portions of a company's website;
- Privacy statements;
- Cybersecurity policies;
- Customer brochures or other customer-facing publications;
- Press releases describing a new product;
- Statements to consumers;
- Statements on product packaging;
- Statements to Congress, government agencies or regulators;
- A speech or commencement address — or any other public remarks, no matter the context — by a company's CEO; and
- Statements on X, formerly known as Twitter, or other social media, even if not directed to investors.

Conclusion

As the Facebook case proceeds, it will be interesting to see whether the plaintiffs continue to pursue allegations based on statements in Facebook's privacy policies and, if so, whether they can develop evidence to substantiate those allegations.

More broadly, until there is greater clarity in this area of the law, public companies may want to err on the side of caution and assume that statements in advertisements, brochures and other consumer-facing materials may be challenged by plaintiffs lawyers as alleged misstatements in connection with the purchase or sale of securities.

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[1] Facebook Inc. v. Amalgamated Bank, 604 U.S. 4, 4 (2024).

[2] 15 U.S.C. § 78j(b).

[3] 17 C.F.R. § 240.10b-5 (2014).

[4] In re: Facebook Inc. Sec. Litig., 405 F. Supp. 3d 809, 822 (N.D. Cal. 2019).

[5] Id. at 834.

[6] In re: Carter-Wallace Inc. Sec. Litig., 150 F.3d 153, 154 (2d Cir. 1998).

[7] In re: Lifelock, Inc. Sec. Litig., 690 F. App'x 947, 953-54 (9th Cir. 2017).

[8] In re: Carter-Wallace, 150 F.3d at 156.

[9] Id. See also In re: Apple Inc. Sec. Litig., 2020 U.S. Dist. LEXIS 96953 at *51 (N.D. Cal. June 2, 2020) (declining to dismiss claims based on statements in letter to Congress because the court determined that it was "plausible that 'reasonable investors would base their investment decisions' on Apple's representations to Congress").

[10] Bien v. LifeLock Inc., 2015 U.S. Dist. LEXIS 196120 at *33 (D. Ariz. July 21, 2015).

[11] In re LifeLock, 690 F. App'x at 953.

[12] Howard v. Arconic Inc., 395 F. Supp. 3d 516, 538 (W.D. Pa. 2019).

[13] Id. at 538-41.

[14] Lindblom v. Mobile Telecommunications Techs. Corp., 985 F. Supp. 161, 164 (D.D.C. 1997).

[15] Id. See also Hemming v. Alfin Fragrances, Inc., 690 F. Supp. 239, 244-45 (S.D.N.Y. 1988) (statements about product's qualities as a skin care treatment in a New York Times Magazine advertisement, on the packaging of the product, and in a brochure and pamphlet geared to consumers of the product were not made "in connection with" the purchase or sale of a security).