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Petition for Certiorari Asks Supreme Court to Clarify Whether the Federal Securities Laws Carry a Duty to Update

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Last week, executives of the now-defunct biotechnology company, Orexigen, filed a [petition for certiorari](#) with the [U.S. Supreme Court](#), seeking clarification of the duty to update under the federal securities laws. The petition seeks further review of a recent decision by the [Ninth Circuit](#), [Khoja v. Orexigen Therapeutics, Inc.](#), which not only created a departure from other courts in its narrow-approach to incorporation by reference and judicial notice ([see our prior post here](#)), but according to the petition, also distinguished itself from other Circuit Courts by being the first Circuit Court of Appeal to find that an issuer owes a duty to update a statement of historical fact that was accurate when made. Specifically, the Ninth Circuit held that “by touting and publishing the ‘surprisingly’ positive 25 percent interim results [of the drug at-issue’s ability to decrease cardiovascular events], Orexigen created its own obligation to report that those results did not pan out after all” as evidenced by the 50 percent interim results. The Ninth Circuit’s opinion raises several questions: If early drug trials show positive results, must the company report the later interim results, which eradicate any supposed benefit of the drug? If this duty to update historical fact is upheld, in what other circumstances would the duty arise?

As set forth in petitioners’ brief, Circuit Courts have disagreed as to whether a duty to update exists under the federal securities laws for nearly three decades. According to petitions, the Ninth Circuit’s decision “directly conflicts with the decisions of the First, Second, Third, Seventh, and Eleventh Circuits” and “adds a third branch to the already-existing circuit split” as to whether a duty to update exists in the first instance. Petitioners urge the Supreme Court to grant certiorari because this case involves a question of federal law “with enormous consequences to corporate issuers and, thus the Nation’s economy.” Petitioners further request that the Court grant certiorari to prevent forum-shopping and provide uniform application of the federal securities laws

Petitioners urge the U.S. Supreme Court to adopt the reasoning of the [Seventh Circuit](#), the lone Circuit Court [to find no duty to update exists under the federal securities laws](#). Looking at the language of the Exchange Act, Petitioners contend that “on its face, [the statute] makes no mention of events arising after a challenged statement is made” and a duty to update cannot be squared with “the federal securities laws’ ex ante approach” [See 17 C.F.R. § 240.10b-5\(b\)](#) (“It shall be unlawful for any person . . . (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading) (emphasis and alternations in original)). Accordingly, Petitioners insist statements must be assessed “when made.”

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