

## Third Circuit: Describing a Risk as Hypothetical Is Not Misleading Unless That Specific Risk Has Already Materialized

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On August 23, 2017, the Third Circuit held a medical device company had no duty to disclose the materialization of a risk where the company did not portray that specific risk as hypothetical. [Williams v. Globus Medical, 2017 WL 3611996 \(3d Cir. 2017\) \(Scirica, J.\)](#).

At issue was the company's representation that if any of its "independent distributor[s] were to cease to distribute [its] products, [the company's] sales could be adversely affected." Plaintiffs contended that the company's disclosures were "misleading" because the company "warned that the loss of an independent distributor could have a negative impact on sales—but it omitted to warn investors . . . that [the company] had *in fact* lost an independent distributor."

The Third Circuit recognized that "[o]nce a company has chosen to speak on an issue—even an issue it had no independent obligation to address—it cannot omit material facts related to that issue so as to make its disclosure misleading." The court "agree[d] that a company may be liable under Section [10(b)] for misleading investors when it describes as hypothetical a risk that has already come to fruition."

In the case before it, however, the Third Circuit found "[t]he risk actually warned of [was] the risk of adverse effects on sales—not simply the loss of independent distributors generally." The court determined that "[t]he risk at issue only materialized—triggering [the company's] duty to disclose—if sales were adversely affected at the time the risk disclosures were made." Because plaintiffs did "not plead that [the company] was already experiencing an adverse financial impact at the time of the risk disclosures," the court held the company had "no duty to disclose its decision to terminate its relationship with" its independent distributor.

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