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Statistically Significant, or It Didnâ€™t Happen? Corrective Disclosure Under the Securities Act

In *Terry Longair Professional Corporation v Akumin Inc*, the Ontario Court of Appeal addressed the question of whether a securities class action can be pursued for misleading or incorrect statements, even if there was no statistically significant decline in share price. The short answer is yes, at least as far as the leave and certification stages are concerned.

Background

The case was an appeal of a decision granting the plaintiffs leave to pursue a secondary market misrepresentation claim under the *Securities Act* and certify the claim as a class action. Akumin Inc, a medical-imaging company, had announced an acquisition transaction that would be “transformative” and triple its size. Shortly after, on August 15, 2021, the company announced it was delaying the filing of its financial statements due to “potential additional credit losses with respect to prior years.” This led to a 20% decline in share price, which all parties agreed was significant, but they disagreed on the cause. Akumin Inc argued the decline was mainly attributable to concerns about a delay in the transaction and that the August 15 announcement did not contain any correction of any prior financial statement.

After August 15, 2021, several further “public corrections” were issued that did correct prior financial statements, but the company asserted that none of them was followed by a statistically significant decline in the company’s share price. Section 138.3 of the *Securities Act* requires that a misrepresentation be “publicly corrected” before liability attaches but the statute does not define what counts as a public correction. In this case, Akumin Inc argued that when the stock fell, there was no “correction,” and when there was a correction, the stock did not fall in a statistically significant way. In the absence of these events happening together, Akumin Inc said Terry Longair Professional Corporation could not meet the test for certification and leave.

At first instance, the Ontario Superior Court rejected this argument, granted leave to proceed with the secondary market misrepresentation claim, and certified the proceeding as a class action. Akumin Inc appealed to the Ontario Court of Appeal, which dismissed the appeal.

The Legal Issue: Must a Correction Move the Market?

The Ontario Court of Appeal held that in assessing whether there was a “correction,” the inquiry focuses on whether the disclosure corrected an earlier misrepresentation, not whether the market reacted. Conflating the two, in the words of the motion judge, “muddles the materiality of the representation with the materiality of the correction.” The question of whether there had been a “correction” ought to remain on whether the alleged correction actually corrected an alleged misrepresentation or not. While share price movement can provide useful evidence of how the market understood a disclosure, it is not a legal precondition. A corrective disclosure may plainly identify prior misstatements even if the market has already priced in the information or reacts for unrelated reasons.

The Court of Appeal held that while the market’s reaction could be probative as to whether the alleged misrepresentation was material, there is no obligation to prove a statistically significant decline in the price of an issuer’s securities to establish a misrepresentation. In the result, the Court of Appeal dismissed the appeal.

What is Statistical Significance Anyway?

In some respects, the Court’s decision seems straightforward. The Court of Appeal is surely right that evidence pertaining to statistical significance of a share price drop, if relevant, is to the question of whether there was a material misrepresentation, not whether there was a public correction. But beyond that, the question of statistical significance becomes more challenging.

It’s important to understand what the term “statistically significant” means and what it does not. Statistical significance is linked to conducting hypothesis testing in statistics. When you conduct a hypothesis test in statistics, you’re generally looking at whether an observed result is sufficiently inconsistent with some underlying process that it can’t easily be explained by random chance.

Consider a weekly 50/50 draw in your office. Suppose Suzie wins the first week: no surprise, because somebody has to win. But then Suzie wins 10 weeks in a row. Statistical hypothesis testing can show that it is extremely unlikely that Suzie would have won that many times in a row by random chance. So, a statistically significant result can be evidence that the game must have been rigged somehow in Suzie's favour, rather than being a truly random draw.

But here's the important thing about statistical significance: the absence of statistical significance *doesn't* prove the effect you're investigating *doesn't* exist. Suppose Suzie wins the 50/50 draw only once. That would not yield any statistically significant result, since it's entirely plausible that Suzie was randomly selected a single time. But it's still entirely possible the draw *was* rigged that one time to allow Suzie to win – it just wasn't rigged in a way to create a pattern that would generate a statistically significant result.

That's a simple example, and the real world, particularly financial markets, is substantially more complicated. But the same point remains generally true: while a statistically significant result can be probative of a particular fact, the absence of a statistically significant result is not necessarily probative of the absence of that particular fact. That doesn't mean that statistical evidence is not helpful; it absolutely is. But it will be important for experts to clearly explain basic statistical concepts to courts and for courts to engage carefully with that evidence to understand what it is and is not. While the Court of Appeal approached these issues correctly in *Terry Longair Professional Corporation v Akumin Inc*, the real challenging issues remain to be decided at later stages of these cases.

Key Takeaway

The case illustrates the importance of correctly framing statistical evidence, particularly in the context of securities actions. This will be an important continuing issue for the case as it proceeds.