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I. INTRODUCTION

Although several cases decided by the United States Supreme Court during the tenure of Chief Justice John Roberts (the "Roberts Court") have dealt blows to class-action litigation, it would be a mistake to characterize the Roberts Court as generally hostile to class actions. Some decisions have sustained class proceedings that many had thought dead on arrival in the Supreme Court. And the Roberts Court's recent decisions on class certification in open-market securities-fraud cases have been particularly agreeable to investors asserting class-action claims.

Part II of this Article presents an overview of Roberts Court decisions concerning class litigation.[1] Those decisions are a mixed bag – some are unfavorable to class litigation, and others are quite favorable. With the exception of decisions applying arbitration clauses to bar class litigation, however, the Roberts Court's decisions are, on whole, not particularly hostile to class proceedings. Some are remarkably favorable – rejecting state-law bars to asserting certain state-law claims on behalf of a class, for example; denying preclusive effect to federal orders

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denying class certification; and rejecting contentions that a Ponzi scheme's purported investments in exchange-traded securities mean its victims' state-law claims are precluded by a federal law barring state-law class actions based on false statements made in connection with the purchase or sale of exchange-traded securities.[2]

The Article's primary focus, however, is on a trilogy of Roberts Court decisions concerning class certification in open-market securities-fraud cases, where fraudulent statements allegedly manipulated the price of securities traded in the open market: *Erica P. John Fund, Inc. v. Halliburton, Co.* ("*Halliburton I*"),[3] *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,[4] and *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*").[5] Together these decisions are remarkably favorable to plaintiffs seeking to proceed on behalf of a class. Each construes and applies the Rehnquist Court's 1988 decision in *Basic Inc. v. Levinson*,[6] which held that proving the reliance element of federal securities-fraud claims will not cause individual issues to predominate over common issues, so long as the securities in question were actively traded and the allegedly false or misleading statements at issue were publicly disseminated.[7] Each rejects limitations on class certification under *Basic* that had been imposed by some lower courts, or that were proposed by defendants. And *Halliburton II* flatly rejects an invitation to overrule *Basic*, a formerly controversial decision the Roberts Court reaffirms in terms quite favorable to plaintiff investors.

Rather than jumping directly into a discussion of the three decisions, which have been extraordinarily good news for investors seeking to prosecute securities-fraud class actions, Part III provides background of the fraud-on-the-market doctrine that *Basic* embraced, explaining why many thought the decision might be vulnerable to overruling. Part IV discusses *Basic* in the lower courts and the controversy surrounding empirical evidence generated by efficient-markets research that many commentators and courts quite erroneously asserted was the foundation of *Basic*'s holding.

Part V then considers, in turn, the Roberts Court's trilogy of open-market securities-fraud class-certification decisions. It sets forth how

2. *See infra* text accompanying notes 42-54.

3. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (U.S. 2011) [hereinafter *Halliburton I*].

4. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184 (U.S. 2013).

5. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (U.S. 2014) [hereinafter *Halliburton II*].

6. Basic Inc. Levinson, 485 U.S. 224 (1988).

7. *Id.* at 241-47.

Halliburton I relieved plaintiffs of the burden of proving loss causation to obtain class certification – a requirement that had been a serious stumbling block in the Fifth Circuit. *Amgen* then relieved plaintiffs of the burden of proving a statement or omission's materiality to obtain class certification. And although *Halliburton II* vacated a class-certification order – affording the defendants a formal victory – that victory is thoroughly Pyrrhic. For *Halliburton II* reaffirms the validity of *Basic* and rejects rigid interpretations of market efficiency with an opinion that sweeps away the underpinnings of numerous lower-court precedents that have been problematic for plaintiffs.

Part VI outlines the favorable impact that *Halliburton II* has for plaintiffs asserting open-market securities-fraud claims. It explains how *Halliburton II* (1) overturns existing lower-court decisions employing rigid notions of market efficiency; (2) upends precedents assuming that the market instantaneously incorporates all information; (3) undermines decisions withholding the fraud-on-the-market presumption in cases involving initial public offerings; (4) undermines decisions demanding that plaintiffs produce event studies; and (5) reverses the burdens on the parties in cases involving so-called "confounding factors."

Part VII offers a brief summary and conclusion.

II. THE ROBERTS COURT RECORD: SOMETIMES QUITE HOSPITABLE TO CLASS PROCEEDINGS

Although it is easy to pick out Roberts Court decisions that vacate class-certification orders or otherwise impair access to class relief, the truth is that many Roberts Court decisions have been quite friendly to class litigation.

Roberts Court decisions impeding class proceedings need little introduction. In *Wal-Mart Stores, Inc. v. Dukes*,[8] for example, the Court quashed class certification in a nationwide employment discrimination class action seeking to prove that Wal-Mart's practice of delegating discretion to local managers and supervisors produced discriminatory results.[9] And in *Comcast Corp. v. Berhend*,[10] the Roberts Court overturned class certification where the plaintiffs' expert – whose testimony the plaintiffs submitted to show that antitrust injury and damages could be established with common proof – attested that he could not distinguish between economic harm caused by the antitrust

8. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (U.S. 2011).
9. *Id.* at 2550-57.
10. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (U.S. 2013).

claim asserted and harms associated with other claims excluded from the class case.[11]

Yet even in *Wal-Mart* the five-justice majority's objection was not to class litigation, so much as it was to the plaintiffs' theory of liability. A five-justice majority believed the very nature of Wal-Mart's decentralized, discretionary decision-making foreclosed finding that the case provided the kind of "common question" required by Rule 23(a).[12] But it did so primarily because a majority disliked the plaintiffs' central theory of liability, that Wal-Mart's policy of decentralized discretion might be discriminatory: "Because respondents provide no convincing proof of a company-wide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common questions."[13] As Justice Ginsburg observed in her dissent: "The Court gives no credence to the key dispute common to the class: whether Wal-Mart's discretionary pay and promotion policies are discriminatory."[14] Thus, *Wal-Mart* likely reflects a narrow understanding of grounds for substantive liability under the civil-rights laws more than it does a narrow view of Rule 23's class-certification provisions.

Moreover, *Comcast* turned on specific deficiencies of a particular expert's analysis of antitrust injury and damages, which the plaintiffs apparently *had conceded* they would need to show were provable on a class basis.[15] Given the "oddity of the case, in which the need to prove damages on a classwide basis was never challenged," Justices Ginsburg and Breyer noted in a dissent joined by Justices Sotomayor and Kagan, "[t]he Court's ruling is good for this day and case only."[16] And though the Court found the expert's analysis deficient for incorporating damages attributable to causes other than the violation asserted, the majority opinion itself emphasizes that "[c]alculations need not be exact,"[17] favorably citing *Story Parchment Co. v. Patterson Parchment*

11. *See id.* at 1433-34.
12. *Wal-Mart*, 131 S. Ct. at 2554-57.
13. *See id.* at 2556-57.
14. *Id.* at 2565 (Ginsburg, J. dissenting in part).
15. *See Comcast*, 133 S. Ct. at 1430 ("The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged anti-trust violation (referred to as 'antitrust impact') was 'capable of proof at trial through evidence that [was] common to the class rather than individual to its members'; and (2) that the damages resulting from that injury were measurable 'on a class-wide basis' through use of a 'common methodology.'").
16. *Id*. at 1437.
17. *Id.* (citing Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931)).

Paper Co.,[18] which held that legitimate doubts concerning the amount of damages generally should be resolved against culpable defendants.[19] *Comcast* thereby reaffirms a rule quite favorable to plaintiffs, even if it did not much help the plaintiffs in *Comcast*, whose damages case the majority found was not even "'consistent with [their] liability case.'"[20]

The Roberts Court's decisions concerning arbitration agreements and class proceedings may deal more serious blows to class proceedings, at least where claims are subject to an arbitration agreement.[21] The Court's 2010 decision in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*,[22] severely curtailed the availability of class proceedings in arbitration by holding that an arbitration clause's silence on the subject precluded a finding of consent to class arbitration proceedings.[23] With *AT&T Mobility LLC v. Concepcion*,[24] the Roberts Court then overturned a substantial body of state-law precedent to the effect that arbitration clauses precluding class proceedings, particularly in consumer cases, may be found unconscionable and thus unenforceable.[25] And with *American Express Co. v. Italian Colors Restaurant*,[26] the Court enforced a contractual waiver of class arbitration where an individual proceeding was not feasible because "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[27] Taken together, these decisions could have truly devastating effects on the ability of

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18. *Story Parchment*, 282 U.S. at 563.

19. *See id.* The rule of *Story Parchment* clearly places the risk of uncertainty concerning the amount of damages on wrongdoing defendants' shoulders:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise . . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

Id. (citations omitted).

20. *Comcast*, 133 S. Ct. at 1433 (quoting ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 57, 62 (2d ed. 2010)).

21. *See* Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions*: Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CON. L. & PUB. POL. 73, 85-96 (2011); Erwin Chemerinsky, *Supreme Court: Class (Action) Dismissed*, L.A.TIMES, May 10, 2011.

22. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

23. *Id*. at 672-87.

24. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (U.S. 2011).

25. *See id*. at 1746-53.

26. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (U.S. 2013).

27. *Id.* at 2307.

consumers, bound by arbitration clauses in contracts of adhesion, ever to obtain meaningful redress.[28]

Yet the Roberts Court's decisions are by no means consistently inhospitable to class litigation. Some are remarkably favorable.

Take *Shady Grove Orthopedics Associates v. Allstate Insurance Co.*,[29] for instance, which held that a New York law prohibiting class actions to recover penalties or statutory minimum damages could not keep a federal district court, sitting in diversity, from entertaining a class action to recover such statutory penalties under New York law. Writing for a five-justice majority that included Chief Justice Roberts, Justice Scalia did not have to look far for an answer to whether these claims might proceed as a class action:

> Rule 23 provides an answer. It states that '[a] class action may be maintained' if two conditions are met: the suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation, and it must also fit into one of the three categories described in subdivision (b).[30]

"By its terms, this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claims as a class action."[31] Indeed, the Court concluded, "Rule 23 provides a one-size-fits-all

28. These decisions' likely effect is mitigated but little by *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (U.S. 2013), where the Roberts Court sustained an arbitrator's ruling that a specific arbitration agreement permitted certain claims to be arbitrated on a class basis, since companies intent on avoiding accountability can easily frame provisions to bar class proceedings.

29. Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S. Ct. 1431 (U.S. 2010).

30. *Id*. at 1437. Those categories are set out as follows:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. . . .

FED. R. CIV. P. 23(b).

31. *Shady Grove*, 130 S. Ct. at 1437.

formula for deciding the class-certification question,"[32] one that "permits all class actions that meet its requirements," even if statutory policies of the State under whose law the claims arise would preclude class proceedings.[33] To be clear: "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the rule's prerequisites are met."[34] And if Rule 23's requirements are met, a federal judge has no discretion to deny certification. For when Rule 23 "says that if the prescribed conditions are satisfied '[a] class action *may be maintained*,'" any "discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim as a class action if he wishes."[35] Those are words to warm any class-action plaintiffs' lawyer's heart.

Consider *Smith v. Bayer Corp.*[36] for another example of a Roberts Court decision notably friendly to class litigation. The Court held that denial of class certification in a federal proceeding asserting consumer claims against a pharmaceutical company could not bar later certification and entry of final judgment in state-court proceedings of an essentially identical class to pursue the very same claims.[37] A federal district court that denied class certification under Rule 23(b)(3), finding individual questions would predominate over common questions, had enjoined a motion in a West Virginia state court for certification of essentially the same class to assert the same claims.[38] The federal district judge thought that this edict came within the Anti-Injunction Act's provision permitting a federal court to enjoin state-court proceedings when necessary "to protect or effectuate its judgments."[39] The Eighth Circuit affirmed, noting that the Federal Rule 23 on certifying class actions and West Virginia's Rule 23 are virtually identical.[40]

But the Roberts Court reversed, giving two reasons, either of them independently sufficient. First, Justice Kagan explained for a unanimous Court, the courts below both erred in assuming that merely because Federal Rule 23 and West Virginia Rule 23 are virtually identical, class-certification motions under those two rules present the same question in state court as in a federal court. Because West Virginia's courts

32. *Id*.
33. *Id.* at 1439.
34. *Id.* at 1442.
35. *Id*. at 1438.
36. Smith v. Bayer Corp., 131 S. Ct. 2368 (U.S. 2011).
37. *See id.* at 2379-81.
38. *See id.* at 2374.
39. *Id.* at 2374-75 (quoting 28 U.S.C. § 2283 (2012)).
40. Smith v. Bayer Corp. (*In re* Baycol Prods. Litig.), 593 F.3d 716, 721-22 (8th Cir. 2010).

approach Rule 23 issues rather differently than the federal district court had, class certification in each forum presented different questions – and certification of a class in state court thus would not conflict with the earlier *denial* of class certification in the federal proceeding.[41] Second, Justice Kagan explained for all the Court but Justice Thomas (who was content to join the Court's opinion solely on its first ground), a *denial* of class certification *never* binds members of the putative class – since it is only certification and notice that make a judgment binding on absent class members.[42]

That, once again, is a ruling sure to please class-action plaintiffs' lawyers. Without a single dissenting voice, the Roberts Court overruled circuit-court decisions barring what the lower courts had condemned as "serial litigation" of class-certification rulings.[43]

If one turns from employment, antitrust, and consumer cases to the Roberts Court's recent decisions in litigation involving investors' claims, the picture gets even better for plaintiffs seeking to proceed on behalf of a class.

In *Chadbourne & Parke LLP v. Troice*,[44] the Roberts Court held that victims of a Ponzi scheme – whose promoters purported to (but in fact did not) invest assets in securities trading on U.S. stock exchanges – are not subject to preclusion of their state-law claims under the federal Securities Litigation Uniform Standards Act ("SLUSA").[45] Enacted in 1998 to keep litigants from avoiding certain restrictions that the Private Securities Litigation Reform Act of 1995 ("PSLRA")[46] imposed on federal securities litigation,[47] SLUSA forecloses state-law class actions alleging false statements made in connection with the purchase or sale of any "covered security" – which the statute defines to include U.S.-exchange-traded securities and mutual funds.[48] A series of lower-court

41. *Smith*, 131 S. Ct. at 2376-79.

42. *Id.* at 2379-82.

43. *Id.* at 2381. The Court expressly disapproved of the Seventh Circuit's decision in *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763 (7th Cir. 2003), which had "objected to 'an asymmetric system in which class counsel can win but never lose' because of their ability to relitigate the issue of class certification."

44. Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058 (U.S. 2014).

45. *Id.* at 1062-64.

46. *See* Pub.L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. §§ 77z-1, 78u-4).

47. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81-82 (2006).

48. SLUSA expressly precludes state-law class actions alleging misrepresentations or omissions, or the use of "any manipulative device or contrivance in connection with the purchase or sale of any covered security," 15 U.S.C. § 78bb(f)(1) (2012), with "covered security" defined to include securities qualified for trading on U.S. stock exchanges. *See id.* § 78bb(f)(5)(E).

decisions, including several in cases seeking relief for Bernie Madoff's victims, had held that SLUSA precluded state-law claims if a Ponzi scheme's operators falsely said they were investing assets in exchange-traded securities.[49] When the Fifth Circuit ruled that similar claims asserted by victims of Alan Stanford's Ponzi scheme were *not* barred by SLUSA, the Supreme Court granted certiorari.[50]

I imagine many assumed the Roberts Court would make short work of the Stanford investors' class claims. Even the federal government, as a friend of the Court, asserted that the claims were SLUSA-precluded.[51] Yet with only two justices (Kennedy joined by Alito) dissenting,[52] the Roberts Court ruled that the investors' state-law class-action claims were *not* barred.[53] Even if investments in Stanford's Ponzi scheme were purportedly backed by covered securities, what the scheme's victims actually received was not an exchange-traded "covered security," and their claims thus were not precluded by SLUSA.[54] Score another Roberts Court victory for class-action plaintiffs.

III. BACKGROUND OF THE ROBERTS COURT'S SECURITIES CLASS-ACTION DECISIONS: THE 1988 REHNQUIST COURT *BASIC V. LEVINSON* DECISION AND THE PRESUMPTION OF MARKET RELIANCE

Ponzi-scheme claims account for relatively little investment-fraud litigation. Far more important, in practical terms, are open-market

49. *See, e.g.,* Backus v. Connecticut Cmty Bank, N.A., 789 F. Supp. 2d 292, 305-06 (D. Conn. 2011); *In re* Herald, Primeo, & Thema Sec. Litig., No. 09 Civ. 289 (RMB), 2011 WL 5928952, at *7 (S.D.N.Y. Nov. 29, 2011), *aff'd* 730 F.3d 112 (2d Cir. 2013), *reh'g denied*, 753 F. 3d 110 (2d Cir. 2014), *petitions for cert. filed sub nom*. Davis v. Kohn, No. 14-730 (Dec. 17, 2014) *and* Trezziova v. Kohn, No. 14-736 (Dec. 17, 2014); *In re* Kingate Mgt. Ltd. Litig., No. 09 Civ. 5386 (DAB), 2011 WL 1362106, at *9 (S.D.N.Y. Mar. 30, 2011); Newman v. Family Mgmt. Corp., 748 F. Supp. 2d 299, 312 (S.D.N.Y. 2010); *In re* Beacon Assocs. Litig., 745 F. Supp. 2d 386, 430 (S.D.N.Y. 2010); Wolf Living Trust v. FM Multi-Strategy Inv. Fund, L.P., No. 09 Civ. 1540 (LBS), 2010 WL 4457322, at *3 (S.D.N.Y. Nov. 2, 2010); *but see* Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 398 (S.D.N.Y. 2010). This Article's author is appellate counsel for an investor in the *Herald, Primeo, & Thema* proceeding.

50. *See* Roland v. Green, 675 F.3d 503, 520-24 (5th Cir. 2012), *cert granted sub nom.* Chadbourne & Parke LLP v. Troice, 133 S. Ct. 977 (U.S. 2013), Willis of Colo. Inc. v. Troice, 133 S. Ct. 977 (U.S. 2013), *and* Proskauer Rose LLP v. Troice, 133 S. Ct. 978 (U.S. 2013).

51. *See* Brief for the United States as Amici Curiae Supporting Petitioners at 9 et seq., Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058 (U.S. 2014), 2013 WL 1947418, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-79-12-86-12-88_pet-amcu-usa.pdf.

52. Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058, 1072-81 (U.S. 2014) (Kennedy, J., joined by Alito, J., dissenting).

53. *Id.* at 1066-72.

54. *Id.* at 1071-73.

securities-fraud cases alleging that misleading public statements of a securities issuer, its top officers, and occasionally others (such as the issuer's underwriters or its auditors) manipulated the price at which the issuer's securities traded on the stock market.

We shall now turn to such fraud-on-the-market cases. As discussed below, three recent Roberts Court decisions address class certification in such cases, every one of them rejecting attempts to heighten the showing required of plaintiff investors seeking class certification in open-market securities-fraud cases.[55] But first some background, as each of the three decisions construes and applies a 1988 Rehnquist Court decision embracing the fraud-on-the-market theory of reliance for open-market securities-fraud cases.

I think it is important to begin by describing how *Basic* came to hold that material misrepresentations can be presumed to affect an actively traded security's market price, and that investors may further be presumed to rely upon the integrity of that price.[56] This of course means that the element of reliance can be presumed in "fraud-on-the-market" cases without the kind of direct proof concerning each individual class member's state of mind that might defeat class certification under Federal Rule of Civil Procedure 23(b)(3) by causing individual questions to predominate over common ones.[57]

From the outset, however, *Basic* was a controversial decision. Though *Basic* emanated from the Rehnquist Court, three prominent conservatives – Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy – did not participate.[58] With a six-justice quorum to decide the case, the majority opinion endorsing the fraud-on-the-market theory was rendered by a rather liberal four-justice majority: Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens.[59] Two relatively moderate conservatives, Justice White joined by Justice O'Connor, charged in dissent that the majority's ruling rested upon a nascent (and the dissenters thought doubtful) economic theory framed by the so-called "Efficient Capital Markets Hypothesis" or "Efficient Markets Hypothesis" (frequently abbreviated "ECMH" or "EMH").[60] One had to wonder – had Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy participated in the decision, might they have cast their votes

55. *See infra* text accompanying notes 165-246.
56. Basic Inc. v. Levinson, 485 U.S. 224, 241-47 (1988).
57. *See supra* text accompanying note 30; *infra* text accompanying note 97.
58. *See Basic*, 485 U.S. at 225.
59. *Id.* at 225, 241-50.
60. *Id.* at 250-62 (White, J., dissenting).

with Justices White and O'Connor, thereby turning Justice Blackmun's four-justice majority opinion into a four-justice dissent?[61]

Basic was also, perhaps, a somewhat ambiguous opinion, leaving lower courts to interpret it in a variety of ways. Given its citation of empirical evidence generated by efficient-markets research, some observers concluded (as Justice White's dissent asserted) that the majority's opinion hinged upon the extreme notion of "efficiency" stated by the ECMH, requiring *all* publicly available information *always* to be fully incorporated in a security's market price.[62] Some courts took the hypothesis literally, expecting information to be incorporated in market price both immediately and completely.[63] Some, such as the Fifth Circuit, believed they had license to "tighten" access to *Basic*'s presumption of reliance by adding further threshold requirements – demanding, for example, that plaintiff investors prove "loss causation" in order to obtain class certification.[64] Circuits divided on whether plaintiffs had to establish loss causation, or the materiality of the statements and omissions at issue, in order to obtain class certification.[65] Some courts, again including the Fifth Circuit, ruled against plaintiffs' claims whenever "confounding" factors made it difficult to parse out the separate effects of several simultaneous disclosures.[66]

A. Background of Basic: The Rise of the Fraud-on-the-Market Doctrine

When the 73rd Congress enacted the Securities Exchange Act of 1934 ("Exchange Act" or "1934 Act") to regulate securities markets and require that publicly traded securities' issuers file periodic reports disclosing information material to the securities' valuation, it prefaced the statute with a statement on the "Necessity for Regulation."[67] Congress' codified prefatory statement observed that the stock market's published price quotations themselves had come to "constitute a basis

61. *See* Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 157 (2009) ("The line-up of justices was remarkably skewed . . . Justice Anthony Kennedy was not sworn in until a few months after the oral argument. Two other key conservatives, Chief Justice Rehnquist and Justice Antonin Scalia recused themselves. *Basic* was decided by six, mostly liberal, justices."). *See supra* text accompanying notes 58-60.

62. *See infra* text accompanying notes 122-25.

63. *See infra* text accompanying notes 140-43.

64. *See infra* text accompanying notes 168-75.

65. *See infra* text accompanying notes 144-45.

66. *See infra* text accompanying notes 329-30.

67. 15 U.S.C. § 78b (2012).

for determining the prices at which securities are bought and sold."[68] Unfortunately, "the prices of securities on such exchanges and markets are susceptible to manipulation."[69] Congress said it thus intended the 1934 Act "to require appropriate reports" by securities issuers of material information concerning their operation and results, "and to insure the maintenance of fair and honest markets,"[70] so that securities might trade at their "fair valuation" on the basis of complete and truthful information.[71] The statutory preface thus reflects Congress' understanding that market prices reflect publicly available information, and Congress' intention that investors should be able to rely on the integrity of the resulting price quotations.

Two sections of the 1934 Act spoke directly to the manipulation of securities markets. With 1934 Act § 9, Congress proscribed specified manipulative practices and provided an express cause of action affording relief to "any person who shall purchase or sell any security at a price which was affected" by the proscribed deceptive acts, or by the misleading statements of brokers, dealers, and others buying and selling securities.[72] Recognizing that other persons too might seek to manipulate securities prices, and in perhaps unforeseen ways, Congress added § 10(b) as a broad "catch-all" provision making it "unlawful for *any* person" to employ, in connection with the purchase or sale of any security, "*any* manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe."[73] Promulgated by the SEC in 1942, Rule 10b-5 made it unlawful, in connection with the purchase or sale of *any* security, for any person (1) to "employ any device, scheme, or artifice to defraud," (2) to make false or misleading statements, or (3) to "engage in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person."[74] Federal courts soon recognized an implied right of

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68. *Id.* § 78b(2).

69. *Id.* § 78b(3).

70. *Id.* § 78b.

71. *Id.* § 78b(3).

72. 15 U.S.C. § 78i(f) (2012).

73. 15 U.S.C. § 78j(b) (2012) (emphasis added). *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202-03 (1976) (quoting legislative history describing the provision as "'a catch-all clause'" conferring "'the authority to deal with new manipulative devices'") (citing *Stock Exchange Regulation, Hearing on H.R. 7852 and H.R. 8720 Before the H. Comm, on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess., 115 (1934)).

74. 17 C.F.R. § 240.10b-5 (2014); *see Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 921-23 (1967) (remarks of Milton Freeman). Captioned "Employment of Manipulative and Deceptive Devices," Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or action under § 10(b) for violations of Rule 10b-5,[75] which the Supreme Court, by the 1980s, itself recognized as "simply beyond peradventure."[76]

As a matter of plain English, § 10(b)'s reference to "any manipulative or deceptive device or contrivance" encompassed conduct calculated to manipulate stock-market prices – that is, "[t]o force (prices) up or down, as by matched orders, wash sales [*or*] *fictitious reports*," such as false or misleading public statements.[77] The common law of market manipulation, since the 1814 King's Bench ruling in *Rex v. De Berenger*,[78] had recognized that a security's price can be manipulated with false public statements, since the deliberate dissemination of false rumors into a securities market "strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud levelled [sic] against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."[79]

From false rumors influencing securities' prices, the common-law precedents had proceeded to deceptive acts and transactions similarly designed to affect market prices by creating the false appearance of active trading and, thus, the false appearance of real demand for the security. As Chief Justice Burger observed for a unanimous Court in *Schreiber v. Burlingtom Northern, Inc.*,[80] a seminal 1892 decision that

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> instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (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 the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

75. *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514-15 (E.D. Pa. 1946).

76. Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983).

77. *Hochfelder*, 425 U.S. at 199 n.21 (quoting WEBSTER'S INTERNATIONAL DICTIONARY (2d ed. 1934)) (emphasis added). *See generally* A.A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 COLUM. L. REV. 264, 278-79 (1931); *see also* A.A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 403 (1938).

78. Rex v. De Berenger, (1814) 105 Eng. Rep. 536 (K.B.) 538; 3 Maule & Selwyn 67, 72-73.

79. *Id.*; *see* McMullen v. Hoffman, 174 U.S. 639, 649 (1899) (quoting Lord Ellenborough's opinion in *De Berenger* to hold that bid rigging is against public policy); United States v. Brown, 5 F. Supp. 81, 85-86 (S.D.N.Y. 1933), *aff'd* 79 F.2d 321 (2d Cir. 1935); Morris Run Coal Co., v. Barclay Coal Co., 68 Pa. 173, 187-88 (1871); State v. Buchanan, 5 H. & J. 317, 348 (Md. App. 1821).

80. Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985).

"broke new ground in recognizing that manipulation could occur without the dissemination of false statements" had itself "placed emphasis on the presence of deception" effected by sham transactions executed to create the appearance of active trading.[81] "As Lord Lopes stated in that case, 'I can see no substantial distinction between false rumours and false and fictitious acts.'"[82] Or, as a federal district court put it in early 1933,[83] "'even a speculator is entitled not to have any present fact involving the subject matter of his speculative purchase or the price thereof misrepresented by word or act."[84] This was the common-law background against which Congress legislated in the 1930s.

Following 1966 amendments to Rule 23 that were designed to facilitate class litigation[85] and, the Advisory Committee Notes said, to do so specifically in cases of mass fraud,[86] the federal courts naturally gave effect to § 10(b)'s statutory proscription of manipulative practices by allowing investors, whose transactions were executed at prices affected by fraud, to recover without requiring proof that each individual investor subjectively knew of the particular false and misleading statements that had impaired the market's integrity. Section 10(b) and Rule 10b-5, the Ninth Circuit explained in *Blackie v. Barrack*,[87] "are designed to foster an expectation that securities markets are free from fraud – an expectation on which purchasers should be able to rely."[88] And because

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81. *Id.* at 7 n.4 (citing Scott v. Brown, Doering, McNab & Co., [1892] 2 Q. B. 724 (Eng.).

82. *Id*. (quoting Scott, 2 Q.B. at 730).

83. *Id.* (quoting United States v. Brown, 5 F. Supp. 81, 85 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935)).

84. *Id.* (quoting *Brown*, 5 F. Supp. at 85) (*Schreiber*'s brackets); *see also* Willcox v. Harriman Sec. Corp., 10 F. Supp. 532, 535 (S.D.N.Y. 1933).

85. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999) ("[M]odern class action practice emerged in the 1966 revision of Rule 23").

86. The Advisory Committee Note to the 1966 amendments identified "a fraud perpetrated on numerous persons" as "an appealing situation for a class action" despite individual issues concerning injury and damages. FED. R. CIV. P. 23(b)(3), Advisory Committee Note to 1966 Amendment; *see* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1437 (U.S. 2013) (Ginsburg, J., and Breyer, J., dissenting); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 139 (2d Cir. 2001); Henry v. Lehman Commercial Paper, Inc. (*In re* First Alliance Mortgage Co.), 471 F.3d 977, 990 (9th Cir. 2006); Green v. Wolf Corp., 406 F.2d 291, 300-01 (2d Cir. 1968); Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968).

87. Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975).

88. *See, e.g.*, *id.* at 907; *accord, e.g.*, Peil v. Speiser, 806 F.2d 1154, 1161 (3d Cir. 1986); Harris v. Union Elec. Co., 787 F. 2d 355, 367 & n.9 (8th Cir. 1986); Lipton v. Documation, Inc., 734 F.2d 740 (11th Cir. 1984); T.J. Raney & Sons, Inc. v. Fort Cobb, Okla. Irrigation Fuel Auth., 717 F.2d 1330, 1332-33 (10th Cir. 1983); Panzirer v. Wolf, 663 F.2d 365, 367-68 (2d Cir. 1981), *vacated*, Price Waterhouse v. Panzirer, 459 U.S. 1027 (1982); Ross v. A.H. Robins Co., 607 F.2d 545, 553 (2d Cir. 1979); Schlanger v. Four-Phase Sys., 555 F. Supp. 535 (S.D.N.Y. 1982); *In re* LTV Sec. Litig., 88 F.R.D. 134 (N.D. Tex. 1980); Wolgin v. Magic Marker Corp., 82 F.R.D. 168, 169-70, 176-77 (E.D. Pa. 1979).

market prices respond to and reflect publicly available information, in open-market fraud cases involving actively traded securities the element of reliance could sensibly be "established indirectly, by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock."[89] Applying "to all fraud on the market cases, individual as well as class actions," the resulting presumption of reliance obviously facilitated certification of class actions under Rule 23(b)(3) by ensuring that individual issues concerning reliance would not overwhelm common ones.[90]

B. *Basic Inc. v. Levinson*

Such was the state of the law in 1988, when the fraud-on-the-market theory reached the Supreme Court in *Basic Inc. v. Levinson*.[91] Yet three prominent conservative justices did not participate in the decision: Chief Justice Rehnquist and Justice Scalia recused themselves, and Justice Kennedy had been sworn in after the case was argued.[92] And although the resulting quorum of six justices was unanimous on the materiality standard that should govern § 10(b) claims,[93] Justice Blackmun wrote for a majority of only four on class certification under the fraud-on-the-market theory of reliance, joined on this issue by Justices Brennan, Marshall, and Stevens.[94]

The four rather liberal justices agreed with the circuit courts that "where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed."[95] *Basic* thus held that when securities trade in an "open and developed" or "efficient" market, the element of reliance may be established based upon the presumption that an actively traded security's price likely reflects most publicly available information about the issuer,

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89. *Blackie*, 524 F.2d at 908.

90. *Id.*

91. Basic Inc. v. Levinson, 485 U.S. 224 (1988).

92. *Id.* at 225, 241-50; *see supra* note 61.

93. *See id.* at 230-41 (adopting and applying the materiality standard of TSC Indus. v. Northway, 426 U.S. 438, 448-49 (1976)).

94. *Id.* at 225; *see id.* at 241-50. The six-justice Court was unanimous on another issue, concerning the standard for evaluating materiality. *See id.* at 226-41; *id.* at 250 (White, J., joined by O'Connor, J., concurring in part) ("I join Parts I-III of the Court's opinion, as I agree that the standard of materiality we set forth in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), should be applied to actions under §10(b) and Rule 10b-5.").

95. *Id.* at 247, n.25.

coupled with the further understanding that investors are entitled to assume that market prices are not manipulated by fraud – the "integrity" of the market.[96]

The Court thus rejected contentions that reliance is an element of open-market securities-fraud claims whose proof would cause individualized issues to predominate over class issues, thereby precluding class certification under Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members."[97]

Noting "that reliance is and long has been an element of common-law fraud," the Court agreed with the defendants "that reliance is an element of a Rule 10b-5 cause of action."[98] Indeed, "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[99]

"There is, however, more than one way to demonstrate the causal connection," the Court continued, noting that its opinion in *Affiliated Ute Citizens v. United States*[100] had "dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached."[101] *Affiliated Ute* had indeed held, in a case involving breach of a duty to disclose, that "positive proof of reliance is not a prerequisite to recovery" under § 10(b).[102] "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important," in which case the "obligation to disclose and [the] withholding of a material fact establish the requisite element of causation in fact."[103]

96. *See id*.
97. FED. R. CIV. P. 23(b)(3); *see Basic*, 485 U.S. at 243.
98. *Basic*, 485 U.S. at 243.
99. *Id*.
100. Affiliated Ute Citizens v. Utah, 406 U.S. 128, 153-54 (1972).
101. *Basic*, 485 U.S. at 243 (citing *Affiliated Ute*, 406 U.S. at 153-54).
102. *Affiliated Ute*, 406 U.S. at 153.
103. *Id.* at 153-54. *Affiliated Ute*, incidentally, mirrors the common-law rule that reliance may be inferentially presumed from a misleading statement or omission's materiality. *See* RESTATEMENT (FIRST) OF CONTRACTS § 479 & cmt. a (1932) ("Materiality of a fraudulent misrepresentation is essential before any presumption arises that it induced action."); Terra Firma Invs. (GP) 2 Ltd. v. Citigroup, Inc., 716 F.3d 296, 299 (2d Cir. 2013) (applying English common-law rule: "When the misrepresentation is one on which a reasonable person would rely, there is a rebuttable presumption of reliance."); Lamborn v. Wm. M. Hardie Co., 1 F.2d 679, 682 (6th Cir. 1924) (holding that "even if this presumption is always one of fact and is rebuttable, yet unless it is rebutted it must prevail"); Abel v. Paterno, 285 N.Y.S. 58, 64 (N.Y. App. Div. 1935) (following Redgrave v. Hurd, (1881) 20 Ch. 1 at 21 (Lord Jessel) (Eng.)). That some federal decisions insist *Affiliated Ute*'s presumption inferring reliance from materiality cannot apply to cases involving misstatements, or to "mixed" cases where material omissions caused affirmative statements to be misleading is, to put it bluntly,

The fraud-on-the-market theory similarly provided an appropriate causal link, Justice Blackmun explained,

> based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.[104]

In framing the 1934 Act, Justice Blackmun observed, "Congress expressly relied on the premise that securities markets are affected by information" and "enacted legislation to facilitate an investor's reliance on the integrity of those markets."[105] "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," the Court thus held.[106] "Because *most* publicly available information is reflected in the market price, an investor's reliance on any public misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[107]

Although Justice Blackmun rested the Court's opinion upon the enacting Congress' understanding of securities markets' functioning in the 1930s, he also observed that "[r]ecent empirical studies have tended to confirm Congress' premise that the market price of shares traded on

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passing strange. *See, e.g.*, Vervaecke v. Chiles, Heider & Co., 578 F.2d 713, 716-17 (8th Cir. 1978); Desai v. Deutsche Bank Sec. Ltd., 573 F.3d 931, 946 (9th Cir. 2009) (Graber, J., concurring); Binder v. Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999); Joseph v. Wiles, 223 F.3d 1155, 1163 (10th Cir. 2000); Cavalier Carpets v. Caylor, 746 F.2d 749, 756-57 (11th Cir. 1984) ("mixed case"); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 722 (11th Cir. 1987). Other precedents have sensibly refused to draw a distinction that makes little sense. *E.g.*, Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 202-03 (3d Cir. 1990); Sharp v. Coopers & Lybrand, 649 F.2d 175, 187-88 (3d Cir. 1981); *see also Binder*, 184 F.3d at 1069 (Reinhardt, J., dissenting in part).

104. *Basic*, 485 U.S. at 241-42 (quoting Peil v. Speiser, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

105. *Id.* at 246 (quoting H.R. REP. NO. 1383, at 11 (1934)):

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value."

106. *Id.* at 247.

107. *Id.* (emphasis added).

well-developed markets reflects all publicly available information and, hence, any material misrepresentations."[108] A footnote referenced sources "citing literature on efficient-capital-market theory,"[109] in which academics had employed extreme definitions of "efficiency" to test just how quickly and completely securities markets react to new information.[110]

Far from purporting to adopt ECMH or any other extreme model of market efficiency, however, the Court emphasized:

> We need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.[111]

"By accepting this rebuttable presumption," the Court reiterated, "we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price."[112] It was enough that securities markets tend to respond to and reflect most publicly available information, even if the responses are not always instantaneous or complete.

The resulting presumption of reliance, the Court then added, is rebuttable: "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[113] If defendants "could show that the 'market makers' were privy to the truth," for example, "and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone."[114]

108. *Id.* at 246 & n. 24.

109. *Id.* at 246 & n. 24 (citing, *inter alia*, Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 BUS. LAW. 1, 4 n.9 (1982)).

110. *See* Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 24 J. FIN. 383, 383 (1970).

111. *Basic*, 485 U.S. at 247 n. 24.

112. *Id.* at 248 n. 28.

113. *Id.*

114. *Id.* The Court's reference to 'market makers' appears, at first glance, to be one of finance jargon: "A 'market maker' is a firm that stands ready to buy and sell a particular stock on a continuous basis at a publicly quoted price." *Market Maker*, U.S. SEC. & EXCH. COMM., http://www.sec.gov/answers/mktmaker.htm (last modified Mar. 17, 2000). But whether the Court's

"Similarly, if, despite [the defendants'] allegedly fraudulent attempt to manipulate market price, news of [the truth] credibly entered the market and dissipated the effects of the misstatements, those who traded [the company's] shares after the corrective statements could have no direct or indirect connection with the fraud."[115] "Proof of that sort," the Court noted, "is a matter for trial, throughout which the District Court retains authority to amend the certification order as may be appropriate."[116]

Justice White filed a dissent that ignored Justice Blackmun's disclaimers that the Court's decision neither endorsed, nor rested upon, any particular theory of just how quickly or completely market prices incorporate publicly available information. Justice White charged that "the fraud-on-the-market theory is a mere babe,"[117] born of the "efficient capital market hypothesis,"[118] which Justice White characterized as "'an economic concept that did not exist twenty years ago.'"[119] To embrace it he reckoned was a mistake: "For while the economists' theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are – in the end – nothing more than theories which may or may not prove accurate upon further consideration."[120] "Consequently," Justice White concluded, "I cannot reconfigure securities laws, based on recent economic theories, to better fit what it perceives to be the new realities of financial markets."[121]

Beyond that, Justice White declared that any presumption that investors rely on the "integrity of the market price" is contrary to fact, as "'many investors purchase or sell stock because they believe the price inaccurately reflects the corporation's worth.'"[122]

Since *Basic* was decided by a six-justice Court, with two moderate justices dissenting, one had to wonder whether the participation of the

reference to "market makers" was really intended in this technical sense, or as a looser reference to the market's major participants, is not entirely clear. Informed traders generally put more effort into finding and evaluating information than do market insiders, whose obligation it is merely to "make a market," i.e., to stand ready to ensure liquidity, to meet traders' demands.

115. *Basic*, 485 U.S. at 248-49.

116. *Id.* at 249 n.29.

117. *Id.* at 250 (White, J., dissenting).

118. *Id.* at 253 & n.4.

119. *Id.* (quoting Ronald Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 549-50 (1984)).

120. *Id.* at 254.

121. *Id.* at 255.

122. *Id.* at 255-56 (quoting Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. REV. 435, 455 (1984)).

Court's three permanent conservatives – Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy – might have changed the result. Bound by the decision in any event, lower courts proceeded to apply it.

IV. *BASIC* IN THE LOWER COURTS

Despite *Basic*'s clear statement that "[b]y accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price,"[123] a loud chorus developed in the legal academy insisting that the Court had indeed embraced the strict notions of efficiency framed by ECMH, providing the rationale upon which many insisted *Basic*'s presumption of reliance thus rested.[124] Many lower courts also appeared to accept this view.[125] Somehow overlooking

123. *Id.* at 249 n.28.

124. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1060 (1990) (purporting to analyze "adoption of the ECMH by the Court in *Basic*"); Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 965 (1991) ("the *Basic* plurality [*sic*] seems to rely on the Efficient Capital Markets Hypothesis (ECMH)," that "as a logical matter, must underlie the fraud-on-the-market presumption"); Larry E. Ribstein, Dabit*, Preemption, and Choice of Law*, SUP. CT. REV. 141, 143-44 (2005) ("the ECMH provided the impetus and rationale for the 'fraud-on-the-market' theory adopted in *Basic*"); Matthew Eisler, Note, *Difficult, Duplicative and Wasteful?: The NASD's Prohibition of Class Action Arbitration in the Post-Bazzle Era*, 28 CARDOZO L. REV. 1891, 1920 n. 210 (2007) (emphasis added) ("In order to prove fraud on the market, *the plaintiff class must show* that there is an efficient capital market for the disputed security. The efficient capital market hypothesis (ECMH) operates in securities markets where the *market price instantly* reflects information disseminated to the marketplace."); Nathaniel Carden, Comment, *Implications of the Private Securities Litigation Reform Act of 1995 for the Judicial Presumptions of Market Efficiency*, 65 U. CHI. L. REV. 879, 880 (1998) ("Despite this emerging debate, most courts and legal commentators have remained steadfastly committed to the ECMH. The Supreme Court, for example, employed the ECMH in the influential case *Basic Inc. v. Levinson*.").

125. *See, e.g.*, Meyer v. Greene, 710 F.3d 1189, 1195 (11th Cir. 2013) (asserting that "[t]he fraud-on-the-market theory . . . 'derives from the so-called efficient capital market hypothesis'") (citation omitted); Connecticut Ret. Plans & Trust Funds v. Amgen, Inc., 660 F.3d 1170, 1173 (9th Cir. 2011) (*Basic* "rests on the efficient capital market hypothesis"); FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1309-10 (11th Cir. 2011) ("Fraud-on-the-market claims derive from the so-called efficient market hypothesis . . . ."); ATSI Commc'ns, Inc. v. Shaar Fund. Ltd., 493 F.3d 87, 100 n.4 (2d Cir. 2007) (quoting *Basic*, 485 U.S. at 246) ("The efficient capital market hypothesis, as adopted by the Supreme Court, points that 'the market price of shares traded on well-developed markets reflects all publicly available information'"); Bowe v. PolyMedica Corp. (*In re* PolyMedica Corp. Sec. Litig.), 432 F.3d 1, 10 (1st Cir. 2005) (citing Fama, *supra* note 110) (emphasis added) ("According to the prevailing definition of market efficiency, an efficient market is one in which market price fully reflects *all* publicly available information.")); George v. China Auto Sys., No. 11 Civ. 7533, 2013 U.S. Dist. LEXIS 93698, at *8 (S.D.N.Y. July 3, 2013); *In re* Oracle Sec. Litig., 829 F. Supp. 1176, 1181 (N.D. Cal. 1993) (Vaughn Walker, D.J.) (citing "the efficient capital market hypothesis endorsed by the plurality [*sic*] in *Basic*"); *In re* Seagate Tech.

the common law of market manipulation,[126] some state courts refused to follow *Basic* on account of qualms about EMCH.[127]

Professor Eugene Fama's 1970 review of the evidence for ECMH framed three versions of the hypothesis: "weak," "semi-strong," and "strong."[128] Many courts and commentators specifically identified *Basic*'s presumption with Professor Fama's "semi-strong" hypothesis, that securities prices at *all* times reflect *all* publicly available information.[129] Fama's "weak" hypothesis stated only that information from past prices is fully incorporated in a stock's current price – making it impossible to devise profitable trading strategies based on trading on ostensible price trends or on "technical analysis" of a stock's historical price charts.[130] Fama's "strong" hypothesis stated that all information, both public and private, is reflected in stock prices.[131] Tests of the hypothesis, in its several forms, asked whether investors could devise profitable trading strategies on the basis of each type of information.[132] The ability to earn excess profits (above ordinary stock-market index returns) by trading on information would indicate some degree of inefficiency.

By focusing on ECMH and the efficient-markets literature of the 1970s and 1980s, however, many overlooked the fact that even in the 1930s it was well known that securities markets respond to public

Sec. Litig., 843 F. Supp. 1341, 1354 (N.D. Cal. 1994) (Vaughn Walker, D.J.) (*Basic*'s "rule draws its intellectual sustenance not from law, but from the efficient capital market hypothesis").

126. *See supra* text accompanying notes 77-84; *infra* note 133.

127. *See, e.g.*, Kaufman v. I-Stat Corp., 754 A.2d 1188, 1198-1201 (N.J. 2000); Fink v. Ricoh Corp., 839 A.2d 942, 962-63 (N.J. Super. Ct. Law Div. 2003).

128. *See* Fama, *supra* note 110,at 383-88.

129. *See, e.g.*, Macey & Miller, *supra* note 124, at 1062 ("We show that the Court implicitly adopted the *semi-strong* form of the ECMH."); *In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 631 (3d Cir. 2011) ("The Supreme Court appears to have adopted the semi-strong version of the efficient capital market hypothesis."); Schleicher v. Wendt, 618 F.3d 679, 684-85 (7th Cir. 2010) ("the fraud-on-the-market doctrine rests on the semi-strong form" of ECMH); Oscar Private Equity Investors v. Allegiance Telecom, 487 F.3d 261, 269 (5th Cir. 2007) (asserting that in fraud-on-the-market cases "loss causation speaks to the semi-strong efficient market hypothesis on which classwide reliance depends"); *PolyMedica Corp.*, 432 F.3d at10 n.16 (quoting *In re* Res. Am. Sec. Litig., 202 F.R.D. 177, 189 (E.D. Pa. 2001)) ("'the *Basic* court adopted the semi-strong form of market efficiency as a prerequisite for a fraud on the market presumption'").

130. *See* Fama, *supra* note 110, at 388.

131. *See id.*

132. *See id.* at 383; *see also* Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 IOWA J. CORP. L. 635, 651 (2003) (a market is efficient when "prices respond so quickly to new information that it is impossible for traders to make trading profits on the basis of that information"); Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 913 (1989) ("a market is efficient if it is impossible to devise a trading rule that systematically outperforms the market").

information and, thus, are subject to manipulation by false statements.[133] This was a foundational assumption of the common law of market manipulation[134] and is reflected in the 1934 Act's statutory preface,[135] in § 9's proscription of specific manipulative acts,[136] and in § 10(b)'s broader proscription of manipulative contrivances.[137] But it somehow escaped those who, like Justice White in dissent, assumed that *Basic*'s fraud-on-the-market theory rested upon recent framings of the ECMH. Justice White was right about one thing, though: embracing financial economists' working research hypothesis could easily engender confusion. It surely did.

Fama himself warned that "the hypothesis that security prices at any point in time 'fully reflect' *all* available information," though a useful research tool, "is obviously an extreme null hypothesis. And, like any other extreme null hypothesis, we do not expect it to be literally true."[138] And Professor Burton Malkiel has observed that "the market *cannot* be perfectly efficient, or there would be no incentive for professionals to uncover the information that gets so quickly reflected in market prices."[139]

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133. *See, e.g.*, Berle, *Liability for Stock Market Manipulation*, *supra* note 77, at 268-69; GEORGE RUTLEDGE GIBSON, THE STOCK EXCHANGES OF LONDON, PARIS, AND NEW YORK: A COMPARISON 11 (1889). Robert Shiller cites Gibson's treatise to show that although the "Efficient Capital Markets Hypothesis" was coined by Eugene Fama in the 1960s and popularized in the 1970s, the concept of market efficiency has long held force:

> The idea of efficient markets is so natural that it has probably been with us for centuries. Although the term efficient markets apparently first became widely known through the work of University of Chicago professor Eugene Fama and his colleagues in the late 1960s, the theory itself preceded this name by many years. It was clearly mentioned in 1889 in a book by George Gibson entitled *The Stock Markets of London, Paris and New York*. Gibson wrote that when "shares become publicly known in an open market, the value which they acquire may be regarded as the judgment of the best intelligence concerning them." In this century, the efficient markets theory has long been a fixture in university economics and finance departments.

ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 178 (2d ed. 2005); *see also* ROBERT SHILLER, MARKET VOLATILITY 432, 438 n.3 1992) ("The efficient markets theory is not, as some finance textbooks imply, basically a sophisticated theory that came from the University of Chicago in the 1960s. It is actually a very old theory . . . .").

134. *See id.*; VIII LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 517-23 (4th ed. 2012).

135. *See* 15 U.S.C. § 78b (2012).

136. 15 U.S.C. § 78i (2012).

137. 15 U.S.C. § 78j(b) (2012); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.21 (1976).

138. Fama, *supra* note 110, at 388.

139. Burton G. Malkiel, *The Efficient Market Hypothesis and Its Critics*, 17 J. ECON. PERSP. 59, 80 (2003) (citing Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980)); *accord, e.g.*, Stout, *supra* note

Some lower courts, nonetheless, took ECMH quite literally, treating market efficiency as a binary all-or-nothing concept under which *all* information must be *fully* absorbed "immediately following disclosure."[140] For example, after the First Circuit defined "efficiency" in *In re PolyMedica Corp. Sec. Litig.*[141] to require "that market price responds so quickly to new information that ordinary investors cannot make trading profits on the basis of such information,"[142] the district court on remand denied class certification of an exchange-traded stock because this conception of efficiency "requires that the reaction to news be fully completed on the same trading day as its release – and perhaps even within hours or minutes."[143]

Some courts, including the Fifth Circuit, believed that *Basic* gave them license to impose their own overlay of requirements before a plaintiff could successfully invoke the presumption of reliance. Circuits divided on whether plaintiffs should be required to prove loss causation at the class-certification stage.[144] They also divided on whether a plaintiff must demonstrate materiality in order to obtain class certification.[145] Only the Supreme Court could resolve their differences, setting the stage for the Roberts Court's three recent fraud-on-the-market class-certification decisions.

V. THE ROBERTS' COURT'S FRAUD-ON-THE-MARKET CLASS-ACTION TRILOGY: *HALLIBURTON I*, *AMGEN*, AND *HALLIBURTON II*

With growing disorder in the lower courts, the Roberts Court began to sort things out in a series of three cases specifically concerning *Basic*'s application at the class-certification stage.

The first of the three is *Erica P. John Fund, Inc. v. Halliburton, Co.*,[146] or "*Halliburton I*," in which Chief Justice Roberts authored a

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132, at 640 n.24.

140. Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000); *accord, e.g.*, City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 676 (6th Cir. 2005) (quoting *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997)) ("in an open and efficient securities market 'information important to reasonable investors' (in effect, the market) is immediately incorporated into stock prices").

141. Bowe v. PolyMedica Corp. (*In re* PolyMedica Corp. Sec. Litig.), 432 F.3d 1 (1st Cir. 2005).

142. *Id.* at 19.

143. *In re* PolyMedica Sec. Litig., 453 F. Supp. 2d 260, 278 (D. Mass. 2006).

144. *Compare* Oscar Private Equity Inv. v. Allegiance Telecom, 487 F.3d 261, 265-70 (5th Cir. 2007) *with* Schleicher v. Wendt, 618 F.3d 679, 685-87 (7th Cir. 2010) (rejecting *Oscar*).

145. *Compare PolyMedica Corp.* 432 F.3d 1 at 7 n.11 (proof of materiality required) *with Schleicher*, 618 F.3d at 687-88 (proof of materiality not required for class certification).

146. *Halliburton I*, 131 S. Ct. 2179 (U.S. 2011).

unanimous opinion overturning a line of Fifth Circuit decisions requiring plaintiffs to prove loss causation as a prerequisite for class certification in fraud-on-the-market cases.[147] This was a clear victory for plaintiff investors seeking class certification, but the Court limited its ruling to the element of loss causation.[148] Halliburton argued that its evidence purporting to rebut "loss causation" also showed that its allegedly misleading statements had no "price impact" and that this should preclude class certification independently of any loss-causation requirement; but the Supreme Court declined to pass on an argument not considered below.[149]

In the second decision, *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,[150] Justice Ginsburg wrote for a six-justice majority (including the Chief Justice). Although only material misrepresentations and omissions can affect a security's market price, a divided Court held that proof of materiality is not a prerequisite to class certification,[151] overturning circuit-court decisions that had demanded such proof.[152]

Again, plaintiffs had prevailed, but this time three justices dissented. Justice Scalia and Justice Thomas (whose dissent was joined in part by Justice Scalia and in whole by Justice Kennedy) each filed opinions that directly challenged *Basic*'s continuing legitimacy as precedent.[153] More troubling still, Justice Alito's concurring opinion stated he joined the *Amgen* majority only because "petitioners did not ask us to revisit *Basic*'s fraud-on-the-market presumption," which, he agreed with the dissenters, "may rest on a faulty economic premise."[154] Thus, Justice Alito concluded, "reconsideration of the *Basic* presumption may be appropriate."[155]

With at least four justices suggesting their readiness to reconsider and perhaps overrule *Basic*, the stage was set for the third, and by far most important, of the three Roberts Court decisions dealing with class certification in fraud-on-the-market cases as the issue of class certification and "price impact" in the *Halliburton* litigation returned to

147. *See infra* text accompanying note 157.
148. *Halliburton I*, 131 S. Ct. at 2186-87; *see infra* text accompanying notes 167-68.
149. *Halliburton I*, 131 S. Ct. at 2186-87; *see infra* text accompanying notes 186-87.
150. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184 (U.S. 2013).
151. *Id*. at 1191.
152. *See infra* text accompanying note 195.
153. *See Amgen*, 133 S. Ct. at 1204-06 (Scalia, J., dissenting); *id*. at 1206-16 (Thomas, J., joined by Kennedy, J., dissenting).
154. *Id.* at 1204 (Alito, J., concurring).
155. *Id.*

the Court.

Chief Justice Roberts personally authored the Court's majority opinion in *Halliburton Co. v. Erica P. John Fund*,[156] or "*Halliburton II*," which vacated the Fifth Circuit's decision affirming class certification.[157] Writing for a six-justice majority, the Chief Justice rejected both the defendants' invitation to overrule *Basic*,[158] and also their suggestion that plaintiffs should have to affirmatively prove price impact in order to obtain class certification.[159] But the Court also concluded that defendants are entitled to oppose class certification with evidence showing that their allegedly misleading statements and omissions did not affect stock-market prices.[160] The Fifth Circuit's decision affirming class certification accordingly was vacated so that the defendants could present their rebuttal evidence on remand.[161]

As a formal matter, the defendants had won: the class certification that they opposed was vacated. On this the Court was unanimous, though Justice Thomas's opinion "concurring" in a judgment that vacated class certification did so on a far more radical ground – in an opinion joined by Justices Scalia and Alito he called for overruling *Basic*.[162] Moreover, the Court had held that defendants were entitled to present the very kind of rebuttal evidence that *Halliburton I* and *Amgen* had apparently rejected.[163]

Yet neither the formality that the plaintiffs "lost," nor any qualification of *Halliburton I* and *Amgen*'s effect, can obscure the fact that *Halliburton II* bodes remarkably well for fraud-on-the-market class actions. Chief Justice Roberts' opinion for the Court emphatically reaffirms *Basic*'s holding,[164] which many thought marked for overruling.[165] And it rejects the defendants' suggestion that plaintiffs must prove price impact, which still is presumed under *Halliburton II*, just as it was under *Basic*.[166] But far more than that, Chief Justice Roberts' interpretation of *Basic* as a decision resting on relatively modest ideas of market "efficiency" can be expected to have far-

156. *Halliburton II*, 134 S. Ct. 2398 (2014).
157. *Id.* at 2417 ("we vacate the judgment of the Court of Appeals").
158. *Id*. at 2407-13.
159. *Id*. at 2413-14.
160. *Id*. at 2414-17.
161. *Id*. at 2417.
162. *Id*. at 2417-27 (Thomas, J., dissenting).
163. *Id.*; *see infra* text accompanying note 193.
164. *Halliburton II*, 134 S.Ct. at 2408-13.
165. *See, e.g.*, Ramzi Abadou, *"Fraud on the Market" is* Basic*ally Over*, DAILY J., Jan. 27, 2014.
166. *See Halliburton II*, 134 S. Ct. at 2413-14.

reaching consequences for securities-fraud litigation, not only at class certification, but also at other stages of a case, including pleadings motions, summary-judgment motions, and at trial. And those consequences are apt, on whole, to be quite favorable to class-action plaintiffs asserting fraud-on-the-market claims.

A. *Halliburton I*

Loss causation is an element that plaintiffs must allege and then prove in order to establish a § 10(b) claim, as the Supreme Court unanimously held in *Dura Pharmaceuticals v. Broudo*.[167] But in *Halliburton I*, the Roberts Court rejected a line of Fifth Circuit decisions holding that fraud-on-the-market plaintiffs must establish the element of loss causation to obtain class certification.[168]

Asserting "that *Basic* 'allows each of the circuits to develop its own fraud-on-the-market rules,'"[169] the Fifth Circuit had observed in *Oscar Private Equity Investments v. Allegiance Telecom*[170] that its own decisions opted "to tighten the requirements for plaintiffs seeking a presumption of reliance."[171] *Oscar* then announced: "We now require more than proof of a material misstatement; we require proof that the misstatement *actually moved* the market."[172] "Essentially, we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market representation."[173]

In *Halliburton*, a district court bound by the Fifth Circuit precedent denied class certification solely on the ground that the plaintiffs had failed to establish loss causation.[174] The Fifth Circuit affirmed.[175]

167. Dura Pharm. v. Broudo, 544 U.S. 336 (2005); *see* Patrick J. Coughlin, Eric Alan Isaacson & Joseph D. Daley, *What's Brewing in* Dura v. Broudo? *The Plaintiffs' Attorneys Review the Supreme Court's Opinion and Its Import for Securities-Fraud* Litigation, 37 LOY. U. CH. L. J. 1 (2005).

168. *Halliburton I*, 131 S. Ct. 2179, 2183 (U.S. 2011).

169. Oscar Private Equity Inv. v. Allegiance Telecom, 487 F.3d 261, 264 (5th Cir. 2007) (quoting Abell v. Potomac Ins. Co., 858 F.2d 1104, 1117-18 (5th Cir. 1988), *vacated on other grounds sub. nom.* Fryar v. Abell, 492 U.S. 914 (1989)).

170. *Id.*

171. *Id.* at 264 (citing Finkel v. Docutel/Olivetti Corp., 817 F.2d 356, 364 (5th Cir. 1987); *Abell*, 858 F.2d at 1120-21; Nathenson v. Zonagen Inc., 267 F.3d 400, 414 (5th Cir. 2001); Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 661 (5th Cir. 2004)); *see also* Fener v. Operating Eng'rs, 579 F.3d 401, 408 (5th Cir. 2009).

172. *Oscar*, 487 F.3d at 265.

173. *Id.*

174. Archdiocese of Milwaukee Supporting Fund v. Halliburton Co., No. 3:02-CV-1152-M, 2008 U.S. Dist. LEXIS 89598 (N.D. Tex. Nov. 4, 2008). Although the district court purported to rule on loss causation only, its order reads more like one following a bench trial on falsity and scienter because it construed the Fifth Circuit's precedent as holding that loss causation requires

Writing for a unanimous Court, Chief Justice Roberts rejected the Fifth Circuit's conclusion that proof of loss causation may be required for class certification. "It is undisputed," the Chief Justice observed, "that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s presumption of reliance."[176]

> It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the representations were made and the time the truth was revealed.[177]

But the Fifth Circuit had conflated loss causation and reliance, which the Supreme Court held implicated conceptually distinct concerns: "Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively, or otherwise, when buying or selling a stock."[178] "Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on defendants' misrepresentation if 'information is reflected in [the] market price' of the stock at the time of the relevant transaction."[179]

"According to the Court of Appeals, however, an inability to prove loss causation," in the form of a *subsequent* decline in the securities price attributable to the fraud, "would prevent a plaintiff from invoking

demonstrating a price decline on a disclosure of *fraud*. *See id.* at *28 (no loss causation where "nothing in the August 9 disclosure to suggest that [defendants] were lying"); *id*. at *43 ("The Plaintiffs must prove that the disclosure actually revealed to the market prior fraud."); *id*. at *58 ("Plaintiffs offer no evidence that Halliburton did not believe it was complying with proper accounting practices."); *id*. at *63 ("Since there is no evidence supporting an inference of fraud . . . the Court will not certify the class . . .").

175. Archdiocese of Milwaukee Supporting Fund v. Halliburton Co., 597 F.3d 330 (5th Cir. 2010). The Fifth Circuit's opinion asserts at one point that an investor who purchases a security at an artificially inflated price was defrauded "if the falsity becomes known and the stock price declines," *id*. at 334, but then states that "the district must decide whether the corrective disclosure more probably than not shows that the original estimates or predictions were designed to defraud." *Id*. at 338. A footnote adds that while "a plaintiff need not prove at the class certification stage intentional fraud by the defendant," nonetheless "we conclude that a plaintiff still must prove that the defendant is responsible for the error of the misrepresentation." *Id*. at 338 n.35. What all this means, and what it might have to do with loss causation, is anyone's guess. As the opinion ultimately was vacated by the Supreme Court, it retains no precedential value. *See* Cent. Pines Land Co. v. United States, 274 F.3d 881, 893-94 n.57 (5th Cir. 2001); Ridley v. McCall, 496 F.2d 213, 214 (5th Cir. 1974) (a vacated opinion "has no precedential value").

176. *Halliburton I*, 131 S. Ct. 2179, 2185 (U.S. 2011).

177. *Id.* (quoting Basic Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988)).

178. *Id.* at 2186.

179. *Id.*

the rebuttable presumption of reliance."[180] "Such a rule," the Supreme Court held, "contravenes *Basic*'s fundamental premise – that an investor presumptively relies on a misstatement so long as it was reflected in the market price at the time of the transaction."[181] "Loss causation," the Court added, "has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory."[182]

The Roberts Court thus overruled the line of Fifth Circuit decisions requiring plaintiffs to prove loss causation in order to obtain class certification.[183] That clearly was a good result for plaintiffs seeking to pursue securities-fraud claims on behalf of a class.

Yet, Chief Justice Roberts' opinion was a narrow one, declining to consider Halliburton's argument about "price impact."[184] Halliburton's alternative theory was that "if a misrepresentation does not affect market price, an investor cannot be said to have relied on the misrepresentation merely because he purchased stock at that price. If the price is unaffected by the fraud, the price does not reflect the fraud."[185]

But that theory was one that the Fifth Circuit had not considered. It had ruled that plaintiffs must show loss causation, "not price impact."[186] Any further arguments that Halliburton had preserved might be addressed on remand.[187]

B. Amgen

Having relieved plaintiffs of the burden of proving loss causation to obtain class certification, the Roberts Court next rejected contentions that fraud-on-the-market plaintiffs must establish materiality for a class to be certified. In *Amgen*, a six-justice majority including Chief Justice Roberts concluded that since materiality is an element of liability whose proof will not vary from one class member to the next, and whose absence will defeat every class member's claim, it presents a common

180. *Id.*
181. *Id.*
182. *Id.*
183. The decisions overruled include: Oscar Private Equity Investments v. Allegiance Telecom, Inc., 487 F.3d 261, 266-70 (5th Cir. 2007); Fener v. Operating Eng'rs Constr. Indus. & Misc. Pension Fund (Local 66), 579 F.3d 401, 406-10 (5th Cir. 2009); Luskin v. Intervoice-Brite, Inc., 261 Fed. Appx. 697, 701-02 (5th Cir. 2008). This Article's author represented the investors on appeal in *Fener*.
184. *Halliburton I*, 131 S. Ct. at 2187.
185. *Id.*
186. *Id.*
187. *Id.*

question.

Although *Basic* presumes price inflation and reliance from materiality, which a § 10(b) plaintiff ultimately must prove to prevail on the merits, the Roberts Court held in an opinion by Justice Ginsburg that "such proof is not a prerequisite to class certification."[188] "Because materiality is judged according to an objective standard, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class," and the "alleged misrepresentations and omissions, whether material or immaterial, would be equally so for all investors composing the class."[189] Moreover, "the plaintiff class's inability ultimately to prove materiality would not result in individual questions predominating," but rather "would end the case, given that materiality is an essential element of the class members' securities-fraud claims."[190]

Amgen contended that it should at least be able to rebut an inference of reliance with proof that its statements were not material. "Because immaterial information, by definition, does not affect market price," Justice Ginsburg acknowledged, "it cannot be relied upon indirectly by investors who, as the fraud-on-the-market-theory presumes, rely on the market price's integrity."[191] Thus, as it happens, materiality sometimes is proved (or disproved) with evidence demonstrating that allegedly misleading statements and omissions did (or did not) affect a security's market price.[192]

But the district court did not err "by disregarding Amgen's rebuttal evidence."[193] For "just as a plaintiff class's inability to prove materiality creates no risk that individual issues will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class."[194]

Although plaintiffs again had won a class-certification decision

188. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (U.S. 2013).

189. *Id.*

190. *Id.*; *see* Matrixx Initiatives v. Siracusano, 131 S. Ct. 1309, 1318 (U.S. 2011); *Basic*, 425 U.S. at 238.

191. *Amgen*, 133 S. Ct. at 1195.

192. *See, e.g.*, *United States v. Schiff*, 602 F.3d 152, 173-74 & nn.29-31 (3d Cir. 2010) (in criminal prosecution for violation of § 10(b) and Rule 10b-5, event study of price movements on public disclosures is proper evidence of materiality); *cf.* Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000) ("the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock"); *In re* NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1330 (3d Cir. 2002) ("[i]f the disclosure of certain information has no effect on stock prices, it follows that the information disclosed was immaterial").

193. *Amgen*, 133 S. Ct. at 1203.

194. *Id.* at 1204.

from a Supreme Court many believed was hostile to class litigation, three justices dissented from *Amgen*'s holding that proof of materiality is neither required nor appropriate at the class-certification stage.[195] And rather ominously, though Justice Alito joined the opinion of the Court, he nonetheless suggested that "*Basic* should be reconsidered."[196]

Justice Scalia wrote in dissent that the "fraud-on-the-market rule says that purchase or sale of a security in a well-functioning market establishes reliance on a material misrepresentation known to the market."[197] He then declared: "This rule is to be found nowhere in the United States Code or in the common law of fraud or deception; it was invented by the Court in *Basic v. Levinson*."[198]

Justice Thomas's *Amgen* dissent agreed that "[t]he *Basic* decision itself is questionable," citing Justice White's *Basic* dissent.[199] "Justice White's concerns remain valid today," Justice Thomas insisted, "but the Court has not been asked to revisit *Basic*'s fraud-on-the-market presumption."[200] Asserting he would "thus limit [his] dissent to demonstrating that the Court is not following *Basic*'s dictates,"[201] Justice Thomas nonetheless noted that Justice Ginsburg's majority opinion "acknowledges there is disagreement as to whether market efficiency is ""'a binary, yes or no question,''' or instead operates differently depending on the information at issue."[202] He then declared that in *Basic* "four Justices of a six-Justice Court created the fraud-on-the-market presumption from a combination of newly minted economic theories, and 'considerations of fairness, public policy, and probability,' to allow claims that otherwise would have been barred due to the plaintiffs' inability to show reliance."[203] *Basic* had produced "a judicially invented doctrine based on an economic theory adopted to ease the burden on plaintiffs bringing claims under an implied cause of action."[204]

Justice Alito's concurring opinion suggested sympathy with the dissenting justices' view: "As the dissent observes, more recent evidence

195. *See id.*. at 1204-06 (Scalia, J., dissenting); *id*. at 1206-16 (Thomas, J., dissenting, joined by Kennedy, J., and joined by Scalia, J., except for Part I-B).

196. *Id.* at 1204 (Alito, J., concurring).

197. *Id.* at 1205 (Scalia, J., dissenting).

198. *Id.* at 1204.

199. *Id.* at 1208 n.4 (Thomas, J., dissenting).

200. *Id.*

201. *Id.*

202. *Id.* (quoting footnote 6 of Justice Ginsburg's majority opinion and citing Langevoort, *supra* note 61, at 167).

203. *Id.* at 1212-13 (Thomas, J., dissenting) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 250-51 n.1 (1988) (White, J., concurring in part and dissenting in part)) (citations omitted).

204. *Id*. at 1213.

suggests that the presumption may rest on a faulty economic premise."[205] "In light of this development," Justice Alito concluded, "reconsideration of the *Basic* presumption may be appropriate."[206]

Plaintiffs had won another Roberts Court class-certification decision. But it now appeared that at least four justices were prepared to reconsider, and perhaps overrule, *Basic* and its fraud-on-the-market theory of reliance. That, of course, would deal a devastating blow to open-market securities-fraud class actions.

C. *Halliburton II*

On remand from the Court's decision in *Halliburton I*, defendants had presented the same evidence that they had earlier said disproved loss causation, recharacterizing it now as evidence unhinged from common elements of liability such as materiality or loss causation. Rather, they said, they now meant for it only to show that their misrepresentations had "no price impact," rather than to disprove loss causation (barred by *Halliburton I*) or materiality (barred by *Amgen*). The district court on remand rejected the defendants' attempt at a second bite from what appeared to be the same apple.[207] The Fifth Circuit affirmed.[208]

The defendants then petitioned for certiorari, asking the Supreme Court to reconsider and overrule *Basic* or, failing that, to require plaintiffs to present evidence affirmatively demonstrating price impact as a prerequisite to class certification.[209] With the Supreme Court's grant of certiorari, some of my colleagues in the plaintiffs' class-action bar feared *Basic* was doomed.[210]

Given *Amgen*'s dissenting opinions and Justice Alito's rather ambidextrous concurrence, *Basic* appeared vulnerable to overruling. Commentators often had discounted Justice Blackmun's opinion, joined by Justices Brennan, Marshall, and Stevens, by describing it as a mere "plurality" opinion rather than as a fully binding opinion of the Court.[211]

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205. *Id.* at 1204 (Alito, J., concurring) (citing Langevoort, *supra* note 61, at 175-76).

206. *Id.*

207. *See* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M, 2012 U.S. Dist. LEXIS 24823 (N.D. Tex. Jan. 27, 2012).

208. *See supra* text accompanying note 175.

209. *See* Petition for a Writ of Certiorari, Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 133 S. Ct. 1184 (U.S. 2013), 2012 WL 707042.

210. *See, e.g.*, Abadou, *supra* note 165.

211. *See, e.g.*, Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 457 & 465 n.28 (2006) (chiding "the Court's plurality" for "relying on a theory that had not yet gone through as much academic give and take" and characterizing Justice Blackmun's opinion as "the decision for the plurality"); Paul A. Ferrillo,

So, too, had some lower courts.[212] Compared to the current lineup on the Roberts Court, moreover, *Basic*'s supposed "plurality" appeared to be a dubiously liberal one: Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens. Their ruling's authority seemed undermined by the fact that Justice White and Justice O'Connor had dissented, while the Court's remaining conservatives, Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, did not participate in the decision. Had those three participated, might the decision have come out the other way?

Yet as six justices constitute a quorum of the Court, Justice Blackmun's opinion for four of the six-justice quorum in fact constituted a binding majority "opinion of the Court"[213] that had been in place more than a quarter century. And the Roberts Court proved loathe to overrule such a precedent.

Chief Justice Roberts himself wrote the opinion of the Court reaffirming *Basic*. "Before overturning a long-settled precedent," the

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Frederick C. Dunbar & David Tabak, *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 ST. JOHN'S L. REV. 81, 84 ("this article discusses the plurality and dissenting opinions in *Basic*"); William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 EMORY L.J. 843, 848 & n.2 (2005) (asserting "a plurality of the Supreme Court ruled that, at least under certain circumstances, plaintiffs in 10b-5 securities cases may invoke 'a rebuttable presumption of reliance, supported in part by the fraud-on-the-market theory' (FOTM)" and noting that "Justice White, joined by Justice O'Connor, filed an opinion dissenting from the portion of the plurality decision addressing the FOTM issues"); Carden, *supra* note 124, at 886 ("Numerous writers have noted the link between the plurality opinion in *Basic* and the semi-strong ECMH."); Joseph De Simone, Note, *Should Fraud on the Market Theory Extend to the Context of Newly Issued Securities?*, 61 FORDHAM L. REV. 151, 165 (1993) ("Justice Blackmun could muster only a plurality for the Court's resolution of the issue of reliance and the fraud on the market theory."); Andrew R. Simmonds, Kenneth A. Sagat & Joshua Ronen, *Dealing with Anomalies, Confusion and Contradiction in Fraud on the Market Securities Class Actions*, 81 KY. L.J. 123, 124 n.3 (1993) ("For the plurality of the Court, the existence of an efficient market justified a presumption of reliance . . . ."); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 698 n.34 (1992) ("The plurality opinion in *Basic* cited empirical studies suggesting that 'the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.'"); Ayres, *supra* note 124, at 983 (discussing "Justice Harry Blackmun's plurality opinion").

212. *See, e.g.*, *In re Seagate Tech. Sec. Litig.*, 843 F. Supp. 1341, 1354 (N.D. Cal. 1994); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1181 (N.D. Cal. 1993); Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 299-300 (D.N.J. 1989).

213. SUP. CT. R. 4.2 ("Six Members of the Court constitute a quorum."); 28 U.S.C. § 1 (2012) ("The Supreme Court of the United States shall consist of a Chief Justice of the united States and eight associate justices, any six of whom shall constitute a quorum."); *see Amgen*, 133 S. Ct. at 1192 n.1 (citing 28 U.S.C. § 1); Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited,* 140 U. PA. L. REV. 851, 892 n.138 (1992) ("Some have characterized the decision as a plurality holding. That characterization is not accurate, however, since the decision was made by a majority of those sitting; it is thus an opinion of the Court with stare decisis effect.").

Chief Justice explained, "we require 'special justification,' not just an argument that the precedent was wrongly decided."[214] "According to Halliburton," the Chief Justice observed, "the *Basic* presumption contravenes congressional intent and has been undermined by subsequent developments in economic theory."[215] "Neither argument, however, so discredits *Basic* as to constitute 'special justification' for overruling the decision."[216]

Halliburton argued that § 10(b)'s closest analog is 1934 Act § 18(a), "which creates an express private cause of action allowing investors to recover damages based on misrepresentations made in certain regulatory filings," but which "requires an investor to prove that he bought or sold stock 'in reliance upon' the defendant's misrepresentation"; the plaintiff, on the other hand, insisted that "the closest analogue to section 10(b) is not section 18(a) but section 9, a provision that does not require actual reliance."[217] "We need not settle this dispute," the Chief Justice asserted, for "[i]n *Basic*, the dissenting justices made the same argument based on section 18(a)."[218] "The *Basic* majority did not find that argument persuasive then, and Halliburton has given us no new reason to endorse it now."[219]

Justice White's *Basic* dissent also had charged that Justice Blackmun's opinion rested upon newfangled economic theory – the relatively recently framed "Efficient Capital Markets Hypothesis."[220] Halliburton insisted "that the *Basic* Court espoused 'a robust view of market efficiency' that is no longer tenable, for '"overwhelming empirical evidence" now "suggests that capital markets are not fundamentally efficient."'"[221] Chief Justice Roberts' rejection of this contention will have important consequences.

The Chief Justice observed that "Halliburton focuses on the debate among economists about the degree to which the market price of a company's stock reflects public information about that company – and thus the degree to which an investor can earn an abnormal above-market

214. *Halliburton* II, 134 S. Ct. 2398, 2407 (U.S. 2014) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000).

215. *Id.* at 2408.

216. *Id.*

217. *Id.* at 2409 (citing 15 U.S.C. § 78i (2012)).

218. *Id.*

219. *Id.*

220. *See* Basic Inc. v. Levinson, 485 U.S. 224, 250-51 (1988) (White, J., dissenting).

221. *Halliburton II*, 134 S. Ct. at 2409 (quoting Brief for Petitioners 14-16 (quoting Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: a Legal, Economic, and Policy Analysis*, 47 STAN. L. REV 7, 20 (1994))).

return by trading on such information."[222] Such "criticisms fail to take *Basic* on its own terms," the Chief Justice observed, explaining that the financial economists' "debate is not new. Indeed, the *Basic* Court acknowledged it and declined to enter the fray, declaring that '[w]e need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory.'"[223]

"The markets for some securities are more efficient than the markets for others," the Chief Justice acknowledged, "and even a single market can process different kinds of information more or less efficiently, depending on how widely the information is disseminated and how easily it is understood."[224] But *Basic* itself said that to recognize a presumption of reliance "was not conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price."[225] "The Court instead based the presumption on the fairly modest premise that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."[226] "*Basic*'s presumption of reliance thus does not rest on a 'binary' view of market efficiency. Indeed, in making the presumption rebuttable, *Basic* recognizes that market efficiency is a matter of degree and accordingly made it a matter of proof."[227]

Thus, Chief Justice Roberts concluded for the Court, "academic debates" about market efficiency "have not refuted the modest premise underlying the presumption of reliance" that open and developed markets tend to respond to public information.[228] "Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices."[229] "Debates about the precise *degree* to which stock prices accurately reflect public information are thus largely beside the point."[230]

As for contentions that so-called "value investors" do not rely on market price when, acting on the belief "that certain stocks are

222. *Id.* at 2410.
223. *Id.* (quoting *Basic*, 485 U.S. at 246-47 n.24).
224. *Id.* at 2409.
225. *Id*. at 2410 (quoting *Basic*, 485 U.S. at 247 n.28).
226. *Id*. (quoting *Basic*, 485 U.S. at 247 n.24).
227. *Id*.
228. *Id*.
229. *Id.* (citing Robert Shiller, *Sharing Nobel Honors, and Agree to Disagree*, N.Y. TIMES, Oct. 26, 2013, at BU6 ("Of course, prices reflect available information.")).
230. *Id.*

undervalued or overvalued," they try "to 'beat the market' by buying undervalued stocks and selling overvalued ones,'"[231] Chief Justice Roberts declared:

> Such an investor implicitly relies on the fact that a stock's market price will eventually reflect material information – how else could the market correction on which his profit depends occur? To be sure, the value investor "does not believe that the market price accurately reflects public information *at the time he transacts*." But to indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable stock period. The value investor also presumably tries to estimate *how* undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price tainted by fraud.[232]

Halliburton asked the Roberts Court, if it would not overrule *Basic* in whole, at least to require plaintiffs to do more than show that allegedly misleading statements were disseminated in an efficient market, by demanding further evidence demonstrating that the statements moved the stock's price. Justice Roberts' opinion for the Court in *Halliburton II* flatly rejects defense contentions that plaintiffs should be required "to prove that a defendants' misrepresentation actually affected the stock price – so-called 'price impact' – in order to invoke the *Basic* presumption."[233] Such a requirement, the Chief Justice explained, would amount to overruling of *Basic*'s holding that "if a plaintiff shows that the defendants' misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price."[234] *Basic* remained binding: "For the same reasons we declined to completely jettison the *Basic* presumption, we decline to effectively jettison half of it, by revising the prerequisites for invoking it."[235]

This left Halliburton's last-ditch argument – that fraud-on-the-market defendants should at least be permitted "to rebut the presumption of reliance with evidence of a *lack* of price impact, not only at the merits stage . . . but also before class certification."[236] On remand from *Halliburton I*, the lower courts had concluded that the Supreme Court

231. *Id.*
232. *Id.* at 2411 (quoting Thomas, J., concurring in judgment).
233. *Id.* at 2413.
234. *Id.* at 2414.
235. *Id.*
236. *Id*. at 2413.

was not particularly friendly to defendants' attempts to oppose class certification with evidentiary showings of this sort. When the *Halliburton* defendants sought on remand to present the very same evidence that the Supreme Court had rejected – the second time through as evidence of "no price impact" unhinged from elements such as loss causation and materiality – the district court considered this an obvious attempt to make the very same showing that the Supreme Court had rejected in *Halliburton I*.[237] And with the Roberts Court's further opinion in *Amgen*, denying defendants the opportunity to oppose class certification with evidence that statements were not material (which could well include evidence that they had no impact on the stock market) the Fifth Circuit naturally affirmed.[238]

Yet in *Halliburton II*, the Supreme Court held that these rulings were wrong: "Defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misstatement did not affect the market price of the stock."[239]

Naysayers might assert that this undoes the holdings of both *Halliburton I* and *Amgen* by permitting defendants to oppose class certification with essentially the very kind of evidentiary showing that *Halliburton I* and *Amgen* foreclosed. In *Halliburton I*, the Court ruled that the defendants could not oppose class certification with evidence that they said disproved loss causation because alleged misstatements did not move Halliburton's stock price.[240] And *Amgen* held that defendants may not oppose class certification by disproving materiality – which typically would be done with evidence showing that alleged misstatements and omissions had no effect on market price.[241] But *Halliburton II* holds that defendants *can* oppose class certification with such evidence.

Yet, by relieving plaintiffs of the burden of proving price impact, and requiring defendants to demonstrate *absence* of price impact, *Halliburton II* clearly favors plaintiffs at class certification. And by acknowledging that markets may respond to information at variable rates, *Halliburton II* dramatically shifts the field in plaintiffs' favor by making efficiency issues questions of fact, ill-suited to disposal as a matter of law on motions to dismiss or for summary judgment. This is

237. *See* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M, 2012 U.S. Dist. LEXIS 24823, at *11 (N.D. Tex. Jan. 27, 2012).

238. Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 432-35 (5th Cir. 2013).

239. *Halliburton II*, 134 S. Ct. at 2417.

240. *Halliburton I*, 131 S. Ct. 2179, 2185-87 (U.S. 2011).

241. Amgen v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (U.S. 2013).

critically important to the litigation of open-market securities-fraud claims.[242]

Before turning to the majority opinion's implications, however, it is worth addressing Justice Ginsburg's concurring opinion joined by Justices Breyer and Sotomayor. "Advancing price impact consideration from the merits stage to the certification stage may broaden the scope of discovery available at certification," Justice Ginsburg wrote for three justices of the six-justice majority.[243] This may open the door to discovery, for example, of internal corporate communications concerning the company's stock price – for we know that corporate executives and their investment-relations staff care very much about what moves the company's stock price, and that they often will discuss the subject in internal memoranda and emails. Justice Ginsburg also underscored the majority's holding that "it is incumbent upon the defendant to show the absence of price impact," leaving no doubt that defendants seeking to rebut *Basic*'s inference of price inflation and reliance bear the burden of proof and persuasion.[244]

With plaintiffs afforded the discovery to which they are entitled, and the burden of proving the absence of price impact placed squarely on defendants' shoulders, the concurring opinion concluded, *Halliburton II* "should pose no heavy toll on securities-fraud plaintiffs with tenable claims."[245] "On that understanding," Justices Ginsburg, Breyer, and Sotomayor joined the opinion of the six-justice majority.[246]

VI. WHAT *HALLIBURTON II* MEANS FOR SECURITIES-FRAUD CLASS ACTIONS

Halliburton II is good news for plaintiffs prosecuting securities-fraud class actions. All doubts concerning the fraud-on-the-market theory's continuing viability have been removed by the Roberts Court's reaffirmation of a controversial four-justice majority opinion in *Basic*. In addition, the *degree* of efficiency that plaintiffs must establish has been considerably relaxed from that which some lower courts had demanded. By rejecting the notion that efficiency is a "binary, yes or no," all-or-nothing-proposition, *Halliburton II* overturns decisions requiring plaintiffs to establish almost perfect efficiency and undermines decisions

242. *See supra* text accompanying notes 228-30.
243. *Halliburton II*, 134 S. Ct. at 2417 (Ginsburg, J., concurring).
244. *Id.*
245. *Id.*
246. *Id.*

disposing of plaintiffs' claims as a matter of law because the market did not react swiftly enough.[247]

By holding that *Basic* rests upon a flexible idea of "market efficiency," rather than upon extreme ECMH definitions underlying financial economists' technical tests of efficiency – as lawyers, commentators, and even some lower courts often assumed – *Halliburton II* severely undermines, and probably overrules, decisions employing extreme notions of "efficiency" to deny class certification, to dismiss securities-fraud claims on the pleadings, or to enter summary judgment for defendants. This is very good news for investors seeking class relief in fraud-on-the-market cases.[248]

Lower courts' decisions requiring plaintiffs to prove conformity with rigid ideas of "efficiency" associated with ECMH clearly are inconsistent with *Halliburton II's* much looser notion of market efficiency – under which it is enough that markets eventually tend to reflect new information, even if they do so neither immediately nor completely.[249]

Lower courts' decisions applying extreme assumptions about market efficiency to dismiss fraud-on-the-market claims as a matter of law at the pleadings stage should fall before *Halliburton II*'s much more flexible concept of efficiency. These include precedents holding, as a matter of law, that fraud-on-the-market claims may be dismissed whenever information was publicly available and the market price did not instantaneously respond. Under *Halliburton II*'s approach to efficiency, price effects ultimately are questions of fact ill-suited to determination as a matter of law. *Halliburton II*'s recognition that the market for a given security may be quite efficient with respect to some disclosures, but less so with respect to others, should preclude disposing of claims as a matter of law.[250]

Lower courts' decisions rejecting fraud-on-the-market claims with respect to initial public offerings also conflict with *Halliburton II*'s rather lenient concept of market efficiency which, as it happens, comports with the understanding of the Congress that framed the securities laws. The 73rd United States Congress clearly expected that information in an initial public offering's registration statement and prospectus would determine a new issue's price in the market.[251]

247. *See, e.g.*, *In re* Merck & Co. Inc. Sec. Litig., 432 F.2d 261, 270-71 (3d Cir. 2005).
248. *See supra* text accompanying notes 221-30.
249. *See supra* text accompanying notes 228-30.
250. *See supra* text accompanying note 242.
251. *See infra* text accompanying notes 299, 308-12.

By endorsing a flexible concept of efficiency, under which markets need not immediately incorporate all new information, *Halliburton II* should also undermine expectations that plaintiffs should submit sophisticated multiple-variate regression analyses focusing on statistically significant price movements, on pain of losing their claims for failure to produce such evidence.[252]

Finally, by placing squarely on defendants' shoulders the burden of disproving price effects when securities trade actively in an open-and-developed market, the Roberts Court has upended lower-court decisions throwing out plaintiffs' fraud-on-the-market cases on account of so-called "confounding factors," where a security's price moved significantly on simultaneous public disclosure of more than one piece of news. Any difficulties posed by dealing with such factors are now problems not for plaintiffs, but for defendants trying to shoulder their burden of disproving price impact.[253]

A. Halliburton II *Overrules Decisions Employing Rigid Notions of Market Efficiency*

To illustrate how favorable *Halliburton II* is to class-action plaintiffs asserting open-market securities-fraud claims, consider its impact on the First Circuit and district court decisions in *In re PolyMedica Corp. Sec. Litig.*,[254] which Professor Langevoort sharply criticized in his 2009 article, *Basic at Twenty*.[255]

In the *PolyMedica* litigation, district Judge Robert E. Keaton had certified a class, noting the parties' disagreement about what is required for a securities market to qualify as "efficient."[256] The plaintiff thought it enough that "the stock price was affected by the material information available in the market," while the defendants insisted that the market price must "reflect all the news about the company or industry" so quickly and completely that "it is no longer possible to generate arbitrage profits."[257]

Judge Keaton concluded that the fraud-on-the-market theory did not require a market where prices nearly instantaneously reflect all publicly available material information, but merely one in which, quoting *Basic*,

252. *See supra* text accompanying notes 228-30.

253. *See Halliburton II*, 134 S. Ct. 2398, 2413 (U.S. 2014).

254. Bowe v. PolyMedica Corp. (*In re* PolyMedica Corp. Sec. Litig.), 432 F.3d 1, 3 (1st Cir. 2005), *on remand* 453 F. Supp. 2d 260 (D. Mass 2006).

255. *See* Langevoort, *supra* note 61, at 172 & n.94 (2009).

256. *In re* PolyMedica Corp. Sec. Litig., 224 F.R.D. 27, 39 (D. Mass. 2004).

257. *Id.* at 40.

"'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.'"[258] This definition, Judge Keaton acknowledged, "differs from the definition of an 'efficient' market as an economic term of art," under which "'prices at any time fully reflect "all available information,'" so that publicly "available information does not support profitable trading strategies or arbitrage opportunities."[259] Judge Keaton acknowledged that "the definition I have derived from *Basic* differs from much of the existing case law," which often tracked the academic notion that *all* information must be *completely* reflected in price at *all* times for a securities market to be deemed "efficient."[260]

On an interlocutory class-certification appeal, the First Circuit rejected Judge Keaton's view, instead embracing "the prevailing definition of market efficiency," under which "an efficient market is one in which market price fully reflects all publicly available information."[261] This, it said, was the definition "adopted by many lower courts as a prerequisite for applying the fraud-on-the-market presumption of reliance."[262]

Although Judge Keaton had quoted *Basic* itself for his more lenient standard, the First Circuit noted a Third Circuit decision that *Basic* favorably cited also included a footnote asserting that "the 'fraud on the market' theory rests on the assumption that there is a *nearly perfect market in information*, and that the market price of stock reacts to and reflects the available information."[263] Moreover, lower-court decisions issued after *Basic* had "overwhelmingly" favored a definition of efficiency requiring *all* information to be fully reflected in price at *all* times.[264] "By rejecting the prevailing definition of market efficiency" and by "focusing instead on the general consideration by market professionals of *most* publicly announced material statements about companies, the district court applied the wrong standard of efficiency," the First Circuit concluded.[265] It held "an efficient market is one in which the market price of the stock *fully reflects all* publicly available

258. *Id.* at 41 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 246 n.24 (1988)).

259. *Id.* (quoting Gilson & Kraakman, *supra* note 119, at 554-55.

260. *Id.* at 42.

261. Bowe v. PolyMedica Corp. (*In re* PolyMedica Corp. Sec. Litig.), 432 F.3d 1, 10 (1st Cir. 2005) (citing Stout, *supra* note 132, at 639; Fama, *supra* note 110, at 383).

262. *Id.*

263. *Id.* at 11-12 (quoting Peil v. Speiser, 806 F.2d 1154, 1161 n.10 (3d Cir. 1986)) (emphasis added).

264. *Id.* at 12-13 (collecting cases).

265. *Id.* at 14.

information."[266]

Under this definition, the First Circuit explained, prices must "'respond so quickly to new information that it is impossible for traders to make trading profits on the basis of that information.'"[267] A court's "focus" in ruling on class certification thus must be "on whether a particular market has absorbed all available information (and misinformation), such that an ordinary investor cannot beat the market by taking advantage of unexploited profit opportunities."[268] To be clear: "By 'fully reflect,' we mean that market price responds so quickly to new information that ordinary investors cannot make trading profits on the basis of such information."[269]

Applying a more lenient test, the district court had ignored defendant PolyMedica' s proffered evidence that an expert witness's "serial correlation test" and "put-call parity test" showed potential for profit by trading on publicly available data about PolyMedica – thereby suggesting less-than-perfect efficiency.[270] The district court's task on remand would be to consider that evidence in light of the proper test.[271]

With Judge Keaton's retirement, that task fell to the district court's chief judge, the Honorable William G. Young, who concluded that the evidence successfully rebutted the stock market's efficiency.[272] "It is difficult to accept that a stock with an average weekly trading volume of over 4,000,000 shares would not have impounded news quickly," Chief Judge Young acknowledged.[273] But the First Circuit had adopted an extreme definition of efficiency.

Chief Judge Young accepted the defendants' contention that although PolyMedica stock was actively traded, strict efficiency was lacking in light of three factors. First, there were "constraints" on short selling.[274] Second, "violations of put-call parity" might have permitted investors with the means and know-how to earn risk-free profits by trading put and call options.[275] And third, an expert running a regression analysis could find positive "serial correlations" or price trends during

266. *Id.*
267. *Id.* (quoting Stout, *supra* note 132, at 651).
268. *Id.* at 16.
269. *Id.*at 19.
270. *Id.* at 18 & n.21.
271. *See id.*
272. *PolyMedica*, 453 F. Supp. 2d at 278.
273. *Id.* at 270-71.
274. *Id.* at 273-74.
275. *Id.* at 274-76.

the class period.[276]

It is far from clear that any of this should have been sufficient to disprove efficiency even by financial academics' rigorous standards. If short sales were *outlawed* altogether, actively traded securities prices still would be set by supply and demand informed by publicly available information. Moreover, the defendants' evidence that short selling was "constrained" rather paradoxically consisted of data showing that many people were in fact doing it: "Compared to the NASDAQ short interest average of less than 2%, the percentage of PolyMedica shares outstanding represented by the short interest rose from 7.8% at the end of 2000 to 66% in April 2001."[277] That much short selling, the defendants' expert reasoned, must have made additional short selling somewhat more difficult.[278] The district court agreed, holding that although short selling may have only incremental price effects, "low or nonexistent barriers to short selling are nonetheless essential to information efficiency."[279]

Chief Judge Young's reliance on expert testimony concerning investors' alleged opportunity to earn risk-free profits by trading in the derivative securities called "put options" and "call options" also was doubtful. The First Circuit had defended efficiency in terms of whether "ordinary investors" could profitably trade on the basis of public information, not whether a financial economist could do so.[280] Neither constraints on short sales nor esoteric arbitrage opportunities should have mattered much, for they did not show that *ordinary investors* could have profited by trading on public information about PolyMedica.

PolyMedica's expert also asserted that efficiency of the market for PolyMedica stock was contradicted by the presence of "serial correlations" during part of the class period – which means simply that past movement in stock price may have had some predictive value with

276. *Id.* at 276-78.

277. *Id.* at 273.

278. *See id*.

279. *Id*. at 275 n.18.

280. *See* Bowe v. PolyMedica Corp. (*In re* PolyMedica Corp. Sec. Litig.), 432 F.3d 1, 19 (1st Cir. 2005) ("[A]n efficient market is one in which the market price fully reflects all publicly available information. By 'fully reflect,' we mean that market price responds so quickly to new information that ordinary investors cannot make trading profits on the basis of such information."). The First Circuit itself held in *Stuebler v. Xcelera.com* that even if "the presence of irrational investors and limits to arbitrage which prevented market price from reflecting fundamental value – may have been 'relevant to the extent it raises questions about informational efficiency,' the district court did not err in finding 'other more accessible and manageable evidence' sufficient to establish the presumption of reliance." *Stuebler v. Xcelera.com* (*In re* Xcelera.com Sec. Litig.), 430 F.3d 503, 518 (1st Cir. 2005) (citation omitted).

respect to future movement of the stock's price. The expert did not explain how investors could have known this at the time, of course, and other decisions have held (even before *Halliburton II*) that "the presence of serial correlation is not itself determinative of inefficiency."[281] The financial economist whose name is most closely associated with efficient-capital-market theory, Professor Fama himself, had warned that where "statistically significant evidence for dependence in successive price changes or returns has been found," this generally "does not appear to be sufficient to declare the market inefficient" and "does not seem of sufficient importance to warrant rejection of the efficient markets model."[282] It is, after all, notoriously easy *with hindsight* to identify technical trading strategies that would have produced profits during any particular historical period. Fama himself reportedly identified many, but with a caveat: "The various strategies Fama developed seemed to work very well in back testing on past data, but failed when subjected to out-of-sample tests."[283] Science is about *replicable* results, not *post hoc* "data mining."

Chief Judge Young in any event credited PolyMedica's expert testimony concerning serial correlations during part of the putative class period as evidence that PolyMedica stock "did not 'quickly' and 'fully' respond to material information."[284]

Such holdings cannot survive *Halliburton II*, which clearly overrules the First Circuit's rigid definition of market efficiency. Halliburton's arguments "focus[ed] on the debate among economists about the degree to which the market price of a company's stock reflects public information – the degree to which an investor can earn abnormal, above-market return by trading on such information."[285] But *Halliburton*

281. *In re* Countrywide, 273 F.R.D. 586,615 (C.D. Cal. 2009); *see also, e.g.*, *In re* Computer Sci. Corp. Sec. Litig., 288 F.R.D. 112, 121 & n.9 (E.D. Va. 2012); *In re* NetBank, 259 F.R.D. 656, 675 (N.D. Ga. 2009); *In re* DVI, Inc. Sec. Litig., 249 F.R.D. 196, 213 (E.D. Pa. 2008); Plumbers & Pipefitters Nat'l Pension Fund v. Burns, 967 F. Supp. 2d, 1143, 1160 (N.D. Ohio 2013).

282. Fama, *supra* note 110, at 414; *see Computer Sci.*, 288 F.R.D. at 121 n.9. A leading treatise similarly dismisses the importance of "serial correlation over short horizons," because the correlation coefficients "tend to be fairly small, at least for large stocks for which price data are the most reliably up-to-date," so that while "studies demonstrate weak price trends over short periods, the evidence does not clearly suggest the existence of trading opportunities," let alone meaningful departures from market efficiency. ZVI BODIE, ALEX KANE & ALAN J. MARCUS, INVESTMENTS 359 (8th ed. 2009). The treatise's authors "conclude that markets are very efficient," *despite* such minor anomalies. *Id*. at 375.

283. COLIN READ, THE EFFICIENT MARKET HYPOTHESISTS: BACHELIER, SAMUELSON, FAMA, ROSS, TOBIN, AND SHILLER 96 (2012).

284. *PolyMedica*, 453 F. Supp. 2d at 278.

285. *Halliburton II*, 134 S. Ct. 2398, 2410 (U.S. 2014).

II holds that *Basic* "instead based the presumption on the fairly modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock prices.'"[286]

B. Halliburton II *Overrules Decisions Assuming that the Market Prices Immediately and Completely Incorporate All Available Information*

Some courts have held that because the efficient-market hypothesis supposes *all* information is *instantaneously* reflected in stock price, investors' claims may be dismissed on the pleadings if accurate information was available from any source before otherwise misleading public statements were made. Other decisions hold that any substantial delay in the market's response to a disclosure is fatal to plaintiff investors' claims.

The poster child for this approach would be *Merck & Co., Inc. Sec. Litig.*,[287] which dismissed claims where the *Wall Street Journal*'s analysis of the company's financial reports triggered a significant drop in Merck's stock price.[288] But the Third Circuit affirmed dismissal on the pleadings because the *Wall Street Journal*'s analysis was based on documents that had been available for a month and that upon disclosure had triggered no stock drop.[289] The Third Circuit flatly rejected the plaintiffs' argument that in *Basic* "the Supreme Court declined to resolve 'how quickly and completely publicly available information is reflected in market price.'"[290] For "our Court has resolved how 'quickly and completely' public information is absorbed into a firm's stock price. We have decided that this absorption occurs 'in the period immediately following disclosure.'"[291]

A more recent example would be *Meyer v. Greene*, which sustained a Rule 12(b)(6) dismissal on the pleadings where a stock's price fell in response to a short seller's public explanation that a company's real-estate assets were impaired, because "efficient market theory . . . posits that all publicly available information about a security is reflected in the market price."[292] The Eleventh Circuit explained, "any information

286. *Id.*
287. *In re* Merck & Co., Inc. Sec. Litig., 432 F.3d 261, 270-71 (3d Cir. 2005).
288. *Id*. at 268-69.
289. *Id*. at 269-71.
290. *Id.* at 269.
291. *Id*. (quoting Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000)).
292. Meyer v. Greene, 710 F.3d 1189, 1197, 1201-02 (11th Cir. 2013).

released to the public is immediately digested and incorporated into the price."[293] But the short seller had managed to figure out the issuer's fraud from publicly available sources. This the court deemed "fatal to the [i]nvestors claims."[294] "The efficient market theory," it explained, "is a Delphic sword: it cuts both ways."[295] "Either the market is efficient or it is not."[296]

This is the "binary" view rejected by *Halliburton II*, utterly at odds with the Supreme Court's observation that markets may absorb some kinds of disclosures more rapidly than others.[297]

These decisions assume that all publicly available disclosures of all sorts will be immediately digested and reflected in stock price. That assumption is no longer tenable after *Halliburton II*: "The markets for some securities are more efficient than markets for others, and even a single market can process different kinds of information more or less efficiently, depending on how widely the information is disseminated and how easily it is understood."[298]

C. Halliburton II *Casts Doubt on the Continuing Validity of Decisions Withholding the Fraud-on-the-Market Presumption in Cases Involving Initial Public Offerings*

Although Congress clearly assumed that information in a new security's registration statement would determine its price,[299] several lower-court decisions, both before and after *Basic*, have flatly rejected the notion that the market for an initial public offering ("IPO") could be "efficient" in the sense that prices would in fact reflect information in the security's offering documents.

Prior to *Basic*, the Fifth Circuit had applied a presumption of reliance to a new offering of municipal bonds in *Shores v. Sklar*[300] on the theory that absent false statements the securities could not have been sold. The Fifth Circuit's "fraud-created-the-market" opinion faced withering criticism, however, from commentators who insisted that a new issue's price is set not by market forces, but by the new securities'

293. *Id.* at 1197.
294. *Id.* at 1198.
295. *Id.*
296. *Id.*
297. *Halliburton II*, 134 S. Ct. 2398, 2409 (U.S. 2014).
298. *Id.*
299. *See* H.R. REP. NO. 85, at10 (1933).
300. Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981).

issuer and underwriters.[301] Other courts endorsed their view. The Eleventh Circuit declared in dictum that "in the case of new securities, the price will be set by the offeror and underwriters, not the market."[302] The Third Circuit said that while a presumption of reliance on material misstatements "is plausible in developed markets, it may not be in the case of newly issued stock."[303]

After *Basic* was decided, the academic commentary and courts continued to assert that a presumption of reliance has no place in cases involving a new issue of securities. Commentators insisted that with *Basic*'s supposed adoption of ECMH, one could not presume false statements affect a new issue's price because a new issue, by definition, is not yet actively traded.[304] The Sixth Circuit declared that "[a] primary market for newly issued [securities] is not efficient or developed under any definition of these terms."[305] The Second Circuit agreed that "the market for IPO shares is not efficient."[306] And many district court decisions concluded the same.[307]

These decisions are clearly at odds with the 73rd Congress' understanding of how securities markets work. In contrast with 1934 Act § 10(b) claims, 1933 Act § 11 initially required no proof of reliance precisely because it may be assumed that the new issue's price is based on information in its registration statement. The 1933 Act's legislative

301. *See* Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1156-58 (1982); Black, *supra* note 122, at 453.

302. Lipton v. Documation, Inc., 734 F.2d 740, 746 (11th Cir. 1984).

303. Peil v. Speiser, 806 F.2d 1154, 1161 n.10 (3d Cir. 1986).

304. *See, e.g.,* De Simone, *supra* note 211, at 5176-77; Robert G. Newkirk, *Sufficient Efficiency*: *Fraud on the Market in the Initial Public Offering Context*, 58 U. CHI. L. REV. 1393, 1394 (1991).

305. Freeman v. Laventhol & Horwath, 915 F.2d 193, 199 (6th Cir. 1990) (internal quotation marks omitted); *accord* Ockerman v. May Zima & Co., 27 F.3d 1151, 1158 (6th Cir. 1994) ("This Circuit has held that the fraud on the market presumption of reliance does not apply when securities are not traded on an efficient market, as is the case with new issues.").

306. *See, e.g.*, Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 42 (2d Cir. 2006); *see also* Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1129 (7th Cir. 1993) (no fraud-on-the-market presumption for IPO of securities for which "[n]o trading market developed" even after the IPO).

307. Danis v. USN Commc'ns, Inc., 189 F.R.D. 391, 397 (N.D. Ill. 1999) ("no market exists at the time of the initial public offering"); Berwecky v. Bear, Stearns & Co., 197 F.R.D. 65, 68 n.5 (S.D.N.Y. 2000) ("in an IPO there is no well-developed market in the offered securities"); Degulis v. LXR Biotechnology, 176 F.R.D. 123, 126 n.1 (S.D.N.Y. 1997) ("some courts have held that the presumption may not apply in cases involving IPO's – such as this one – because in the IPO setting, there is no well-developed, efficient trading market" (dictum)); Gruber v. PriceWaterhouse, 776 F. Supp. 1044, 1052 (E.D. Pa. 1991) ("the 'fraud on the market' theory cannot apply to initial public offerings"); Masri v. Wakefield, 106 F.R.D. 322, 324-25 (D. Colo. 1984) (holding fraud-on-the-market presumption inapplicable to an initial public offering).

history indicates that Congress dispensed with requiring proof of reliance on the understanding that the representations in a new issue's registration statement and prospectus,

> although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security, which in the last analysis reflects those manifold causes that are the impelling motive of the particular purchase. The connection between the statements made and the purchase of the security is clear, and, for this reason, it is the essence of fairness to insist upon the assumption of responsibility for the making of these statements.[308]

Contemporaneous commentary explained that "the registration statement will be an important conditioner of the market" so that a purchaser in the open market "may be as much affected by misstatements as if he had read and understood the statement."[309]

Congress returned to the issue of reliance for § 11 claims with the 1934 Act's amendment inserting a new reliance requirement for some, but not all, § 11 claimants. Those staking § 11 claims to a new issue's registration statement would have to show reliance only if they "acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months after the effective date of the registration statement."[310] Even then, the amendment to § 11 specified "such reliance may be established without proof of the reading of the registration statement."[311]

The Conference Report explained that while it could be assumed that statements in offering documents initially determined a new security's price, where an intervening twelve months of financial results have been released, the assumption is no longer warranted, and proof of a lingering effect should be required.[312]

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308. H.R. REP. NO. 85, at 10 (1933).

309. William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 176 (1933).

310. 15 U.S.C. § 77k(a) (2012).

311. Securities Exchange Act of 1934, § 206(a), 48 Stat. 907, *amending* Securities Act of 1933 § 11(a) (codified as amended at 15 U.S.C. § 77k(a)) (emphasis added), states:

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection *shall be conditioned on proof that such person acquired the security relying upon such untrue statement* in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established *without proof of the reading of the registration statement by such person*.

312. As the Conference Report put it:

If § 11's text and history thus show that Congress expected offering documents' statements and omissions to determine a new security's market price, on which it believed investors should be able to rely, it is hard to see how courts may legitimately refuse to apply a fraud-on-the-market presumption to § 10(b) claims asserted in connection with an initial public offering. The Supreme Court held in *Herman & MacLean v. Huddleston*[313] that § 11 and § 10(b) provide cumulative remedies and that investors may seek relief under § 10(b) if a registration statement covered by § 11 was fraudulently misleading.[314] Investors might wish to do so for a variety of reasons, including the much longer limitations period for securities-fraud claims under § 10(b)[315] and differences in the calculation of recoverable damages.[316]

The notion expressed by commentators and courts that an initial public offering's price is arbitrarily set by the issuer and its underwriters without reference to market forces, never was terribly plausible. The United States has a well-developed market for initial public offerings. The purchasers generally are sophisticated institutional investors, the very sort of market professionals that *Basic* counted on to "consider most publicly announced material statements" about companies in which they invest, "thereby affecting stock prices."[317] And while the issuer and

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> Section 11(a) is amended so as to require proof that the purchaser of a security at the time he acquired the security, relied upon the untrue statement in the registration statement or upon the registration statement and did not know of the omission. But this requirement is imposed only in the case of purchase after a period of 12 months subsequent to the effective registration date and then only when the issuer shall have published an earning statement to its security holders covering a period of at least 12 months after the registration date. The basis of this provision is that in all likelihood the purchase and price of the security purchased after publication of such an earning statement will be predicated on that statement rather than upon the information disclosed upon registration.

H.R. REP. NO. 1838, at 41 (1934) (Conf. Rep.).

313. Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).

314. *Id.* at 379-88.

315. *Compare* 15 U.S.C. § 77m (2012) (providing a limitations period of one year after discovery should have been made in the exercise of reasonable diligence, and repose period of "three years after the security was bona fide offered to the public" for § 11 claims) *with* 28 U.S.C. § 1658(b) (2012) (providing a limitations period of "2 years after the discovery of facts constituting the violation" and a repose period of "5 years after such violation").

316. Section 11 caps recoverable damages as "the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public)" and either the "value thereof as of the time . . . suit was brought" or the price at which the claimant sold it. 15 U.S.C. § 77k(e). Thus, if a § 11 plaintiff acquired the security in the open market at a price higher than the offering price, § 10(b) damages may be substantially larger than § 11 damages.

317. Basic Inc. v. Levinson, 485 U.S. 224, 246 n.24 (1988); *see generally* Lawrence M. Benveniste & Paul A. Spindt, *How Investment Bankers Determine the Offer Price and Allocation of New Issues*, 24 J. FIN. ECON. 343 (1989).

underwriter typically set an anticipated "price range," many offerings actually price above or below this range, based on the institutional investors' response and as "bids are submitted to the bookrunner who constructs a demand curve for the issue."[318] Some offerings are postponed or cancelled "due to market conditions."[319]

With *Halliburton*'s clear adoption of a lenient standard of efficiency, there no longer is any basis for refusing to apply *Basic*'s presumption to IPOs.

D. *Halliburton II Overrules Decision Demanding that Plaintiffs Produce Event Studies*

Also doubtful after *Halliburton II* are lower-court decisions requiring plaintiffs to come forward with a sophisticated econometric multivariate regression analysis or "event study" to demonstrate market efficiency of an actively traded and widely followed security.

In his article, *Basic at Twenty*, Professor Langevoort observed that "wading into the mind numbing data defendants (and thus plaintiffs as well) often put forward in their expert reports, creates the illusion that there is a bright-line distinction among different issuers," reinforcing assumptions that efficiency is "a binary, yes or no question."[320] With *Halliburton II*'s holding that *Basic*'s presumption of reliance "does not rest on a 'binary' view of market efficiency,"[321] but applies even if the market takes a while to digest some information, such mind-numbing statistical analysis is largely beside the point. This is for the better and surely comports with the legislative understanding of the 73rd Congress.

Though Congress clearly contemplated that false statements may affect market prices, providing relief in § 9, for example, an investor "who shall purchase or sell a security at a price which was affected,"[322]

318. Tim Jenkinson, Alan D. Morrison, & William J. Wilhelm, Jr., *Why are European IPOs So Rarely Priced Outside the Indicative Price Range*, 80 J. FIN. ECON. 185, 186 (2005); *see id.* at 185-86 (noting that "in around one-half of US IPOs the final price is set outside the initial price range").

319. *See, e.g.*, News Release, LipoScience, Inc., LipoScience Postpones Initial Public Offering Due to Market Conditions (Sept. 25, 2002), *available at* PR NEWSWIRE, http://www.prnewswire.com/news-releases/liposcience-postpones-initial-public-offering-due-to-market-conditions-75914657.html ("LipoScience, Inc. announced today that it has postponed its Initial Public Offering due to market conditions."); *cf. In re* Merck & Co., Inc. Sec. Litig., 432 F.3d 261, 265 (3d Cir. 2005) ("Merck announced the postponement of the Medco IPO and indicated that it would drop Medco's offering price"; "later, Merck announced it would postpone the Medco IPO indefinitely").

320. Langevoort, *supra* note 61, at 167-68.

321. *Halliburton II*, 134 S. Ct. 2398, 2410 (U.S. 2014).

322. 15 U.S.C. § 78i(f) (2012).

it surely did not contemplate that sophisticated statistical regressions should be required to prove a case. The earliest reference to regression analysis that I have found in reported state or federal decisions is *Trans World Airlines, Inc. v. Hughes*,[323] a 1969 order in an antitrust case that quoted an expert witness on "regression analysis" merely to demonstrate how extraordinarily complicated the matter was – setting it apart from ordinary litigation.[324] Not until the mid-1970s did Supreme Court decisions first refer to "regression analysis"[325] or "multivariate analysis,"[326] and then only in dissenting opinions.

Congress could not have expected such evidence to be required when it enacted the federal securities laws in the 1930s, even though both the 1933 Act and the 1934 Act clearly assume that litigants will present proof of price effects. Congress gave defendants subject to liability under 1933 Act § 11 the opportunity to reduce damages by showing that the decline in the securities price was due to factors other than its registration statements' misleading statements and omissions.[327] And it provided in § 9 an express remedy in permitting investors who acquire a security at a price manipulated by certain deceptive statements or actions to recover damages.[328]

With *Halliburton II*'s return to the more flexible notions of market

323. Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969), *later opinion*, 312 F. Supp. 478 (S.D.N.Y. 1969), *modified on appeal*, 449 F.2d 51 (2d Cir. 1971), *rev'd sub nom.* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

324. *Id.* at 685 n.2. The Supreme Court ultimately directed that the case be dismissed on the ground that the alleged antitrust violations were authorized by the Civil Aeronautics Board under the Federal Aviation Act and thus immune from antitrust liability. *Hughes Tool Co.*, 409 U.S. 363.

325. Gregg v. Georgia, 428 U.S. 153, 184 (1976) ("Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive."); *see also id.* at 235-36 (Brennan, J., dissenting) (discussing regression analysis concerning whether the death penalty has any deterrent effect).

326. Aberdeen & R. R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 329-30 (1975) (Douglas, J., dissenting).

327. Section 11 of the 1933 Act presumes that a registration statement's misleading statements and omissions would affect a new security's price and awarded as presumptive damages the difference between the price paid for a registered security (not to exceed its offering price) and either its price on the date of suit or the price at which the plaintiff sold the security: "*Provided*, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of all such damages shall not be recoverable." 15 U.S.C. § 77k(e) (2012).

328. 15 U.S.C. § 78i(f) (2012) ("Any person who willfully participates in any act or transaction in violation of subsection (d), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction.").

efficiency familiar to the enacting Congress, decisions that fault plaintiffs for failure to present detailed statistical models should fall by the wayside.

E. HALLIBURTON II UPENDS CASES HOLDING PLAINTIFFS' SHOWINGS FRUSTRATED BY "CONFOUNDING FACTORS"

Some lower courts, and the Fifth Circuit in particular, have trashed plaintiffs' cases on account of so-called "confounding factors" where a security's price moves upon the simultaneous disclosure of multiple bits of information, not all of them related to a fraud.

In the very decision that *Halliburton I* reversed, the Fifth Circuit had faulted the plaintiffs because Halliburton, a defendant, had included "three different pieces of information in the [press] release" that triggered a stock sell off.[329] Similarly, in *Fener v. Operating Engineers*,[330] the Fifth Circuit faulted plaintiffs' case, and affirmed denial of class certification, because the defendants' press release that triggered a stock sell-off "contained not one piece of information, but three separate pieces of news."[331] Quite recently the First Circuit held in *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Secs. (USA) LLC*[332] that the plaintiffs' expert's failure to account for "confounding factors" meant plaintiffs had no evidence of loss causation and that "[s]ummary judgment was therefore properly awarded to the defendants."[333] The message seemed clear: issuers may commit securities fraud with impunity merely by ensuring that any fraudulent statements they make are accompanied by statements on other subjects and that any revelation of the true state of affairs is mixed up with further disclosures designed to "confound" investors relying on *Basic*'s fraud-on-the-market presumption.

These decisions, which can be traced back to the now-overruled Fifth Circuit's holding in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*,[334] cannot survive *Halliburton II*. By casting on defendants the burden of *disproving* price impact, *Halliburton II* rather clearly shifts

329. *See* Archdiocese of Milwaukee Supporting Fund v. Halliburton Co., 597 F.3d 330, 342 (5th Cir. 2010).

330. Fener v. Operating Eng'rs, 579 F.3d 401 (5th Cir. 2009). This Article's author represented the plaintiffs-appellants in *Fener*.

331. *Id.* at 408.

332. Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec., 752 F.3d 82 (1st Cir. 2014).

333. *Id.* at 84.

334. Oscar Private Equity Inv. v. Allegiance Telecom, 487 F.3d 261 (5th Cir. 2007).

from plaintiffs to defendants the risk of uncertainty produced by "confounding factors." As Judge Dennis's trenchant *Oscar* dissent observed, *Oscar* "attempts to recharacterize the *Basic* presumption as a sort of 'bursting bubble' presumption" that "'disappears if anything to the contrary is placed before the Court.'"[335] Under such a view, "the *Basic* presumption evaporates as soon as a defendant simply introduces a mere possibility the defendant's material misrepresentation might not have affected the market price."[336]

The "bursting bubble" approach is contrary, of course, to the Federal Rules of Evidence's treatment of presumptions. The Advisory Committee Note to Rule 301 explains that evidentiary presumptions "place upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it."[337]

Defendants should have little hope of *Oscar*'s "bursting bubble" conception of *Basic*'s presumption. *Basic* itself embraced no bursting-bubble analysis.[338] To the contrary, *Basic* states that the defendants rebut the presumption not merely by producing *some* evidence of their own, but only if with it they "*could show* . . . that the market price could not have been affected by their representations."[339] As Judge Dennis's *Oscar* dissent observed, "*Basic* thus clearly places the burdens of both producing evidence and persuasion on the defendant and requires an actual showing that the defendant's misrepresentation did not, or could not have, affected the market price of the stock."[340] The great weight of precedential authority has long agreed.[341] *Halliburton II* now confirms

335. *Id.* at 274 (Dennis, J., dissenting) (quoting United States v. Zavala, 443 F.3d 1165, 1169 (9th Cir. 2006)).

336. *Id.*

337. FED. R. EVID. 301 advisory committee's note ("the so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact is rejected as according presumptions too 'slight and evanescent' an effect.").

338. *See* Steven Serajeddini, Note, *Loss Causation and Class Certification*, 108 MICH. L. REV. 255, 266-67 (2009) ("There is no indication that the *Basic* court intended to adopt the bursting-bubble approach."); *see also* Cammer v. Bloom, 711 F. Supp. 1264, 1291 (D.N.J. 1989) (applying *Basic* and rejecting "bursting bubble approach" "under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed facts").

339. Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988) (emphasis added).

340. *Oscar*, 487 F.3d at 274 (Dennis, J., dissenting).

341. *See, e.g.*, Millowitz v. Citigroup Global Mkts., (Inc.) (*In re* Salomon Analyst Metromedia Litig.), 544 F.3d 474, 485 (2d Cir. 2008) (defendants "bore the burden of showing that market price was not affected"); Ganino v. Citizens Utils. Co., 228 F.3d 154, 167 (2d Cir. 2000) (quoting *Basic*, 485 U.S. at 248) (emphasis added) (the "presumption of reliance in a fraud-on-the-market case *may be rebutted by proving* that 'the "market makers" were privy to the truth'"); Semerenko v. Cendent

that *Basic* "affords defendants the opportunity to rebut the presumption *by showing*, among other things, that the particular misrepresentation at issue did not affect the stock's market price."[342]

This view is consistent with the rule of *Story Parchment*, which the Roberts Court's *Comcast* decision made a point of citing with approval.[343] With wrongdoing established, "the risk of uncertainty should be thrown upon the wrongdoer instead of upon the injured party."[344] If defendants are shown to have committed securities fraud by making materially misleading statements with fraudulent intent, they cannot be permitted to avoid liability by mixing things up with disclosures on multiple issues.

This view also is consistent with how courts have long treated the presumption of reliance from materiality that the Supreme Court endorsed in *Affiliated Ute Citizens v. United States*.[345] Thus, where omissions caused an opinion letter to be materially misleading, the Third Circuit held in *Sharp v. Coopers & Lybrand*,[346] the burden of proof at trial properly rested upon the defendants.[347] The Second Circuit held similarly in *duPont v. Brady*,[348] that "once the plaintiff establishes the materiality of the omission by a preponderance of the evidence, the burden shifts to the defendant to establish by a preponderance of the evidence that the plaintiff did not rely on the omission in making the

Corp., 223 F.3d 165, 179 (3d Cir. 2000) ("the presumption of reliance may be rebutted *by showing that the market did not respond*"); Peil v. Speiser, 806 F. 2d 1154, 1161-62 n.11 (3d Cir. 1986) (finding it "sensible to shift the burden of disproving reliance to the defendants"); Fine v. Am. Solar King, 919 F.2d 290, 299 (5th Cir. 1990) (emphasis added) ("The presumption of reliance can be rebutted *by showing* . . . that the non-disclosures did not affect the market price. . . ."); *see also* Abell v. Potomac Ins. Co., 858 F.2d 1104, 1120 (5th Cir. 1988) (*Basic* "shift[s] the burden of persuasion, as to reliance, onto securities fraud defendants"); *In re* Moody's Corp. Sec. Litig., 274 F.R.D. 480, 489-90 (S.D.N.Y. 2011) ("Plaintiffs bear the burden of demonstrating that they satisfy each element of the *Basic* presumption . . . Defendants bear the burden of rebutting the presumption by a preponderance of the evidence"); Pa. Ave. Funds v. Inyx Inc., No. 08 Civ. 6857 (PKC), 2011 U.S. Dist. LEXIS 72999, at *24 (S.D.N.Y. July 5, 2011) ("Once a plaintiff establishes that the fraud-on-the-market presumption applies, defendants bear the burden of rebutting the presumption by a preponderance of the evidence"); Steiner v. Southmark Corp., 734 F. Supp. 269, 277 n.6 (N.D. Tex. 1990) ("the fraud-on-the-market presumption is rebuttable, and serves only to shift to the defendant the burden of persuasion as to reliance.").

342. *Halliburton II*, 134 S. Ct. 2398, 2414 (U.S. 2014) (emphasis added); *accord id.* at 2417 ("it is incumbent upon the defendant to show the absence of price impact") (Ginsburg, J., concurring).

343. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (U.S. 2013); *see supra* text accompanying notes 17-19.

344. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

345. Affiliated Ute Citizens v. Utah, 406 U.S. 128 (1972).

346. Sharp v. Coopers & Lybrand, 649 F.2d 175, 188-89 (3d Cir. 1981).

347. *Id.* at 188-89.

348. duPont v. Brady, 828 F.2d 75 (2d Cir. 1987).

investment decision."[349] The great weight of authority agrees that proof of materiality "shifts the burden of persuasion on the issue of reliance."[350] "It is thus the defendant who must prove by a preponderance of the evidence" that a material omission had no effect.[351]

CONCLUSION

The Roberts Court is by no means as hostile to class actions as some may believe. Without doubt, the Court's decisions in cases concerning arbitration clauses are apt to frustrate the pursuit of justice by consumers and others bound by contracts of adhesion. But in other respects the Court's class-action jurisprudence can be quite favorable to class litigation.

The Court's recent decisions concerning certification of open-market securities-fraud claims are particularly favorable. With its decisions in *Halliburton I* and *Amgen*, the Roberts Court has relieved plaintiffs in fraud-on-the-market case of the burdens, imposed by lower courts, of demonstrating loss causation and materiality in order to obtain class certification. Most significantly, with *Halliburton II*, the Court both preserved and restored vitality to the fraud-on-the-market presumption recognized by four liberal justices in *Basic,* soundly rejecting contentions that the controversial decision should be overruled – and doing so with an opinion apt to curtail lower courts' inclination to interpret and apply the concept of market efficiency with a case-killing vengeance. With *Halliburton II*'s rejection of rigid binary notions of efficiency, courts no longer will be able to dispose of cases as a matter of law on the rationale that market prices did not react quickly enough or by assuming that those prices incorporated all information immediately.

For securities-fraud class-action plaintiffs, at least, the Roberts Court's decisions have been a blessing.

349. *Id.* at 76; *accord, e.g.*, Burke v. Jacoby, 981 F.2d 1372, 1379 (2d Cir. 1992); *In re* Smith Barney Transfer Agent Litig., 290 F.R.D. 42, 48-49 (S.D.N.Y. 2013); Grossman v. Waste Mgmt. Inc., 589 F. Supp. 395, 400 (N.D. Ill. 1984).

350. *duPont*, 828 F.2d at 78 (citing Michaels v. Michaels, 767 F.2d 1185, 1200 (7th Cir. 1985); Rifkin v. Crow, 574 F.2d 256, 262 (5th Cir. 1978); Chelsea Assocs. v. Rapanos, 527 F.2d 1266, 1271-72 (6th Cir. 1975); Rochez Bros. v. Rhoades, 491 F.2d 402, 410 (3d Cir. 1973)).

351. *Id.*