United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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November 04, 2015

TO: All Counsel and Parties Listed Below

Misc. No. 15-90038 Erica P. John Fund, Inc. v. Halliburton Company, et al
USDC No. 3:02-CV-1152
USDC No. 3:02-CV-1615
USDC No. 3:02-CV-2067
USDC No. 3:02-CV-2373

Attached to the initial docket entry is the court's order granting the application(s) for leave to appeal. The case is transferred to the court's general docket. All future inquiries should refer to docket No. 15-11096.

Unless the district court has granted you leave to proceed on appeal in forma pauperis, the appellant(s) should immediately pay the court of appeals' $505.00 docketing fee to the clerk of the district court, and notify this office of your payment within 14 days from the date of this letter. If you do not, we will dismiss the appeal, see 5TH CIR. R. 42.3.

By copy of this letter, I am requesting the district court to send the notice of certified record immediately.

Counsel desiring to appear in this case must electronically file a "Form for Appearance of Counsel", naming each party you represent, within 14 days from the date of this letter. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from the docket. Pro se parties do not need to file an appearance form.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

Mr. David Boies
Mr. Carl Edward Goldfarb
Ms. Kim Elaine Miller
Mr. Aaron Michael Streett

Mr. Emery Lawrence Vincent

Enclosure(s)

cc:
Ms. Karen S. Mitchell

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

A True Copy
Certified order issued Nov 04, 2015

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 15-90038

ERICA P. JOHN FUND, INCORPORATED, On Behalf of Itself and All Others Similarly Situated, formerly known as Archdiocese of Milwaukee Supporting Fund, Incorporated,

Plaintiff - Respondent

v.

HALLIBURTON COMPANY,

Defendant - Petitioner

LORI A. RUSSO, On Behalf of Herself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants - Petitioners

ERNEST HACK, On Behalf of Himself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants - Petitioners

POLAR INVESTMENT CLUB, On Behalf of Itself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants - Petitioners

Motion for Leave to Appeal
under Fed. R. Civ. P. 23(f)

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of Petitioners, Halliburton Company and Mr. David J. Lesar, for leave to appeal under Fed.R. Civ. P. 23(f) is GRANTED.

JAMES L. DENNIS, Circuit Judge, concurring:

I reluctantly concur in my colleagues' decision to grant the petitioners leave to appeal the district court's order granting class certification. The petition raises the question of whether a defendant in a federal securities fraud class action may rebut the presumption of reliance at the class certification stage by producing

evidence that a disclosure preceding a stock-price decline did not correct any alleged misrepresentation.[1] The district court held that a defendant may not do so at the class certification stage. *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260-62 (N.D. Tex. 2015). Although I believe the Supreme Court's precedent and our own case law support the district court's holding, I think it is appropriate to allow our court to answer this question expressly and to settle any questions regarding the Supreme Court's recent precedent in this area.

In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,* the Supreme Court held that any question as to the materiality of an alleged misrepresentation should be left to the merits stage because it does not bear on the predominance requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure. 133 S. Ct. 1184, 1194 (2013). In so holding, the Court reasoned that materiality is an objective issue susceptible to common, classwide proof, and it

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[1] In a private securities fraud action, investors can recover damages "only if they prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405 (2014). Investors can satisfy this requirement by invoking a rebuttable presumption of reliance, under which "anyone who buys or sells the stock at the market price may be considered to have relied on [the alleged] misstatements." *Id.* To invoke this presumption, "a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Id.* at 2413 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988)).

The presumption of reliance may be rebutted by "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." *Basic*, 485 U.S. at 248. Thus, one way in which defendants may rebut the presumption is to show that the alleged misstatements had no price impact, *i.e.*, that they did not affect the price of the stock. *See id.*

noted that failure to prove materiality would defeat every class member's claim on the merits. *Id.* at 1195-96. Thus, the Court made clear that substantive questions that are "common to the class" and are capable of classwide resolution need not be decided at the class certification stage. *See id.* at 1197.

Applying *Amgen*'s analysis, we recently held that district courts need not "resolve concerns about the inclusion of certain corrective events at the class certification stage." *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 688 (5th Cir. 2015). Although *Ludlow* dealt with this issue in the context of damages, its analysis and conclusion are based on *Amgen* and are equally applicable in the context of reliance. We reasoned that "the question of whether certain corrective disclosures are linked to the alleged misrepresentations in question is common to the class, and is 'susceptible of a class-wide answer.'" *Id.* (quoting *Amgen*, 133 S. Ct. at 1196). This is true in the context of reliance just as it is in the context of damages.

Furthermore, the Supreme Court has already reversed our previous attempt to adopt an analysis similar to the one the petitioners now advance when this case first came up on appeal before our court. We had affirmed the district court's denial of class certification, holding that "a subsequent disclosure that does not correct and reveal the truth of the previously misleading statement

is insufficient to establish loss causation." [2] *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 336 (5th Cir. 2010), *vacated and remanded sub nom. Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 131 S. Ct. 2179 (2011) (*Halliburton I*). But the Supreme Court subsequently rejected this analysis and held that plaintiffs need not prove loss causation at the class certification stage. *Halliburton I*, 131 S. Ct. at 2184. To require a showing that a corrective disclosure is linked to the alleged misrepresentation is to require a showing of loss causation in contravention of *Halliburton I*. *See id.*; *see also Ludlow*, 800 F.3d at 687 ("Addressing the corrective events question at the class certification stage . . . is in tension with *Halliburton I*'s holding.").

When this case went before the Supreme Court for the second time, the Court held that defendants may introduce evidence of lack of price impact to rebut the presumption of reliance at the class certification stage and that they may do so "through direct as well as indirect price impact evidence." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014) (*Halliburton II*). The Court explained that any showing that severs the link between the price that the plaintiff paid or received for the stock and the alleged misrepresentation is sufficient to rebut the presumption of reliance.

[2] Loss causation refers to a causal connection between an alleged material misrepresentation by the defendant and the economic loss suffered by the plaintiffs. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

Id. at 2415 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988)).

But "without the presumption of reliance, a [securities fraud] suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones, as required by Rule 23(b)(3)." *Id.* at 2416. The petitioners argue that evidence that the relevant disclosure that preceded a decline in stock price is not linked to any alleged misrepresentation should be allowed under *Halliburton II*. It is, after all, "indirect price impact evidence." *Id.* at 2417.

I do not read *Halliburton II* to require that any evidence that is somehow related to price impact must be considered at the class certification stage. Instead, *Halliburton II* merely rejected our categorical holding below, prohibiting all direct evidence of lack of price impact to rebut the presumption of reliance at the class certification stage. *See id.* at 2406-07 (describing our holding). The Court did not hold that issues that would otherwise be strictly merits issues under *Amgen* can be raised at the class certification stage merely because they bear on the issue of price impact. Indeed, materiality, too, is directed at price impact. *Halliburton II*, 134 S. Ct. at 2413-14. Yet *Halliburton II* made clear that courts should not consider defendants' evidence that their alleged misrepresentations were immaterial and thus had no price impact at the class

certification stage. *See id.* at 2416. The Supreme Court in *Halliburton II* did not so much as hint that it intended to overrule *Amgen*.

Halliburton II, therefore, only allows defendants to introduce at the class certification stage evidence of lack of price impact that *Amgen* does not otherwise preclude, *i.e.*, evidence that "has . . . to do with the issue of predominance at the class certification stage." *Halliburton II*, 134 S. Ct. at 2416. But where the evidence relates to an issue that is "susceptible to common, classwide proof" and whose resolution in favor of the defendant will "necessarily defeat every plaintiff's claim on the merits," the consideration of such evidence should be left to the merits stage. *Id.*

Here, the issue the petitioners seek to raise falls under the latter category. As the district court correctly noted, a finding that the relevant disclosure that preceded a decline in stock price is not linked to any alleged misrepresentation—that it is not corrective—would defeat every plaintiff's claim on the merits. This is because, among other things, the plaintiffs will not be able to establish loss causation. *See Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) ("[T]o establish loss causation [the] disclosed information must reflect part of the "relevant truth"—the truth obscured by the fraudulent statements."). As to the corrective nature of the disclosure, then, "the class is entirely cohesive: It will

prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Amgen*, 133 S. Ct. 1184, 1191. Thus, as I read *Halliburton II*, it did not render the corrective nature of a disclosure a class certification issue because, even though it bears on the issue of price impact, it does not affect the issue of predominance at the class certification stage.

Accordingly, I believe that *Halliburton I*, *Amgen*, *Halliburton II*, and *Ludlow* support the district court's holding in this case. I am also reluctant to allow a third interlocutory appeal in a case that has remained in the class certification stage for thirteen years. Nevertheless, I think it is appropriate for this court to consider the appeal and to clarify *Halliburton II*'s holding and its effect on the Supreme Court's prior precedent. The courts as well as future litigants will surely benefit from the added clarity that we can provide on this issue. I therefore concur in the court's decision to grant the petitioners leave to appeal.