

To Halliburton And Back: What To Expect From Round 3

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In what is now the third interlocutory appeal in the course of class certification proceedings spanning more than a decade, *Erica P. John Fund Inc. v. Halliburton Co.* will head back to the United States Court of Appeals for the Fifth Circuit, with perhaps another trip to the U.S. Supreme Court to follow. The Fifth Circuit's eventual decision on this latest interlocutory appeal could clarify — at least in the Fifth Circuit — just how far a defendant in a securities class action may go in presenting indirect evidence of (or lack of) price impact to defeat class certification.

Before turning to the burgeoning Halliburton trilogy, we must get back to basics. In 1988, the Supreme Court held in *Basic v. Levinson* that plaintiffs in 10b-5 class actions may invoke a rebuttable presumption of reliance using the fraud-on-the-market theory. Although generally a boon to the securities litigation plaintiffs bar, *Basic* made clear that the “rebuttable” qualification had heft. The court opined that any showing that “severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or [the plaintiff’s] decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.”

Skipping over Halliburton I for the moment, recall that the court in Halliburton II quoted *Basic*'s language concerning any showing that “severs the link” between misrepresentation and price when it held that defendants at the class certification stage “may seek to defeat *Basic*'s presumption at that stage through direct as well as indirect price impact evidence.” Thus, the court's holding in Halliburton II allowing indirect evidence of a lack of price impact at class certification seemed entirely consistent with its holding in *Basic* allowing for any evidence severing the link between misrepresentation and price.

But the issue now concerning the Fifth Circuit — and possibly eventually the Supreme Court — is how to square two other Supreme Court cases — Halliburton I and *Amgen* — with *Basic* and Halliburton II.

In particular, the question is whether Basic's allowance for any evidence severing the link between misrepresentation and price and Halliburton II's allowance for indirect evidence of a lack of price impact combine to allow defendants at class certification to introduce evidence that a given disclosure was not corrective of an alleged misrepresentation to begin with.

The issue arises on Halliburton's third interlocutory appeal, this one of the district court's decision in August of this year that was nearly a clean sweep for Halliburton. The district court ruled, in light of Halliburton II, that Halliburton demonstrated a lack of price impact for five of six corrective disclosures. On the sixth disclosure — concerning an adverse judgment in an asbestos-related suit — the district court held that Halliburton failed to demonstrate a lack of price impact. According to the district court, a defendant at the class certification stage may not present evidence that a specific disclosure preceding a stock-price decline was not corrective of an alleged misrepresentation, because such arguments go to the merits of the claim, not the class prerequisites. Halliburton appealed.

While a three-judge panel of the Fifth Circuit unanimously agreed on Nov. 5, 2015, to allow Halliburton's third interlocutory appeal to proceed, Judge James L. Dennis penned a separate concurrence, expressing his view that the district court was correct. Judge Dennis elaborated on the tension among the Supreme Court's holdings in Basic, Halliburton I and II, and Amgen. Evidencing weariness for "a case that has remained in the class certification stage for thirteen years," Judge Dennis nonetheless agreed to allow the appeal to proceed in order to achieve "added clarity" on the question of just how much indirect evidence of price impact (or lack thereof) a defendant can present at class certification.

Judge Dennis expressed the view that the Supreme Court's 2011 decision in Halliburton I had already rejected the very argument that Halliburton now urges in its third interlocutory appeal, namely "that evidence that the relevant disclosure that preceded a decline in stock price is not linked to any alleged misrepresentation should be allowed" at class certification because such evidence is, after all, indirect price impact evidence.

Indeed, the Supreme Court in Halliburton I did reject the argument that "in order to invoke a rebuttable presumption of reliance, [plaintiffs] needed to prove that the decline in Halliburton's stock was because of the correction to a prior misleading statement." The Supreme Court characterized the rejected argument as relating to loss causation, which the court reiterated was not a precondition for invoking Basic's rebuttable presumption of reliance. In addition, Judge Dennis explained his view that Halliburton's argument is contrary to the Supreme Court's holding in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, where the court held that any question as to materiality of an alleged misrepresentation should be left to the merits stage because it does not bear on the predominance requirement in Federal Rule of Civil Procedure 23(b)(3).

While the court in Halliburton II held that defendants may introduce direct as well as indirect evidence of a lack of price impact to rebut the presumption of reliance at the class certification stage, Judge Dennis did not read Halliburton II to require a court to consider all evidence "somehow related to price impact" at class certification. To the contrary, Judge Dennis reasoned, the Supreme Court in Halliburton II 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." Consequently, according to Judge Dennis, Halliburton II "only allows defendants to introduce at the class certification stage evidence of a lack of price impact that Amgen does not otherwise preclude."

Whatever the Fifth Circuit does in round three, the case may be destined for yet another trip to the

Supreme Court. A holding in Halliburton’s favor could be significant. The district court’s August decision was already a win for Halliburton to the extent that the court devoted well over half of its 53-page opinion to dueling experts and event studies concerning price impact, ultimately holding for Halliburton on all but one disclosure. But that much of the district court’s decision was arguably a straightforward application of Halliburton II. For the Fifth Court to go further and allow evidence that a particular disclosure was not corrective would arguably be a broad interpretation of the “indirect” evidence allowed under Halliburton II and any evidence which “severs” allowed under Basic, or, according to Judge Dennis, a direct contradiction of the prohibitions in Halliburton I and Amgen.

Given the history of this case, Judge Dennis’s view that allowing yet another appeal will provide “added clarity” seems a bit optimistic. In any event, it may be several years before any clarity materializes.

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