Clients&FriendsMemo

Supreme Court to Weigh in on Presumption of Reliance in Securities Class Actions: Goldman Sachs v. Arkansas Teacher Retirement System

March 30, 2021

Introduction

On March 29, the United States Supreme Court heard oral argument in *Goldman Sachs Group, Inc., et al. v. Arkansas Teacher Retirement System, et al.*, No. 20-222. The closely-watched case raises a host of important issues concerning the substantive and procedural requirements for certifying a securities fraud class action. Most notably, the Court will clarify what evidentiary burden a defendant bears in attempting to rebut the "fraud on the market" presumption of reliance that permits claims asserted under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") to proceed as class (as opposed to individual) actions. While the Court has opined on this issue in past decisions, including in its seminal *Basic v. Levinson* decision in 1988,[1] which established the doctrine, and more recently in *Amgen*[2] and *Halliburton I & II*,[3] the lower courts have struggled to apply those rulings consistently.[4]

More broadly, the case implicates the challenges lower courts have faced in applying the Supreme Court's instruction that class action plaintiffs, whether in the Section 10(b) context or otherwise, "must affirmatively demonstrate" compliance with Federal Rule of Civil Procedure 23.[5] As the Court held in *Comcast* and *Wal–Mart*, the "Rule 'does not set forth a mere pleading standard.' Rather, a party must not only 'be prepared to prove that there are *in fact* sufficiently numerous parties,

1 485 U.S. 224 (1988).

2 *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013).

3 *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), 563 U.S. 804 (2011); *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258 (2014).

4 *See, e.g.*, Federal Securities Litigation and Regulation: A Periodic Review and Predictions for the Remainder of 2019, Cadwalader, Wickersham & Taft LLP (May 13, 2019), https://www.cadwalader.com/resources/clients-friends-memos/federal-securities-litigation-and-regulation-a-periodic-review-and-predictions-for-the-remainder-of-2019; 2017 Year in Review: Securities Litigation and Regulation, Cadwalader, Wickersham & Taft LLP (Jan. 4, 2018), https://www.cadwalader.com/resources/clients-friends-memos/2017-year-in-review--securities-litigation-and-regulation; 2016 Year in Review: Securities Litigation and Regulation, Cadwalader, Wickersham & Taft LLP (Jan. 13, 2017), https://www.cadwalader.com/resources/clients-friends-memos/2016-year-in-review--securities-litigation-and-regulation.

5 *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)," including that "questions of law or fact common to class members predominate over any questions affecting only individual members."[6] Importantly, the Court made clear that "such an analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'"[7]

The case also presents the Court with the opportunity to comment for the first time on the validity of the increasingly prevalent "inflation maintenance" theory. Under that theory, plaintiffs premise liability on the allegation that misstatements artificially "maintained" preexisting inflation caused by other (sometimes unidentified) misstatements. In particular, the Court will be confronted with the difficulties posed by such a theory when applied to the relatively general, aspirational statements regarding compliance and internal controls that are at issue in *Goldman*. According to Goldman, if these general statements—the type made by nearly every issuer—are sufficient to certify a securities class action, then class certification will be virtually automatic in any case in which a stock price declines on the heels of negative news, in this case the public announcement of a government enforcement action.[8] Even plaintiffs concede that it is appropriate for a court to consider evidence regarding the "generic" nature of the alleged misstatements at the class certification stage, albeit through expert testimony, not the court's "intuition."[9]

It would be difficult to overstate the importance of these issues to securities class action defendants. Denial of class certification likely results in the effective termination of the litigation because typically individual stockholders do not have a sufficient amount at stake or the necessary resources to continue to pursue the case. On the other hand, granting class certification dramatically increases a defendant's potential damages exposure and creates tremendous *in terrorem* pressure to settle at amounts arguably in excess of the legitimate value of the case. As Justice Scalia observed in dissent in *Amgen*, "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."[10] As a result, the Supreme Court's decision in *Goldman*, particularly its instructions regarding whether lower courts are required to adjudicate issues and evidence relevant to merits determinations at the class certification stage, may prove outcome-determinative in many future Section 10(b) class actions.

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6 *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal–Mart*, 564 U.S. at 350–51).

7 *Id.* at 33–34 (quoting *Wal–Mart*, 564 U.S. at 351).

8 Petitioner's Reply Br. 3, 18.

9 Respondents' Br. 26.

10 *Amgen*, 568 U.S. at 485 (Scalia, J., dissenting).

Background: Securities Fraud Class Actions and the *Basic* Presumption

The elements of a claim under Section 10(b) and Rule 10b-5 promulgated thereunder are well established. A plaintiff must prove: (i) a material misstatement or omission, (ii) scienter, (iii) a connection with the purchase or sale of a security, (iv) economic loss, (v) loss causation, and (vi) reliance.[11] To obtain class certification, plaintiffs must also satisfy the requirements of Federal Rule of Civil Procedure 23, including (for any action seeking damages) a showing that "questions of law or fact common to class members predominate over any questions affecting only individual members."[12]

Ordinarily, Section 10(b) plaintiffs would face a significant challenge in meeting this "predominance" requirement, as each putative class member may have purchased the security for different, individualized reasons, thereby precluding a finding of predominance due to the existence of individual issues of reliance. In *Basic v. Levinson*,[13] however, the Supreme Court recognized the "fraud on the market" theory of reliance that makes Section 10(b) class actions possible: when a stock trades in an efficient market, courts may presume that all investors rely on the integrity of the market price as reflecting all material public information, including any fraudulent statements. Where established, the *Basic* presumption alleviates plaintiffs' need to show reliance on a case-by-case basis, thus allowing adjudication as a class action.

To invoke the *Basic* presumption at the class certification stage, plaintiffs must establish that the alleged misrepresentation was public, that the stock traded in an efficient market, and that the plaintiffs traded sometime between when the misrepresentation was made and when the truth was revealed.[14] The Supreme Court has held that at class certification, plaintiffs need only meet these three requirements; they need not prove substantive elements of their claim—even those, such as materiality, that are relevant to the *Basic* presumption—if those elements are capable of resolution on a class-wide basis.[15]

Once plaintiffs have made a threshold showing that they are entitled to the *Basic* presumption, a defendant can rebut the presumption with any evidence that "severs the link" between the alleged misrepresentation and either the price paid by plaintiffs or their decision to trade at that price.[16] For

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[11] *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38 (2001).

[12] Fed. R. Civ. P. 23(b)(3).

[13] 485 U.S. at 225.

[14] *Halliburton II*, 573 U.S. at 268 (citing *Basic*, 485 U.S. at 248 n.27).

[15] *See Halliburton I*, 563 U.S. at 813; *Amgen*, 568 U.S. at 455. While materiality is necessary to invoke the *Basic* presumption, the Court has made clear that class members need not prove it prior to class certification. *See Halliburton II,* 573 U.S. at 282 (citing *Amgen*, 568 U.S. at 467).

[16] *Halliburton II*, 573 U.S. at 269 (citing *Basic*, 485 U.S. at 248).

example, a defendant could rebut the presumption by presenting "evidence that the alleged misrepresentation did not, for whatever reason, actually affect the market price"—in other words, an absence of so-called "price impact."[17] Absent price impact, the *Basic* presumption collapses, as plaintiffs could not rely on the integrity of the market price as incorporating the supposedly false information when they purchased or sold the security.[18] The Supreme Court has held that district courts should not "artificially limit" the types of rebuttal evidence a defendant may offer, even if such evidence "is also highly relevant at the merits stage."[19]

Increasingly, defendants seeking to rebut the *Basic* presumption must contend with plaintiffs' reliance on the "inflation maintenance" theory at issue in the *Goldman* case. Under that theory, plaintiffs allege that the purported misstatements at issue did not *introduce* inflation into a share price, but rather *maintained* preexisting, artificial price inflation deriving from some other source—even if that "other" source is not identified.[20] Imagine, for example, that a car maker with a sterling safety record has plans to release a new model. The market mistakenly believes, for unidentified reasons, that the model is safe. In fact, the car maker knows that the model has failed multiple safety tests, but nevertheless makes positive statements regarding its safety. When the truth is revealed, the stock price drops. Under an inflation maintenance theory, the manufacturer would be liable for securities fraud for artificially propping up the share price, even absent any evidence that the company's statements had caused the inflation in the first place.[21] Importantly, courts applying this theory have held that if a court finds a corrective disclosure caused a reduction in a defendant's

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[17] *Id.* Alternatively, defendants can rebut the presumption by showing that plaintiffs did not rely on the market price of the stock as an accurate measure of the stock's value, but instead relied on their own private method of valuation. *See, e.g.*, *GAMCO Invs., Inc. v. Vivendi*, S.A., 927 F. Supp. 2d 88, 101 (S.D.N.Y. 2013), *aff'd sub nom. GAMCO Invs., Inc. v. Vivendi Universal, S.A.*, 838 F.3d 214 (2d Cir. 2016) (plaintiffs were not entitled to the *Basic* presumption where the "metric that Plaintiffs used to determine the intrinsic value of [the stock] is completely independent of . . . market price").

[18] In *Halliburton II*, the Court held that plaintiffs seeking to invoke the *Basic* presumption need not directly prove that the defendant's statements had an effect on its share price, as *Basic*'s requirements are an "indirect proxy" for showing price impact. 573 U.S. at 278–79. "But an indirect proxy should not preclude . . . a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.* at 281–82. Thus, the Court reasoned that a defendant is entitled to rebut the *Basic* presumption through evidence showing that "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." *Id.* at 279–80. The Court also held that the fact that such evidence overlaps with an issue that goes to the elements of a Section 10(b) claim, *i.e.*, loss causation, does not preclude a court from considering such evidence at the class certification stage. *Id.* at 283.

[19] *Id.* at 283–84.

[20] *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016).

[21] *See id.* at 258. The Second, Seventh, and Eleventh Circuits have recognized the inflation maintenance theory. *See id.*; *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 418 (7th Cir. 2015); *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1316 (11th Cir. 2011).

share price, it can effectively "work backwards," and infer that the price was inflated by the amount of the reduction.[22]

Case History: The Decade-Long *Goldman* Class Certification Saga

The long-running dispute now before the Supreme Court dates back to 2010, when shareholders brought a putative class action in the Southern District of New York alleging that Goldman made material misstatements concerning its procedures for managing conflicts of interest. As defendants have observed throughout the litigation, the alleged misstatements at issue are fairly "generic," *i.e.*, the type of general, aspirational statements regarding compliance with law that nearly all issuers are bound to make at one time or another. For example, the statements include: "We have extensive procedures and controls that are designed to . . . address conflicts of interest;" "Our clients' interests always come first;" and "Integrity and honesty are at the heart of our business."[23] In a merits context, defendants would typically argue that such statements are, at most, vague and immaterial "puffery" that are not actionable under the securities laws.[24] It follows that such immaterial statements would not have any price impact, and therefore the fraud on the market theory should not apply.

Nonetheless, the shareholder plaintiffs in *Goldman* alleged that these statements were fraudulent because Goldman had conflicts of interest with respect to CDOs that it sold in 2006 and 2007. In 2010, Goldman's stock price fell after the SEC announced an enforcement action against it for fraud, alleging, among other things, that Goldman failed to disclose to CDO investors that a hedge fund, Paulson & Co., played a role in the asset-selection process for the "Abacus" CDO sponsored by Goldman, purposefully selecting risky mortgages that it hoped would fail, and thereby profiting Paulsen, which had taken a short position on the CDO.[25] The plaintiffs alleged that the SEC's announcement, along with the announcement of two other investigations into Goldman's conflicts of interest by the SEC and the DOJ, revealed the falsity of Goldman's prior general statements.

After the district court denied in part Goldman's motion to dismiss (rejecting its contention that the alleged misstatements now at issue before the Supreme Court were immaterial as a matter of law), plaintiffs moved for class certification, invoking the *Basic* presumption. Plaintiffs relied on the inflation maintenance theory, alleging that Goldman's prior statements regarding its controls

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[22] *See Vivendi*, 838 F.3d at 255 (citing *Glickenhaus & Co.*, 787 F.3d at 415).

[23] *In re Goldman Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2015 WL 5613150, at *1 (S.D.N.Y. Sept. 24, 2015).

[24] *See, e.g.*, *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at *36 (S.D.N.Y. Sept. 28, 2012) (alleged misstatements were "non-actionable puffery").

[25] Goldman ultimately reached a $550 million settlement with the SEC, at the time the largest-ever penalty paid by a Wall Street firm. Press Release, SEC, Goldman to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), https://www.sec.gov/news/press/2010/2010-123.htm.

artificially maintained an inflated stock price and that the enforcement announcements constituted corrective disclosures. The district court certified the class.[26]

On interlocutory appeal, the Second Circuit vacated the district court's order, holding that the court failed to apply the proper preponderance-of-the-evidence standard in determining whether Goldman had rebutted the *Basic* presumption, and failed to consider some of Goldman's evidence regarding the absence of price impact.[27]

On remand, Goldman sought to rebut the presumption by presenting expert testimony that its share price did not move in a statistically significant way on any of 36 dates—each prior to the announcement of the SEC enforcement action—on which the press reported on Goldman's conflicts of interest in the Abacus CDO and other transactions. A second defense expert testified that the stock price declines on the alleged corrective disclosure dates were caused by the announcements of government enforcement activity, not by any correction of the alleged misstatements.[28] Finally, a third defense expert testified that stock market prices are not impacted by such generic, ubiquitous statements in company communications.[29] Plaintiffs countered with their own expert. Weighing the evidence, the court concluded that Goldman had failed to rebut the *Basic* presumption by a preponderance of the evidence.[30]

On a second interlocutory appeal, a divided panel affirmed.[31] In doing so, the majority rejected Goldman's argument that the alleged misstatements were too general to maintain price inflation in an issuer's stock, characterizing Goldman's arguments as "really a means for smuggling materiality into Rule 23," and concluding that "[w]hile Goldman's test might weed out potentially unmeritorious claims, Rule 23 is not a weed whacker for merits problems."[32] The court noted that defendants could still challenge materiality on a motion to dismiss (as they had previously) or a motion for summary judgment.[33]

In dissent, Judge Sullivan criticized the majority's approach as "miss[ing] the forest for the trees" and "essentially turning the [*Basic*] presumption on its head."[34] In his view, Goldman had offered

[26] *Id.* at *8.

[27] *Ark. Teachers Ret. Sys. v. Goldman Grp., Inc.* (*ATRS I*), 879 F.3d 474, 484–85 (2d Cir. 2018).

[28] *See In re Goldman Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *3 (S.D.N.Y. Aug. 14, 2018).

[29] *Id.*

[30] *Id.* at *4.

[31] *Ark. Teachers Ret. Sys. v. Goldman Grp. Inc.* (*ATRS II*), 955 F.3d 254 (2d Cir. 2020).

[32] *Id.* at 267–68.

[33] *Id.* at 269.

[34] *Id.* at 275 (Sullivan, J., dissenting).

persuasive evidence that its stock price was "unaffected" by news reports of its alleged conflicts of interest, "thereby severing the link that undergirds the *Basic* presumption."[35] Judge Sullivan also faulted the majority for failing to consider the generic nature of the alleged misstatements in assessing whether the statements affected the market price: "Candidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact."[36] In his view, the generic nature of the statements provided the "obvious explanation" for the absence of a price decline in response to the new reports of the alleged conflicts, and the "mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper."[37]

Analysis: What's at Stake before the Supreme Court?

Formally, *Goldman* presents two questions before the Supreme Court. First, how should a court account for the "generality" of alleged misstatements in the Section 10(b) context? Second, does a defendant seeking to rebut the *Basic* presumption have only a burden of production, or does the defendant also bear the ultimate burden of persuasion?[38] Despite the seemingly narrow scope of these two questions presented, the case raises a number of issues with potentially far-reaching consequences for securities class-actions:

- ***First, at what stage of the litigation should the district court address a defendant's argument that alleged misstatements were too general to have affected the stock price?*** Goldman argues that at class certification, the generality of alleged misstatements is strong evidence that the statements did not have price impact, and thus an assessment of this issue is critical to a defendant's ability to rebut the *Basic* presumption.[39] The Second Circuit countered that statements that are truly immaterial will be weeded out on a motion to dismiss, and that defendants should not get a second bite at the materiality apple at class certification—not to mention an opportunity for interlocutory appeal at class certification.[40] While plaintiffs now seem to have conceded that some consideration of the generic nature of the alleged

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[35] *Id.*

[36] *Id.* at 278.

[37] *Id.*; *see also Halliburton II*, 573 U.S. at 283 (evidence of price impact may be relevant to class certification "even though such proof is also highly relevant at the merits stage").

[38] The *burden of production* is "a party's obligation to come forward with evidence to support its claim," while the *burden of persuasion* is a party's obligation to "persuade the trier of the facts . . . of the truth of a proposition which he has affirmatively asserted." *Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272–75 (1994).

[39] *See* Petitioner's Br. 26–27.

[40] *See ATRS II*, 955 F.3d at 269. Under Rule 26(f), a court of appeals may permit an interlocutory appeal from an order granting or denying class certification. By contrast, interlocutory appeal is generally not available with respect to a motion-to-dismiss ruling. And of course, no appeal will take place if the action settles following class certification. During oral argument, Justice Breyer drew attention to the interlocutory appeal issue, though he appeared to agree with the government that the availability of interlocutory appeal should not factor into the Court's decision.

misstatements is permissible at the class certification stage, the Supreme Court should be in a position to clarify this issue in *Goldman*.

- ***Second, will the Supreme Court attempt to square what could be viewed as inconsistencies between Comcast and Wal–Mart, on the one hand, and Amgen on the other?*** As explained above, *Comcast* and *Wal–Mart* arguably require consideration of the merits at the class certification stage where plaintiffs' proof "that there are in fact sufficiently numerous parties, common questions of law or fact, etc. . . . overlap[s] with the merits of the plaintiff's underlying claim."[41] In *Amgen*, however, the Court rejected the proposition that "proof of materiality is needed to ensure that the *questions* of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses."[42] *Goldman* could provide the Court with a vehicle to harmonize these two strains of its class action jurisprudence, as Justices Thomas, Kavanaugh, and Barrett indicated in their questioning at oral argument.
- ***Third, how does the court assess the significance of such "general" or "aspirational" statements—through expert testimony or its own "intuition"?*** Plaintiffs emphasize that while materiality turns on whether an alleged misstatement would have been considered significant by a reasonable investor,[43] price impact is an "empirical, context-dependent question," and thus must be determined by a court's weighing of expert testimony—not the court's own "intuition."[44] In contrast, Goldman argues that courts should not be required to "set aside common sense in addressing the Basic presumption" and turn a blind eye to the "simple" wisdom that the more generic a challenged statement, the less likely it is to have affected the price of a stock.[45] This is especially true where plaintiffs invoke the inflation maintenance theory, Goldman claims, because if the "generic nature of the alleged misstatement is off-limits, a court cannot critically evaluate whether the connection between the alleged misstatement and the alleged corrective disclosure supports an inference that the back-end price drop is evidence of front-end price inflation."[46]

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41 *Comcast*, 569 U.S. at 33.

42 *Amgen*, 568 U.S. at 467 (quoting Fed. R. Civ. P. 23(b)(3)). The Court provided two primary rationales for its holding. First, the court reasoned that because the materiality determination is "an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor . . . [it] can be proved through evidence common to the class." *Id.* Second, the Court found that "a failure of proof on the *common* question of materiality ends the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class." *Id.* at 468.

43 *See Basic*, 485 U.S. at 224.

44 Appellants' Br. 16.

45 Petitioners' Br. 27.

46 *Id.* at 22. As Goldman argues, "[i]t does not take a doctorate in econometrics to understand that exceptionally generic statements such as '[o]ur clients interests always come first' . . . very likely did not affect the stock price." Petitioners' Reply Br. 7.

- ***Fourth, when a defendant seeks to rebut the* Basic *presumption, who has the burden of persuasion with regard to price impact?*** Goldman argues that under Federal Rule of Evidence 301, while "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," the rule "does not shift the burden of persuasion, which remains on the party who had it originally."[47] Therefore, Goldman argues, defendants need only produce *some* evidence of no price impact, while plaintiffs bear the ultimate burden of persuasion. Plaintiffs respond that the *Basic* presumption would be rendered impotent if a defendant could rebut it merely by producing *any* evidence, no matter how weak, and in any event, the Supreme Court in *Halliburton II* has already declined to place the burden of proof of price impact on plaintiffs at class certification.[48] As highlighted during oral argument before the Supreme Court, this issue, while highly technical, could have important implications for how class certification is actually litigated. In particular, the Supreme Court may clarify whether plaintiffs may simply rest on the *Basic* presumption in the face of direct evidence of no price impact by defendants and, more realistically, how a district court should weigh the inevitable "battle of the experts" that will be presented on the price impact issue at class certification.
- ***Fifth, will the Supreme Court take this opportunity to weigh in on the debate over the validity of the "inflation maintenance" theory?*** Class-action plaintiffs have increasingly relied on the inflation maintenance theory; one estimate found that plaintiffs invoked inflation maintenance in 71% of recent district court cases involving the *Basic* presumption, and have successfully established price impact in all of those cases.[49] Though the validity of the theory is not formally at issue before the Court, Goldman argues that the Second Circuit's approach would render the *Basic* presumption effectively irrebuttable.[50] If plaintiffs are permitted to work backward from any price drop following an unanticipated event to allege fraud based on "generic statements that companies make all the time," Goldman claims, the Court will open the floodgates to a surge of litigation based on weak claims while equipping plaintiffs with enormous leverage to coerce defendants into settlements.[51] During oral argument, Justice Thomas took the point one step further, suggesting that the *Basic* theory might not even apply to the inflation

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[47] Petitioners' Br. 39 (quoting Fed. R. Evid. 301).

[48] *See Halliburton II*, 573 U.S. at 278–79.

[49] *See* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1077 (2019).

[50] Courts are already generally reluctant to find that defendants have rebutted the *Basic* presumption at class certification if plaintiffs make a threshold showing entitling them to it. *See, e.g.*, *Vizirgianakis v. Aeterna Zentaris, Inc.*, 775 F. App'x 51 (3d Cir. 2019); *Monroe Cnty Employees' Ret. Sys. v. Southern Co.*, 332 F.R.D. 370 (N.D. Ga. 2019); *Villella v. Chemical and Mining Co. of Chile, Inc.*, 333 F.R.D. 39 (S.D.N.Y. 2019); *Roofer's Pension Fund v. Papa*, 333 F.R.D. 66 (D.N.J. 2019).

[51] Petitioners' Br. 36.

maintenance theory in the first place. Given its importance, the Court may use this case as an occasion to opine on the inflation maintenance theory.

- ***Sixth, could the Court revisit the fraud on the market theory itself?*** In *Amgen*, both Justice Thomas (in his dissent)[52] and Justice Alito (in his one-page concurrence)[53] questioned the continuing vitality of *Basic*'s fraud-on-the-market presumption of reliance. According to Justice Alito, "recent evidence suggests that the [fraud-on-the-market] presumption may rest on a faulty economic premise" and that "reconsideration of the *Basic* presumption may be appropriate."[54] Justice Thomas likewise criticized *Basic* as "questionable," but indicated that the Court had not been "asked to revisit *Basic*'s fraud-on-the-market presumption" in *Amgen*.[55] Since *Amgen*, the Court's make-up has changed considerably, with Justices Gorsuch, Kavanaugh, and Barrett joining (replacing Justices Scalia, Kennedy, and Ginsburg). While an outright overruling of *Basic* in *Goldman*, where the issue is not squarely presented and was not raised in the briefing or oral argument, seems highly unlikely, the case may provide clues as to the receptiveness of a majority of the Court to eroding the fraud on the market presumption in future cases.
- ***Finally, despite the weighty issues implicated, it is possible that the Supreme Court may decide to leave those questions for another day in light of the unique procedural posture of* Goldman.** As the case has been presented to the Supreme Court, the parties significantly narrowed their arguments. As a result, they largely agree with the Second Circuit that district courts may consider the generic nature of alleged misstatements as relevant to price impact at class certification. Given this, and the fact that the *Goldman* class certification drama has been unfolding for half a decade, the Court may be content to let the class certification stage of the case finally "die" (as Justice Sotomayor put it during oral argument) without signaling any significant changes in the law. In that event, the Court likely would remand for further consideration in light of any guidance offered in its opinion.

Whatever the outcome, the Court's decision will likely have significant ramifications for future securities class actions. We will provide an update and analysis following the Supreme Court's decision.

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[52] *See Amgen*, 568 U.S. at 486 (Thomas, J., dissenting).

[53] *See id.* at 482 (Alito, J. concurring).

[54] *Id.* at 482–83.

[55] *Id.* at 489 n.4 (Thomas, J., dissenting).

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