Clients&FriendsMemo

Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System: Supreme Court Vacates Class Certification Order in Decade-Long Class Action, Clarifying That Courts May Consider the Materiality of Alleged Misstatements in Applying Fraud-on-the-Market Presumption

June 30, 2021

On June 21, 2021, the United States Supreme Court issued a decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*,[1] vacating a decision of the Second Circuit that affirmed certification of a securities fraud class action against The Goldman Sachs Group, Inc. The Court directed the Second Circuit to consider the "generic" nature of Goldman's alleged misrepresentations in assessing whether Goldman had successfully rebutted the fraud on the market presumption of reliance for purposes of plaintiff's claim under Section 10(b) of the Securities Exchange Act of 1934, and therefore, whether class certification is appropriate. In an opinion by Justice Amy Coney Barrett, the Court held that courts at class certification must consider "all evidence relevant to price impact," which is a prerequisite to invoking the fraud-on-the-market presumption afforded to plaintiffs in an efficient market, "regardless whether that evidence overlaps with materiality or any other merits issue." Because the Second Circuit's opinion left "sufficient doubt" as to whether it had "properly considered the generic nature of the alleged misrepresentations," the Court vacated and remanded the case to the lower court. A 6-3 majority of the Court also held that a defendant seeking to rebut the fraud-on-the-market presumption of reliance (also known as the *Basic* presumption) bears the burden of persuasion to show, by a preponderance of the evidence, that a misrepresentation did not in fact lead to a distortion of the price of a security.

The decision not only gives Goldman Sachs a renewed opportunity to defeat class certification in this long-running class-action suit; it also is likely to create a new front in the class certification battleground. Most notably, *Goldman* clarifies that the materiality of alleged misrepresentations is relevant to a showing of price impact, and a defendant is entitled to introduce materiality evidence to rebut the *Basic* presumption at the class certification stage—a conclusion that many courts rejected following the Supreme Court's prior decisions in *Halliburton* and *Amgen*. The decision's emphasis on the "generic" nature of the alleged misrepresentations in this case—and direction that

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[1] *Goldman Sachs Grp., Inc. v. Ark. Teachers Ret. Sys.*, No. 20-222, 594 U.S. ___ (2021).

the Second Circuit consider it in reviewing the district court's class certification decision—may lead to reversal of the district court's decision certifying the class action. Finally, although preserving the *Basic* presumption, *Goldman* confirms that plaintiffs and defendants are on nearly equal footing in establishing whether the presumption applies (through evidence of price impact or lack thereof), subject to a preponderance of the evidence standard. Accordingly, the battle over *Basic*—already one of the main events in securities class-action litigation—is likely to grow even more heated in *Goldman*'s wake.

Background[2]

To obtain class certification, plaintiffs must 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."[3] Ordinarily, plaintiffs bringing a Section 10(b) claim would face a significant challenge in meeting this "predominance" requirement: each putative class member may have purchased the security for different reasons, precluding a finding of predominance due to individualized issues of reliance, one of the elements of a Section 10(b) claim.[4]

In *Basic v. Levinson*,[5] 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, allowing adjudication as a class action. To invoke the *Basic* presumption a plaintiff must prove that: (1) the alleged misrepresentation was publicly known; (2) it was material (*i.e.*, significant to a "reasonable investor"); (3) the stock traded in an efficient market; and (4) the plaintiff traded the stock between the time the misrepresentation was made and when the truth was revealed.[6] These preliminary

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2 For a full discussion of the relevant background, see our Clients & Friends Memo previewing the case: *Supreme Court to Weigh in on Presumption of Reliance in Securities Class Actions:* Goldman Sachs v. Arkansas Teacher Retirement System.

3 Fed. R. Civ. P. 23(b)(3).

4 *Goldman*, slip op. at 4 (citing *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 462–63 (2013); *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258, 281–82 (2014)).

5 485 U.S. 224, 225 (1988).

6 *Goldman*, slip op. at 3 (citing *Halliburton II*, 573 U.S. at 268). The Court has held, however, that materiality need not be proven at class certification, which, as interpreted by lower courts, effectively absolved plaintiffs of directly demonstrating price impact at class certification. *See Halliburton II*, 573 U.S. at 282 ("Even though materiality is a prerequisite for invoking the *Basic* presumption, we held that it should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3).").

showings serve, at the class certification stage, as an "indirect proxy" for establishing that alleged misrepresentations affected stock price, *i.e.*, "price impact."[7]

Once plaintiffs have made this threshold showing, a defendant can rebut the presumption by demonstrating "that the misrepresentation in fact did not lead to a distortion of price," which may be accomplished by any showing that "severs the link" between the alleged misrepresentation and either the price paid by plaintiffs or their decision to trade at that price.[8] For example, a defendant could rebut the presumption by showing that "the alleged misrepresentation did not, for whatever reason, actually affect the market price"—in other words, an absence of "price impact."[9] As the Supreme Court has explained, there is no reason for a court to limit its review to indirect evidence of price impact adduced by the plaintiff seeking to invoke the *Basic* presumption; defendants may seek to rebut the presumption "through direct as well as indirect price impact evidence."[10]

Case History

This dispute dates back to 2010, when shareholders brought a putative class action against Goldman and certain of its executives in the Southern District of New York asserting claims for violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 thereunder. The plaintiffs alleged that, between 2006 and 2010, Goldman made misrepresentations concerning its procedures for managing conflicts of interest—including "[w]e have extensive procedures and controls that are designed to . . . address conflicts of interest" and "[i]ntegrity and honesty are at the heart of our business."[11] According to plaintiffs, the statements were fraudulent because Goldman had conflicts of interest with respect to collateralized debt obligations it sold in 2006 and 2007. Plaintiffs relied on the inflation-maintenance theory, alleging that Goldman's prior statements regarding its controls artificially maintained an inflated stock price and that announcements of an SEC enforcement action and investigations constituted corrective disclosures.

The plaintiffs moved to certify a class of investors who purchased Goldman stock between 2007 and 2010, invoking the *Basic* presumption. The district court initially certified the class.[12] On interlocutory appeal, the Second Circuit vacated the district court's order, holding that the lower 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

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7 *Halliburton II*, 573 U.S. at 281.

8 *Id.* at 269 (citing *Basic*, 485 U.S. at 248).

9 *Id.*

10 *Id.* at 283. In *Halliburton II*, the Court explained that "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.

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

12 *Id.* at *8.

regarding the absence of price impact.[13] On remand, the district court weighed both parties' expert testimony and fact evidence and concluded that Goldman had failed to rebut the *Basic* presumption by a preponderance of the evidence.[14] Once again on appeal to the Second Circuit, a divided panel affirmed.[15] 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."[16] In dissent, Judge Sullivan criticized 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."[17] On December 11, 2020, the Supreme Court granted certiorari.

The Supreme Court's Decision

Before the Supreme Court, Goldman challenged the Second Circuit's decision on two grounds: first, that the Second Circuit incorrectly held that the generic nature of Goldman's alleged misstatements was irrelevant to whether defendants successfully rebutted the *Basic* presumption by showing a lack of price impact; and second, that the court improperly assigned defendants the burden of persuasion of proving lack of price impact.

The "Generic" Nature of the Alleged Misstatements

Regarding the first issue, the Court recognized that the parties' dispute had "largely evaporated," with both sides conceding that district courts may consider the generic nature of alleged misstatements as relevant to the assessment of price impact at class certification.[18] The Court agreed, stating that courts "should be open to all probative evidence," even if that "evidence is also relevant to a merits question like materiality."[19] The Court explained that while "materiality and price impact are overlapping concepts and that the evidence relevant to one will almost always be relevant to the other," district courts "may not use the overlap to refuse to consider the evidence" at class certification.[20] Furthermore, the Court recognized that the "generic nature of a

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

[14] *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 CIV. 3461 (PAC), 2018 WL 3854757, at *4 (S.D.N.Y. Aug. 14, 2018).

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

[16] *Id.* at 267–68.

[17] *Id.* at 278 (Sullivan, J., dissenting).

[18] *Goldman*, slip op. at 6–7.

[19] *Id.* at 7.

[20] *Id.* at 7 n.2 (quoting *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 613 n.6 (7th Cir. 2020)).

misrepresentation often will be important evidence of a lack of price impact," especially in cases where plaintiffs rely on the inflation-maintenance theory. Where an earlier misrepresentation is generic, but the later corrective disclosure is specific, "it is less likely that the specific disclosure actually corrected the generic misrepresentation, which means that there is less reason to infer front-end price inflation—that is, price impact—from the back-end price drop."[21]

The Court held that the Second Circuit's opinion had left "sufficient doubt" about whether it had "properly considered the generic nature of the Goldman's alleged misrepresentations."[22] The Court remanded in order for the Second Circuit to "take into account *all* record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issues."[23]

The Burden of Persuasion

On the second issue, Goldman argued that, under Federal Rule of Evidence 301, plaintiffs should have borne the burden of persuasion on price impact because, once defendants produced some evidence of lack of price impact, the rule does "not shift the burden of persuasion, which remains on the party who had it originally."[24] The Court rejected the argument as contrary to *Basic* and *Halliburton II*, which were a "clear departure from [the] general rule" that "presumptions shift only the burden of production."[25] The Court explained that, in those cases, it made clear that defendants may rebut the presumption if they "*show* that the misrepresentation *in fact* did not lead to a distortion of price" by making "[a]ny *showing* that *severs the link* between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff."[26] The Court interpreted this precedent as having exercised the Court's authority under Rule 301 to change the customary burdens of persuasion to reassign the burden of persuasion to the defendant to prove a lack of price impact upon a prima facie showing by the plaintiff.[27]

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[21] *Id.* at 8.

[22] *Id.* at 8–9.

[23] *Id.* at 9. Justice Sotomayor—who at oral argument observed that it was perhaps time to let the class certification stage of the case finally "die"—wrote separately that while she agreed with the Court's answers to the questions presented, she dissented from the Court's judgment to vacate because she believes the Second Circuit properly considered the generic nature of Goldman's alleged misrepresentations, and "nothing in the Second Circuit's opinion misstates the law." *Id.* at 1–4 (Sotomayor, J., concurring in part and dissenting in part).

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

[25] *Goldman*, slip op. at 11 n.4.

[26] *Id.* at 10.

[27] *Id.* Rule 301 by its terms applies "unless a federal statute . . . provide[s] otherwise." The Court explained that in *Halliburton II* and *Amgen*, the Court exercised its authority to assign defendants the burden of persuasion "in establishing the *Basic* framework pursuant to the securities laws." *Goldman*, slip op. at 10.

Dissenting on this issue, Justice Gorsuch—joined by Justices Thomas and Alito—argued that the *Basic* presumption should operate like most other presumptions: while the burden of *production* may shift, the burden of persuasion remains on the party who had it originally, *i.e.*, plaintiffs.[28] Justice Gorsuch disputed the majority's interpretation of *Basic* and *Halliburton II*, arguing that "nothing in our prior decisions has ever placed a burden of persuasion on the defendant with respect to any aspect of the plaintiff 's case."[29] The majority disagreed with Justice Gorsuch's interpretation of the Court's precedent, explaining that the language in those cases imposed more than a mere production burden on defendants. Moreover, to hold otherwise would "effectively negate *Halliburton II* 's holding that plaintiffs need not directly prove price impact in order to invoke the *Basic* presumption": if a "defendant could defeat *Basic*'s presumption by introducing *any* competent evidence of a lack of price impact—including, for example, the generic nature of the alleged misrepresentations—then the plaintiff would end up with the burden of directly proving price impact in almost every case."[30]

Finally, the Court downplayed the significance of its holding on the burden of persuasion. The Court observed that in any event, the "allocation of the burden is unlikely to make much difference on the ground" because the district court's task is "simply to assess all the evidence of price impact."[31] Where both parties submit expert evidence on price impact, the Court explained, the burden of persuasion will "have bite" only when the district court finds the parties' evidence to be "in equipoise—a situation that should rarely arise."[32]

Implications

On the surface, the Court's holdings appear muted—affirming the Second Circuit's decision on one issue, and vacating and remanding for further consideration on the other. In fact, *Goldman* addresses several issues of considerable significance to securities litigants, including opening up a revitalized materiality-based defense for defendants seeking to rebut the *Basic* presumption at the class certification stage.

- ***Materiality Is Back at Class Certification***. A frequent point of contention in securities fraud cases is whether a misstatement or omission is material—that is, whether it would be "viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[33] Materiality, furthermore, is one of the threshold requirements for the *Basic*

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[28] *Id.* at 3 (Gorsuch, J., concurring in part and dissenting in part).

[29] *Id.* at 9 (opinion of the Court).

[30] *Id.* at 11.

[31] *Id.* at 11–12.

[32] *Id.* at 12.

[33] *Basic*, 485 U.S. at 231-32 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

presumption; a misrepresentation that is immaterial by definition would have no "price impact."[34] Nevertheless, following the trilogy of Supreme Court decisions in *Halliburton I* (2011), *Amgen* (2013), and *Halliburton II* (2014), courts typically did not permit defendants to argue materiality at class certification, including prohibiting the introduction of evidence relevant to materiality even if also directed at rebutting the *Basic* presumption at the class certification stage. The *Amgen* Court held that "materiality need not be proved prior to Rule 23(b)(3) class certification" because "a failure of proof on the issue of materiality . . . does not give rise to any prospect of individual questions overwhelming common ones,"[35] a view the Court reaffirmed in *Halliburton II*.[36] Numerous courts, including the Second Circuit, took these decisions at their word, holding flatly that "materiality . . . is not an appropriate consideration at the class certification stage"[37] and the *Basic* presumption "may not be indirectly rebutted by showing that the misrepresentation was immaterial."[38]

Goldman clarifies that *Halliburton II* and *Amgen* should not be construed as absolute prohibitions on the introduction of price impact evidence at class certification even if "the evidence is also relevant to a merits question like materiality."[39] Rather, courts "should be open to all probative evidence." Indeed, the Court recognized that materiality and price impact are "overlapping concepts," "evidence relevant to one will almost always be relevant to the other," and "a district court may not use the overlap to refuse to consider the evidence."[40] In other words, it remains true after *Goldman* that a defendant cannot directly argue that a statement was immaterial in seeking to defeat class certification; the Court's holding in *Amgen* to that effect remains good law. However, given its relevance to the price impact inquiry, a defendant may introduce the same evidence and argument for the purpose of severing the link between the alleged misrepresentation and the stock price.

The Court's holding is a significant win for Section 10(b) defendants. For almost a decade defendants have been barred from arguing materiality in attempting to rebut the *Basic* presumption, having to rest their case on statistical evidence such as "event studies" that purport to show lack of price impact. Now, however, materiality is sure to be a prime battleground. Following *Goldman*, we expect that defendants will argue routinely at the class certification stage that—in addition to statistical evidence—the nature of alleged misrepresentations defeats any inference of price impact. How courts handle these *Goldman*-

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[34] *See Amgen*, 568 U.S. 474.

[35] *Id.*

[36] *See Halliburton II*, 573 U.S. at 282.

[37] *ATRS I*, 879 F.3d at 486.

[38] *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 670 (S.D. Fla. 2014).

[39] *Goldman*, slip op. at 7 (quoting *Allstate Corp.*, 966 F.3d at 613 n.6).

[40] *Id.* at 7 n.2.

based arguments—and whether this turns out to be a boon for securities defendants—remains to be seen.

- ***Is* Goldman *a Stealth Reversal?*** Technically, the Court only vacated the Second Circuit's decision so that it may consider all record evidence relevant to price impact, including the generic nature of the alleged misrepresentations; it did not express a view on how the Second Circuit should resolve the matter.[41] Nevertheless, it is difficult to escape the conclusion that the majority was skeptical of the lower court's decision to certify the class. The majority quoted, for example, Judge Sullivan's dissent, where he concluded that "'the generic quality of Goldman's alleged misstatements, coupled with' Goldman's expert testimony, compelled the conclusion that Goldman proved a lack of price impact."[42] Further, the Court repeatedly characterized the alleged misstatements pled by the plaintiffs as "generic" in nature.[43] And the Court opined that "the generic nature of a misrepresentation often will be important evidence of a lack of price impact," particularly in cases such as this one based on inflation-maintenance theory.[44] That is because a necessary predicate is that the price drop equals the amount of inflation created by an earlier misrepresentation—an inference that "starts to break down" when "the earlier misrepresentation is generic" and "the later corrective disclosure is specific."[45]
- ***Courts May Assess the Significance of "General" or "Aspirational" Statements Using "All Evidence," Including Both Expert Testimony and Their Own Intuition***. In their briefing before the Supreme Court, plaintiffs emphasized that while materiality turns on whether an alleged misstatement would have been considered significant by a reasonable investor, 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."[46] In contrast, Goldman argued 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.[47] The *Goldman* opinion now makes clear that courts "may consider expert testimony and use their common sense in assessing whether a generic misrepresentation had a price impact," and indeed "'should be open to all probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense.'"[48]

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[41] *Id.* at 8-9.

[42] *Id.* at 6 (quoting *ATRS II*, 955 F.3d at 278–79 (Sullivan, J., dissenting)).

[43] *Id.* at 1, 2, 3, 8-9.

[44] *Id.* at 2.

[45] *Id.* at 8.

[46] Appellants' Br. 16.

[47] Petitioners' Br. 27.

[48] *Goldman*, slip op. at 7 (quoting *Allstate Corp.*, 966 F.3d at 613 n.6).

- ***Not a Ringing Endorsement of the Inflation-Maintenance Theory.*** Although accepting plaintiffs' inflation-maintenance theory for the purpose of the decision, the Court made a point that it "has expressed no view on its validity or its contours" and "[w]e need not and do not do so in this case."[49] Unlike a traditional fraud case, where the plaintiff alleges that the defendant's misstatements introduced inflation into a company's stock price, an inflation-maintenance theory hinges on "statements that merely maintain inflation already extant in a company's stock price, but do not add to that inflation."[50] Price impact, in turn, is shown when a corrective disclosure causes the artificial inflation to dissipate and the stock price to fall.[51] 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.[52] While lower courts have widely approved of the theory—including endorsements by the Second, Seventh, and Eleventh Circuits[53]—some district courts have expressed skepticism of the theory as unduly speculative.[54] The Supreme Court's refusal to take a definitive stand in *Goldman* means that debate over the propriety of inflation-maintenance theory and its specific contours will continue to percolate in the lower courts.
- ***The Court Preserves the* Basic *Presumption—at Least for Now.*** *Goldman* holds that, to rebut the *Basic* presumption, the defendant "bears the burden of persuasion to prove a lack of price impact" and "must carry that burden by a preponderance of the evidence."[55] In what Justice Gorsuch describes in dissent as a "curious disavowal," the majority attempts to downplay the significance of this holding, explaining that in most cases the parties will submit competing evidence on price impact and the court will assess the evidence and "determine

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[49] *Id.* at 5 n.1.

[50] *Waggoner v. Barclays PLC*, 875 F.3d 79, 104 (2d Cir. 2017); *see also In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016).

[51] *In re Chi. Bridge & Iron Co. N.V. Sec. Litig.*, No. 17-1580, 2019 WL 5287980, at *21 (S.D.N.Y. Oct. 18, 2019).

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

[53] *Waggoner*, 875 F.3d at 104 (recognizing that the plaintiffs were relying on a price maintenance theory, "which we have previously accepted"); *Glickenhous & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 419 (7th Cir. 2015) (recognizing that a plaintiff can rely on a price maintenance theory); *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1316 (11th Cir. 2011) ("Defendants whose fraud prevents preexisting inflation in a stock price from dissipating are just as liable as defendants whose fraud introduces inflation into the stock market in the first instance.").

[54] *See, e.g.*, *Credit Suisse First Boston Corp. (Lantronix Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008) ("price maintenance theory is patently deficient," because "Rule 23 determinations must be based on 'relevant facts' "); *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 4:08CV0160, 2018 WL 3861840, at *18 (N.D. Ohio Aug. 14, 2018) ("Lead Plaintiff cannot meaningfully argue that the misrepresentations artificially maintained the price of the stock until risks materialized, as that argument proves too much at the class certification stage, where OPERS has the burden of persuasion as an evidentiary matter. . . . A theory that statements maintained an inflated stock price is not evidence that can refute otherwise overwhelming evidence of no price impact.").

[55] *Goldman*, slip op. at 11.

whether it is more likely than not that the misrepresentations had a price impact."[56] The burden of persuasion will only "bite" when the court finds the evidence in "equipoise"—a situation that "should rarely arise."[57]

But in adopting this rule, the Court makes clear that the *Basic* presumption is no ordinary presumption. As Justice Gorsuch explains, presumptions typically evaporate upon the opposing party's production of evidence that, if "taken as true," would "permit the conclusion" that the presumption in plaintiff's favor is "mistaken."[58] Applied here, that means all a defendant would have to do to rebut the *Basic* presumption would be to produce "any competent evidence of a lack of price impact,"[59] at which point the presumption would "drop from the case" and the "trier of fact" would proceed to "decide the ultimate question."[60] In rejecting such an approach, under the rule adopted by the majority, the *Basic* presumption acts more like an evidentiary standard on price impact—tilted ever so slightly in favor of plaintiffs—rather than a "presumption" in any traditional sense.

The *Basic* presumption has been subject to significant criticism since it was first articulated in 1988. Indeed, Justices Thomas and Alito—who joined Justice Gorsuch's dissent in *Goldman*—have previously called for abrogation of the rule, explaining that the "view of market efficiency" embodied in *Basic* "has since lost its luster."[61] Rather, "even 'well-developed' markets (like the New York Stock Exchange) do not uniformly incorporate information into market prices with high speed."[62] To date, the Court has refused to overrule *Basic*. Nevertheless, and perhaps in tacit recognition of these critiques, the Court now gives plaintiffs and defendants almost equal footing in proving or disproving the validity of the presumption in a given case. In the wake of *Goldman*, the battle over *Basic* is certain to remain a critical and fiercely contested event in putative securities class actions.

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[56] *Id.* at 12.

[57] *Id.*

[58] *Id.* at 3–5 (Gorsuch, J., dissenting).

[59] *Id.* at 9.

[60] *Id.* at 3.

[61] *Halliburton II*, 573 U.S. at 290 (Thomas, J., dissenting); *see also Amgen*, 568 U.S. at 482-83 ("[M]ore recent evidence suggests that the presumption may rest on a faulty economic premise. . . . In light of this development, reconsideration of the *Basic* presumption may be appropriate.") (Alito, J., concurring).

[62] *Id.*

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