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Abstract

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I. INTRODUCTION

Investors in publicly traded companies who believe they have been defrauded by corporate managers have a limited set of private remedies available to them. One of the most significant is to file lawsuit under Section 10(b) of the Securities Exchange Act.[1] However, these cases are time-consuming and expensive to prosecute, and only a handful of investors are likely to experience losses significant enough to justify the expense on their own. For that reason, claims alleging open-market frauds—frauds accomplished via public announcements designed to affect trading in a developed market—are usually brought as class actions. Indeed, when the opt-out class action device was added to the federal rules of civil procedure in 1966, the Advisory Committee notes suggested that open-market securities fraud cases were among the types of claims the Committee expected would be facilitated.[2]

In many ways, Section 10(b) claims for open-market fraud are exceptionally well-suited for class treatment, because the misconduct will be common for all traders, and the logistical difficulties of litigating claims individually are likely to render a class action "superior to other available methods for fairly and efficiently adjudicating the controversy."[3] The main sticking point, however, is the element of reliance: Section 10(b), like many fraud causes of action, requires proof that the misconduct caused the investors' injuries, and, traditionally, this has been established by showing that the investors relied upon, and were misled by, the fraud when making an investment decision.[4] But each investor is likely to have received different information, and made different judgments about it, creating individualized issues that could be fatal to class treatment.

In 1988, the Supreme Court appeared to solve this problem by endorsing the "fraud-on-the-market" presumption that false, material information affects stock prices, thereby creating a common mechanism by which a fraud can be shown to have impacted all traders in a similar fashion.[5] But even as *Basic* facilitated the modern securities class action, suspicions about abusive litigation festered. Congress stepped in with new restrictions on securities actions,[6] and courts adopted increasingly restrictive interpretations of the substantive prohibitions of Section 10(b).[7] Even then, concerns regarding the "vexatiousness"[8] of securities class actions persisted. After the federal rules of civil procedure were amended to permit interlocutory appeal of class certification decisions, appellate courts began applying increasing scrutiny to these

[1] 15 U.S.C. § 78j(b).
[2] FED. R. CIV. P. 23 (Advisory Committee's notes on the 1966 amendments) ("a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class").
[3] FED. R. CIV. P. 23(b)(3).
[4] Eckstein v. Balcor Film Inv'rs, 8 F.3d 1121, 1129 (7th Cir. 1993).
[5] Basic Inc. v. Levinson, 485 U.S. 224 (1988).
[6] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act, Pub. L. No. 105-353, 112 Stat. 3227 (1998).
[7] *E.g.*, Janus Capital Grp. v. First Derivative Traders, 564 U.S. 135 (2011); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).
[8] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975).

determinations as well[9] and, in particular, to plaintiffs' ability to establish their entitlement to the fraud-on-the-market presumption so as to establish that common issues would predominate over individualized ones,[10] culminating in multiple trips to the Supreme Court.

Unfortunately, the Court's pronouncements on the subject have been, at times, both illogical and internally contradictory, leaving lower courts with little guidance as to how to proceed. As a result, today's Section 10(b) class certification proceedings resemble nothing so much as a full-blown merits adjudication—precisely what courts are supposed to avoid at the Rule 23 stage. Though it may be possible to tweak the doctrine to make it more consistent, the more fundamental flaw has been the underlying judicial assumption that the fraud-on-the-market presumption—the legal basis for classwide treatment of Section 10(b) claims—should be tested at the class certification stage in the first place. In fact, as this Essay will demonstrate, fraud-on-the-market claims should be viewed as a distinct cause of action, whereby the failure of proof does not create individualized issues, but simply causes plaintiffs to lose on the merits. Viewed through that lens, there is no reason to adjudicate the applicability of the fraud-on-the-market presumption as part of the process of certifying a class.

II. A Brief History of Fraud on the Market

Section 10(b) of the Securities Exchange Act, and Rule 10b-5 promulgated thereunder, prohibit fraud in connection with securities transactions. As far back as 1946,[11] courts have permitted private plaintiffs, as well as government enforcers, to bring claims under the federal securities laws. Initially, courts analogized claims under Section 10(b) to common law fraud, and required plaintiffs to prove similar elements, including the existence of a material false representation, and a causal connection to the plaintiff's injuries.[12] The causal connection would typically be demonstrated with a showing that the plaintiff had relied on the defendant's fraud when transacting,[13] and, further, that it was the defendant's misstatements or omissions (rather than some intervening event) that triggered the plaintiff's losses.[14] Courts could be quite demanding when it came to the reliance requirement, often requiring that plaintiffs show that their reliance had been "justifiable," which could involve an inquiry into whether they had exercised due diligence in researching the investment.[15]

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[9] West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002); Hevesi v. Citigroup Inc., 366 F.3d 70, 79–80 (2d Cir. 2004).

[10] *See* Margaret V. Sachs, *Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market*, 48 U.C. Davis L. Rev. 1207 (2015).

[11] Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

[12] Theresa A. Gabaldon, *Unclean Hands and Self-Inflicted Wounds: The Significance of Plaintiff Conduct in Actions for Misrepresentation under Rule 10b-5*, 71 Minn. L. Rev. 317, 319–20 (1986).

[13] *Id.* at 319–20.

[14] Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974); *see also* Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811, 816 (2009).

[15] Gabaldon, *supra* note 12, at 323–25

Over time, however, courts' view of the reliance element shifted. To begin, in 1976, the Supreme Court made clear that Section 10(b) could be violated only by intentional, or at least reckless, conduct,[16] after which notions of contributory negligence seemed inappropriate.[17] Additionally, once it became clear that Section 10(b) claims did not require privity between the plaintiff and defendant, Section 10(b) claims became more commonplace with respect to open-market frauds.[18] In that context, an explicit reliance requirement seemed out of place with the affirmative disclosure regime of the federal securities laws.[19] Courts either found ways to relax the requirement, or dodge it altogether, both in the context of securities class actions and in the context of individual claims for relief.[20]

The trend culminated in *Basic Inc. v. Levinson*,[21] where the Supreme Court endorsed the fraud-on-the-market doctrine as a mechanism by which open-market investors could satisfy the element of reliance. The doctrine consists of two separate presumptions that benefit open-market purchasers: first, that in an "open and developed market," securities prices will reflect all public, material information,[22] and second, that investors who trade at market prices do so in "reliance" on that price as a reflection of the security's value.[23] The combination of a subjective reliance on market prices, coupled with the expectation that the price itself is tainted by fraud, would now suffice to prove reliance (and causation) for Rule 10b-5 claims. The Court made clear that these presumptions were just that—they could be rebutted by appropriate evidence, including evidence that the fraud had not impacted stock prices after all, or that the distortionary effects of the fraud had dissipated prior to the plaintiff's purchase.[24] Since *Basic*, the Supreme Court has clarified that the Section 10(b) cause of action requires plaintiffs to prove six elements: a material misrepresentation, made with scienter, in connection with a securities transaction, economic loss, and loss causation.[25]

Though the fraud-on-the-market presumptions are available to all investors who bring Section 10(b) claims based on open-market purchases, even ones who sue individually,[26] they are more commonly associated with class actions. To bring cases on behalf of a class of similarly affected investors, plaintiffs must satisfy Federal Rule of Civil Procedure 23, which requires that common issues among class members "predominate" over individual ones.[27] That predominance requirement may be difficult or impossible to meet if each investor must prove how the fraud affected his or her trading decisions, but the fraud-on-the-market doctrine transforms what would otherwise be individualized issues of reliance into generalized issues regarding the fraud's

[16] Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Spectrum Fin. Cos. v. Marconsult, 608 F.2d 377, 381 (9th Cir. 1979).
[17] *See, e.g.*, Teamsters Local 282 Pension Fund v. Angelos, 762 F.2d 522 (7th Cir. 1985).
[18] Donald C. Langevoort, *From* Texas Gulf Sulphur *to* Chiarella*: A Tale of Two Duties*, 71 SMU L. REV. 835 (2018).
[19] Jill E. Fisch, *The Trouble with* Basic: *Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895, 901 (2013) [hereinafter Fisch, *Trouble*].
[20] *Id.* at 901; *see also* List v. Fashion Park, Inc., 340 F.2d 457, 462–64 (1965).
[21] 485 U.S. 224 (1988).
[22] *Id.* at 247.
[23] *Id.*; *see also* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 160 [hereinafter Langevoort, Basic *at 20*].
[24] *Basic*, 485 U.S. at 248–49.
[25] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014).
[26] *See, e.g.*, Black v. Finantra Cap., Inc., 418 F.3d 203, 209 (2d Cir. 2005).
[27] FED. R. CIV. P. 23(b)(3).

impact on the market, thus facilitating class certification. And there are certainly reasons why, from a policy perspective, facilitating class actions may be beneficial: securities actions are expensive to litigate, and absent the class action mechanism, investors with relatively smaller holdings will not be incentivized to pursue even meritorious claims; additionally, absent the threat of class actions, bad actors may not be sufficiently deterred from committing fraud in the first place. But by endorsing the fraud-on-the-market doctrine, the *Basic* Court put its stamp of approval on a cause of action that may be viewed as *substantively* distinct both from its common law antecedents and even from reliance-based conceptions of Section 10(b).[28]

Nonetheless, *Basic* and the fraud-on-the-market doctrine are usually discussed in terms of their procedural significance, the consequence of which has been decades of disputes over whether and to what extent *Basic*'s application should be litigated at the certification phase of a securities class action. There is no question that, at trial (or even at summary judgment), plaintiffs will have to establish the prerequisites necessary to win the fraud-on-the-market presumptions (publicity, materiality, market efficiency, and trades between the fraud and its revelation to the market[29]), and that defendants will—also at trial or summary judgment—be permitted to offer evidence in rebuttal.[30] But a recurring question—one that the Supreme Court has revisited four times in ten years—is whether these disputes must additionally be litigated at the class certification phase, where a judge—sitting without a jury—must make a determination that it is more likely than not that common issues predominate over individualized ones.[31]

A. Round I—Erica P. John Fund, Inc. v. Halliburton Co.

In the years following *Basic*, lower courts were frequently called upon to determine whether plaintiffs seeking class certification in a securities action had satisfied the prerequisites necessary to entitle them to the fraud-on-the-market presumptions.[32] Courts explained that such an inquiry was necessary because, if investors could not prove reliance via market prices, the trial would necessarily devolve into individualized inquiries regarding each investor's reasons for trading, and common issues would no longer predominate.[33]

That situation continued until, in a pair of cases, *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*,[34] and *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*,[35] the Fifth Circuit raised the bar for plaintiffs seeking class certification under a fraud-on-the-market theory, in two distinct ways. First, instead of awarding plaintiffs a *presumption* that material information would impact prices in open-market settings, the Fifth Circuit held that plaintiffs would have the initial burden of establishing that a particular fraud had affected prices.[36] Second,

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[28] As Jill Fisch explained, "A market-based approach to 10b-5 liability leads to a dramatic shift in the conceptualization of the plaintiffs' harm." Fisch, *Trouble*, *supra* note 19, at 916; *see also id.* at 929 ("reliance is simply inconsistent with the theory on which FOTM is based").
[29] Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 471–72 (2013).
[30] *Basic*, 485 U.S. at 249 n.29.
[31] Teamsters Local 445 Freight Div. Pension Fund v. Bombadier, 546 F.3d 196, 202 (2d Cir. 2008).
[32] Langevoort, Basic *at 20*, *supra* note 23, at 167.
[33] *E.g.*, Unger v. Amedisys, Inc., 401 F.3d 316, 322 (5th Cir. 2005).
[34] 487 F.3d 261 (5th Cir. 2007).
[35] 597 F.3d 330 (5th Cir. 2010), *rev'd*, Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011).
[36] *Id.* at 335.

the Fifth Circuit held that plaintiffs would be able to meet that burden only if they *either* demonstrated that stock prices rose in response to the initial fraud,[37] *or* if they demonstrated that stock prices fell upon disclosure of the truth, a phenomenon the court equated with the separate element of loss causation,[38] i.e., the requirement that plaintiffs demonstrate that the misstatements and omissions resulted in financial harm. The Fifth Circuit reasoned that "the efficient market doctrine facilitates an extraordinary aggregation of claims. We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater showing of loss causation to sustain certification."[39]

These decisions created problems for plaintiffs for two reasons. First and most obviously, they reversed the burdens of *Basic*: now, instead of presuming price impact and requiring defendants to rebut that showing, plaintiffs would be expected to prove price impact in the first instance. But second, the requirement that plaintiffs use *price movement* to demonstrate impact threatened to create nearly insurmountable burdens in a large number of cases.

To understand why, one must consider the typical securities class action. In many if not most cases, the defendants do not begin by inventing falsely positive news out of thin air; instead, defendants make good faith, optimistic statements about the company's future. It is only once reality disappoints that defendants lie to conceal the failure. In these cases, then, the lie is not so much intended to lift stock prices as to maintain the market's existing rosy view of the company's potential; the lie is engineered to keep stock prices from falling, rather than to boost them upward.[40] As a result, there is no detectable price reaction to the initial fraud, and this mechanism for proving price impact is likely unavailable to plaintiffs, leaving them to prove price impact with a showing that the stock prices declined upon disclosure of the truth.

But what truth? In every securities action, there is some disclosure of negative corporate news, followed by a stock price drop; after all, without a stock price drop, there are no damages for plaintiffs to collect, and no point to bringing a lawsuit. Thus, in order to prove price impact under the Fifth Circuit's test, the plaintiffs would have to prove that the drop was triggered by a "corrective disclosure," namely, a "correction to a prior misleading statement."[41]

As it turns out, however, frauds are often not revealed to the market so simply, a problem that many courts had encountered previously in the context of loss causation, that is, the element of a Section 10(b) claim that requires plaintiffs to establish that the fraud was the proximate cause of their economic harm. For example, suppose a company lies about the functionality of a

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[37] *Id*.
[38] *Id.* at 336–37; *Oscar Private Equity*, 487 F.3d at 265. As the court explained, plaintiffs would have to prove "(1) that the negative 'truthful' information causing the decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline." *Oscar Private Equity*, 487 F.3d at 266 (quoting Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 666 (5th Cir. 2004)).
[39] *Oscar Private Equity*, 487 F.3d at 267.
[40] Merritt B. Fox, Halliburton II: *It All Depends on What Defendants Need to Show to Establish No Impact on Price*, 70 BUS. LAW. 437, 441 (2015); Schleicher v. Wendt, 618 F.3d 679, 683–84 (7th Cir. 2010); FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1290–91 (11th Cir. 2011); *In re* Vivendi, S.A. Sec. Litig., 838 F.3d 223, 232 (2d Cir. 2016).
[41] *Halliburton*, 597 F.3d at 336.

new product, thus introducing artificial inflation into the stock price. Over time, as customers discover the product's flaws, sales dry up. The company announces the poor sales figures, resulting in a stock price drop. At no point has there been any announcement that corrects the earlier lie; indeed, at this point, investors may not even be aware they have been misled. Even if the truth is eventually revealed at a later date, by now, it has no continuing relevance; the product may have been fixed, or discontinued, and thus any stale lies about its qualities have little ongoing relevance.[42] Yet one would be hard pressed to say that investors' losses—triggered by the poor sales figures, which themselves were directly traceable to the condition the fraud was designed to conceal—were not proximately related to the fraud.[43] The fraud, in other words, was "the cause of the transaction's turning out to be a losing one."[44]

As a result, many (though not all) courts have recognized that price drops in reaction to "corrective disclosures" are only one method of proving the element of loss causation, i.e., that the fraud triggered economic losses for investors. Alternatively, plaintiffs may prove loss causation by demonstrating that a risk concealed by the fraud, or portrayed as unlikely, materialized, triggering a stock price drop.[45] In the above hypothetical, then, the lie about product functionality can be said to have concealed a risk that the product would be rejected by customers, and it was that risk that materialized in the form of poor sales.

Notably, though, materialization of the risk cases shed little light on whether the initial false statement caused the stock to be artificially inflated; indeed, they frequently involve disclosure of bad news that goes well beyond the initial lie, and that would have caused a stock price drop regardless of any fraud, a phenomenon known as "overdisclosure."[46] For example, a company might lie about its chances of receiving FDA approval of a new drug; the market believes there is an 80 percent chance of approval, when in fact the chances are closer to 30 percent. As a result, the company's stock price is artificially inflated. When approval is denied—thus, in hindsight, establishing that the chances of approval are zero—the stock price falls.[47] That bad news would have caused a price drop even had the company told the truth at the outset; investors were nonetheless defrauded, because they were led to believe the risks of nonapproval were more remote than they actually were, and paid for their stock accordingly. For sure, in such a case, the *damages* that investors may collect might be limited to the difference between an 80 percent chance of approval and a 30 percent chance of approval—more on that point below[48]—but it would be difficult to claim that the fraud had not resulted in *some* loss to investors.

Thus, the Fifth Circuit's proposed rule threatened to turn most class certification disputes into an argument about whether the disclosure that triggered the stock price drop was the "right"

[42] This is, roughly, the fact pattern in *In re Oracle Corp. Securities Litigation*, 627 F.3d 376 (9th Cir. 2010), where the court found plaintiffs had introduced insufficient evidence of loss causation to survive summary judgment.
[43] *See* RESTATEMENT (SECOND) OF TORTS § 435 (1965) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.").
[44] Bastian v. Petren Res. Corp., 892 F.2d 680, 684 (7th Cir. 1990).
[45] Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005); *see also* Ann M. Lipton, *Fact or Fiction: Flawed Approaches to Evaluating Market Behavior in Securities Litigation*, 20 TENN. J. BUS. L. 741, 753–60 (2019) [hereinafter Lipton, *Fact or Fiction*].
[46] Bradford Cornell & James C. Rutten, *Collateral Damage and Securities Litigation*, 2009 UTAH L. REV. 717.
[47] Jill E. Fisch, *Cause for Concern*: *Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 849 (2009).
[48] *See infra* Part IV.B.2.

kind of disclosure, namely, whether it specifically corrected defendants' prior misstatements—"wrong" disclosures, even if proximately caused by the fraud, would be insufficient. As a result, the rule would permit class actions to proceed only on a fairly limited set of fact patterns—and because corporate management controls how information is disseminated, the Fifth Circuit's test would make it trivially easy for defendants to avoid liability with strategically crafted communications.

The Fifth Circuit's reinterpretation of fraud on the market eventually reached the Supreme Court in *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*),[49] where the Court quickly dispensed with the notion that plaintiffs, rather than defendants, bear the burden of proof with respect to price impact. Instead, reaffirming *Basic*, the Court held:

> It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. 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 misrepresentations were made and the time the truth was revealed." . . . [W]e have never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance.[50]

Though the Court fixated, to some extent, on the Fifth Circuit's use of the term "loss causation," rather than "price impact,"[51] its logic made clear that the evidence the Fifth Circuit was demanding—a price decline in response to a corrective disclosure—would shed little light on the separate issue of whether the fraud had impacted prices at the time of investment:

> The Court of Appeals' requirement is not justified by *Basic* or its logic. . . . The fact that a stock's price on the date of purchase was inflated because of a misrepresentation does not necessarily mean that the misstatement is the cause of a later decline in value. We observed that the drop could instead be the result of other intervening causes. . . .
>
> The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory.[52]

Note the critical role here played by the burden of proof. In a world where plaintiffs have the burden to prove price impact in the first instance, it may be logical (if unduly narrow) to require that they demonstrate price movement in response to relevant information (i.e., that the

[49] 563 U.S. 804 (2011).
[50] *Id*. at 811–12. Indeed, the defendants in *Halliburton I* even conceded that the Fifth Circuit had erred by reversing the burdens of proof. *See id.* at fn *.
[51] The Court rejected the argument that the Fifth Circuit had been using "loss causation" to mean price impact, *Halliburton I*, 563 U.S. at 814, while at the same time accepting the Fifth Circuit's definition of loss causation to mean a "decline" in stock price "because of the correction to a prior misleading statement" that "could not otherwise be explained by some additional factors revealed then to the market," *id.* at 812.
[52] *Id*. at 812–13 (citations and quotations omitted).

stock price reacted to the initial fraud, or to its correction). Such a rule may be underinclusive, in that it would disallow many claims in which frauds did, in fact, impact the market in a manner that was felt by all traders (as in the FDA and faulty product examples above), but the cases that would fall within its scope would be ones where the evidence of price impact was fairly compelling.

But in a world where price impact is *presumed* due to the fraud-on-the-market doctrine, such that defendants have the burden to *rebut* the inference that prices were affected, the fact that stock prices later fall in response to different, noncorrective information does not add anything to the inquiry. Stock prices rise and fall all the time; it would be shocking if stock prices did not react to negative information, corrective of frauds or not. Such evidence, as the Supreme Court recognized in *Halliburton I*, is simply orthogonal to the question whether prices were impacted in the first place. It may be the case that the fraud was *never* corrected—perhaps the artificial inflation never left the stock or, as the Supreme Court observed, perhaps the company was critically damaged due to an intervening event that rendered the fraud irrelevant (like, a lightning strike that destroys inventory whose qualities had previously been falsely described to the market). In these scenarios, the plaintiffs will surely lose at trial—on the merits of their claims—for failure to demonstrate loss causation.[53] But they will do so as a class; the lack of loss causation is not a problem that creates individualized issues of reliance such that a failure of proof is appropriate to consider at class certification.[54]

B. Round II—Amgen Inc. v. Conn. Ret. Plans & Trust Funds

Just two years later, the Supreme Court once again granted certiorari to determine how *Basic* would apply at the class certification stage.

As above, the fraud-on-the-market doctrine affords plaintiffs a presumption that material information—defined as information "a reasonable investor" would consider "significant"[55]—is incorporated into stock prices. The question presented in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*[56] was whether defendants would be permitted to contest materiality at class certification. Since *Basic* only permits a presumption of price impact for *material* information, the defendants in *Amgen* claimed that plaintiffs should be required to prove (or defendants entitled to rebut) that any misstatements were material, before a class could be certified predicated on the fraud-on-the-market theory. The Supreme Court rejected the argument, reasoning that materiality—in addition to being a prerequisite for fraud-on-the-market theory—is also an independent element of a Rule 10b-5 action, and one that is common to the class. As a result, a failure of proof on the element of materiality "would not cause individual reliance questions to overwhelm the questions common to the class. Instead, the failure of proof on the

[53] One might reasonably argue that if a company lies about its financial condition, and then an intervening event causes the stock to lose all value, investors have suffered a fraud-related loss at least to the extent they paid more for the stock than it was worth, and that portion of their investment has now vanished. However, courts have rejected this interpretation of the loss causation requirement; instead, they require that the stock price drop itself be related to the fraud. *See* Lipton, *Fact or Fiction*, *supra* note 45, at 755.
[54] *See* Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010) (explaining that at class certification, courts may only entertain merits issues that bear on plaintiffs' ability to satisfy the requirements of Rule 23).
[55] Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988).
[56] 568 U.S. 455 (2013).

element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate."[57]

The Supreme Court was untroubled by the precise nature of the argument the *Amgen* defendants were making under the guise of "materiality." Defendants did not contend that their misstatements were inherently of little interest to investors, either on their own or read in context with other generally available information. Instead, defendants contended that truthful information had been disseminated among sophisticated investors who, by their trading patterns, would have mitigated any price impact that would otherwise have been caused by the initial lie[58]—an argument known as the "truth-on-the-market" corollary to the "fraud-on-the-market" doctrine.[59] "Truth on the market" is subtly different from a pure question of materiality because it does not necessarily examine the "total mix of information" available to *all* investors; instead, it posits that truthful information—even if available to only a *select* set of investors—may nonetheless have marketwide effects.[60] "Truth on the market," as a doctrine inherently about price impact, is therefore relevant only in a case proceeding on a "fraud-on-the-market" theory; materiality, by contrast, is an element in all Rule 10b-5 cases, including where plaintiffs do not use fraud on the market to satisfy the element of reliance. This was not a distinction the *Amgen* Court appeared to appreciate.

To make matters worse, the *Amgen* Court simultaneously acknowledged that courts must at minimum determine whether a representative plaintiff traded before disclosure of the truth, because "a misrepresentation's impact on market price is quickly nullified once the truth comes to light. Thus, a plaintiff whose relevant transactions were not executed between the time the misrepresentation was made and the time the truth was revealed cannot be said to have indirectly relied on the misrepresentation through its reliance on the integrity of the market price."[61] In other words, even as the *Amgen* Court rejected consideration of a "truth-on-the-market" defense, it also conceded that courts must, in some fashion, determine whether disclosures ultimately neutralized the effects of the original lie, if only to confirm that the class representatives' trades (and, by extension, the class's trades) occurred before that point (an argument that Justice Thomas made in dissent[62]).

These inconsistencies would prove difficult for courts to reconcile,[63] but *Amgen* held what it held: courts may not, at the class certification stage, determine whether the fraud was material to investors, *nor* may they examine whether the truth was sufficiently known to at least some market traders so as to offset any price impacts of the initial lie.

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[57] *Id.* at 468.
[58] *Id.* at 480–81.
[59] Ganino v. Citizens Utils. Co., 228 F.3d 154, 167 (2d Cir. 2000).
[60] *In re* Atossa Genetics Inc. Sec. Litig., 868 F.3d 784, 795–96 (9th Cir. 2017). For example, in *Amgen*, the defendants argued that the truthful information was available in relatively obscure sources likely viewed by experts but not by average investors, such as the Federal Register, which published the agenda of an upcoming FDA Advisory committee meeting. *See Amgen*, 568 U.S. at 581.
[61] *Amgen*, 568 U.S. at 472.
[62] *Id.* at 490 n.6 (2013) (Thomas, J. dissenting).
[63] Lipton, *Fact or Fiction*, *supra* note 45, at 766–68.

C. Round III—Halliburton Co. v. Erica P. John Fund, Inc. ("Halliburton II")

The *Halliburton* case reached the Supreme Court again in 2014. This time, the defendants offered a frontal attack on *Basic* itself, arguing that markets were simply not efficient enough to justify a presumption that any particular statement impacted prices—an argument that the Supreme Court easily rejected.[64] In the alternative, however, the defendants returned to a version of the claim they had advanced in *Halliburton I*, namely, that class certification is an appropriate procedural stage to contest the application of the fraud-on-the-market doctrine, including to rebut an inference that any false statements had impacted stock prices. This time, however, they did not claim that any particular evidence (such as the lack of a corrective disclosure and associated price drop) would be sufficient to rebut; instead, they sought permission only to introduce "direct evidence" that the misrepresentation had not had an impact on prices.[65]

The Supreme Court granted it. It reasoned that, since plaintiffs were already introducing "indirect" proxies for price impact at class certification—namely, the prerequisites necessary to invoke the fraud-on-the-market presumptions (such as market efficiency)—courts were not required to "ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price."[66]

In so doing, I have previously argued, the Court almost seemed to imply that in efficient markets, individual reliance claims—claims where investors did not rely on the fraud-on-the-market presumption, but instead argued that they personally heard and traded based on false information—would no longer be viable.[67] But the Court also appeared to be under the impression that a *lack* of price impact could be readily proved through econometric evidence, such as a statistical study of stock price movement.[68]

This proved not to be the case.

D. Round IV—Goldman Sachs Group, Inc. v. Arkansas Teachers Retirement System

It is very difficult to demonstrate a *lack* of market reaction to any particular statement, just as it is often difficult to demonstrate an *affirmative* market reaction. This is because the statistical tools for such an inquiry are imprecise, and developed for large scale market analysis rather than for analysis of individual companies.[69] Thus, in the wake of *Halliburton II*, courts struggled to determine how to evaluate price impact rebuttal evidence without considering: (1) price reactions to noncorrective disclosures (*Halliburton I*); (2) materiality (*Amgen*); and (3) lack of price reactions to corrective disclosures (*Amgen*).

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[64] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 269 (2014).
[65] *Id.* at 281, 283.
[66] *Id.* at 282.
[67] Ann M. Lipton, Halliburton *and the Dog that Didn't Bark*, 10 DUKE J. CONST. L. & PUB. POL'Y 1, 11 (2015) [hereinafter Lipton, *Dog that Didn't Bark*].
[68] 573 U.S. at 281.
[69] Lipton, *Fact or Fiction*, *supra* note 45, at 765.

Enter *Goldman Sachs Group, Inc. v. Arkansas Teachers Retirement System*.[70] The *Goldman* case was originally filed in the wake of the Great Financial Crisis. Goldman shareholders alleged that the company had lied about its business ethics and its systems for managing conflicts of interest, and shareholders had experienced losses when the truth was revealed through government investigations faulting Goldman for standing on both sides of certain transactions involving mortgage-backed securities.

From inception, Goldman's main argument was that its allegedly false statements were immaterial puffery. Goldman had spoken about its business "ethics" and its conflicts management only in vague and noncommittal terms.[71] Moreover, the supposed "truth" that was disclosed—i.e., the failure of Goldman's conflict management systems—came in the form of government enforcement actions, i.e., a classic overdisclosure. Or, to put it another way, had Goldman said absolutely nothing about its conflicts management, investors would still have been expected to react negatively to news of government investigations and an SEC settlement,[72] which meant that the market reaction to those developments did not bolster the inference that Goldman's pretentions to ethical business practices had earlier inflated Goldman's market price. And, Goldman pointed out, even before the government actions and the associated price drops, there had been earlier reports of how Goldman's conflicts of interest had infected its business, to no detectable market effect.[73] Nonetheless, Goldman's repeated arguments were unsuccessful in the district court and before the Second Circuit,[74] culminating in a grant of class certification that ultimately reached the Supreme Court.

In *Goldman Sachs Group, Inc. v. Arkansas Teachers Retirement System*,[75] the Supreme Court began by holding that more "generic" statements were less likely to impact the market than less generic ones, and so—although "materiality" could not be considered at the class certification stage—a statement's degree of genericness would be relevant evidence in determining whether defendants had rebutted the inference of price impact. (This was a somewhat ironic holding, as courts rarely hesitate to hold that defendants' generic warnings of hypothetical future risks are sufficiently substantive to neutralize the impact of fraudulent statements.[76]) Next, the Court offered this inscrutable guidance:

> The generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory. Under that theory, price impact is the amount of price inflation maintained by an alleged misrepresentation—in other words, the amount that the stock's price would have fallen

[70] 594 U.S. 113 (2021).
[71] *See, e.g.*, Richman v. Goldman Sachs Grp., Inc., 868 F. Supp. 2d 261 (S.D.N.Y. 2012).
[72] Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474, 479 (2d Cir. 2018).
[73] *Id.* at 486.
[74] Richman v. Goldman Sachs Grp., Inc., 868 F. Supp. 2d 261 (S.D.N.Y. 2012); *In re* Goldman Sachs Sec. Grp., Inc., Master File No. 10 Civ. 3461,2018 WL 3854757 (S.D.N.Y. Aug. 14, 2018); Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc., 955 F.3d 254 (2d Cir. 2020), *vacated &remanded* 594 U.S. 113 (2021).
[75] 594 U.S. 113 (2021)
[76] *E.g.*, *In re* Semtech Corp. Sec. Litig., No. 2:25-cv-01474-MCS-JC, 2025 U.S. Dist. Lexis 199623, at *23–24 (C.D. Cal. Oct. 7, 2025); *In re* Mylan NV Sec. Litig., 2:20-cv-955-NR, 2023 WL 3539371, at *12 (W.D. Pa. May 18, 2023); SEB Inv. Mgmt. AB v. Align Tech., Inc., 485 F. Supp. 3d 1113, 1123 (N.D. Cal. 2020); Steamship Trade Ass'n of Balt. Int'l Longshoreman Ass'n Pension Fund v. Olo, 22-cv-8228 (JSR), 2023 WL 4744197, at *2 (S.D.N.Y. July 25, 2023).

> "without the false statement." *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (C.A.7 2015). Plaintiffs typically try to prove the amount of inflation indirectly: They point to a negative disclosure about a company and an associated drop in its stock price; allege that the disclosure corrected an earlier misrepresentation; and then claim that the price drop is equal to the amount of inflation maintained by the earlier misrepresentation. See, *e.g., id.*, at 413–417; *In re Vivendi, S. A. Securities Litig.*, 838 F.3d 223, 233–237, 253–259 (C.A.2 2016).
>
> But that final inference—that the back-end price drop equals front-end inflation—starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure. That may occur when the earlier misrepresentation is generic (e.g., "we have faith in our business model") and the later corrective disclosure is specific (e.g., "our fourth quarter earnings did not meet expectations"). Under those circumstances, 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.[77]

This passage both contradicted the Court's prior holdings and is nearly incoherent on its own terms. First, both *Glickenhaus* and *Vivendi* had been addressing loss causation, not price impact, and both were decided after trial on the merits. But in *Halliburton I*, the Court was explicit that the plaintiffs' ability to prove loss causation had no relevance to class certification, both because it is common to the class, and because the cause of a later loss sheds no light on the question whether prices were impacted by earlier false statements.

In *Goldman*, however, the Court held that these loss causation inquiries *would* be relevant to the question of price impact in "inflation maintenance" cases (i.e., cases where there was no price reaction to the initial statement), because the inference that "the back-end price drop equals front-end inflation . . . starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." And *that* statement suggests that it is *the plaintiffs'* burden to prove the existence of price impact, by showing either a price increase when the fraud begins, or a price decrease when the fraud is revealed. But *that* is exactly the *Oscar Private Equity* reasoning that the *Halliburton I* Court had rejected. And—so long as the price impact is *presumed*, and it is defendants' burden to disprove its existence (an arrangement the *Goldman* court once again affirmed[78]), then, as discussed above, the fact that a subsequent statement *did not* correct the market is irrelevant to the question whether the market was misled in the first place.

In other words, the Supreme Court directed lower courts to determine the existence of price impact by relying on evidence that is facially inapposite to that inquiry. Unsurprisingly, a great deal of mischief has ensued.

[77] 594 U.S. at 123.
[78] *Id*. at 126.

III. POST-*GOLDMAN* CONFUSION

Given the Supreme Court's own inconsistent approaches to class certification in the fraud-on-the-market context, it is not surprising that courts entertaining class certification motions since *Goldman* have adopted contradictory approaches. Most concerningly, however, the price impact analysis articulated by the Court now threatens to draw within it almost all elements of a securities action as part of the Rule 23 certification process, before any evidence is actually presented to a fact finder.

A. Genericness Becomes Materiality

Materiality is, of course, a required element of any Section 10(b) claim, and, in *Amgen*, the Supreme Court held that it should not be part of the class certification inquiry. *Goldman*, however, distinguished "materiality"—a prohibited inquiry—from "genericness," which is not. This is a distinction that has proved impossible for courts to maintain, and many do not even make the attempt, openly relying on precedent developed under the "materiality" rubric when entertaining motions for class certification.[79] Courts frequently turn to expert evidence of how defendants' statements were received by the market, with some courts declaring the *absence* of market commentary on the false statements as evidence of genericness,[80] and others reasoning that if defendants merely falsely reaffirmed the status quo, analysts may not have any reason to single out these reassurances.[81] Sometimes, courts have found it significant that analysts displayed concern over the general subjects on which the defendants spoke falsely,[82] while in others, courts have treated analyst commentary as probative only when the false statements themselves were highlighted.[83]

The problem here is not merely the inconsistency in analysis—which, granted, in at least some cases may simply represent appropriate responses to different fact patterns—but the extent to which the entire inquiry has become a straightforward adjudication of a critical element on the merits: whether a statement "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[84]

The problem extends to truth-on-the-market evidence. As above, *Amgen* held that neither materiality, nor "truth on the market"—the notion that the impact of any false statements was offset by truthful information—may be considered at class certification. At the same time, *Goldman* itself suggested that price impact may be evaluated by price reaction—to the initial lie

[79] *E.g.,* Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc., 77 F.4th 74, 96, 101–02 (2d Cir. 2023); *In re*: Concho Res. Inc. Sec. Litig., No. 4:21-cv-2473, 2025 WL 1040379 (S.D. Tex. Apr. 7, 2025).
[80] *Ark. Teacher Ret. Sys.*,, 77 F.4th at 104; *In re:* Kirkland Lake Gold Ltd. Sec. Litig., 20-CV-4953 (JPO), 2024 WL 1342800, at *9 (S.D.N.Y. Mar. 29, 2024); Shupe v. Rocket Cos., 752 F. Supp. 3d 735, 781 (E.D. Mich. 2024).
[81] *Concho*, 2025 WL 1040379, at *14 ("there is little incentive for an analyst to reference an alleged misrepresentation if the alleged misrepresentations were supposedly intended to maintain the status quo"); Brokop v. Farmland Partners Inc., No. 18-cv-02104-DME-NYW, 2021 WL 4913970, at *7 (D. Colo. Sept. 30, 2021).
[82] *See, e.g.*, Sjune AP-Fonden v. Goldman Sachs Grp., Inc., 798 F. Supp. 3d 416, 477 (S.D.N.Y. 2025) (though analysts did not connect the corrective disclosure to earlier misstatements, they were concerned with the underlying narrative those statements reinforced).
[83] *Goldman Sachs Grp.*, 77 F.4th at 104.
[84] Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

or to disclosure of the truth. Post-*Goldman*, some courts have treated *Amgen* as dead letter.[85] Others, relying on pre-*Goldman* precedent, have treated a lack of market reaction to truthful disclosures as inconclusive, especially given the lack of precision in the statistical tools available for measuring stock price movements.[86]

That said, courts have been more hesitant to make factual determinations about price impact when it comes to defining the class period. As above, *Amgen* was notably unclear on this subject, simultaneously disallowing truth-on-the-market evidence while also recognizing that the court must identify the point when the inflation left the stock for the purpose of establishing which traders were affected by the fraud. As it turns out, plaintiffs and defendants often dispute when that occurred, with defendants typically contending that any inflation dissipated—due to disclosure of the truth—much earlier than plaintiffs claim. Here, courts frequently refuse to resolve reasonable factual disputes over class period length at certification,[87] treating the matter as more appropriate for trial (which, functionally, allows plaintiffs' proposed period to control).[88] As discussed in Part IV.A, below, courts' hesitance on this point actually works as proof of concept for a broader question, namely, whether it is necessary for courts to engage in any of these determinations at class certification at all.

B. Limiting Loss Causation

The heart of *Goldman*'s reasoning was the concept of "mismatch," namely, the notion that, when false statements do not cause an initial upward price movement, price impact must be shown via subsequent price drops tied to a revelation of the truth. But as above, once price impact is presumed via *Basic*'s prerequisites, the existence of price impact cannot be *disproved* by subsequent reactions to a statement that, by hypothesis, does *not* correct the original misstatements (as the Supreme Court understood in *Halliburton I*).

One potential interpretation of *Goldman*'s reasoning goes something like this: plaintiffs begin with a presumption of price impact, which defendants can rebut by demonstrating that stock prices remained unmoved by the original lie. At that point, with no further evidence, the defendants prevail. To counter this successful defense rebuttal, plaintiffs now have the burden to prove price impact by arguing that theirs is a "price maintenance" case, which is to say, one

85 Crews v. Rivian Automotive Sec. Litig., No. 2:22-cv-01524-JLS-E, 2024 WL 3447988, at *11 (C.D. Cal. July 17, 2024); Pardi v. Tricida, Inc., No. 21-cv-00076-HSG, 2024 WL 4336627, at *7 (N.D. Cal. Sept. 27, 2024); City of Birmingham Relief & Ret. Sys. v. Acadia Pharms., Inc., 348 F.R.D. 372, 386–87 (S.D. Cal. 2024).

86 Del. Cnty. Emps. Ret. Sys. v. Cabot Oil & Gas Corp., No. H-21-2045, 2023 WL 6300569, at *9–10 (S.D. Tex. Sept. 27, 2023); *Rivian*, 2024 WL 3447988, at *15; cf. AMI – Gov't Emps. Provident Fund Mgmt. Co. Ltd. et al. v. Alphabet, Inc., et al., 833 F. Supp. 3d 1034, 1042 (N.D. Cal. 2026) (recognizing flaws in the standard 95% confidence level as applied in the securities context). Of course, if truth-on-the-market arguments are entertained at class certification, the court must make a related determination of whether the truth was widely publicized enough that it could be expected to influence trading, giving rise to more factual disputes. *See, e.g.*, San Diego Emps. Ret. Sys. v. Johson & Johnson, No. 24-1409, 2025 WL 2176586, at *4 n.11 (3d Cir. July 30, 2025); Jaeger v. Zillow Grp., No. 24-6605, 2025 WL 2741642, at *2 (9th Cir. Sept. 26, 2025); *Brokop*,2021 WL 4913970, at *7.

87 IBEW Loc. 98 Pension Fund v. Deloitte & Touche LLP, 348 F.R.D. 35 (D.S.C. 2024); *Rivian*, 2024 WL 3447988, at *16.

88 *But see In re* The Boeing Co. Aircraft Sec. Litig., 351 F.R.D. 108, 137 (N.D. Ill. 2026) (concluding that defendants had shown, by a preponderance of the evidence, that the market was fully aware of the truth earlier than plaintiffs' proposed class period end date, and certifying a class of traders only up to that earlier point).

where the fraud was designed to keep prices steady, or prevent them from falling quite as far as they might have had the truth been disclosed. To bolster that proof, plaintiffs must introduce evidence that the back end disclosure caused a stock price drop, at which point "matching" is necessary.

To the extent this story – which is not articulated in *Goldman* itself – provides a rationale for why *Goldman* seemed to put the burden on plaintiffs to demonstrate a connection between the back end drop and the initial inflation, it fails on its own terms. The unstated premise is that the presumption of price impact accorded plaintiffs in *Basic* is, in fact, a presumption that prices will go up in response to a fraud. But there is simply no reason the *Basic* presumption should work that way. As explained above, many frauds are designed to conceal problems and hold prices steady, rather than create fictional grounds for price increases[89]; indeed, in *Basic* itself, the alleged fraud consisted of managers falsely telling the market that there were no new developments, when in fact there were significant developments that managers sought to conceal.[90] The *Basic* Court would have therefore been well aware that frauds are commonly designed to stabilize the market, rather than affirmatively move prices in a particular direction.[91]

Thus, with *Goldman*'s reasoning left somewhat inexplicable, lower courts have no real guidance or principles they can use to determine if a match between the original statement and the final disclosure is sufficiently close to warrant class certification, and courts have taken differing approaches to the matter.

For example, in a subsequent iteration of the *Goldman* case, the Second Circuit held that when a market moving disclosure (and associated market commentary) reveal concerns about the *conduct* that the false statement concealed—without actually referencing the statement itself—a "mismatch" exists.[92] In so doing, it explicitly held that its earlier opinions permitting plaintiffs to establish loss causation by demonstrating materialization of an undisclosed risk were inapposite,

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[89] *See supra* Part II.A.
[90] *Basic* was the rare fraud designed to prevent prices from going up, rather than keep them from going down, but the point stands: the defendants sought to maintain prices at existing levels rather than move them in a particular direction. *See* Basic Inc. v. Levinson, 485 U.S. 224, 226–28 (1988).
[91] Moreover, if the *Goldman* Court intended to imply that the presumption of price impact can be rebutted by defendants with a simple showing that prices did not move upward in response to the lie, it should be sufficient for plaintiffs to respond by pointing out that theirs is a price maintenance case, and that prices should not be expected to move upward on false assurances that nothing has changed. To find such a response by plaintiffs insufficient to move the ball back in defendants' court would be to suggest that defendants' burden to rebut price impact is nothing other than a burden of production, i.e., to produce some evidence to suggest there was no price impact. But that argument was explicitly rejected in *Goldman* itself. *See* Goldman Sachs Group, Inc. v. Ark. Teachers Ret. Sys., 594 U.S. 113, 124 (2021). Notably, the Second Circuit in *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017) also confronted, and rejected, the argument that the presumption of price impact was so fragile. *Id*. at 99–104.
[92] Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc., 77 F.4th 74, 97, 104 (2d Cir. 2023). In such cases, the Second Circuit directed courts to test price impact by imagining whether the market would have reacted to truthful statement by the defendants at an equal level of genericness to the original false statement, *see id.* at 99, but then failed to conduct its own analysis along these lines, leaving it unclear how such a test might be applied. Many generic statements – like Goldman's – appear in securities filing after securities filing as boilerplate, unchanged from quarter to quarter and year to year. Were that to suddenly change – for example, language to disappear because it had become untrue – it seems unlikely that the market would ignore it, as the district court concluded, *see In re* Goldman Sachs Grp., Inc. Sec. Litig., 579 F. Supp. 3d 520, 536 (S.D.N.Y. 2021), nor is it likely the market would ignore a sudden admission that, for example, Goldman was unable to manage its conflicts effectively.

and tighter links between the original false statement, and subsequent disclosures, would be required to justify certifying a class.[93] Though it is not clear how this test might usually play out, *Shupe v. Rocket Companies*,[94] perhaps provides an early clue: there, when defendants allegedly misled the market by claiming consumer demand was "strong," the court found no match—and thus no price impact—in part because the subsequent disclosure consisted of specific figures demonstrating weakening demand, which the court deemed to operate at a different level of generality than the original lie.[95]

The Ninth Circuit, however, has disagreed, holding that subsequent disclosures *need not* reference the original false statements, and pointing out that the Supreme Court itself relied on loss causation decisions in its reasoning.[96]

More concerningly, the requirement that plaintiffs demonstrate a market drop in reaction to a sufficiently "corrective" statement presents the exact same problems as it does in the context of loss causation: it ignores the way many frauds are revealed to the market, first through their effects on the company, and only later (if at all) with a disclosure that fraudulent conduct occurred. For example, though the court in *Delaware County Employees Retirement System v. Cabot Oil & Gas Corp*.[97] ultimately certified the class for other reasons, the court agreed that a "mismatch" existed where a company lied about its environmental compliance, and later reported disappointing financial results that—plaintiffs had evidence to show—were the result of its concealed environmental violations.[98] Under such circumstances, the court reasoned, it "would not have been apparent to the public" that there was any connection between the losses experienced by shareholders and the initial lie.[99] Once again, the fact that shareholders would not have drawn a connection between their losses and the earlier misstatements simply does not answer the question whether the original misstatement artificially inflated the company's stock in the first place, and the requirement that plaintiffs demonstrate such awareness, as a practical matter, prevents Section 10(b) claims from proceeding on a "materialization-of-the-risk" theory for proving loss causation on the merits. The result is, defendants will be able to escape liability even for frauds that cause real harms to investors and—worse—will be able to manipulate their own exposure simply by hedging their disclosures.

C. Adjudicating Falsity

The analysis mandated by *Goldman* and its progeny has also threatened to leak into the element of falsity. For example, as above, some courts have treated evidence that the truth was disclosed, with no market impact, as sufficient to rebut the presumption that the original false statement impacted prices. But that inquiry necessarily requires courts to determine whether the truth was, in fact, disclosed—and, correlatively, what precisely rendered the original statements

[93] 77 F.4th at 99 n.11.
[94] 752 F. Supp. 3d 735 (E.D. Mich. 2024).
[95] *Id.* at 781.
[96] Jaeger v. Zillow Grp. Inc., No. 24-6605, 2025 WL 2741642, at *1 (9th Cir. Sept. 26, 2025).
[97] No. H-21-2045, 2023 WL 6300569 (S.D. Tex. Sept. 27, 2023).
[98] *Id.* at *11.
[99] *Id.*; *see also In re*: Concho Res. Inc. Sec. Litig., No. 4:21-cv-2473, 2025 WL 1040379, at *16 (S.D. Tex. Apr. 7, 2025) (agreeing that a disclosure of poor financial results, without more, does not "match" lies about the capabilities of particular business segments).

false in the first place. Thus, in *In re: Kirkland Lake Gold Ltd. Securities Litigation*,[100] the plaintiffs alleged that a company denied it intended to grow through acquisition activity, even though it was secretly engaged in merger negotiations. The court concluded at the class certification stage that, in fact, the company had *not* been engaged in merger negotiations, but instead only had been considering the possibility of mergers. With that interpretation of the evidence in hand, it concluded that those facts had been disclosed, to no discernable market effect, thus rebutting the presumption that the original lie had affected prices. In other words, to conduct its price impact analysis, the court first had to make a merits determination regarding the truthfulness of the defendants' statement.[101]

The *Gambrill v. CS Disco, Inc.*[102] class certification decision involved a similar analysis. There, the plaintiffs alleged that the defendant misrepresented the extent to which it relied on a small number of large customers, and that a corrective disclosure occurred—resulting in a price drop—when the company admitted that several customers had decreased spending, reducing revenues. The court concluded there was a "mismatch"—and thus no price impact—because the original alleged misstatement implied only that the company was not reliant on a *single* customer, and the revelations had involved *several* customers.[103] But that conclusion might just as easily have been framed as finding that CS Disco's statements had been truthful in the first place, because they only disclaimed reliance on one customer, not several.

D. Summing Up

Class certification hearings in Section 10(b) cases increasingly resemble mini merits trials in at least one other respect: the burdens placed on plaintiffs to *prove* price impact, rather than on defendants to *disprove* it, once the prerequisites (materiality, publicity, and market efficiency) are met. Perhaps reflecting the *Goldman* Court's own confusion, courts frequently muddy the waters as to whether the plaintiffs or the defendants bear the burden of proof of establishing price impact (or its lack). For example, on remand from the Supreme Court in *Goldman*, both the district and appellate courts framed their inquiries in terms of the *plaintiff*'s burden to establish price impact through a demonstration that a corrective disclosure was followed by a negative market reaction.[104] Similarly, in *Delaware County Employees Retirement System v. Cabot Oil & Gas Corp*., the district court summarized the standard in terms of how *plaintiffs* might create an inference of price impact by linking the false statements to the

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[100] 20-CV-4953 (JPO), 2024 WL 1342800 (S.D.N.Y. March 29, 2024).
[101] *Id.* at *8–9. The problem arose a second time in the same case, regarding a different alleged misstatement. In the guise of examining whether disclosure of the truth "matched" the alleged lie, the court ultimately concluded that the later disclosure was entirely consistent with the original statement and, therefore, could not have cured any market misimpressions. In other words, the "mismatch" analysis was another sub rosa examination of whether the plaintiffs had proved the element of falsity. *See id.* at *11; *see also* City of Birmingham Relief & Ret. Sys. v. Acadia Pharms., Inc., 348 F.R.D. 372, 388–89 (S.D. Cal. 2024) (adjudicating falsity as part of the determination of whether defendants had raised a truth on the market defense).
[102] A-24-CV-28-DAE, 2025 WL 3771433 (W.D. Tex. Dec. 16, 2025).
[103] *Id.* at *11.
[104] *See also In re* Goldman Sachs Grp. Sec. Litig., 579 F. Supp. 3d 520, 531 (S.D.N.Y. 2021) (describing "Plaintiffs' Persuasive Evidence of Price Impact," concluding that "Plaintiffs have persuasively established a link between the public revelations concerning Goldman's conflicts of interest and the subsequent stock price declines").

corrective disclosures.[105] And Judge Chung, dissenting from the Third Circuit's affirmance of a grant of class certification in *San Diego Employees' Retirement Ass'n v. Johson & Johnson*, wrote, "Price impact is somewhat more difficult to prove for inflation-maintenance-theory plaintiffs because, as the Supreme Court recognized in *Goldman*, such '[p]laintiffs typically try to prove the amount of inflation indirectly.'"[106]

The upshot of all of this is that not only are courts using idiosyncratic and inapposite criteria to decide whether to certify classes, but increasingly the class certification stage is replacing merits determinations for critical elements of plaintiffs' claims. And though, as the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*,[107] courts may not shy away from merits determinations that are necessary to ensure compliance with Rule 23's requirements, it is important to ensure that the matters decided at class certification *really are* targeted toward Rule 23's strictures,[108] rather than serve as an opportunity for defendants to take multiple bites at the apple to get a case dismissed before it reaches a jury.

IV. QUESTIONING THE PREMISE

All of this begs the question why it is necessary to examine any of these issues at the class certification stage, rather than simply save them for trial on the merits. As has been demonstrated, the elements—materiality, price impact, falsity, loss causation—all intertwine to create a unified set of questions regarding the extent to which the market was misled, how it was misled, and what, if anything, led to a correction. Moreover, though scienter has not (yet) explicitly become part of the class certification analysis, that may only be a matter of time, if only because scienter and materiality are often closely related inquiries.[109] Thus, if the elements are going to be artificially disentangled in piecemeal proceedings rather than considered on a full record at trial, there needs to be a strong justification for doing so—especially since there is no dispute that, whatever elements a court decides in a class certification hearing, they will all be revisited at trial anyway.[110]

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[105] No. H-21-2045, 2023 WL 6300569, at *7 (S.D. Tex. Sept. 27, 2023) ("When a plaintiff's theory is that the defendant's misrepresentations or omissions kept its stock artificially inflated, price impact may be shown on the back end. Front-end price impact may be inferred from a back-end price drop when a corrective disclosure shows that the defendant's previous statements were untrue or that the defendant failed to disclose the truth, and when the stock price falls after the truth is revealed. However, a back-end price drop supports this inference only when the corrective disclosure 'matches' the earlier misrepresentations or omissions. If there is a 'mismatch' between the contents of the corrective disclosure and the misrepresentations or omissions, the inference of price impact is weaker.").
[106] No. 24-1409, 2025 WL 2176586 (3d Cir. July 30, 2025) (Chung, J., dissenting).
[107] 564 U.S. 338 (2011).
[108] *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006).
[109] *See* SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45152 (1999) ("While the intent of management does not render a misstatement material, it may provide significant evidence of materiality. The evidence may be particularly compelling where management has intentionally misstated items in the financial statements to 'manage' reported earnings. In that instance, it presumably has done so believing that the resulting amounts and trends would be significant to users of the registrant's financial statements.").
[110] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

A. (Lack of) Policy Justification

If plaintiffs are able to prove fraud-on-the-market at trial, then (assuming the other elements of a 10(b) action are proved, such as scienter), they will have proved their claims for the class. If they cannot prove fraud-on-the-market, the class's claims will fail. This is true regardless of whether price impact is additionally examined at class certification.

The usual justification for examining fraud-on-the-market at class certification is that, absent proof of price impact, reliance will devolve into individualized inquiries.[111] But this is descriptively inaccurate. If the jury accepts that the prerequisites for the fraud-on-the-market presumption are met, and that defendants' evidence fails to rebut price impact, the plaintiffs will have proved their case, and no individualized evidence will be necessary. By contrast, if the jury returns a verdict for the defendants for any reason (including lack of price impact), plaintiffs will simply lose on the merits. There will be no individualized analysis; indeed, it is not obvious how such analysis would even become part of the case.[112] This stands in marked contrast to other class cases, where certification was denied because the "classwide" proof plaintiffs offer would not—even if accepted by a jury—resolve the class's claims; the plaintiffs' case-in-chief would still require individualized evidence, or the defendants' rebuttal would.[113] None of this is true in (most) fraud-on-the-market cases (more on the exceptions below).

Viewed through a policy lens, the class certification process is often justified as protecting plaintiffs, protecting defendants, or protecting judicial resources. However, as I have previously argued, examination of price impact accomplishes none of these.[114]

From the point of view of absent class members, the argument is usually that if a dissimilar class is certified, absent class members' interests may not be represented adequately by the named plaintiff, whose unusual circumstances may unfairly bind dissimilar class members.[115] But this is not an issue in a fraud-on-the-market class action, because the theory does not operate at an individual investor level; the only facts to be determined by a jury concern the qualities of a market that are indisputably applicable to all class members. Indeed, some judges have *excluded* evidence of individual investors' decisionmaking processes as irrelevant in the fraud-on-the-market context.[116]

A distinct concern may be that absent class members will mistakenly rely on the pendency of a class action and, in so doing, sacrifice their chance to bring stronger claims

[111] Goldman Sachs Grp., Inc. v. Ark. Teachers Ret. Sys., 594 U.S. 113, 119 (2021).
[112] For example, in two recent fraud-on-the-market trials, the class representatives rested their cases without presenting any evidence of individual reliance. *See* Ramirez v. Exxon Mobil Corp., No. 3:16-cv-03111, Doc. 375 (N.D. Tex. filed May 7, 2026); Pampena v. Musk, No. 22-cv-05937-CRB, Doc. 590 (N.D. Cal. filed Oct. 10, 2022). The jury returned a verdict for the defendants in the former trial and the plaintiffs in the latter.
[113] *Wal-Mart Stores, Inc.*, 564 U.S. at 356.
[114] Lipton, *Dog that Didn't Bark*, *supra* note 67, at 22–25.
[115] Hansberry v. Lee, 311 U.S. 32, 45 (1940).
[116] *In re* WorldCom, Inc. Sec. Litig., No. 02 Civ.3288(DLC), 2005 WL 408137, at *4 (S.D.N.Y. Feb. 22, 2005); Sjune AP-Fonden v. General Elec. Co., 722 F. Supp. 3d 347, 353 (S.D.N.Y. 2024).

individually,[117] such as claims that they actually relied on the false statements. But even assuming such claims are viable absent a showing of price impact,[118] these theoretical individual actions will, in many cases, be somewhere between extremely impractical and legally impossible to bring. Recent Supreme Court precedent has established that statutes of repose are not tolled during the pendency of a class action[119]; therefore, by the time many Section 10(b) class actions reach the certification stage, the five-year repose period will have expired,[120] and investors will have already lost the opportunity to bring claims individually.[121] And in those circumstances where the repose period has not expired, the reality is that securities fraud claims are uneconomical for most investors to bring individually, and so the only plaintiffs who, in practice, are capable of pursuing actions based on proof of actual reliance are likely to be institutional investors. These investors are well-counseled as to their options and have access to an existing market for opt-out litigation; they are therefore eminently capable of making the appropriate calculus and do not need to be protected via denial of class certification.[122]

Similarly, there is no unfairness to defendants by skipping an inquiry into fraud-on-the-market at class certification, as they will be able to offer all arguments against fraud-on-the-market at trial before a jury. To be sure, outside of the fraud-on-the-market context, there may be some situations where, if a class is improperly certified, defendants might be unfairly bound to a jury determination based on idiosyncratic evidence unique to a representative plaintiff.[123] But, as above, fraud-on-the-market actions do not depend—or, often, even permit introduction of—representative-specific evidence. Thus, if the jury finds that fraud-on-the-market applies, the plaintiffs' claims will have been proven classwide, and there is no injustice in binding defendants; if the jury does not find the elements of fraud-on-the-market have been proven, the claims will be rejected and defendants will prevail. And to the extent the plaintiffs' evidence is especially thin, defendants are always free to seek summary judgment on the issue.[124]

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[117] Lipton, *Dog that Didn't Bark*, *supra* note 67, at 22–23; *Wal-Mart Stores*, *Inc.*, 564 U.S. at 364 ("Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief.").

[118] *Halliburton II* suggests they are not. *See* Lipton, *Dog that Didn't Bark*, *supra* note 67, at 11.

[119] Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc., 582 U.S. 497, 516 (2017). Since *ANZ* was decided, a handful of investors have sought to intervene in pending securities class actions in order to preserve their claims if they are unsatisfied with the class outcome, *e.g.*, *In re* eHealth Inc. Sec. Litig., No. 4:20-cv-2395-JST, ECF No. 141 (N.D. Cal. May 11, 2023), but this is hardly a common occurrence.

[120] 28 U.S.C. § 1658(b).

[121] Due to the demands of the Private Securities Litigation Act, 15 U.S.C. §78u-4, early stages of a fraud-on-the-market class action are exceptionally lengthy. First, the court must select a lead plaintiff, often from competing movants; then, the lead plaintiff typically files a new complaint to govern the action; then, due to the pleading demands placed on securities plaintiffs, there is often extensive motion practice before discovery even begins. As a result, the class certification determination frequently occurs many years after the initial events that inspired the case. *See, e.g.*, Brokop v. Farmland Partners Inc, No. 18-cv-02104-DME-NYW, 2021 WL 4913970, at *7 (D. Colo. Sept. 30, 2021) (class certification decision issued six years after the first alleged violation); Ferris v. Wynn Resorts Ltd., No. 2:18-cv-00479-APG-DJA, 2023 WL 2337364 (D. Nev. Mar. 1, 2023) (class certification decision issued seven years after the first alleged violation); Carpenters Pension Trust Fund of St. Louis v. Barclays PLC, 310 F.R.D. 69 (S.D.N.Y. 2015) (class certification decision issued eight years after the first alleged violation); Pelletier v. Endo Int'l PLC, 338 F.R.D. 446 (E.D. Pa. 2021) (class certification decision issued six years after the first alleged violation).

[122] Lipton, *Dog that Didn't Bark*, *supra* note 67, at 23.

[123] *Cf.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011); *see also* Duran v. U.S. Nat'l Bank Ass'n, 325 P.3d 916, 935 (Cal. 2014).

[124] *E.g.*, St. Clair Cty Employees' Ret. Sys. v. Acadia Healthcare Co., 808 F. Supp. 3d 828 (M.D. Tenn. 2025).

Finally, there is no risk to judicial resources, for the same reason that individualized inquiries are unlikely to ever arise. If a fraud-on-the-market case is put before a jury, the plaintiffs will prevail, or they will not; it is the class certification hearing itself, where the judge must make factual determinations that are destined to be second-guessed by a jury, that taxes the judiciary. In this respect, it is notable that so many courts have refused to make factual determinations as to the appropriate end of the class period, often accepting plaintiffs' allegations that the truth remained concealed for a prolonged stretch of time, even over defendants' objections that the truth had been disclosed earlier.[125] These courts implicitly recognize that, even if it turns out some investors included in the class cannot, in fact, be presumed to have relied on the fraud—because they traded after the fraud ceased to impact on prices—a jury can make that determination easily enough with no prejudice to any party, and without any risk that individualized issues will overwhelm the common ones. That same logic can extend to the class as a whole.

B. Fraud-on-the-Market as a Distinct Substantive Claim

Though claims based on actual reliance ("eyeball reliance"), and fraud-on-the-market claims, may both be brought under Section 10(b), it is perhaps better to think of them as substantively different causes of action. Just as we do not refuse to certify Section 10(b) class actions because of the possibility that some members of the class may have more success pursuing claims under other laws (like state anti-fraud law, or Section 18 of the Exchange Act, both of which may be less stringent than Section 10(b)[126] but also are likely to require eyeball reliance[127]), we should not refuse to certify fraud-on-the-market Section 10(b) class actions because some investors might have available to them substantively distinct Section 10(b) eyeball reliance claims. This is precisely why Rule 23(b)(3) permits opt outs; to the extent any class member would prefer to pursue their cases individually—where they might advance personal claims that are not common to the class—the opt-out mechanism is sufficient to protect their interests.[128]

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[125] *See supra* Part III.A.

[126] State antifraud laws might permit claims against additional defendants for aiding and abetting, *see, e.g.*, CAL. CORP. CODE § 25504.1; private plaintiffs, by contrast, are not permitted to allege aiding and abetting claims under Section 10(b), *see* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). Section 10(b) requires plaintiffs to plead and prove scienter, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); Section 18 of the Exchange Act does not, *Deephaven Private Placement Trading, Ltd. v. Grant Thornton & Co*., 454 F.3d 1168, 1172 (10th Cir. 2006).

To be sure, the Securities Litigation Uniform Standards Act would prohibit investors from opting out of most fraud-on-the-market class actions while bringing individual state law claims, at least so long as they seek to coordinate with the class. Investors might, however, be permitted to opt out and advance individual state law claims if they disclaim any coordination with the class claims and bring their actions entirely separately. *See* N. Sound Capital LLC v. Merck & Co., 938 F.3d 482 (3d Cir. 2019); Alta Fundamental Advisers LLC v. Bisaro, No. 24-9245 (ZNQ) (JTQ), 2025 WL 1793691 (D.N.J. June 30, 2025), *vacated in part on other grounds*, 2026 WL 508178 (D.N.J. Feb. 24, 2026).

[127] *In re* Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 283 (3d Cir.2006).

[128] In the context of Rule 23(b)(2) —which does not permit opt-outs—some courts have suggested that representatives who abandon claims available to individual class members (who will then be precluded by res judicata from asserting them individually) are inadequate under Rule 23. Whatever the merits of this reasoning, *see* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 780–88 (2013), it does not apply in the context of Rule 23(b)(3), where opt-outs are permitted.

Notably, the *Basic* Court was somewhat obscure on the extent to which price impact via the fraud-on-the-market presumptions should be adjudicated as part of the class certification determination.. On the one hand, it held that rebuttal evidence regarding market characteristics was "a matter for trial,"[129] but on the other, it emphasized that the trial evidence could be used as a basis for amending the certification order.[130] Justice Scalia, dissenting in *Amgen*, interpreted *Basic* to require that courts substantively examine plaintiffs' entitlement to the fraud-on-the-market presumption at the class certification stage.[131] But regardless what the original *Basic* Court intended, given the shape of the Section 10(b) cause of action as it exists today (not to mention changes in investor behavior such as the rise in passive investing,[132] as discussed below), it is simply no longer true, if it ever was, that a lack of price impact creates individualized issues of eyeball reliance.

1. Different investors

The most obvious distinction between fraud-on-the-market actions and eyeball reliance actions is that fraud-on-the-market expands the universe of investors who may bring claims at all.

In a traditional Section 10(b) fraud claim, the plaintiff must prove that he or she was aware of the fraudulent conduct and transacted in response. This might be accomplished straightforwardly, with proof the plaintiff actually considered the false statement as part of the investment process.[133] Theoretically, courts might even accept proof of a chain of causation—perhaps the plaintiff could demonstrate that he or she made an investment decision in reliance on advice from some third party who was influenced by the fraud. But either way, at bottom, a traditional Section 10(b) claim is only available to a plaintiff who adopts an active investment strategy—who picks stocks—and can prove that the fraud, in some way, factored in to that strategy.

By utilizing the fraud-on-the-market doctrine, however, even *passive* investors—who do not engage in any stockpicking at all—may bring fraud claims. These investors, by definition, do not take any information, fraudulent or otherwise, into account when making an investment decision; they simply buy all the securities in an index, and accept the market return. These investors therefore could not bring Section 10(b) action under a traditional reliance theory, not simply because of the logistical burden of introducing courtroom evidence of reliance, but because they did not, *in fact*, rely on the fraud in the traditional sense; their investment strategy eschews relying on any information distributed by anyone. Or, to put it another way, if a fraud-on-the-market plaintiff sought to certify a class that consisted solely of index investors—investors who simply buy the S&P 500, or the Russell 2000—there could be no argument that, absent proof of price impact, individualized reliance issues would predominate, because,

[129] *See* Basic Inc. v. Levinson, 485 U.S. 224, 249 n.29 (1988).
[130] *Id.*
[131] Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 483–84 (2013) (Scalia, J., dissenting).
[132] *See* Hao Jiang, Dimitri Vayanos, & Lu Zheng, *Passive Investing and the Rise of Mega-Firms*, 38 Rev. Fin. Studies 3461, 3462 (2025).
[133] *See, e.g.*, Amended Complaint at paras. at 423–37, Orbis Global Equity LE Fund (Austr. Registered) v. Vale S.A., No. 21-CV-6590 (S.D.N.Y.).

definitionally, no investor in the class would even be able to allege reliance on the fraud, much less prove it.

Thus, the because the fraud-on-the-market action allows investors to bring claims who simply would not have a cause of action under traditional theories, fraud-on-the-market Section 10(b) claims should be viewed as a distinct cause of action, and the availability—or not—of traditional fraud claims as an alternative, to some members of the class, should not bar class certification.[134]

2. Different damages

Fraud-on-the-market differs from eyeball reliance in a second manner: calculation of damages. Fraud-on-the-market damages typically consist of "artificial inflation" damages, meaning, the difference between the market price of the stock at the time of the transaction, and the price the stock would have been had the truth been disclosed. By contrast, an investor alleging eyeball reliance may be able to claim additional consequential damages, caused by the ripple effects of the fraudulent behavior.[135]

Ludlow v. BP, P.L.C.[136] illustrates the distinction. There, the plaintiff class alleged that BP misrepresented its safety protocols, and the truth was revealed when the Deepwater Horizon exploded, with catastrophic consequences in the Gulf of Mexico, i.e., an undisputed overdisclosure. As a result, BP's stock price plummeted, well past the point of merely erasing the artificial inflation induced by the lie, reflecting the further damage to the company wrought by the materialization of the risks BP's lie had concealed. In that context, the Fifth Circuit held that class members who pursued a fraud-on-the-market theory were entitled to damages only equivalent to the amount by which they had overpaid for the stock, i.e., artificial inflation damages; investors who could prove eyeball reliance, by contrast, could collect the full price drop caused by the explosion.[137] The Fifth Circuit reasoned that the former group had essentially purchased a risk profile, and were defrauded to the extent the stock price did not appropriately account for the full suite of risks; the latter group, by contrast, may have been forced to assume a risk they would not have accepted at all had they known the truth, and deserved to be compensated for the consequences that followed.

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[134] To be sure, in *Basic Inc. v. Levinson*, the Supreme Court held that defendants could rebut one leg of the fraud on the market presumption – the presumption that investors "rely" on market prices, subjectively – by demonstrating that a particular investor would have transacted even had she known the truth, and some subsequent cases have approached the matter similarly. *See, e.g.*, *In re* Vivendi Universal., S.A, Sec. Litig., 183 F. Supp. 3d 458, 465 (S.D.N.Y. 2016). That may accurately describe passive investors, who are essentially forced buyers, regardless of how they may judge individual stocks. Langevoort, Basic *at Twenty*, *supra* note 23, at 162 n.46. On the other hand, passive investors – far more than any active trader – rely entirely on the "integrity of the market," Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988), and therefore courts regularly include passive investors within fraud on the market classes, *In re* Lehman Bros. Sec. & ERISA Litig., No. 09 MD 2017(LAK), 2013 WL 440622, at *2 (S.D.N.Y. Jan. 23, 2013) ("Tracking an index for an efficient market is sufficient reliance for the purpose of class certification"); GAMCO Inv'rs v. Vivendi S.A., 927 F. Supp. 2d 88, 100 n.4 (S.D.N.Y. 2013) (same).
[135] *See* City of Birmingham Relief & Ret. Sys. v. Acadia Pharms., Inc., 348 F.R.D. 372, 392–95 (S.D. Cal. 2024); Weston v. DocuSign, Inc., 348 F.R.D. 354, 367–70 (N.D. Cal. 2024); Ind. Pub. Ret. Sys. v. AAC Holdings, No. 3:19-cv-00407, 2023 WL 2592134, at *21–25 (M.D. Tenn. Feb. 24, 2023).
[136] 800 F.3d 674 (5th Cir. 2015).
[137] *Id*. at 689–91.

Thus, as Professor Jill Fisch has argued, *Basic* transformed the nature of the harm of a Section 10(b) action from the "autonomy of the investment decision" to "a market-based harm."[138] The different harms envisioned by fraud-on-the-market cases versus eyeball reliance cases further demonstrates that these are substantively different causes of action, such that the failure of proof on the former does not create claims for the latter.

C. Proper Considerations at Class Certification

Even if class certification is not the time to test whether market prices were affected by the fraud, this does not mean that courts should simply rubber stamp motions for class certification. It is simply that publicity, market efficiency, price impact, and whether and when the truth became known are all merits issues that can await trial (or, in weaker cases, summary judgment). At the Rule 23 stage, courts should instead determine such prerequisites as adequacy of the class representatives and ascertainability of the class members, as well as whether individualized issues *outside* the context of price impact predominate, making class treatment inappropriate, or at least counseling in favor of certifying only an issue class under Rule 23(c)(4).

Most obviously, damages calculations may be difficult to establish classwide, especially for cases involving longer class periods and multiple misstatements and partial disclosures. In *Ludlow*, for example, the Fifth Circuit held that plaintiffs had not articulated a mechanism to distinguish artificial inflation damages from consequential damages,[139] and in *Rhode Island Office of the General Treasurer v. The Boeing Company*,[140] the Fourth Circuit reversed a class certification order on the ground that plaintiffs had not demonstrated how they would calculate fluctuating levels of artificial inflation throughout the class period.[141]

Additionally, *Basic* holds that defendants may rebut the presumption of reliance by proving that certain traders were aware of the truth.[142] Though this is rarely a plausible defense in fraud-on-the-market cases, it does occasionally arise. In *In re Initial Public Offering Securities Litigation*,[143] for example, the Second Circuit held that the inclusion in the class of certain investors who had participated in the alleged market manipulation scheme—and therefore did not subjectively rely on market prices as an indicia of value—created individualized issues of reliance that precluded class treatment.[144]

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[138] Fisch, *Trouble, supra* note 19, at 901, 913–14. She advocated for eliminating the concept of reliance in fraud on the market cases entirely, thereby simplifying the Rule 23 inquiry. *Id.* at 929.
[139] 800 F.3d at 690.
[140] 182 F.4th 422 (4th Cir. 2026).
[141] *Id.* at 428. The Sixth Circuit recently remanded a case with instructions to consider whether plaintiffs could present a classwide damages methodology, *see* Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp., No. 25-3765, 2026 WL 2454184 (6th Cir. Aug. 21, 2026), and an additional case presenting the same issue is pending in the Seventh Circuit, Pub. Emps. Ret. Sys. of Miss. v. Boeing Co. et al., No. 26-02018 (7th Cir.).
[142] Basic Inc. v. Levinson, 485 U.S. 224, 248–49 (1988).
[143] 483 F.3d 70 (2d Cir. 2007).
[144] *Id.* at 72–73.

V. CONCLUSION

The difficulty with adjudicating price impact at class certification is twofold: first, it necessitates a piecemeal approach to complex question that requires a full record for an accurate determination, and second, the price impact inquiry actually sheds little light on the fundamental issue under consideration, namely, whether common questions predominate over individualized ones.

Nonetheless, the Supreme Court, and many lower courts, have demonstrated a zeal for evaluating price impact at the class certification stage, which is very likely traceable to general distrust of the securities class action in general, and, in particular, to the suspicion that defendants are regularly pressured to settle even unmeritorious cases out of fear of debilitating damages liability. But Congress, and the Supreme Court, have already addressed this concern, with legislation and with ever-narrowing interpretations of the Section 10(b) cause of action.[145] To the extent even more stringent barriers are required, the class certification stage is simply not fit for purpose, because the question purportedly under consideration—the commonality of plaintiffs' evidence—is inapposite to concerns about the substantive weakness of the claims. The endless attempts to shove the square peg of merits-testing into the round hole of commonality only results in short shrift analysis of both.

In any event, the "in terrorem settlement pressures" that likely fuel courts' appetite for stringent Rule 23 standards[146] may, in the modern era, be overstated. As of May 2026, at least three different fraud-on-the-market securities cases have gone to trial this year alone, resulting in two defense-side victories.[147] Moreover, if the SEC adopts its proposed rules permitting corporations to report semi-annually rather than quarterly,[148] the result is likely to be increased volatility in stock prices, which will make it even harder for plaintiffs to establish a cause-and-effect relationship between the announcement of material information and price impact.[149] Under such circumstances, it is imperative that *all* evidence be considered, rather than the truncated and artificially-constrained record available at class certification. In this new environment, securities class actions may play an especially important role in policing the market; whatever fears may persist about nuisance actions, they should not be used to erect arbitrary barriers that thwart meritorious claims.

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[145] *See supra* Part I.
[146] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 296 n.7 (2014) (Thomas, J., concurring in the judgment).
[147] *See* Pampena v. Musk, 3:22-cv-05937 (N.D. Cal.); *In re* Vaxart, Inc. Sec. Litig., No. 3:20-cv-05949 (N.D. Cal.); Ramirez v. Exxon Mobil Corp., 3:16-cv-03111 (S.D. Tex.).
[148] 91 Fed. Reg. 24,968 (May 7, 2026).
[149] Langevoort, *Basic* at 20, *supra* note 23, at 179.

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