Louisiana Law Review

Volume 76 | Number 1
The Voting Rights Act at 50: The Past, Present, and Future of the Right to Vote
A Symposium of the Louisiana Law Review
Fall 2015

A Court's Guide on How to Gut Precedent by Relying on it: Halliburton II's Puzzling Effect on Securities-Fraud Class Actions

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Repository Citation
Leah Neupert, *A Court's Guide on How to Gut Precedent by Relying on it: Halliburton II's Puzzling Effect on Securities-Fraud Class Actions*, 76 La. L. Rev. (2015)
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A Court's Guide on How to Gut Precedent by Relying on it: *Halliburton II*'s Puzzling Effect on Securities-Fraud Class Actions

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INTRODUCTION

In 2013 alone, corporations paid an estimated $4.8 billion in settlement costs for securities-fraud class action claims.[1] Enormous settlement figures

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1. LAARNI T. BULAN, ELLEN M. RYAN & LAURA E. SIMMONS, SECURITIES CLASS ACTION SETTLEMENTS: 2013 REVIEW AND ANALYSIS 1 (2014), *available at* https://www.cornerstone.com/GetAttachment/e1800abc-dc50-4df3-b7a9-cf8ee3fea116/Securities-Class-Action-Settlements-2013-Review-and-Analysis.pdf [https://perma.cc/RD66-PSLJ].

have been common since the early 1990s[2] and are attributable to the 1988 Supreme Court case *Basic Inc. v. Levinson*.[3] Although courts have recognized a private cause of action for securities fraud under Security Exchange Commission's Rule 10b-5 ("Rule 10b-5") since the 1940s,[4] one of the most significant aspects of a Rule 10b-5 claim has become the class action.[5] *Basic* made bringing a Rule 10b-5 claim as a class action possible, holding that reliance is a requisite element of a Rule 10b-5 claim,[6] but that plaintiffs benefit from a rebuttable presumption of reliance for the purposes of class certification.[7] Given the stark rise in litigation and settlement costs that occurred in the years after *Basic*, the Supreme Court has unsurprisingly given a great deal of attention to *Basic*'s requirements for class certification of a Rule 10b-5 claim.[8]

Rule 10b-5 class actions typically involve a claim that an investor purchased a corporation's stock after a value-enhancing misstatement by that corporation and suffered a loss when the price of the stock dropped after the corporation corrected the misstatement.[9] The 2011 Supreme

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2. *Id.*; *see also* Denise N. Martin, Vinita M. Juneja, Todd S. Foster & Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 STAN. J.L. BUS. & FIN. 121, 123, 159 (1999).

3. 485 U.S. 224 (1988); Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152 ("Tens of billions of dollars have changed hands in settlements of 10b-5 lawsuits in the last twenty years as a result of *Basic*.").

4. Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946) (explaining that "there is no provision in [Rule 10b-5] . . . expressly allowing civil suits by persons injured as a result of [a] violation" but such violation makes an actor liable to that individual). The Supreme Court's acknowledgment that Rule 10b-5 provides a private right of action did not occur until years later. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (explaining "[the Supreme] Court had no occasion to deal with the subject until 25 years [after the *Kardon* decision], and at that time [the Court] confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist"). Rule 10b-5 provides that "[i]t shall be unlawful for any person . . . [t]o engage in any act . . . which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2014).

5. *See, e.g.*, *Basic*, 485 U.S. 224; Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179, 2184 (2011); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013); Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398 (2014).

6. *Basic*, 485 U.S. at 243.

7. *Id.* at 250.

8. *See, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005); *Halliburton I*, 131 S. Ct. at 2184; *Amgen*, 133 S. Ct. at 1191.

9. *See, e.g.*, *Halliburton I*, 131 S. Ct. 2183; *Amgen*, 133 S. Ct. at 1193. Securities-fraud actions also involve omissions by a corporation that render a public statement misleading. *See, e.g.*, Kas v. Caterpillar, Inc., 815 F. Supp. 1158,

Court case *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*) held that plaintiffs do not have to prove that a corporation's misstatement was the proximate cause of their economic loss to invoke *Basic*'s presumption and achieve class certification.[10] Two years later, the Court reached a similar conclusion in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*.[11] In *Amgen*, the Court held that plaintiffs do not have to show that a corporation's misstatement was material at the class certification stage to invoke *Basic*'s presumption.[12] *Amgen* also held that defendants may not provide proof of immateriality at class certification to rebut the *Basic* presumption.[13]

In 2014, the Supreme Court faced the question of whether defendants could submit proof of an absence of "price impact"—a concept that has evolved to mean that a corporation's misstatement was or was not the cause of a stock's decrease in price[14]—at class certification to rebut *Basic*'s presumption.[15] Considering *Halliburton I* and *Amgen*, the Court in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*)[16] seemed poised to answer "no" to this question because a lack of price impact is nearly inseparable from immateriality and a lack of loss causation, both of which are ignored at the class-certification stage.[17] However, six members of the Court found that defendants *may* submit proof of a lack of price impact at class certification for the purposes of rebutting *Basic*'s presumption to defeat class certification.[18] This Comment aims to demonstrate that the correct interpretation of *Halliburton II* will severely undermine, and in effect overrule, *Halliburton I* and *Amgen*. This Comment also proposes that slightly modifying the interpretation of *Halliburton II* could partially preserve these two decisions.

1171 (C.D. Ill. 1992). The failure to disclose a material fact alone, however, will not be enough to prevail in a securities-fraud suit; the failure to disclose must be in connection with a related statement. *Id.* Private securities-fraud claims can also involve *selling*—or both purchasing and selling—of a corporation's stock by a plaintiff in relation to misstatements or omissions by the corporation. *Basic*, 485 U.S. at 228. This Comment's central focus, however, is on claims involving a misstatement followed by the purchase of a security by an investor.

10. 131 S. Ct. at 2186. That a corporation's misstatement was the proximate cause of their economic loss is more commonly referred to as loss causation. *See infra* Part I.A.

11. 133 S. Ct. 1184.

12. *Id.* at 1202–03.

13. *Id.* at 1203–04.

14. *See infra* Part I.D.2.

15. *Halliburton II*, 134 S. Ct. 2398, 2414–15 (2014).

16. *Id.*

17. *See infra* Part IV.B.1.

18. *Halliburton II*, 134 S. Ct. at 2414–15.

Part I provides background on the history of securities-fraud class actions, beginning with the opinion in *Basic*, and explains how the meaning of price impact and materiality have changed over time. Part II discusses the opinions of *Halliburton I* and *Amgen*, focusing on the parts of the opinions that *Halliburton II* undermines. Part III details Chief Justice Robert's opinion in *Halliburton II*. Part IV explains what this author believes is the correct interpretation of *Halliburton II* and concludes that applying this interpretation will effectively overrule *Halliburton I* and *Amgen*, because the concepts of price impact, loss causation, and materiality are inseparably interrelated. Part V presents three alternative interpretations of *Halliburton II* that could preserve *Halliburton I* and *Amgen*. It proposes that courts should either apply the correct interpretation of *Halliburton II* or apply the most rational alternative, which imposes a standard of clear and convincing evidence on defendants to successfully rebut the *Basic* presumption. Finally, Part VI concludes that although *Halliburton II*'s practical impact is uncertain, the inconsistencies between the opinion and *Halliburton I* and *Amgen* are clear.

I. THE EVOLUTION OF PRIVATE SECURITIES-FRAUD CLASS ACTIONS

In 2014, plaintiffs filed a total of 170 federal securities class action claims.[19] A survey estimated that federal securities claims made up 10.2% of all class action matters and 12.1% of all class action spending in 2014.[20] Similar statistics have been the norm since the early 1990s, with only slight variations from year to year.[21] The rule from *Basic*—that reliance may be presumed provided plaintiffs show certain prerequisites[22]—is fundamental to class action Rule 10b-5 claims, as well as to understanding the effect of *Halliburton II*. Of equal importance are the changes in meanings of price impact and materiality that occurred in the years following *Basic*.

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19. *Filings by Year*, STAN. L. SCH. SEC. CLASS ACTION CLEARINGHOUSE, http://securities.stanford.edu/charts.html%22 [https://perma.cc/VL8U-5Q5Z] (last visited June 25, 2015).

20. Carlton Fields & Jorden Burt, *Class Action Spending and Budgets,* CLASS ACTION SURV., http://classactionsurvey.com/spending-budgets/ [https://perma.cc/5GGU-APKA] (last visited June 25, 2015).

21. *See* RICHARD PAINTER, MEGAN FARRELL & SCOTT L. ADKINS, PRIVATE SECURITIES LITIGATION REFORM ACT: A POST-ENRON ANALYSIS 3–4 (2005), *available at* http://fedsoc.server326.com/pdf/PSLRAFINALII.pdf [https://perma.cc/J4LX-ECG2]; *see also Filings by Year*, *supra* note 19.

22. Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988). The prerequisites for invoking *Basic*'s presumption of reliance are discussed *infra* Part I.B.

A. The Requisite Elements for a Rule 10b-5 Claim

The private cause of action for securities-fraud arises out of Rule 10b-5, a Securities Exchange Commission Regulation, which is derived from Section 10(b) of the Securities Exchange Act of 1934.[23] For plaintiffs to recover in a Rule 10b-5 suit, they must prove six elements:[24] (1) a material misstatement or omission by the defendant,[25] (2) scienter,[26] (3) a connection between the misstatement or omission and the purchase or sale of a security by the plaintiff,[27] (4) reliance upon the misstatement or omission, (5) actual economic loss, and (6) the legal cause of the investor's loss was the misstatement or omission, more commonly known as "loss causation."[28] Although all elements are required for a decision on the merits, the

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23. Section 10(b) provides that:

> It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j (2013). The Securities Exchange Act of 1934 was adopted "to protect investors against manipulation of stock prices" after the stock market crash of 1929 and the Great Depression. *See Basic*, 485 U.S. at 230; *In re* Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 298 (S.D.N.Y. 2003). Although neither Section 10(b) nor Rule 10b-5 explicitly provide that a private cause of action exists for a violation of either provision, courts have long recognized that a cause of action can be implied. *See Basic*, 485 U.S. at 230–31 ("Judicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5 . . . .").

24. *See* Dura Pharm., Inc., v. Broudo, 544 U.S. 336, 341–42 (2005).

25. *See infra* Part I.D.1 (discussing materiality).

26. Scienter is defined as "a mental state consisting of an intent to deceive, manipulate, or defraud." BLACK'S LAW DICTIONARY 1547 (10th ed. 2014).

27. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754–55 (1975) (holding that a plaintiff was "not entitled to sue for violation of Rule 10b-5" because "members of its class [were] neither 'purchasers' nor 'sellers' [of a stock]").

28. *Dura*, 544 U.S. at 341–42. One should not confuse the fourth and sixth elements, reliance and loss causation, with each other. Reliance is best described as transaction causation, where but for the defendant's misstatement, the plaintiff would not have purchased or sold the stock. Mariana Estévez, Comment, *Reworking the Unworkable:* Halliburton II *and the Court's Reexamination of Fraud on the Market*, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 221, 226 (2014). Loss causation, on the other hand, is the causal connection between the defendant's misstatement and the plaintiff's loss, as opposed to the plaintiff's decision to purchase or sell the stock. *Id.*

Supreme Court's decision in *Basic*, among others, clarified which elements are necessary to prove for class certification.[29]

B. Basic*: Simple Name, Intricate Problems*

In the 1988 *Basic* decision, the Supreme Court adopted a rebuttable presumption regarding the element of reliance for the purposes of class certification.[30] The presumption allows plaintiffs to more easily meet the standards for class certification.[31] Thus, the presumption has had a lasting effect on securities-fraud litigation because class certification is the pivotal stage in Rule 10b-5 litigation that almost always determines the outcome of the case.[32]

Basic involved a group of investors who sold their shares of Basic's stock after the company made public misstatements denying it was involved in merger negotiations.[33] The investors brought suit against Basic, claiming that they suffered an injury by selling their shares at an artificially deflated price caused by the misstatements.[34] The Court held in a four-to-two opinion that reliance was an essential element of a Rule 10b-5 cause of action,[35] but that the investors were entitled to a presumption of reliance at class certification.[36]

The presumption of reliance stems from the theory that in an efficient market, the market price of a share reflects all public information, including

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29. *See, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013) (holding that plaintiffs do not have to prove materiality at class certification and that defendants may not submit evidence of immateriality at class certification); *Halliburton I*, 131 S. Ct. 2179 (2011) (holding that plaintiffs do not have to prove loss causation at class certification); Basic Inc. v. Levinson, 485 U.S. 224 (1988) (holding that plaintiffs benefit from a presumption of reliance for the purposes of passing class certification).

30. 485 U.S. at 245–49.

31. *See infra* Part I.C.

32. *See infra* Part I.C; *see also* Dwight J. Davis, Karen R. Kowalski & Brandon P. Ansley, *Expert Opinion in Class Certifications: Second Circuit Revisits, Disavows* In re Visa Check *and Joins Majority Rule*, 74 DEF. COUNS. J. 253, 253 (2007) ("In virtually every putative class action, the entire case will turn on the certification decision. Once a class is certified, an overwhelming majority of the cases go on to settlements . . . . On the other hand, those cases that do not survive class certification are typically dismissed.").

33. *Basic*, 485 U.S. at 226–28.

34. *Id.* at 227–28.

35. *Id.* at 243.

36. *Id.* at 250. Justice Blackmun delivered the majority opinion, with Justices Brennan, Marshall, and Stevens joining. *Id.* at 225. Justice White concurred in part and dissented in part, with Justice O'Connor joining. *Id.* at 250. Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy took no part in the consideration of the case. *Id.* at 225. *Basic* also adopted a standard for materiality. *Id.* at 231–41; *see also infra* Part I.D.1.

any material misstatement made by a corporation.[37] Thus, a misstatement reflected in the market price of a stock will defraud a purchaser whether or not the purchaser directly relied on the misstatement.[38] Based upon this theory, if plaintiffs can establish certain facts—that the defendant's misstatements were public and material, that the defendant's shares traded in an efficient market, and that the plaintiffs traded the shares between the time the misrepresentation was made and the time the truth was disclosed[39]—the court will presume that the plaintiffs relied on the defendant's misstatement if they bought or sold the defendant's shares at the market price.[40]

Although *Basic*'s presumption of reliance relieves securities-fraud plaintiffs of the substantial burden of proving direct reliance, the Court explicitly provided that defendants may rebut the presumption by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[41] The Court gave examples for how a defendant could effectively "sever the link," including showing that "market makers" were aware of the truth at the time of the misstatements, that news of the truth "credibly entered the market and dissipated the effects of the misstatements," or that a plaintiff believed a defendant's statements were false, but nevertheless traded his shares for other reasons.[42] The Court's language regarding the threshold facts required both for invoking the presumption and rebutting it have been the source of debate among courts and the legal community.[43]

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37. *Halliburton II*, 134 S. Ct. 2398, 2408 (2014); *Basic*, 485 U.S. at 241–42. This theory is more commonly known as the "fraud-on-the-market" theory. *Id.* at 241.
38. *Basic*, 485 U.S. at 241–42.
39. *See id.* at 248 n.27; *Halliburton II*, 134 S. Ct. at 2413.
40. *Halliburton II*, 134 S. Ct. at 2405.
41. *Basic*, 485 U.S. at 248.
42. *Id.* at 248–49.
43. *See, e.g.*, *Halliburton I*, 131 S. Ct. 2179, 2186 (2011) (holding proof of "loss causation" is not a prerequisite for invoking the presumption of reliance); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013) (holding proof of "materiality" is not required for purposes of class certification, and defendants may not introduce evidence of immateriality at class certification in an effort to rebut the presumption); *see also* Jill E. Fisch, *The Trouble With* Basic*: Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895 (2013); Matthew L. Mustokoff, *Fraud Not on the Market: Rebutting the Presumption of Classwide Reliance Twenty Years After* Basic Inc. v. Levinson, 4 HASTINGS BUS. L.J. 225 (2008); Matthew M. Sanderson, *A "*Basic*" Misunderstanding: How the United States Supreme Court Misunderstands Capital Markets*, 43 S. TEX. L. REV. 743 (2002).

Unfortunately, these problems only highlight a portion of the criticisms *Basic* has received as a whole.[44]

C. Class Actions in the Aftermath of Basic

Basic opened the floodgates for plaintiffs to bring securities-fraud suits as class actions.[45] Requiring each plaintiff in a class to prove direct reliance acted as a barrier to certification under Federal Rule of Civil Procedure 23(b)(3)[46] because the burden of proving direct reliance "turn[ed] on factual information specific to each class member, causing questions that affect[ed] individual members to predominate over common factual issues."[47] With the benefit of the presumption, individual questions of fact no longer predominated over common ones, and plaintiffs were able to secure certification and continue as a class.[48]

Justice White feared *Basic* would transform Rule 10b-5 into a form of "investor's insurance,"[49] and throughout the years, many others have expressed the same skepticism.[50] Some scholars view *Basic* as the direct cause of the stark increase in securities-fraud suits, and thus the cause of a

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44. These criticisms began with Justice White's dissent in the opinion itself. *See Basic*, 485 U.S. at 250–63 (White, J., dissenting). A full discussion of the criticisms *Basic* has received is beyond the scope of this Comment.

45. *See, e.g.*, *Amgen*, 133 S. Ct. at 1209 ("*Basic*'s fraud-on-the-market presumption is highly significant because it makes securities-fraud class actions possible by converting the inherently individual reliance inquiry into a question common to the class . . . ."); Langevoort, *supra* note 3, at 152 ("Tens of billions of dollars have changed hands in settlements of 10b-5 lawsuits in the last twenty years as a result of *Basic*.").

46. To certify a class under Federal Rule of Civil Procedure 23(b)(3), "questions of law or fact common to class members [must] predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). Rule 10b-5 plaintiffs must first meet the Rule 23(a) prerequisites, which they typically do. *See Halliburton I*, 131 S. Ct. at 2183.

47. Estévez, *supra* note 28, at 226.

48. *See, e.g.*, McEwen v. Digitran Sys., Inc., 160 F.R.D. 631, 640–41 (D. Utah 1994) (granting class certification after finding that plaintiffs were entitled to "a presumption of reliance"); Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113, 129–130, 136 (S.D.N.Y. 2001) (same).

49. *Basic*, 485 U.S. at 252 (White, J., dissenting).

50. *See, e.g.*, Douglas A. Smith, *Fraud on the Market: Short Sellers' Reliance on Market Price Integrity*, 47 WM. & MARY L. REV. 1003, 1039 (2005) (arguing that investors who believe market prices to be overvalued should not be entitled to the *Basic* presumption because it acts as an insurance scheme); Julie A. Herzog, *Fraud Created the Market: An Unwise and Unwarranted Extension of Section 10(b) and Rule 10b-5*, 63 GEO. WASH. L. REV. 359, 364 (1995) (explaining that the fraud-on-the-market theory "results in supplying plaintiffs with a type of investors' insurance, a result not warranted by the securities laws and not intended by Congress").

significant amount of money paid out in Rule 10b-5 settlements.[51] As one commentator observed, "[t]he rate at which securities fraud class action suits were filed nearly tripled" after the Court decided *Basic*.[52] One study found that in 1992, 230 securities-fraud actions were filed, 120 actions were settled, 29 actions were dismissed, and only 4 judgments were issued.[53] Seventy-seven of the 120 settlements totaled to $761 million in payouts to plaintiffs.[54] The following years yielded similar results, with an estimated $5.5 billion in total settlement value from 1991 to 1998.[55]

Following this huge growth in securities-fraud class actions, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA").[56] The stated purposes of the PSLRA were to "discourage frivolous litigation" and to avoid the exorbitant settlements of baseless securities-fraud claims.[57] Although the PSLRA enforced new standards and restrictions for Rule 10b-5 claims,[58] *Basic*'s presumption was left wholly intact.[59] To prevent plaintiffs from circumventing the PSLRA through state law class actions, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[60] and reaffirmed its support of the PSLRA. Like the PSLRA, SLUSA left *Basic*'s presumption of reliance free from congressional reform.[61] The impact and success of the PSLRA and SLUSA remains a topic of debate.[62] However, with $3.2 billion in settlement payouts in 2012, and $4.8 billion in 2013, securities-fraud class actions have indisputably remained prevalent in the years following both legislative reforms.[63]

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51. *See, e.g.*, Langevoort, *supra* note 3.
52. Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 663 (1992).
53. Martin et al., *supra* note 2, at 158.
54. *Id.* at 159.
55. *Id.* at 123, 159.
56. Pub. L. No. 104-67, 109 Stat. 737 (1995).
57. H.R. REP. NO. 104–369, at 32 (1995) (Conf. Rep.); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1200–01 (2013).
58. The PSLRA sought to impose heightened pleading standards for securities-fraud plaintiffs, "limit recoverable damages and attorney's fees, provide a 'safe harbor' for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss." Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81 (2006).
59. *See Amgen*, 133 S. Ct. at 1201.
60. Pub. L. No. 105-353, 112 Stat. 3227 (1998). SLUSA was designed to reduce "plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law." *Amgen*, 133 S. Ct. at 1200 (citing 15 U.S.C. § 78bb(f)(1) (2012)).
61. *See Amgen*, 133 S. Ct. at 1201.
62. *See, e.g.*, Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913.
63. BULAN ET AL., *supra* note 1, at 3.

The figures above and the ultimate outcome of most Rule 10b-5 actions hinge on class certification.[64] If the class is certified, the case will virtually always settle; if class certification is denied, the suit will almost always be dismissed.[65] Hence, establishing or refuting the *Basic* presumption has become the centerpiece of most securities-fraud class action lawsuits.

D. The Change in Meaning of "Materiality" and "Price Impact" Since Basic

Basic held that plaintiffs could invoke the presumption of reliance, in part, by showing that a defendant made a public and material misrepresentation.[66] However, the Court also contemplated that defendants could rebut the presumption of reliance by showing a lack of price impact, meaning that a misrepresentation had no effect on the price of a share.[67] The meanings of materiality and price impact, however, have evolved since *Basic* was decided in 1988.

1. The Concept of "Materiality" from Basic*: Fundamentally Altered over Time*

Although often a forgotten aspect of the case, *Basic* also endorsed a legal standard to measure materiality along with establishing the presumption of reliance.[68] A misstatement is material if there is a substantial likelihood that a reasonable investor would have considered a proper disclosure of the misstatement to significantly alter the total mix of information available.[69] Under this view, determining materiality meant evaluating whether a reasonable investor's decision to trade a share at a certain price would have

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64. Davis et al., *supra* note 32, 253 ("In virtually every putative class action, the entire case will turn on the certification decision. Once a class is certified, an overwhelming majority of the cases go on to settlements . . . . On the other hand, those cases that do not survive class certification are typically dismissed.").

65. *Id.*

66. Basic Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988). Plaintiffs also have to show market efficiency and that they traded their shares during the relevant time period. *Id.*

67. *Id.* at 248–49.

68. *See id.* at 231–41.

69. *Id.* at 231–32. *Basic* involved an omission, *id.* at 227–28, but the legal standard of materiality adopted in *Basic* extends to claims involving both misrepresentations and omissions under Rule 10b-5. *See, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013).

been significantly affected if he or she were aware of the truth at the time of the trade.[70]

Over time, the use of event studies has caused this reasonable investor method to become less common.[71] An event study in the context of securities-fraud utilizes a statistical regression analysis to determine an event's effect on the price of a stock.[72] Although event studies are used to evaluate other elements of a Rule 10b-5 claim, they have also been widely used to prove or disprove materiality.[73] Simply put, if an event study concludes that a price movement was caused by the release of a statement, that statement is material.[74] Conversely, if an event study concludes that a price movement was not caused by the release of a statement, then that statement is immaterial.[75] Therefore, scientific evidence showing that a statement did or did not have an effect on the price of a share has become the norm for determining materiality, rather than the legal evaluation from the perspective of a reasonable investor that *Basic* endorsed.[76]

2. The Concept of Price Impact from Basic*: Fundamentally Altered by* Dura

Although the definition of materiality has shifted due to changes in proof methodology, the Court has modified the concept of price impact directly. The Court in *Basic* stated that to rebut the presumption of reliance, defendants could show that a misstatement did not lead to a share's increase or decrease in price.[77] Although the Court did not give the concept a name, one can easily characterize the concept as a lack of price impact, where there was no market movement after a misstatement or its correction. Hence, neither misstatement nor correction impacted the price of the share. The 2005 Supreme Court case *Dura Pharmaceuticals, Inc. v.*

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70. *See, e.g.*, 26A MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 25B:1, at 2 (2014) (explaining "[d]efinitions of materiality all tend to relate back to whether the decision by a reasonable investor to trade at a particular price would have been affected by knowing the omitted or misstated information" (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 467 (1976))).

71. *See* Michael J. Kaufman & John M. Wunderlich, *Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation*, 15 STAN. J.L. BUS. & FIN. 183, 200–01 (2009) (citing to cases demonstrating an event study's role in assessing materiality).

72. *Id.* at 183.

73. *See id.* at 199 ("[T]he elements of materiality, reliance, loss causation, and damages all depend on an initial showing of post-disclosure price movement.").

74. *Id.*

75. *Id.* at 201.

76. *Id.* at 199–201.

77. Basic Inc. v. Levinson, 485 U.S. 224, 248–49 (1988).

Broudo significantly altered the concept of "price impact" contemplated in *Basic* for purposes of rebutting the presumption of reliance.[78] The Court held that loss causation requires plaintiffs to prove that a defendant's misstatements actually caused an economic loss—meaning that the price of the defendant's stock changed—and that the misstatements were the proximate cause of that economic loss.[79] The case involved a group of investors who purchased Dura's stock after Dura officials made false statements regarding the profitability of future sales.[80] The complaint stated that "'[i]n reliance on the integrity of the market, [the plaintiffs] . . . paid artificially inflated prices for Dura securities' and the plaintiffs suffered 'damage[s]' thereby."[81] The Court found the plaintiffs' complaint to be inadequate, as it failed to point to an economic loss and failed to allege that the defendant's misstatements were the proximate cause of that economic loss.[82]

The Court in *Dura* refused to accept the arguments that plaintiffs suffer a loss at the time they overpay for a corporation's stock.[83] Thus, securities-fraud claims are now only brought when there has been a change in stock price after a misstatement or its corrective disclosure because, without alleging a change in stock price, a plaintiff's complaint will be legally deficient as a result of *Dura*.[84] Therefore, the question of whether a misstatement impacts the price of a share no longer addresses the concept of price impact described in *Basic*—that the defendant could rebut the presumption of reliance by showing no price movement. Rather, after *Dura*, the question of whether a misstatement impacts the price of a share only involves evaluating whether the misstatement was the *cause* of the now-required change in price.[85] For example, if a misstatement was the cause of the price drop at issue, price impact occurred. In contrast, if the

78. 544 U.S. 336 (2005).
79. *Id.* at 346.
80. *Id.* at 339–40.
81. *Id.* at 340–41 (citations omitted).
82. *Id.* at 346.
83. *See id.* at 347.
84. *See* James D. Cox, *Fraud on the Market After* Amgen, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 20 (2013) ("[O]ne can appreciate that following *Dura Pharmaceuticals, Inc. v. Broudo*, plaintiffs must allege that the misrepresentation caused an economic loss; in fraud on the market causes this is customarily satisfied with a factual allegation that the security's price changed in connection with the release of corrective . . . information." (footnote omitted)); Scotland M. Duncan, Comment, Dura*'s Effect on Securities Class Actions*, 27 J.L. & COM. 137, 140 (2008) (explaining that *Dura* requires a plaintiff to allege and prove "*ex post* losses in the form of market decline, as opposed to *ex ante* losses in the form of price inflation at the time of purchase").
85. *See infra* Part IV.B.1 (discussing the relationship between price impact, loss causation, and materiality).

misstatement was not the cause of the price drop, a lack of price impact occurred.

II. *HALLIBURTON I* AND *AMGEN*: LESSENING THE BURDEN FOR CLASS CERTIFICATION

Although the fundamental shifts in meaning of materiality and price impact are important aspects in evaluating the impact of *Halliburton II*,[86] the Supreme Court opinions in *Halliburton I* and *Amgen* are also essential to the analysis. As a result of *Halliburton I* and *Amgen*, proof of loss causation and materiality, elements six and one, must be left to the merits and, thus, should not be considered at class certification. These decisions, however, may have little meaning after *Halliburton II*.[87]

A. Halliburton I*: Loss Causation Not Required to Invoke* Basic*'s Presumption*

In *Halliburton I*, Erica P. John Fund, Inc. ("EPJ Fund")[88] filed a Rule 10b-5 class action suit against Halliburton Co.[89] EPJ Fund alleged that Halliburton's officials made public misstatements about potential liability in upcoming asbestos litigation, expected revenues, and the benefits of a merger.[90] EPJ Fund contended that when Halliburton released corrective disclosures, Halliburton's stock prices fell because the misstatements had artificially inflated the prices.[91] Consequently, EPJ Fund argued that Halliburton's misstatements caused all investors who purchased Halliburton's stock after the misstatements were made, but before they were corrected, to suffer an economic loss.[92]

EPJ Fund subsequently filed a motion to have its class certified under Federal Rule of Civil Procedure 23.[93] The class easily satisfied the prerequisites for a class action under Rule 23(a),[94] but failed to meet the

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86. *See infra* Part IV.B.1 (discussing *Halliburton II*'s effect on materiality and loss causation through "price impact").

87. *See infra* Part IV.B.2 (discussing *Halliburton II*'s effect on *Halliburton I* and *Amgen*).

88. EPJ Fund is an investors group that filed suit on behalf of themselves and all other investors in Halliburton's stock during the requisite time period. *Halliburton I*, 131 S. Ct. 2179, 2183 (2011).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* ("The class was sufficiently numerous, there were common questions of law or fact, the claims of the representative parties were typical, and the

requirements to proceed as a class action under Rule 23(b)(3) according to the district court.[95] Fifth Circuit precedent required EPJ Fund to prove loss causation to invoke *Basic*'s presumption and, thus, have its class certified.[96] The district court denied class certification because EPJ Fund failed to prove loss causation for any of its claims, and the court of appeals affirmed.[97] The Supreme Court granted EPJ Fund's petition for certiorari[98] to determine "whether securities fraud plaintiffs must [] prove loss causation in order to obtain class certification."[99] The Court found that plaintiffs are not required to prove loss causation at class certification and vacated the Fifth Circuit's ruling, remanding the case for further proceedings.[100]

1. The Court's Opinion

"Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance."[101] Therefore, the question before the Court in *Halliburton I* was whether proof of loss causation is required to show that reliance can be determined on a class-wide basis.[102] The Court unanimously answered "no" to that question in an opinion written by Chief Justice Roberts.[103]

The Court began by providing an overview of Rule 10b-5 claims, *Basic*'s presumption of reliance, and what plaintiffs must prove to invoke the presumption.[104] Labeling the concept "loss causation" as recognized in *Dura*, however, the Court rejected the Fifth Circuit's holding that EPJ Fund also had to prove that a correction to a previous misstatement, rather than by other information made available to the market simultaneous with the correction, caused the decrease in price of Halliburton's stock.[105]

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representative parties would fairly and adequately protect the interests of the class.").

95. *Id.*

96. *See* Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 269 (5th Cir. 2007), *abrogated by Halliburton I*, 131 S. Ct. 2179 (2011).

97. *Halliburton I*, 131 S. Ct. at 2183–84.

98. *Id.* at 2184.

99. *Id.* at 2183.

100. *Id.* at 2187.

101. *Id.* at 2184.

102. *Id.*

103. *Id.* at 2187.

104. *Id.* at 2184–85. The Court acknowledged that plaintiffs must show that a corporation's misstatements were public, the corporation's shares traded in an efficient market, and the plaintiff traded the shares during the relevant time period. *Id.* at 2185 (citing Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988)).

105. *Id.* at 2185–86 (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–342 (2005)).

The Court offered reasons why loss causation is not required to invoke *Basic*'s presumption. For one, loss causation cannot be found in the *Basic* opinion and has never been declared a predicate for invoking the presumption of reliance.[106] Additionally, the Court explained that "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock."[107] The Court concluded that the two issues have nothing to do with one another:

> 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. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.[108]

Based on this reasoning, the Court found that the Fifth Circuit erred in requiring EPJ Fund to prove loss causation to invoke the presumption and have the class certified.[109]

Halliburton argued that even if plaintiffs do not have to prove *loss causation* to invoke the presumption, the Fifth Circuit actually required plaintiffs prove *price impact*.[110] The Court declined to consider this contention and noted the difference between the two concepts.[111] Price impact merely "refers to the effect of a misrepresentation on a stock price," whereas "loss causation is a familiar and distinct concept in securities law; it is not price impact."[112] Because of the Fifth Circuit's "repeated and explicit references" to loss causation rather than price impact, the Court rejected Halliburton's argument, leaving no doubt that loss causation is a matter for the merits.[113]

106. *Id.* at 2186.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 2186–87.
111. *Id.* at 2187.
112. *Id.* The court defined loss causation as showing a decline in stock that was "'because of the correction to a prior misstatement' and 'that the subsequent loss could not be explained by some additional factors revealed then to the market.'" *Id.* at 2185.
113. *Id.* at 2187.

2. *The Significance of* Halliburton I

Halliburton I separates reliance and loss causation entirely, holding that evidence relating to loss causation has nothing to do with the presumption of reliance, and therefore nothing to do with class certification. Like the Court in *Basic*, *Halliburton I* also defines price impact as whether a misstatement had any effect on a stock's price. Chief Justice Roberts draws bright lines between the presumption of reliance, loss causation, and price impact, concluding that each is a distinct concept. Overall, *Halliburton I* signifies that loss causation is solely a question for the merits of the case.[114] A little over a year and a half later, the Court reached the same conclusion with respect to materiality in *Amgen*.[115]

B. Amgen*: Materiality Not Required to Invoke* Basic*'s Presumption*

Similar to *Halliburton I*, in *Amgen*, Connecticut Retirement Plans and Trust Funds ("Connecticut Retirement")[116] alleged that Amgen made public misstatements concerning two of its leading drugs, which artificially inflated its stock price.[117] Connecticut Retirement claimed that when the misstatements were corrected, the stock price declined, resulting in losses to all investors who purchased the stock at the inflated price.[118] The district court granted Connecticut Retirement's motion for class certification, and the Ninth Circuit affirmed on appeal.[119] Amgen appealed to the Supreme Court and argued that the district court should have required Connecticut Retirement to prove the Rule 10b-5 element of materiality to have its class certified and should have allowed Amgen to present evidence showing immateriality for the purpose of rebutting *Basic*'s presumption to defeat class certification.[120] The Supreme Court granted certiorari to resolve a conflict among the circuits regarding proof of materiality for purposes of class certification.[121]

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114. *See* Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 LOY. U. CHI. L.J. 1475, 1492 (2013) (explaining "the Court clarified [in *Halliburton I*] that loss causation was a merits issue, not one to be determined at the class certification stage").

115. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1203–04 (2013).

116. Connecticut Retirement is an investors group that filed suit on behalf of themselves and all other investors in Amgen's stock during the relevant time period. *Id.* at 1193.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1193–94.

121. *Id.* at 1194.

1. The Court's Opinion

In a six-to-three decision, the Court rejected both of Amgen's arguments.[122] In contrast to *Halliburton I*,[123] the majority in *Amgen* focused its inquiry on whether proof of materiality is necessary to ensure that common questions of law or fact predominate over individual ones.[124] Amgen argued before the Court that materiality is both an element of a Rule 10b-5 claim and a prerequisite for invoking the *Basic* presumption, as evidenced by the *Basic* opinion.[125] Amgen claimed, "[b]ecause immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity."[126] Therefore, according to Amgen, because *Basic*'s presumption could not apply without a material misstatement, plaintiffs must prove materiality to achieve class certification.[127]

The Court acknowledged that materiality is inarguably a prerequisite of the fraud-on-the-market theory and, thus, a predicate of the *Basic* presumption.[128] The Court found, however, that proof of materiality is not necessary to ensure that questions common to the class predominate over questions affecting only individuals.[129] The Court reasoned that materiality is a common question because it involves an objective inquiry and can be shown through evidence common to the entire class.[130] Additionally, the Court explained that a failure to show materiality would not result in individual questions predominating over common ones.[131] Instead, in failing to prove materiality, "the case [would end] for one and for all" because it is an essential element of a Rule 10b-5 claim.[132]

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122. *Id.* at 1204. Justice Ginsburg wrote the majority opinion with Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, and Kagan joining. *Id.* Justice Alito filed a brief concurring opinion. *Id.* Justice Thomas filed a dissenting opinion with Justice Kennedy joining and Justice Scalia joining, except for Part I.B. *Id.* at 1206. A discussion of Justice Thomas' dissent is beyond the scope of this Comment.

123. *Halliburton I* focused on whether loss causation is a predicate of invoking the presumption of reliance, rather than addressing whether proof of loss causation is needed to ensure that common questions of fact predominate over individual ones. *Halliburton I*, 131 S. Ct. 2179, 2185 (2011).

124. *Amgen*, 133 S. Ct. at 1195.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1196. Justice Ginsburg [rationalized this argument] by explaining that a failure to prove materiality at either summary judgment or at trial ends every

Amgen also pointed to policy considerations to support its argument that proof of materiality should be required at class certification.[133] Amgen argued that a court would likely never address materiality on the merits if it did not evaluate materiality at class certification because the granting of class certification places immense pressure on defendants to settle rather than take the risk of litigation.[134] In turn, these settlements could potentially reward plaintiffs for meritless claims. The majority's answer to this assertion was that materiality is no different from the other requisite elements for a Rule 10b-5 claim that are not required at class certification.[135] Further, because Congress has enacted the PSLRA and SLUSA to address the policy concerns raised by Amgen, the Court did not find it appropriate to alter Rule 23 "to make likely success on the merits essential to class certification in securities-fraud suits."[136]

Next, the Court turned to Amgen's assertion that the district court should have considered Amgen's evidence of immateriality at class certification to try to rebut the presumption and defeat class-certification.[137] Amgen contended that its evidence "showed that 'in light of all the information available to the market,' [Amgen's] alleged misrepresentations and misleading omissions 'could not be presumed to have altered the market price'" because the misrepresentations did not significantly alter the total mix of information available.[138] The Court rejected this argument, relying on the same reasoning found throughout the opinion: potential immateriality will not cause individual questions to predominate over common ones. The Court explained that "[j]ust as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate," a rebuttal

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plaintiff's claim on the merits. *Id.* Thus, the same could be said for a failure to prove materiality at class certification. *Id.* Although beyond the scope of this Comment, this argument is unpersuasive, as a ruling at class certification should only answer the question of whether the plaintiffs should proceed as a class or as individual plaintiffs, rather than answering a question of the underlying merits of the case. In other words, one cannot compare a ruling at class certification to a ruling on summary judgment or a ruling at trial, because both a ruling on summary judgment and at trial are actually concerned with the merits of the case. *See infra* Part IV.C.

133. *Amgen*, 133 S. Ct. at 1199–1200.

134. *Id.* at 1200.

135. *Id.* For example, Rule 10b-5 plaintiffs do not have to prove scienter or actual economic loss to have their class certified. *Id.*

136. *Id.* at 1201 (quoting Schleicher v. Wendt, 618 F.3d 679, 686 (7th Cir. 2010)). Justice Ginsburg also made an argument that requiring proof of materiality "would entail considerable expenditures of judicial time and resources," partially because materiality would potentially have to be proven again at trial. *Id.*

137. *Id.* at 1203.

138. *Id.*

regarding immateriality will not create a risk either.[139] Thus, no reason exists for presenting evidence of materiality or immateriality at class certification, where the only questions are those that Rule 23 of the Federal Rules of Civil Procedure presents.[140]

2. The Significance of Amgen

Some commentators considered Justice Alito's one-paragraph concurrence to be the most important part of the *Amgen* opinion.[141] He joined in the majority opinion and judgment only because Amgen did not ask the Court to reconsider the presumption of reliance from *Basic.*[142] Acknowledging the dissenters, Justice Alito suggested that a review of *Basic*'s presumption of reliance may be proper, as "more recent evidence suggests that the presumption may rest on a faulty economic premise."[143] His recommendation set the stage for the review of the criticized decision to come in the following year.[144]

Nevertheless, *Amgen* seemed just as clear as *Halliburton I* from a practical standpoint. Proof of materiality is not required for class certification, and defendants may not proffer evidence to disprove materiality in an effort to rebut *Basic*'s presumption at class certification.[145] Yet eight months later, the

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139. *Id.* at 1204.

140. *Id.* With regard to the principle from *Basic* that the presumption of reliance can be rebutted by any showing that "severs the link," the Court acknowledged that showing the truth credibly entered the market and dissipated the effect of a misstatement can achieve rebuttal, but "[p]roof of that sort is a matter for trial." *Id.* at 1204 n.11 (quoting Basic v. Levinson, 485 U.S. 224, 249 n.29 (1988)). Justice Ginsburg also noted that such proof could be appropriate for "a summary-judgment motion under Federal Rule of Civil Procedure 56." *Id.*

141. *See, e.g.*, Kevin P. Muck & Marie C. Bafus, Amgen*: A Pyrrhic Victory For Plaintiffs in Securities Class Actions?*, FENWICK & WEST LLP LITIG. ALERT, Mar. 5, 2013, at 3, *available at* http://www.fenwick.com/FenwickDocuments/Litigation_Alert_03-05-13.pdf [https://perma.cc/6W7W-DF95] ("[T]he most significant issue to arise out of *Amgen* comes not out of the majority opinion itself, but rather out of Justice Alito's concurrence and several statements made by the dissenters regarding the continuing viability of the fraud-on-the-market presumption."); Douglas W. Green, *Is the Demise of the Fraud-on-the-Market Doctrine Near? Be Careful What You Wish For*, D&O DISCOURSE (Nov. 17, 2013), http://www.dandodiscourse.com/2013/11/17/is-the-demise-of-the-fraud-on-the-market-doctrine-near-be-careful-what-you-wish-for/ [https://perma.cc/Q4TN-Z9RB] ("Perhaps the most striking part of the *Amgen* decision was Justice Alito's one paragraph concurrence . . . .").

142. *Amgen*, 133 S. Ct. at 1204.

143. *Id.*

144. *See infra* Part III.A.

145. *See* Samuel Wolff, *Materiality Fraud-on-the-Market, and Class Certification:* Amgen v. Connecticut Retirement Plans, 35 SEC. & FED. CORP. L. REP. 1, Mar. 2013, at 1 ("Plaintiffs do not have to prove materiality or loss causation at the certification stage of the proceeding. Nor may defendants rebut the fraud-on-the-market

Court followed Justice Alito's recommendation and issued an opinion reconsidering *Basic* that undercuts both *Halliburton I*'s unanimous holding and *Amgen*'s majority holding.

III. *HALLIBURTON II*: FUNDAMENTALLY ALTERING PRECEDENT BY RELYING ON IT

Halliburton returned to the Court for a second time in 2014.[146] On remand from *Halliburton I*, Halliburton contended that its evidence submitted to disprove loss causation at class certification also demonstrated that its alleged misstatements had no effect on its stock price.[147] Halliburton argued that the evidence showing a lack of price impact was sufficient to rebut *Basic*'s presumption.[148] The district court refused to consider Halliburton's argument and certified the class.[149] The Fifth Circuit relied on *Amgen* and affirmed,[150] reasoning "price impact evidence does not bear on the question of common question predominance."[151] The Supreme Court granted Halliburton's writs for certiorari to reconsider the presumption of reliance adopted in *Basic* and to decide whether defendants may rebut the presumption at class certification with evidence showing the absence of price impact.[152] A majority of the Court led by Chief Justice Roberts[153] issued "one of the most anticipated judgments on securities laws in decades."[154]

A. The Majority's Reconsideration of Basic

After providing background information on the elements of a Rule 10b-5 claim, along with the presumption of reliance from *Basic*, Roberts turned to whether the Court should uphold or overrule *Basic*.[155] Acknowledging that "before overturning a long-settled precedent . . . [the Court] require[s]

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presumption at the certification stage by arguing the alleged misrepresentations were not material.").

146. *See generally supra* Part II.A (discussing the Supreme Court's decision in *Halliburton I*).

147. *Halliburton II*, 134 S. Ct. 2398, 2406 (2014).

148. *Id.*

149. *Id.*

150. *See* Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 435–36 (5th Cir. 2013).

151. *Id.* at 435.

152. *Halliburton II*, 134 S. Ct. at 2407.

153. *Id.* at 2404–05. Justices Ginsburg, Sotomayor, Kagan, Breyer, and Kennedy joined in Robert's majority opinion. *Id.*

154. *Halliburton Ramifications*, BEAZLEY (June 23, 2014), https://www.beazley.com/news/news/halliburton_ramifications.html [https://perma.cc/M57Q-YGWU].

155. *Halliburton II*, 134 S. Ct. at 2407–08.

'special justification,' not just an argument that the precedent was wrongly decided," the Court concluded Halliburton had not shown such justification.[156]

1. Halliburton's Attack on the Premises of the Basic *Presumption*

Halliburton's primary argument for overruling *Basic* involved an attack on the two underlying premises of the presumption of reliance,[157] which according to Halliburton could "no longer withstand scrutiny."[158] First, Halliburton questioned the premise of market efficiency. Halliburton argued that the idea that the price of a share traded in an efficient market reflects all public information, including material misstatements, is no longer a widely accepted view because empirical evidence shows capital markets are not necessarily efficient.[159] Relying on studies showing that prices do not reflect public information immediately, Halliburton attacked *Basic* for viewing market efficiency as a "yes or no" question, rather than a matter of degree.[160] The Court rejected this contention, finding that *Basic*'s presumption is based on the "modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.'"[161] Therefore, the presumption is ultimately not rooted in a binary view of market efficiency.[162] With regard to Halliburton's empirical evidence, the Court found that the academic discussions have not disproven the premise of market efficiency underlying *Basic*'s presumption.[163]

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156. *Id.* at 2407 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

157. Halliburton's initial contention for overruling *Basic* was essentially the same argument Justice White made in his dissent in *Basic*: "The *Basic* presumption is inconsistent with Congress's intent in passing the 1934 Act." *Id.* at 2408–09; *see also* Basic Inc. v. Levinson, 485 U.S. 224, 257–59 (1988) (White, J., dissenting). Simply put, Halliburton argued that courts must borrow from "the express provision most analogous to the Rule 10b-5 right of action" because Rule 10b-5 actions are judicially created. *Halliburton II*, 134 S. Ct. at 2408–09. Halliburton suggested that a provision from the 1934 Act that required proof of direct reliance for recovery should apply to Rule 10b-5 claims. *Id.* at 2409. The majority declined to address the argument, stating that "[t]he *Basic* majority did not find that argument persuasive then, and Halliburton has given us no new reason to endorse it now." *Id.*

158. *Halliburton II*, 134 S. Ct. at 2409.

159. *Id.*

160. *Id.*

161. *Id.* at 2409–10 (quoting *Basic*, 485 U.S. at 247 n.24).

162. *Id.* at 2410.

163. *Id.* This portion of the opinion addresses one of the most critiqued aspects of *Basic*'s presumption—market efficiency. *See, e.g.*, Langevoort, *supra* note 3, at 161–62. Roberts' analysis on market efficiency may be significant in the wake of *Halliburton II* when courts determine market efficiency, but such a discussion is

Second, Halliburton attacked the premise that all investors purchase or buy stock in reliance on the integrity of the market price.[164] According to Halliburton, for a significant number of investors, the integrity of the market price is "marginal or irrelevant."[165] The majority rejected Halliburton's argument that this premise could no longer withstand scrutiny on two grounds. First, *Basic* did not deny the existence of value investors[166]—persons who believe a stock price is either "undervalued or overvalued and attempt[] to 'beat the market' by buying the undervalued stocks and selling the overvalued ones."[167] *Basic*'s presumption, however, is merely based on the reasonable premise that most investors rely on the integrity of the market price when purchasing or selling stock.[168] Second, the majority found that value investors "implicitly rel[y] on the fact that a stock's market price will eventually reflect material information."[169] Therefore, for a value investor to indirectly rely on a misstatement, the investor only has to trade a share believing that the market will reflect public information within a reasonable time.[170]

2. Honoring Stare Decisis and Halliburton's Alternative Arguments

The Court began the final section of the portion of its opinion reviewing *Basic* by explaining the principle of stare decisis "in respect to statutory interpretation."[171] Stare decisis has special force for statutory interpretation because Congress is able to change how the Court has interpreted such statutes.[172] Although the *Basic* presumption "is a judicially created doctrine designed to implement a judicially created cause of action,"[173] the Court extended this principle of strong stare decisis to the presumption because it is a "substantive doctrine of federal securities-fraud law," which Congress remains free to modify.[174] With the special force of stare decisis in mind, the Court turned its focus to Halliburton's final arguments against the presumption.

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beyond the scope of this Comment. *See* Donald C. Langevoort, *Halliburton II and Market Efficiency*, CLS BLUE SKY BLOG (July 10, 2014), http://clsbluesky.law.columbia.edu/2014/07/10/halliburton-ii-and-market-efficiency/ [https://perma.cc/9FLL-EWXR].

164. *Halliburton II*, 134 S. Ct. at 2410.
165. *Id.*
166. *Id.* at 2411.
167. *Id.* at 2410.
168. *Id.* at 2411.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* (quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1193 (2013)).

Halliburton argued that *Basic* is inconsistent with recent Supreme Court holdings that courts "must give 'narrow dimensions [] to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law'" with regard to Rule 10b-5 claims.[175] The Court answered Halliburton's contention by clarifying that these holdings merely refused to extend Rule 10b-5 liability to defendants who had not made public and material misstatements.[176] In contrast, the *Basic* presumption does not alter the essential elements of a Rule 10b-5 claim, but instead makes it easier for plaintiffs to have their class certified while preserving the claim's legal scope.[177]

Finally, Halliburton contended that *Basic* should be overruled based on policy considerations. This argument was essentially the same argument raised in *Amgen*[178]—the presumption permits plaintiffs to extort large settlement amounts from defendants for baseless claims.[179] The Court answered as the majority in *Amgen* did, leaving the concerns for Congress.[180] In rejecting Halliburton's argument, the Court relied heavily on the fact that Congress has addressed these policy concerns before by enacting responsive legislation—the PSLRA and SLUSA.[181] Ultimately, the Court found Congress's unwillingness to overrule or modify *Basic* to be acquiescence.[182]

B. Alternatives to Overruling Basic*: Rebutting the Presumption of Reliance*

Although many commentators believe the Court's decision in *Halliburton II* is significant because of the reconsideration of *Basic*,[183] the other portion of the majority opinion represents a significant change in the

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175. *Id.* at 2411 (quoting Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011)).

176. *Id.* at 2412 (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 180 (1994)) (holding that private plaintiffs may not maintain aiding and abetting suits under Section 10(b)); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008) (holding that rebuttable presumption of reliance by investors did not apply to alleged deceptive conduct of corporation's vendors and customers).

177. *Halliburton II*, 134 S. Ct. at 2412.

178. *See Amgen*, 133 S. Ct. at 1199–1200.

179. *Halliburton II*, 134 S. Ct. at 2413; *see also Amgen*, 133 S. Ct. at 1199–1200.

180. *Halliburton II*, 134 S. Ct. at 2413; *Amgen*, 133 S. Ct. at 1200–01.

181. *Halliburton II*, 134 S. Ct. at 2413; *see also supra* Part I.C.

182. *See Halliburton II*, 134 S. Ct. at 2413.

183. *See, e.g.*, Teresa Kimker & Nilan Johnson Lewis, Halliburton II*: The End of Securities Litigation as We Know It?*, 19 WESTLAW J. SEC. LITIG. & REG., Mar. 2014, at 1, *available at* http://blog.thomsonreuters.com/index.php/halliburton-ii-the-end-of-securities-litigation-as-we-know-it/ [https://perma.cc/9RPJ-2SHV].

law. The Court considered two alternatives to overruling *Basic*: (1) plaintiffs must show price impact to invoke the *Basic* presumption, or (2) defendants should be allowed to rebut the *Basic* presumption at the class-certification stage by showing a lack of price impact.[184] These alternatives differ with respect to the burden of proof, but both involve price impact—the exact concept the Court unanimously refused to consider in relation with the class-certification stage three years prior in *Halliburton I*.[185]

1. Plaintiffs Not Required to Show Price Impact to Invoke Presumption

To address Halliburton's first alternative to overruling *Basic*—plaintiffs must show price impact to invoke the presumption of reliance—the Court gave its first complete analysis of price impact.[186] According to the Court, price impact is *Basic*'s "fundamental premise."[187] A plaintiff's showing that the alleged misrepresentations were publicly known, material, and that the stock traded in an efficient market are all directed at showing price impact.[188] A failure to show these elements indicates there was a lack of price impact, defeating *Basic*'s presumption.[189]

Halliburton argued that plaintiffs must prove price impact directly because proving the other prerequisites—market efficiency, market timing, and publicity—"are at best an imperfect proxy for price impact."[190] Moreover, according to Halliburton, because market efficiency is a matter of degree, a public, material misstatement could possibly have no impact on share price even in a generally efficient market.[191] In response, the Court explained that the decision in *Basic* rests on two premises.[192] First, if a plaintiff proves that a defendant made a material and public misstatement, and the defendant's shares traded in an efficient market, the court presumed that the misstatement affected the price of the share.[193] Second, if the plaintiff proves that he or she traded the share during the relevant time period, the court presumes that the plaintiff purchased the share in reliance on the misstatement.[194] The Court reasoned that requiring plaintiffs to prove price impact directly would completely take away the

184. *Halliburton II*, 134 S. Ct. at 2413.
185. *Halliburton I*, 131 S. Ct. 2179, 2187 (2011); *see also supra* Part II.A.2.
186. *Halliburton II*, 134 S. Ct. at 2413–14.
187. *Id.* at 2414 (citing *Halliburton I*, 131 S. Ct. at 2186).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

benefit of the first presumption because instead of presuming price impact by showing materiality, publicity, and market efficiency, plaintiffs would have to show it directly.[195] Further, the Court reiterated that *Basic* does not suggest that market efficiency is a "yes or no" question, which is the exact reason why defendants have the opportunity to rebut the presumption.[196] Ultimately, the Court refused to accept the argument that plaintiffs must prove price impact to invoke the *Basic* presumption.[197]

2. Defendants Allowed to Introduce Direct and Indirect Evidence of the Absence of Price Impact to Rebut Presumption at Class Certification

The Court then turned to Halliburton's second alternative to overruling *Basic*—defendants should be allowed to rebut *Basic*'s presumption at the class certification stage by showing an absence of price impact. After providing reasons why this approach would be sensible, the Court adopted this alternative.[198] The Court explained that defendants are unquestionably allowed to introduce price impact evidence at the merits stage to refute the presumption of reliance and at the class certification stage to show market inefficiency.[199]

EPJ Fund, however, contended that defendants may not "rely on that same evidence [showing market inefficiency] . . . for the particular purpose of rebutting the presumption" at class certification.[200] EPJ Fund's argument did not convince the Court, which reasoned that the argument would lead to the inexplicable outcome of allowing plaintiffs to proceed as a class when the defendant has presented direct evidence showing the *Basic* presumption does not apply.[201] The Court proposed a hypothetical to demonstrate the point.[202] Assume a defendant submits an event study at the class certification stage purporting to show market inefficiency, and the results of the study show one event, the alleged misstatement at issue,

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195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 2414–17.
199. *Id.* at 2414–15. The Court also acknowledged that plaintiffs are allowed to, and EPJ Fund actually did, "introduce evidence of the existence of price impact" through event studies for the purposes of showing market efficiency. *Id.* at 2415. The Court defined event studies as "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." *Id.*
200. *Id.*
201. *Id.* at 2415–16.
202. *Id.* at 2415.

had no impact on the price of the defendant's stock.[203] However, the trial court ultimately concludes that plaintiffs have satisfied their burden to show market efficiency.[204] The Court explained "[t]he evidence at the certification stage thus shows an efficient market, on which the alleged [misstatement] had no price impact . . . yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action."[205] The Court declined to accept this outcome, reasoning that price impact is "an essential precondition for any Rule 10b-5 class action," with *Basic* establishing that plaintiffs can indirectly satisfy that precondition.[206] But the Court held that *Basic* does not require "courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply."[207]

C. Distinguishing Amgen

The Court then turned to the task of distinguishing the case from the reasoning of *Amgen*, where the inquiry regarding materiality solely focused on the predominance requirement for class certification.[208] The Court ultimately concluded that price impact is a pivotal element of the *Basic* presumption regardless of the question of predominance.[209]

Chief Justice Roberts agreed that the issue of price impact is similar to materiality in that price impact does not cause individual questions of fact to predominate over common ones and that a failure to show price impact would end every plaintiff's claim on the merits rather than preclude class certification.[210] But he found that price impact and materiality differ in a critical respect:[211] materiality can be entirely confined to the merits and determined in isolation from the other *Basic* prerequisites.[212] Price impact, or the fact that a stock price reflected a misrepresentation at the time of a transaction, "is *Basic*'s fundamental premise" because if the misrepresentation were not reflected in

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 2416.
207. *Id.*
208. *Id.*
209. *Id.* at 2416–17; *see also supra* Part II.B.1 (discussing *Amgen*). The Fifth Circuit relied on the holding in *Amgen* to conclude that, like evidence of immateriality, defendants could not introduce evidence showing a lack of price impact in an effort to rebut and ultimately defeat class certification. Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 435 (5th Cir. 2013).
210. *Halliburton II*, 134 S. Ct. at 2416.
211. The argument the majority made is unpersuasive, as this Comment argues that materiality and price impact do not differ from one another, but rather are essentially the same concept. *See infra* Part IV.B.3.
212. *Halliburton II*, 134 S. Ct. at 2416.

the price, no reliance would exist when purchasing the stock.[213] The Court reasoned that because evidence of publicity and market efficiency is indirect evidence of price impact, the choice was not between permitting price impact evidence at class certification or confining it to the merits.[214] Rather, the choice was "between limiting the price impact inquiry before class certification to indirect evidence, or allowing consideration of direct evidence as well."[215]

Based on this question, the Court held that "[d]efendants may seek to defeat the *Basic* presumption at [class certification] through direct as well as indirect price impact evidence."[216] Because the Fifth Circuit denied Halliburton the opportunity to introduce evidence showing a lack of price impact, the Court vacated the Fifth Circuit's judgment and remanded the case for further proceedings.[217]

IV. INTERPRETING *HALLIBURTON II*: THE RUINS OF *HALLIBURTON I* AND *AMGEN*

As soon as the Court handed down its opinion, law professors and plaintiff and defense counsel alike were quick to offer their perspectives on the potential impact that *Halliburton II* might have on securities-fraud class actions.[218]

213. *Id.* (quoting *Halliburtion I*, 131 S. Ct. 2179, 2186 (2011)).
214. *Id.* at 2417.
215. *Id.*
216. *Id.*
217. *Id.* Although Justice Ginsburg fully joined in Roberts' majority opinion, she also filed a concurring opinion that Justice Breyer and Justice Sotomayor joined. *Id.* (Ginsburg, J., concurring). In an effort to establish that the Court's holding should not impose a heavy burden on securities-fraud plaintiffs with reasonable claims, Ginsburg specified that the burden is on the defendant to show a lack of price impact. *Id.* Justice Thomas filed a concurring opinion in judgment only, joined in full by Justice Alito and in part by Justice Scalia, which reads very much like a dissent. *See id.* at 2417–27 (Thomas, J., concurring in judgment). Justice Thomas's concurrence is unsurprisingly consistent with his dissent in *Basic* and his dissent in *Amgen*. *See* Basic v. Levinson, 485 U.S. 224, 250–63 (1988) (White, J., concurring in part, dissenting in part); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1206–16 (2013) (Thomas, J., dissenting).
218. *See, e.g.*, Merritt B. Fox, Halliburton II*: Who Won and Who Lost All Depends on What Defendants Need to Show to Establish No Impact on Price,* CLS BLUE SKY BLOG (June 30, 2014), http://clsbluesky.law.columbia.edu/2014/06/30/halliburton-ii-who-won-and-who-lost-all-depends-on-what-defendants-need-to-show-to-establish-no-impact-on-price/ [https://perma.cc/WAW6-DDRR]; Douglas W. Green, *First Take on* Halliburton II*: The Price-Impact Rule May Not Have Much Practical Impact,* D&O DISCOURSE (June 24, 2014), http://www.dandodiscourse.com/2014/06/24/first-take-on-halliburton-ii-the-price-impact-rule-may-not-have-much-practical-impact/ [https://perma.cc/7FBQ-BA8E]; Alison MacGregor, *Update – The Middle Road Taken: The Supreme Court's* Halliburton II *Decision*, SEC. & FIN. SECTOR LEGAL REV. (June 26, 2014), http://www.financiallegalreview.com/2014/06/26/updated-an-analysis-of-the-supreme-courts-halliburton-ii-decision/ [https://perma.cc/W62S-CU7G]; Jason R. Halpin, Halliburton *Gives Defense Bar New Tool to Defeat Class*

Although these commentators' views vary substantially,[219] a rational application of *Halliburton II* will severely undermine the decisions of *Halliburton I* and *Amgen*.

A. The Correct Interpretation of Halliburton II

When lower courts consider *Halliburton II*, two crucial aspects will be involved: price impact and the burden of proof. The variations of these two concepts will determine whether a lower court has applied *Halliburton II* as the decision suggests. Although lower courts would have benefited from the Supreme Court describing exactly what price impact means and stating explicitly who bears the burden of proof and to what degree, there is substantial evidence in the opinion as to the correct application of the two concepts.

1. The Burden of Proof

At a minimum, defendants indisputably have the burden of production—"[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder"[220]—with respect to price impact evidence.[221] Although some commentators believe that the question of burden of persuasion will be a contested issue amongst the lower courts,[222] the opinion itself leaves little doubt that the burden is on the defendants.

Certification, BUS. LITIG. ALERT (July 7, 2014), http://www.businesslitigationalert.com/2014/07/07/halliburton-gives-defense-bar-new-tool-to-defeat-class-certification/ [https://perma.cc/4YL6-UZGW]; Alison Frankel, *SCOTUS* Halliburton *Ruling Could Backfire for Securities Defendants*, REUTERS (June 23, 2014), http://blogs.reuters.com/alison-frankel/2014/06/23/scotus-halliburton-ruling-could-backfire-for-securities-defendants/ [https://perma.cc/C9WD-M6Q5].

219. Although some believe that *Halliburton II* will raise costs for defense, others are certain that plaintiffs' litigation costs will see a stark increase, deterring plaintiffs from bringing suit. *Back to* Basic*: The Supreme Court Revisits a Landmark Securities Case and Eases Its Impact on Defendants*, COOLEY (June 25, 2014), http://www.cooley.com/supreme-court-revisits-landmark-securities-case-and-eases-impact-on-defendants. *Halliburton II* has also been understood as providing a new defense tool for defendants, Halpin, *supra* note 218, but some believe that the decision could backfire for securities defendants, Frankel, *supra* note 218.

220. BLACK'S LAW DICTIONARY, *supra* note 26, at 236.

221. *Halliburton II,* 134 S. Ct. at 2413–14 (rejecting that plaintiffs must show price impact to invoke *Basic*'s presumption).

222. *See, e.g.*, Fox, *Who Won and Who Lost all Depends on What Defendants Need to Show to Establish No Impact on Price, supra* note 218; Dan Gold & Richard Guiltinan, *Fraud-on-the-Market Lives: Takeaways and Open Issues from* Halliburton II, 42 SEC. REG. L.J. 2 (2014); Wendy Gerwick Couture, *Answering* Halliburton II*'s Unanswered Question: Burdens of Production and Persuasion on Price Impact at Class Certification*, __ SEC. REG. L.J. __ (forthcoming 2015), *available*

The Court's language in *Halliburton II* indicates that the burden of persuasion is on the defendant to show by a preponderance of the evidence that a lack of price impact existed.[223] The Court defines price impact as proof that a defendant's misstatement caused the change in price that occurred.[224] Showing a lack of price impact thus involves proof that a defendant's misrepresentation did not cause the change in price that occurred.[225] Providing *proof* of a lack of price impact clearly requires more than merely introducing enough evidence to have the factfinder decide the issue. The evidence must also persuade a factfinder that it is more likely than not that the misstatement did not cause the change in price.[226]

Additionally, Rule 301 of the Federal Rules of Evidence supports the conclusion that the burden of persuasion with respect to price impact is on

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at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540348 [https://perma.cc/Y5J 9-J4SK].

223. A preponderance of evidence is generally the degree of proof required in civil cases. *See* California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981); 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 3:8, at 237 (7th ed. 1992). "A fact is established by a preponderance of the evidence if the fact-finder is satisfied that the fact is more likely true than not true." *Id.* at § 3:9, at 237–38.

224. *Halliburton II*, 134 S. Ct. at 2413. The Court used the terms "affected the market price of the stock." *Id.* However, as explained in Part I.D.2, the only question left to be answered in terms of price impact is what caused the effect on the price of a stock, rather than if a misstatement affected it at all.

225. Unsurprisingly, Halliburton made the argument that the burden of persuasion regarding price impact is on the plaintiff in both its brief leading up to *Halliburton II* and in their brief filed on September 10, 2014 in the District Court on remand. Brief for Petitioners at 6, *Halliburton II*, 134 S. Ct. 2398 (2014) (No. 13-317), 2013 WL 6907610, at *6; Defendants' Brief on Price Impact Demonstrating that Class Certification Must be Denied at 3, Erica P. John Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M (N.D. Tex. 2014), 2014 WL 4473340, at *3. Halliburton's brief filed on September 14, 2014 stated the opinion in *Halliburton II* never specified "that a defendant must 'prove' a lack of price impact by a preponderance of the evidence." 2014 WL 4473340, at *3. This argument ignores the court's explicit reference to price impact as proof that a misstatement did not affect the price of the stock.

226. Adding support to the argument that the burden of persuasion to show price impact cannot be on the plaintiffs, the Court unambiguously rejected a similar alternative in *Halliburton II*—that plaintiffs should have the initial burden of showing price impact at class certification. *Halliburton II*, 134 S. Ct. at 2413–14. The only difference between the two scenarios is the ability of the defendant to meet a low burden of production. With the burden of persuasion on plaintiffs during rebuttal, defendants would meet their burden of production by alleging that the plaintiff's evidence of market efficiency and market timing merely fails to directly show price impact. The plaintiff would then be responsible to meet its burden of persuasion to show price impact. Thus, placing the burden of persuasion on plaintiffs at the rebuttal stage is essentially the same as requiring plaintiffs to show price impact to invoke the presumption, and is likely not the result the Court intended. *Id.*

the defendant. Rule 301 provides: "[T]he party against whom a presumption is directed has the burden of [production] to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."[227] Under this rule, the defendant in a Rule 10b-5 case at class certification bears the burden of production as the party against whom the presumption runs and also bears the burden of persuasion because the plaintiffs never bore this burden. *Halliburton II* makes this clear.[228] This rule does not minimize the fact that the *Basic* presumption is not as straightforward as most presumptions, which potentially leads to a more difficult and convoluted application of Rule 301.[229] *Halliburton II*, however, is the first Supreme Court case to provide an analysis of price impact in the context of a Rule 10b-5 cause of action. Thus, the Court clearly established which party has the burden of persuasion with respect to price impact, or for purposes of Rule 301, clarified which party "had it originally"—defendants.[230]

2. How Defendants Must Meet their Burden of Proof with Respect to Price Impact

Determining that defendants bear the burden of persuasion to show a lack of price impact for the purposes of rebutting *Basic*'s presumption at class certification is essential to the application of *Halliburton II*. How defendants are to meet this burden, however, is an equally important issue.

Since *Dura*, the question of whether a misstatement had a price impact asks whether the misstatement caused of the change in price.[231] The most effective way for defendants to meet their burden of persuasion—to show a

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227. FED. R. EVID. 301. According to Halliburton, an application of Rule 301 lends itself to the conclusion that "defendants must have the opportunity to 'produc[e] evidence to rebut the presumption'" and plaintiffs always retain the ultimate burden of persuasion on the price-impact issue. Defendants' Brief on Price Impact Demonstrating that Class Certification Must be Denied, *supra* note 225, at 55. This argument misinterprets Rule 301.

228. Plaintiffs only bear the burden of persuasion with respect to market efficiency, market timing, and publicity to invoke *Basic*'s presumption at class certification. *Halliburton II*, 134 S. Ct. at 2415.

229. Merritt B. Fox, Halliburton II*: It All Depends on What Defendants Need to Show to Establish No Impact on Price*, 70 BUS. LAW. (forthcoming 2015) (manuscript at 32–35), *available at* http://ssrn.com/abstract=2488055 [https://perma.cc/TU4Z-U249].

230. A detailed discussion of the allocation of the burdens of proof is beyond the scope of this Comment. *See* Couture, *supra* note 222 (providing an in-depth analysis of the allocations of burdens of proof). Couture argues that "[u]nder Rule 301, if the defendant's rebuttal evidence is not strong enough that a reasonable jury could find the non-existence of [price impact], the presumption remains unrebutted." *Id.* (manuscript at 16).

231. *See supra* Part I.D.2.

misstatement was not the cause of the change in price—would be to use an event study and focus on the corrective disclosure to that misstatement.[232] The event study would control for all other material information that entered into the market at the same time as the corrective disclosure.[233] In the case of a price drop,[234] if the event study shows other material information that entered into the market caused the decrease in price as opposed to the corrective disclosure, then the study would show the misstatement was not the cause of the change in price.[235] This is a common focus of event studies, especially in the wake of *Dura*.[236] Indeed, Halliburton's brief, filed on remand after *Halliburton II*, argues that its evidence shows that alleged corrective disclosures to previous misstatements did not cause the price drop that occurred.[237]

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232. The fact that a defendant could prove that a misstatement, rather than its correction, did not cause the price of a share to increase may not mean it has proven a lack of price impact. Justice Roberts cited to a "price maintenance case" in *Halliburton II*, which refers to a claim that involved an alleged misstatement that merely kept the price at a certain level rather than causing the price of the stock to increase. *Halliburton II*, 134 S. Ct. at 2410 (citing Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010)). In price maintenance cases, the price of the stock—while not higher as a result of the misstatement, but instead maintained—will decrease at the time of the corrective disclosure, turning the focus to that corrective disclosure. *Schleicher*, 618 F.3d at 685. Showing that the price did not increase due to a misstatement still leaves the question of what caused the price to decrease or increase after *Dura*. *See supra* Part I.D.2. Thus, without evidence showing that the corrective disclosure did not cause any change in the price of a stock, a defendant will be unable to definitively say a misstatement did not cause the change in price.

233. *See, e.g.*, Kaufman & Wunderlich, *supra* note 71, at 188–99 (explaining a properly conducted event study in the context of a Rule 10b-5 lawsuit); *see also* Fox, Halliburton II*: It All Depends on What Defendants Need to Show to Establish No Impact on Price*, *supra* note 229.

234. The result would be the same if a company's stocks price increased when favorable information entered into the market and the company had been denying that information previously, as in *Basic*. *See supra* Part I.B.

235. *See* Fox, Halliburton II*: It All Depends on What Defendants Need to Show to Establish No Impact on Price*, *supra* note 229 (manuscript at 19–26).

236. *See, e.g.*, Madge S. Thorsen, Richard A. Kaplan & Scott Hakala, *Rediscovering the Economics of Loss Causation*, 6 J. BUS. & SEC. L. 93, 119 (2006) (explaining that "in the immediate aftermath [of *Dura*], courts started focusing on the nature and extent of 'corrective disclosures'"); Kaufman & Wunderlich, *supra* note 71, at 199 ("Since the Supreme Court's *Dura* decision in 2005, the key inquiry for securities fraud actions—particularly those dependent on the fraud-on-the-market presumption—is the amount by which the stock declined as a result of the market becoming aware of the alleged fraud.").

237. Defendants' Brief on Price Impact Demonstrating that Class Certification Must be Denied, *supra* note 225, at 9. Halliburton's argument regarding no price impact is in the alternative, nonetheless. The central argument Halliburton makes in their most recent brief opposing class certification is that their alleged

B. Gutting Halliburton I *and* Amgen

After *Halliburton II*, defendants are able to submit proof that a misstatement was not the cause of the change in price that occurred. In effect, the defendants bypass the holdings of *Halliburton I* and *Amgen* because such proof is inextricably interrelated to materiality and loss causation. Thus, *Halliburton II* produces the puzzling legal outcome of adhering to precedent while simultaneously stripping it of its precedential value.

1. Price Impact: Another Name for Loss Causation and Materiality

Defining what is required of plaintiffs and defendants to show the elements of loss causation and materiality, or lack thereof, emphasizes how closely related these elements are to price impact. By introducing evidence showing a lack of price impact at class certification, evidence relating to loss causation and materiality is also introduced.[238] In the case of a price drop, plaintiffs must show that the decline in a stock's price was "because of the correction to a prior misleading statement" to prove loss causation.[239] Therefore, defendants must show that the decline in a stock's price was not caused by the correction to a prior misstatement to disprove loss causation. To prove price impact, plaintiffs must show that a defendant's misstatement caused the change in stock price that occurred.[240] Conversely, for defendants to show a lack of price impact, they must provide evidence that a misstatement did not cause the change in price that occurred.[241] These definitions and clarifications show that virtually no difference exists between price impact and loss causation. Both address the issue of what caused the change in price.

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corrective disclosures "are not, as a matter of law, 'corrective' of the alleged misrepresentations." *Id.* at 5.

238. Plaintiffs do not have the initial burden of persuasion for the elements of loss causation, materiality, and price impact at class certification. *See Halliburton I*, 131 S. Ct. 2179, 2186 (2011) (clarifying plaintiffs do not have to prove loss causation at class certification); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (2013) (holding plaintiffs do not have to prove materiality at class certification); *Halliburton II*, 134 S. Ct. 2398 (2014) (declining to place the burden of proof on plaintiffs with respect to price impact at class certification, but holding that defendants may introduce evidence of the absence of price impact at class certification).

239. *Halliburton I*, 131 S. Ct. at 2185 (internal quotations omitted).

240. *Halliburton II*, 134 S. Ct. at 2413.

241. *Id.* at 2414. Although the Court in *Halliburton II* used the phrase "affect stock price" rather than the phrase "caused the change in stock price" to define price impact, the latter phrase emphasizes the true meaning of the concept in the context of *Dura*. *See supra* Part. I.D.2.

With regard to proof of the element of materiality or immateriality, "[t]he question . . . is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."[242] The *Amgen* Court explained that, "immaterial information, by definition, does not affect market price."[243] Applying the legal standard for materiality, although possibly inconclusive alone in showing price impact, could support a showing of price impact or lack thereof. Regardless, as event studies are now typically used to prove or disprove materiality, showing that a misstatement was not the cause of the change in price proves that the statement was immaterial as well, meaning materiality and price impact are the same as a matter of proof.[244]

Imagine that, to defeat class certification, a defendant submits evidence showing that a corrective disclosure to a previous misstatement did not cause a decrease in price—the exact situation that *Halliburton II* envisions. The evidence comes in the form of an event study. Assume that the event study was conducted properly and is admissible.[245] After controlling for all other factors that could have caused the change that occurred, the event study shows that the corrective disclosure did not cause the change, but rather other information did. If the corrective disclosure did not cause the change in price, the misstatement was not objectively material.[246] Therefore, the defendant's event study proves immateriality. Similarly, if the corrective disclosure to a previous misstatement did not cause the change in price, the defendant has also disproven loss causation.[247] Ultimately, how defendants label this evidence makes no

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242. *Amgen*, 133 S. Ct. at 1195 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976)).

243. *Id.* In theory, an immaterial statement could be material to an individual. But because the materiality of a statement is an objective inquiry, an effect on the price of the stock must occur for a misstatement or "omission" to be material.

244. *See supra* Part I.D.1.

245. *See* Kaufman & Wunderlich, *supra* note 71, at 188–99; Fox, Halliburton II*: It All Depends on What Defendants Need to Show to Establish No Impact on Price*, *supra* note 229 (manuscript at 8–19).

246. Objectively, material information will affect market price. Theoretically, someone could believe a statement to be material with no subsequent price impact. That is not the materiality required for a Rule 10b-5 claim, however. *See Amgen*, 133 S. Ct. at 1197 ("[A] clever mind could conjure up fantastic scenarios in which an individual investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning).").

247. Unlike with materiality, no room exists for a theoretical explanation that loss causation could still occur if an absence of price impact exists. If a defendant can show a lack of price impact at the time of the corrective disclosure, he has disproven loss causation. *See, e.g.*, Kaufman & Wunderlich, *supra* note 71, at 186 ("Courts have effectively collapsed securities-fraud actions into a single question: Whether the defendant's misrepresentation or omission created a disparity between

difference—showing a lack of price impact, a lack of loss causation, or immateriality all prove a misstatement was not the cause of the change in price.[248]

2. Irreconcilable Holdings: Halliburton II *versus* Halliburton I *and* Amgen

The only portion of *Halliburton I* left after *Halliburton II* is that plaintiffs do not bear the initial burden of proof to show loss causation to invoke the presumption of reliance at the class-certification stage. *Halliburton I* and *II* together could potentially stand for a principle that lower courts may consider the issue of loss causation at class certification if defendants submit such evidence for the purposes of rebutting *Basic*'s presumption. Thus, referring to loss causation as price impact effectively moves the timing for considering evidence of loss causation to the class-certification stage.[249] Consequently, when a defendant submits price impact rebuttal evidence as Halliburton did, the overarching principle from *Halliburton I*—that loss causation evidence should be strictly confined to the merits—vanishes. Although this vanishing was immediately apparent in the decision,[250] the majority in *Halliburton II* made no attempt to acknowledge or explain this inconsistency.

The same issue appears with *Amgen*. After *Amgen*, plaintiffs are not required to prove materiality to invoke *Basic*'s presumption at the class-certification stage.[251] Additionally, *Amgen* explicitly held that defendants may not introduce evidence showing immateriality at class certification to rebut *Basic*'s presumption.[252] *Amgen* leaves virtually no room for a court to consider evidence of materiality at class certification. *Halliburton II* undercuts *Amgen*'s explicit holdings that materiality is not required to invoke *Basic*'s presumption and should be entirely reserved for the merits. Because proof that a misstatement did not cause a change in price is

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the transaction price of a security and its true value measured by the precise reaction of the market price to the disclosure of the concealed information.").

248. This demonstration is not new with *Halliburton II*. *See* Cox, *supra* note 84, at 20 (recognizing, even prior to *Halliburton II*, that when taking into account *Dura*, "[i]t . . . appear[ed] that what the defendants sought in both *Amgen* and *Halliburton* was an opportunity to challenge forensically the factual allegations that the material omissions impacted the security's price.").

249. *See supra* Part IV.B.1.

250. *Halliburton II*, 134 S. Ct. 2398, 2406 (2014) ("On remand, Halliburton argued that class certification was inappropriate because the evidence it had earlier introduced to disprove loss causation also showed that none of its alleged misrepresentations had actually affected its stock price.").

251. *See Amgen*, 133 S. Ct. at 1191.

252. *Id.* at 1204.

connected to proof of immateriality,[253] when defendants submit evidence showing that a misstatement did not cause the change in price under *Halliburton II*, they also submit evidence of immateriality. This scenario contradicts the fundamental principle from *Amgen.*

Halliburton II also undermines *Halliburton I* and *Amgen* with respect to the holdings that plaintiffs do not have to show loss causation and materiality to invoke the presumption and to have a class certified. Considering the importance of class certification, if defendants have submitted an event study certified by an expert to show that a misstatement was not the cause of the change in price that occurred—and therefore evidence showing no loss causation and immateriality—plaintiffs will counter with their own expert opinions and event studies, showing the exact opposite.[254] Plaintiffs will still have to show loss causation and materiality to meet class certification, contrary to the *Halliburton I* and *Amgen* holdings. A difference in timing is evident, in that *Halliburton I* and *Amgen* both addressed what plaintiffs must prove to invoke *Basic*'s presumption, whereas *Halliburton II* contemplates a situation where the presumption has already been successfully invoked, and the rebuttal of the presumption is at issue. However, regardless of when loss causation and materiality are at issue during class certification, the ultimate goal for plaintiffs is to have their class certified. To reach that goal, a plaintiff must both invoke the presumption and survive a defendant's attempt at rebutting the presumption, which now could involve both loss causation and materiality after *Halliburton II*.

3. A Puzzling Legal Outcome

Writs were undoubtedly granted in *Halliburton II* to reconsider *Basic*'s presumption of reliance.[255] The outcome in *Halliburton II* is unusual, however, because although the majority appears to uphold *Basic*, the way *Basic* is understood in both *Halliburton I* and *Amgen* is severely weakened, if not effectively overruled. To be clear, *Halliburton II* does not explicitly overrule any part of *Halliburton I* or *Amgen*,[256] making the decision even more of a paradox. Adding to the confusion, Chief Justice

253. *See supra* Part IV.B.1.
254. A battle of the experts is not a new concept to securities-fraud law. Prior to *Halliburton I* and *Amgen*, some circuits imposed upon plaintiffs the burden of proving loss causation and materiality to invoke *Basic*'s presumption and achieve class certification. *See, e.g.*, Michael A. Kitson, Note, *Controversial Orthodoxy: The Efficient Capital Markets Hypothesis and Loss Causation*, 18 FORDHAM J. CORP. & FIN. L. 191, 222–23 (2012) (explaining "factors [showing] market efficiency . . . ultimately give way to a battle of the experts").
255. *Halliburton II*, 134 S. Ct. at 2407.
256. *See id.* at 2405–17.

Roberts—the author of *Halliburton II*[257]—fully joined in the majority opinion of *Amgen*[258] and wrote the unanimous opinion in *Halliburton I*.[259] Further, Justice Ginsburg, who wrote the majority opinion in *Amgen*, and Justices Kagan, Sotomayor, and Breyer, appear with Roberts on all three decisions.[260]

Understanding the distinction between price impact and materiality in *Halliburton II* is difficult as well. Chief Justice Roberts makes an unpersuasive argument that price impact and materiality differ in the respect that materiality can be resolved in isolation on the merits. But the fact that a misstatement was reflected in the market price of the stock, or that it had price impact, is *Basic*'s fundamental principle and should therefore be considered at class certification.[261] Reconciling this distinction is impossible because showing that a misstatement was reflected in the market price of stock also shows that the misstatement was material. That an immaterial misstatement could have caused a change in the price of a stock is inconceivable; the two concepts are inextricable.[262] Notably, Roberts did not distinguish price impact from loss causation in *Halliburton II*. Although these two concepts may be distinct in the eyes of the Court, any attempt by defendants to distinguish the cause of change in stock price from loss causation will likely be in vain, as the two elements are the same.[263]

C. The Correct Interpretation's Practical Impact

Halliburton II will likely be significant for its practical impact as well as its puzzling legal outcome. The price of litigating the merits of a Rule 10b-5 claim, as well as the attempt to certify a class, is certain to change.

The overall price of litigating for defendants and plaintiffs could increase slightly. Expert testimony and event studies are commonly used to show market efficiency or a lack of market efficiency.[264] Requesting a previously called expert to produce evidence showing whether a misstatement was or was not the cause of the change in a stock's price may bring the cost of litigation of securities-fraud suits up marginally, but being

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257. *Id.* at 2405.
258. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1190 (2013).
259. *Halliburton I*, 131 S. Ct. 2179, 2182 (2011).
260. *Halliburton II*, 134 S. Ct. at 2405; *Amgen*, 133 S. Ct. at 1190; *Halliburton I*, 131 S. Ct. at 2182.
261. *Halliburton II*, 134 S. Ct. at 2416.
262. *See supra* Part IV.B.1.
263. *See supra* Parts IV.B.1; I.D.2.
264. *Halliburton II*, 134 S. Ct. at 2415 (stating that plaintiffs use event studies that include evidence of market efficiency to invoke the *Basic* presumption); Kaufman & Wunderlich, *supra* note 71, at 291 ("[The federal courts have held that event studies are a necessary device to prove . . . market efficiency.").

certain is impossible. If plaintiffs' costs increase significantly to survive a rebuttal after *Halliburton II*, this could potentially deter the filing of securities-fraud suits. A correct interpretation of *Halliburton II* by the lower courts may increase the number of class certification denials, ultimately decreasing the total number of settlements. This increased denial rate could decrease total settlement values. A defendant's unsuccessful attempt at rebuttal, however, could be an indication that plaintiffs will be successful at a trial on the merits, producing greater pressure for defendants to settle after class certification is granted, and potentially increasing settlement amounts.[265]

The way Rule 10b-5 litigation functions at the class-certification stage will also change. Assume that a defendant submits evidence showing that a misstatement was not the cause of the change in the price of a stock at the class-certification stage. Plaintiffs will counter with evidence and experts, resulting in a mini-trial on the merits of a Rule 10b-5 cause of action because both the defendant's and plaintiff's evidence is connected to loss causation and materiality, two essential elements of a Rule 10b-5 claim.[266] Although plaintiffs can always pursue claims individually,[267] some opponents of *Halliburton II*'s creation of a mini-trial on the merits misguidedly argue that this effect will deprive plaintiffs of a jury trial on the merits.[268] Ultimately, although the issues of loss causation and materiality will now be at the forefront of class certification, the outcome at class certification will remain as important as it was prior to *Halliburton II*.

V. ALTERNATIVE INTERPRETATIONS OF *HALLIBURTON II*

Halliburton II has the potential to effectively overrule *Halliburton I* and *Amgen*. Lower courts now have substantial support to bypass the holdings that evidence of loss causation and materiality are not admissible at class certification by considering that evidence under the guise of price impact. That the majority in *Halliburton II* neither overruled any part of

265. Gold & Guiltinan, *supra* note 222.

266. In some cases, the use of evidence of a lack of price impact to rebut *Basic*'s presumption could be successful with respect to some, but not all, misstatements.

267. *See, e.g.*, Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 229 (5th Cir. 2009) (addressing the argument that proof of loss causation at class certification conflicts with the Seventh Amendment fails because "it conflates the issue of loss causation for the purposes of establishing predominance under Rule 23 with the issue of loss causation on the merits," plaintiffs may proceed individually after the denial of class certification, and the burden of establishing an element at class certification is independent of the burden to establish that element on the merits).

268. *See, e.g.*, Kaufman & Wunderlich, *supra* note 71, at 220–33 (concluding that event studies at class certification are inconsistent with the Seventh Amendment).

either opinion nor acknowledged that this contradiction may be perplexing for courts, however. Courts could apply alternative interpretations of *Halliburton II* that may partially preserve *Halliburton I* and *Amgen* by placing emphasis on the principles from these cases, but each has one obvious issue: deviation from the actual holding in *Halliburton II*.

A. Basic*'s Understanding of Price Impact: No Change Occurred*

Courts could reconcile *Halliburton II* with *Halliburton I* and *Amgen* by defining price impact as the Court did in *Basic* and *Halliburton I*. Proving the absence of price impact in cases like *Halliburton II*, therefore, would require showing that the price did not change at all after a corrective disclosure. A defendant who could show this would successfully rebut *Basic*'s presumption. Whereas, if a price change did occur, any attempt at rebuttal would fail. This understanding of price impact does not involve issues of loss causation and materiality, so the courts could theoretically preserve these elements for the merits.

This alternative would benefit courts with more pro-plaintiff policy preferences; however, defining price impact to mean no market change ignores the effect of *Dura*.[269] Defendants would almost never bring a successful attempt at rebuttal by showing a lack of price impact because a price drop will almost always be at issue.[270] As a result, *Halliburton II* would be insignificant under this interpretation. *Amgen* and *Halliburton I*, however, would be preserved, as issues of materiality and loss causation would be confined to the merits. As a practical matter, securities-fraud law would remain the same as pre-*Halliburton II*.

B. Full Adherence to Halliburton I *and* Amgen

Another alternative interpretation of *Halliburton II* that deviates from the holding would involve adhering to *Halliburton I* and *Amgen* over *Halliburton II*. One of the first cases to apply *Halliburton II* demonstrates this alternative.[271] A district court held that the "presumption of price impact may be rebutted at the class certification stage by directly showing an absence of price impact, [but] it may not be indirectly rebutted by showing that the misrepresentation was immaterial."[272] The court would not allow the defendant to submit evidence showing that the truth concerning an alleged misstatement was already reflected in the price of the defendant's

269. *See supra* Part I.D.2.
270. *See id.*
271. Aranaz v. Catalyst Pharm. Partners Inc., 302 F.R.D. 657 (S.D. Fla. 2014).
272. *Id.* at 670.

shares at the time of the alleged misstatement.[273] Although this type of evidence would support a conclusion that no price impact occurred, the Court disallowed it because the evidence went to materiality.[274]

The court did consider other evidence purporting to show a lack of price impact, but ultimately found that the defendants did not meet their burden of the "daunting task of proving that the publicly known statement had no price impact."[275] The court's decision to disallow the particular evidence showing a lack of price impact is inconsistent with *Halliburton II*, yet consistent with *Amgen*. Although the evidence that the district court rejected was not direct evidence that the misstatement did not cause the change in price, Chief Justice Roberts explicitly stated that the evidence supporting rebuttal could be both direct and indirect.[276] This application of *Halliburton II* is simply flawed, as it ignores portions of the opinion.

This method could also be extended to loss causation under *Halliburton I*. A court could find that because a defendant's evidence disproves loss causation as well as price impact, the court cannot consider it. Much like the interpretation that defines price impact as the Court in *Basic* did, the application of *Halliburton II* could be beneficial to courts with pro-plaintiff policies. The major issue with the method is obvious, however: the Court's decision in *Halliburton II* would be meaningless, while the principles from *Amgen* and *Halliburton I* would be preserved. Again, as a practical matter, Rule 10b-5 litigation would be the same as it was pre-*Halliburton II*.

C. Requiring Clear and Convincing Evidence of a Lack of Price Impact

Perhaps the most effective way to partially adhere to the principles from all three decisions would be to impose upon the defendant the burden of persuading the court to find a lack of price impact through clear and convincing evidence. Imposing a clear and convincing evidence standard would require defendants to show it is "highly probable" that a misstatement was not the cause of the change in the price that occurred.[277] The burden of clear and convincing evidence is greater than a preponderance of the evidence, standard of proof that is typically imposed upon parties in civil cases.[278] This standard is generally used in cases with specific circumstances, such as those that

273. *Id.* at 670–71.
274. *Id.* at 670. This evidence is more commonly known as a "truth-on-the-market defense." *Id.*
275. *Id.* at 673.
276. *Halliburton II*, 134 S. Ct. 2398, 2417 (2014).
277. FISHMAN, *supra* note 223, at § 3:10, at 238–39.
278. *Id.*

involve fraud or mistake,[279] where important interests involved should be protected.[280] Although Rule 10b-5 claims involve fraud, the standard of clear and convincing evidence is typically imposed upon plaintiffs with respect to showing a defendant committed fraud.[281]

Requiring defendants to show that it is highly probable that a misstatement or its corrective disclosure did not cause a price drop merely imposes a greater burden of proof, making success in rebutting the presumption of reliance less likely. The probability of plaintiffs succeeding at class certification would increase, and the probability that evidence of materiality and loss causation will be considered on the merits would increase, theoretically. Additionally, a lower court could still adhere to the letter of *Halliburton II* by considering evidence that a misstatement did not cause the change in price that occurred rather than disregarding it altogether. Practically, more successful attempts at rebuttal may occur using this approach with pre-*Halliburton II* attempts, but not as many under a rational interpretation of *Halliburton II*.

Still, the use of this method would disregard certain principles from all three opinions—a clear disadvantage. *Halliburton I* and *Amgen* stand for the idea that evidence of loss causation and materiality should not be considered at all at the class certification level, whereas under this approach such evidence is indeed considered. Further, nothing in *Halliburton II* indicates that defendants must meet their burden of showing the absence of price impact through clear and convincing evidence. One could make an argument, however, that a plaintiff's interest in this type of matter is important and should be protected by applying a clear and convincing evidence standard. Overall, this standard could be the best compromise for courts that seek to give partial deference to *Halliburton II*, *Halliburton I*, and *Amgen* together.

D. A Recommended Approach: Apply the True Interpretation of Halliburton II *or Require Clear and Convincing Evidence*

Courts should generally avoid applying any arbitrary interpretation of *Halliburton II*, including using a pre-*Dura* meaning of price impact or adhering to *Halliburton I* and *Amgen* over *Halliburton II*. In general, courts should not ignore how concepts in the law have developed. As a

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279. *See, e.g.*, California *ex rel*. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92–94 (1981) (explaining that courts often find the standard of clear and convincing evidence to apply in particularized cases); Addington v. Texas, 441 U.S. 418, 431 (1979) (noting that the standard of clear and convincing evidence is often used in civil cases involving fraud).

280. 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 301:5, at 354–58 (7th ed. 2012).

281. *See, e.g.*, Master-Halco, Inc. v. Scillia, Dowling & Natarelli, LLC, 739 F. Supp. 2d 109, 116 (D. Conn. 2010) (holding "the liability of . . . [d]efendants [in a civil fraud action] must be proven by clear and convincing evidence").

principle of the law, ignoring a more recent precedent that narrowed prior precedent—like *Halliburton II*—is incorrect. Yet some lower courts may want to avoid the contradictory outcome that occurs when applying *Halliburton II* and instead preserve *Halliburton I* and *Amgen*, particularly because *Halliburton II* never stated that either holding should be altered. Therefore, the best option for lower courts would be to either apply the correct interpretation of *Halliburton II*, or, if seeking to give meaning to all three opinions, apply a modification of *Halliburton II* that imposes a clear and convincing evidence standard on defendants.

CONCLUSION

Halliburton II is an enigma. From a practical standpoint, the opinion armed defendants with at least some type of defense to defeat class certification. From a legal standpoint, the outcome is puzzling. Relying on precedent, the majority claimed to uphold *Basic*'s presumption of reliance. Yet, the majority simultaneously gutted precedent, because *Basic*—as understood in the opinion itself, *Halliburton I*, and *Amgen*—is fundamentally changed. A correct interpretation of the case leads to the near effective overruling of *Halliburton I* and *Amgen*, although nothing from the opinion indicates that either decision is modified or overruled.

Lower courts are left with a choice on how to approach cases similar to *Halliburton II*. To avoid any irrational application of *Halliburton II*, courts should either apply the correct interpretation or interpret the holding as imposing a clear and convincing evidence standard on defendants. Ultimately, how courts will apply *Halliburton II* is mere speculation. Although how the same five Supreme Court Justices could sign all three decisions without recognizing the inconsistencies is unclear, no rational interpretation of *Halliburton II* can truly reconcile the case with *Halliburton I* and *Amgen*.

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* J.D./D.C.L., 2016, Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professor Glenn G. Morris for his continued and invaluable assistance and advice. Without his guidance, this Comment would not have been possible.