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Best Buy: First Appellate Decision Interpreting and Applying *Halliburton II* Rejects Class Certification Based Upon the Absence of "Front-End" Price Impact.

On April 12, 2016, the Eighth Circuit Court of Appeals in *IBEW Local 98 Pension Fund v. Best Buy Co., Inc., et al., CV No. 14-3178,* became the first appellate court to interpret and apply the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.,* 134 S. Ct. 2398 (2014)(*Halliburton II*), that allowed defendants at class certification to attempt to rebut the presumption of reliance that the Supreme Court adopted in *Basic v. Levinson,* 485 U.S. 224 (1988). (The "*Basic* presumption" is what allows most securities class actions to proceed as such by substituting questions of individual reliance on specific misrepresentation(s) with a presumption that the price of stocks trading in an efficient market reflects all publicly available information, including misrepresentations, and purchasers and sellers make their investment decisions in reliance on the integrity of stock prices.)

The Court in *Halliburton II* held that defendants could rebut the presumption with "*direct, more salient evidence* showing that an alleged misrepresentation *did not actually affect* the stock's price and, consequently, that the *Basic* presumption does not apply." *Halliburton II*, 134 S. Ct. at 2416 (emphasis added).

What that "more salient evidence" could consist of has been the subject of considerable debate. A majority of district courts attempting to apply *Halliburton II* have adopted a narrow view of defendants' ability to rebut the *Basic* presumption and have rejected defense challenges to the presumption. Until the Eighth Circuit's decision in *Best Buy*, the exception was the district court's decision in *Halliburton* itself on remand, where the court denied class certification pertaining to the majority of the alleged fraudulent statements because it considered the defense expert's event studies to be "more probative of price impact" than those offered by plaintiff's expert. 309 F.R.D.

251, 260 (N.D. Tx. July 25, 2015).

The facts of *Best Buy* were as follows: before the market opened and at 8:00 a.m. EDT on Sept. 24, 2010, Best Buy issued a press release in which it raised its 2011 EPS guidance. Best Buy's stock opened the trading day approximately 7.5 percent higher than its prior day's close. Importantly, the district court held that the statements in this press release were forward-looking statements statutorily protected under the PSLRA's safe harbor provision.

Two hours later, at 10:00 a.m. and after the market had opened, the company's officers participated in a conference call during which they said "earnings are essentially *in line* with our original expectations for the year" and the company is "*on track* to deliver and exceed our annual EPS guidance." The district court held that these were statements of present facts, not forward-looking statements that were protected by the statutory safe-harbor—a conclusion that, reading between the lines, one can tell the Court of Appeals considered somewhat dubious.

Nevertheless, the case proceeded on that basis, and at class certification the defendants' expert submitted an event study where, using intraday trading prices, he demonstrated that the 10:00 a.m. statements had "no discernible impact on Best Buy's stock price." Significantly, plaintiffs' expert essentially agreed, concluding that the "economic substance" of the non-fraudulent press release and the purportedly actionable "in-line" and "on-track" statements were "virtually the same" and "would have been expected to be interpreted similarly by investors."

The Court of Appeals called this "overwhelming evidence of *'no 'front-end' impact [which] rebutted* the *Basic* presumption" and concluded that "defendants rebutted the *Basic* presumption by submitting direct evidence (the opinions of both parties' experts) that severed any link between the alleged conference call misrepresentations and the stock price at which plaintiffs purchased." Slip op. at 12 (emphasis added). In their appellate briefing in *Best Buy*, plaintiffs made much of the fact that defendant's expert had not addressed the "back-end" impact that occurred three months later when the truth (supposedly) was revealed, and the company lowered guidance, following which the stock price fell nearly 15%. The Court of Appeals found this argument unpersuasive, citing plaintiffs' expert's opinion that the "allegedly 'inflated price' was established by the non-fraudulent press release" (Slip op. at 12), and thus found the absence of front-end impact itself to be sufficient to rebut the presumption.

The Court of Appeals thus overruled the district court's decision granting class certification, which had been based on the theory that the "alleged misrepresentations [during the 10:00 a.m. conference call] could have further inflated the price, prolonged the inflation … or slowed the rate of fall." The district court was referring to the price maintenance theory, which posits that false statements or material omissions can maintain a stock price that would have fallen had the truth been known. Many post-*Halliburton II* challenges to class certification have failed because of courts invoking this theory, and the dissenting opinion in *Best Buy* criticizes the majority for not adequately addressing plaintiffs' theory of price maintenance. However, the majority deals with this issue in a different way, and one that might ultimately become more important to the framework of how *Halliburton II* challenges are decided than the actual result in *Best Buy*.

What the majority opinion says is that, "Earnings projections are statements of what a company is 'on track' to do; thus the Best Buy executives conference call statements added nothing to *what was already public* [as a result of the earlier press release]." Slip op. at 11 (emphasis added). Those italicized words describe a "truth-on-the-market" defense (although the majority opinion does not identify it as such) that many post-*Halliburton II* courts have refused to consider at the class certification stage under *Amgen, Inc. v. Conn. Retirement Plans & Trust Funds,* 133 S. Ct. 1184 (2013), because it pertains to materiality. *See, e.g., Aranz v. Catalyst Pharm. Partners, Inc.* 302 F.R.D. 657, 671 (S.D. Fla. Sept. 29, 2014)("A truth-on–the-market defense may not be used at the class certification

stage to prove an absence of price impact … because it goes to materiality ….”). (For whatever reason, courts do not appear to be equally troubled by evidence that could also apply to loss causation, another essential element that Plaintiffs are not required to prove at class certification under *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (*Halliburton I*).)

Best Buy thus implicates two important points in defendants' post-*Halliburton II* arsenal—the ability to argue, at least in some circumstances, that the absence of front-end impact alone is sufficient to disprove price impact, and the ability to challenge price impact based upon evidence that overlaps with materiality. For defendants discouraged by the narrow view of *Halliburton II* taken by most district courts, *Best Buy* offers a ray of hope. Presumably, more differences between and among the circuits will emerge as courts attempt to balance the arguably conflicting demands of *Halliburton I, Amgen*, and *Halliburton II,* and it would not be surprising to see some of these issues return to the Supreme Court. *Halliburton III* anyone?

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