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Winning The Damages Battle After Losing The Liability War

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Securities class actions that reach verdict are rare, but these rare events provide valuable insights for negotiating the roughly half of all cases that result in settlement.[1] This article describes techniques for minimizing class damages following a judgment for plaintiffs, focusing upon two recent trial victories by plaintiffs, namely In re Vivendi Universal Securities Litigation[2] and Jaffe Pension Plan v. Household International Inc.,[3] as well as my experience defending an issuer with a final, nonappealable verdict in its post-judgment claims process, which resulted in a settlement and the vacating of the fraud judgment.[4]

Two categories of challenge remain following a nonappealable securities class judgment for plaintiffs: (1) rebutting the presumption of reliance that the U.S. Supreme Court adopted in Basic Inc. v. Levinson, 485 U.S. 224 (1988) as to individual class members[5] by focusing upon large institutional claimants; and (2) limiting "allowed claims" through setoffs pursuant to § 28(a)'s requirement limiting plaintiffs to "actual damages,"[6] and the Private Securities Litigation Reform Act's damages provision, which essentially limits plaintiffs to nominal losses.[7]

As to the first category, the Supreme Court's recent decision in Halliburton Co. v. Erica P. John Fund Inc. (Halliburton II), 134 S. Ct. 2398 (2014), makes it harder to argue that sophisticated claimants should not benefit from Basic's presumption of reliance on the "integrity" of the market price. As to the second, some interesting facts emerge after studying defense challenges to the claims process: one is that the well of potentially available setoffs can be quite deep, and is probably underestimated in most settlement negotiations;[8] another is that the application of these offsets varies significantly between settlements and verdicts, and among settlements themselves, with attendant implications for opt-out behavior.

Finally, there are some factors that are unknowable ex ante — i.e., the number of damaged shares and class participation rates — that introduce uncertainty into the final equation. That uncertainty can be used to facilitate a settlement even in the face of a nonappealable final judgment.

Challenging the Presumption of Reliance as to Individual Class Members

Basic holds that "[a]ny showing that severs the link between the alleged misrepresentation and ... [plaintiff's] decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance," including where "plaintiff ... believed [the] statements were false ... and consequently believed that [the] stock was artificially underpriced," but purchased (or sold)[9] "nevertheless because

of unrelated concerns, e.g., potential antitrust problems, or political pressures to divest from shares of certain businesses." Basic, 485 U.S. at 248-49.[10]

Courts have struggled with this exception in the face of arguments that certain types of trading strategies — such as short selling and index fund trading — and a more general category of sophisticated traders[11] are not entitled to the Basic presumption. Courts are split on whether short sellers can claim the benefit,[12] but there is general agreement that index funds can claim it.[13] The treatment of sophisticated traders has been inconsistent, as exemplified by post-trial proceedings in Vivendi and Household.

In Vivendi, a hedge fund that opted out of the class attempted to claim the collateral estoppel benefit of the jury's verdict on the issue of reliance. Following a short bench trial, the district court denied that request based on evidence that the fund's trading methodology was designed to calculate the price a private buyer would pay for the separate components of the company, and used the market price "only as a comparative."[14]

In Household, defendants challenged the ability of sophisticated institutional traders to benefit from the presumption, based in part upon the deposition testimony of senior managers who expressed a fundamental lack of faith in the efficient capital markets theory upon which the Basic presumption is founded.[15] Yet, the Household court held that these statements did not even raise a triable issue as to whether the presumption could be rebutted.[16]

In Halliburton II, as part of defendants' unsuccessful attempt to get the Basic presumption completely overturned, the defendants raised the issue of "value" investors as an illustration where the presumption supposedly did not make sense.[17] The court rejected this analysis, and in dicta took an expansive view of who qualifies for the Basic presumption:

[S]uch [a value] investor implicitly relies on the fact that a stock's market price will eventually reflect material information — how else could the market correction on which his profit depends occur? To be sure, the value investor "does not believe that the market price accurately reflects public information *at the time he transacts*." But to indirectly rely on a misstatement in the sense relevant for the Basic presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable period.[18]

The criticism of this view is encapsulated by the dissent's contention that "an investor ... does not 'rely on the integrity of the market price' if he does not believe that the market price accurately reflects public information *at the time he transacts.*" [19] But as long as this remains the majority view, it suggests that defendants have been misguided in their prior attempts at rebutting the presumption. Instead of challenging a claimant's doctrinal adherence to the efficient market theory, defendants would be better served by focusing upon what one court called an individual claimant's "subjective and accurate belief" regarding the alleged misrepresentation or omission at issue. Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 300 (D.N.J. 1989).

The recent securities class actions that have gone to trial have primarily involved disputes as to whether risks were adequately disclosed.[20] In recent cases lost by the defense, sophisticated and presumably well-advised defendants believed that the allegedly "unknown" risks were in fact quite well known to the market. This is well illustrated by the Household court's description of the compelling evidence offered by the defendants in support of their "truth on the market" defense, which included trial testimony by analysts and market professionals who agreed that Household's supposedly undisclosed

practices were actually well-disclosed in U.S. Securities and Exchange Commission filings and were known to the market.[21] But because the defendants lost that argument at trial as to the class as a whole, the court foreclosed them from arguing in the post-trial claims process that particular class claimants in fact possessed such knowledge.[22]

This fundamentally misapprehends the Basic presumption: While the verdict in the class action is that "the market" did not know of the undisclosed practices, Basic very specifically allows inquiry into whether individual class members "believed [the] statements were false" but purchased anyway "because of unrelated concerns." And Basic described those "unrelated concerns" quite broadly.

Basic involved a class of sellers who sold in the face of the defendants' allegedly false denials regarding a contemplated merger. Among the categories of claimants who the court said would not qualify for the presumption were those who sold because of "antitrust concerns"[23] — in other words, someone who disbelieved the "no merger" statements, but considered them immaterial, perhaps because of a belief that the government would not allow the proposed merger to proceed. Basic specifically contemplates a highly individualized, fact-based inquiry in post-trial claim challenges.

While one might argue that the class action mechanism renders such knowledge defenses irrelevant as a matter of collateral estoppel, a class benefiting from the Basic presumption is never accurately defined merely as purchasers between dates "X and Y," but rather should be defined as purchasers between dates "X + Y, who did not know or believe that the misrepresentation was false or that an omission occurred." As the court in the Vivendi optout case put it:

True rebuttals of the presumption ... often "require an individualized inquiry into the buying and selling decisions of particular class members[,]" and as such are less susceptible to proof on a class-wide basis.... When this occurs, questions of individual reliance will call for individualized proof, which may be taken at separate trials after the class-wide trial has completed.

GAMCO Investors Inc., 927 F. Supp. 2d at 100 (internal citations omitted).

It is easy to imagine situations where an institutional trader disbelieved an issuer's projections about a future event, but purchased anyway. Additionally, institutions might have emails or documents evidencing an awareness of the allegedly undisclosed facts. Post-trial discovery during the claims process should focus upon these issues rather than attempting to demonstrate a class claimant's lack of faith in the efficient capital markets theory, or disbelief in the correctness of the current market price.

Finally, it is wrong to conclude that the Basic presumption is preserved even if the individual class claimant knew (or believed in the existence of) the supposedly undisclosed facts, on the basis that the price paid by that claimant would have been different had the rest of the market also known. That is what the Seventh Circuit recently held in Household when it affirmed the district court's so-called "Phase II" procedures for post-trial claims challenges.[24] Those procedures included a loaded question to be answered by all class claimants asking them whether they would have purchased Household's stock had they known the price was "inflated."[25] Defendants correctly claimed that the proper question should have asked whether a claimant would have transacted had he known that the statements were false. The Seventh Circuit disagreed, concluding that "Basic was very clear that the way to rebut the presumption is to show that the investor would have paid the same *price*[,]"[26] apparently referring to the post-corrective disclosure price.

But Basic was anything but clear on this point, [27] and a better reading of Basic does not support the

proposition that the price paid by the "knowing" purchaser would have to be the same as the price that emerged after the truth was revealed to the rest of the market. That analysis collapses Basic's three categories of exception — two of which concerned classwide "truth on the market" defenses, and one of which focused upon individual knowledge and belief — into a single, solitary "truth on the market" defense.

On an individual claimant basis, this renders Basic's supposedly rebuttable presumption irrebuttable, even in the face of compelling evidence that the claimant was not actually defrauded. But the hypothetical seller in Basic's third example, who sold out of "antitrust concerns," need not have believed that the price he sold at would have been identical to what it would have been had the rest of the market known what he knew.

How could the price be the same if the efficient market theory works the way the court in Basic apparently believed it does? Put another way, that claimant was not defrauded, notwithstanding the fact that he paid a different price than the post-corrective disclosure price.[28] The presumption has been rebutted in such a case: there is no reliance, and hence as to that claimant, no fraud.

Statutory Limitations to Plaintiffs' Recovery

There are two statutory limitations to a plaintiff's securities class action recovery. One is § 28(a)'s "actual damages" limitation,[29] and the other is the Reform Act's "90-day bounce back rule"[30] — which essentially limits a plaintiff to nominal losses (i.e., purchase price less sales price without regard to inflation).

Under the "actual damages" limitation, there are two forms of netting gains against losses. One applies primarily to offset gains from pre-class period purchases sold at inflationary prices during the class period,[31] and the other applies exclusively to gains from shares purchased and sold during the class period. [32] Either or both of these can significantly impact classwide damages.

The size of these potential offsets can be quite surprising, particularly when it comes to offsetting inflationary gains, where the theoretical offsets can actually exceed "plaintiffs-style" damages estimates.[33] While that observation obviously overstates reality — because it fails to account for the fact that one investor's gains cannot reduce another investor's losses — it still suggests that the pool of available offsets can be quite deep, and particularly so for active institutional investors who might make up a significant portion of the class. Because the actual amount of inflationary gain offsets can only be determined at the end of the claims process on an individual basis, it creates a substantial amount of uncertainty as to the overall size of the ultimate judgment. That uncertainty can be used effectively in settlement negotiations.

There is a surprisingly large disparity between the treatment of this inflationary gain offset in settlements and verdicts: While offsetting recognized losses with gains from inflation was applied in both the Vivendi[34]and Household[35] orders implementing the juries' verdicts, it was not applied in any of the 65 settlements occurring between 2012 and 2013 that were reviewed in a study conducted by Cornerstone Research and Goodwin Procter LLP.[36] This suggests that class members with large pre-class period gains might want to think twice before opting out, because historically, those "undeserved" gains are not offset in settlements. When it comes to the (usually) lesser category of nominal gains adjustments,[37] they were applied in over half of the settlements reviewed, but were not expressly applied in either Vivendi or Household.

Finally, a nominal loss cap on damages (essentially, purchase price less sales price)[38] was imposed as part of the Reform Act's "90-day bounce back rule," requiring that damages be limited to the difference between the purchase price and the mean trading price during the 90-day period beginning on the last corrective disclosure date.[39] This statutory limitation can have a big affect on damages (particularly where the stock price appreciates after the class period end). A number of scholars have commented on how inconsistent this limitation on damages is with the rationale behind Basic, because the implied premise that it takes 90 days for the market to incorporate all relevant information is inconsistent with there being an efficient market in the first place.[40] Nonetheless, it was enacted into law and part of the court's reasoning in Halliburton II for not overturning Basic focused upon congressional acquiescence in the form of unspecified "limits on damages" that softened the impact of Basic without actually overturning it.[41]

Settlement "Wild Cards"

Securities class action judgments are rendered as an amount of damage or "inflation" per share (and this amount can vary over the course of a class period where there are multiple partial corrective disclosures). Putting aside the statutory offsets and class membership challenges discussed above, a defendant's total exposure depends upon two things: (1) the total number of "damaged shares,"[42] and (2) class participation rates. Both of these are essentially unknowable ex ante, and there is surprisingly little empirical data about what happens ex post to guide decision-making when contemplating a potential settlement.

Damage estimates are based on models that make assumptions regarding a share's likelihood to trade during the class period, an area of expert testimony that usually leads to very different calculations of the pool of "damaged shares" available for submission to the claims processing agent. There is a dearth of information comparing what the models predict to what actually happens in a claims process after a settlement or verdict, an exception being a study by professor Daniel Fishel of 46 settlements, which concluded that none of the predictive models were particularly accurate (although some were clearly less accurate than others) largely because of the difficulty of estimating "no shows."[43] And the number of "no shows" is often quite large, even for institutional investors who presumably have the most to gain. An analysis by professor James Cox of 118 settlements involving eligible institutional investors as potential claimants found that on average, just 28 percent of eligible institutional investors filed a claim.[44]

The experience in Household is instructive: there the claims agent sent out close to 650,000 claim packages and received approximately 80,000 claims, for a return rate of around 12 percent; of these, slightly more than half (about 46,000) were determined to be valid, or about 7 percent of what were initially considered to be potentially valid claims.[45] Despite the fact that similar information is usually available following settlements, no one (including the insurance industry that pays for most settlements) appears to be tracking and aggregating that date, and in the absence of such readily available information, the actual cost of an adverse judgment remains very much a black box to both sides until after the claims process plays itself out. Ironically, that lack of information provides for settlement opportunities even in the face of a nonappealable judgment.

Conclusions

Even when all is seemingly lost, it is not. Despite Halliburton II, there are still viable challenges to the Basic presumption that should now focus upon what was actually known or believed by a claimant about the misstatement or omission at issue, rather than the claimant's doctrinal adherence to the

efficient market theory. The seldom litigated world of statutory damages limitations provides a rich resource of offsets that perhaps could be better utilized by defendants in settlement negotiations. And the fact that actual class claimant behavior remains relatively unstudied contributes to uncertainty regarding the ultimate dollar value of a verdict, which (ironically) provides a rational basis to settle a case that one might not have thought could be settled.

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[1] See Cornerstone Research, Securities Class Action Filings — 2014 Year in Review 12 (2015) (bar graph showing settlements as a percentage of all resolutions ranging from a low of 46 percent to a high of 72 percent between 1996 and 2008, with most years being slightly in excess of 50 percent).

[2] 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

[3] 756 F. Supp. 2d 928 (N.D. Ill. 2010). The Household verdict was recently overturned in part in Glickenhaus & Co. v. Household International Inc., 787 F.3d 408 (7th Cir. 2015).

[4] In re Apollo Group Sec. Litig., 2012 U.S. Dist. LEXIS 55622 (D. Ariz. Apr. 20, 2012).

[5] See Basic, 485 U.S. at 241-42 ("in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business .... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.") (internal citation and quotation omitted).

[6] Securities Exchange Act (Exchange Act) of 1934, § 28(a), 15 U.S.C. § 78bb(a).

[7] 15 U.S.C. § 78u-4(e)(i).

[8] See Catherine Galley, Daniel Tyukody, Erin McGlogan and Jason Krajcer, Cornerstone Research & Goodwin Procter, Limiting Rule 10b-5 Damage Claims 1, 3 (2014) [hereinafter Cornerstone/Goodwin Report].

[9] Section 10(b) and Rule 10b-5 of the Exchange Act apply equally to defrauded purchasers and sellers, and in fact the class in Basic consisted of allegedly defrauded sellers. However, the overwhelming majority of Rule 10b-5 class actions consist of purchasers, and therefore for stylistic convenience, claimants are generally referred to as purchasers.

[10] Basic included two other examples where the presumption would be rebutted: (1) where "'market makers' were privy to the truth"; and (2) where "news of the [misrepresented or omitted fact] credibly entered the market and dissipated the effects of the misstatements" — i.e., the "truth on the market" defense. Basic, 485 U.S. at 248-49. Many courts have recognized that Basic's examples are not exhaustive. See, e.g., GAMCO Investors Inc. v. Vivendi, S.A., 927 F. Supp. 2d 88, 104 (S.D.N.Y. 2013).

[11] See, e.g., GAMCO Investors Inc. v. Vivendi SA, 917 F. Supp. 2d 246, 253-57 (S.D.N.Y. 2013) (discussing cases involving sophisticated claimants).

[12] Compare Zlotnick v. TIE Communications, 836 F.2d 818, 822-23 (3d Cir. 1988) (short seller cannot benefit from fraud on the market presumption of reliance); In re Critical Path Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1110 (N.D. Cal. 2001) ("Short sales raise the question of whether the seller was actually relying on the market price."); with Schleicher v. Wendt, 618 F.3d 679, 684 (7th Cir. 2010) (that the "class includes short sellers" is irrelevant to the applicability of the Basic presumption: "Both the long and the short are affected by news that influences the price.").

[13] See, e.g., In re Countrywide Fin. Corp. Sec. Litig., 273 F.R.D. 586, 602 (C.D. Cal. 2009) ("Defendants argue that because index purchases seek to match a predetermined index of securities, such purchases are not made in reliance on any misrepresentation. To the contrary: because index purchases seek only to match the index and exclude other considerations (such as, for example, reliance on nonpublic information or other idiosyncratic motivations), index purchases rely *exclusively* upon the market to impound any representations (including misrepresentations) into securities' prices.") (emphasis in original).

[14] GAMCO Investors Inc., 927 F. Supp. 2d at 97, 103 (market price was used "only as a comparative," and the fund treated each corrective disclosure relating to a supposed liquidity crises as a buying opportunity). See also In re Am. Int'l Grp. Inc. Sec. Litig., 689 F.3d 229, 244 n.3 (2d Cir. 2012) (presumption rebutted where plaintiff did not "rely on the market price of [the] securit[y] as an accurate measure of [its] intrinsic value") (internal citation and quotation omitted); In re Safeguard Scientifics, 216 F.R.D. 577, 582 (E.D. Pa. 2003) (evidence that plaintiff increased holdings after disclosure of fraud may demonstrate that plaintiff "would ... — and in fact did — purchase stock regardless of the fraudulent omission.")

[15] Such testimony included the following:

- "It 'cannot be correct,' given the stock market's history, that 'stocks are fairly priced at all times because [the market price] immediately reflects all information in the public domain.'"
- "[H]istory would show that the efficient capital markets pricing theory is not always accurate."
- "Capital Research's 'investment philosophy' would suggest that the efficient market hypothesis is 'not true.'"
- "[O]ur firm relies with the smartest investors we know, which are Warren Buffett and Charlie Munger ... And they say [the efficient capital market theory] is hogwash."
- "'I'm not a believer in the efficient market theory and I think the world has sort of proven that, not in the academic world, but in the real world.'"

See Jaffe Pension Plan v. Household Int'l Inc., No. 02 C 5893, 2012 U.S. Dist. LEXIS 135135, at *13-14 (N.D. Ill. Sept 21, 2012); Defendants' Submission Regarding Rebuttal of the Presumption of Reliance, at *25-26, id., ECF No. 1780.

[16] Id. at *14 ("Given the parties' stipulation that 'Household common stock traded in an efficient market' ... whether these claimants fully subscribe to the efficient market theory is irrelevant. What is

relevant is whether they would have traded in Household stock if they had known about the fraud.")

[17] Brief for Petitioners at 15-16, Halliburton Co. and David Lesar v. Erica P. John Fund Inc. (Halliburton II), 134 S. Ct. 2398 (2014) (No. 13-317), 2013 U.S. S. Ct. Briefs LEXIS 5490.

[18] Halliburton II, 134 S. Ct. at 2411 (emphasis in original).

[19] Id. at 2423 (Thomas, J. dissenting) (emphasis in original).

[20] For example, Vivendi was primarily about whether Vivendi was experiencing a liquidity crisis and whether the market knew that "fact." Vivendi, 765 F. Supp. 2d at 539-40. Household was primarily about whether the market knew about Household's supposedly "predatory" lending practices, "re-aging" of delinquent loans, and credit quality manipulation. Household, 756 F. Supp. 2d at 931.

[21] See Household, 756 F. Supp. 2d at 931-33 (detailed description of trial evidence and testimony, and summarizing: "Throughout the trial, defendants presented evidence that the investors in Household stock were among the most sophisticated in the world and could not have been fooled by the alleged misrepresentations regarding Household's predatory lending and re-aging practices and their impact on its credit quality.")

[22] "[D]efendants will not be afforded a second bite at the apple, regardless of how they frame the issue." Household, 756 F. Supp. 2d at 933.

[23] Basic, 485 U.S. at 248.

[24] Household, 2015 WL 2408029 at *10-11. In the main part of its opinion, the Seventh Circuit reversed on the issue of loss causation, and remanded the case to the district court to allow defendants to prove that some or all of the price decline was caused by firm-specific, nonfraudulent information leaking into the market.

[25] The full question was as follows:

If you had known at the time of your purchase of Household stock that defendants' false and misleading statements had the effect of inflating the price of Household['s] stock and thereby cause you to pay more for Household stock than you should have paid, would you have still purchased the stock at the inflated price you paid? YES___ NO____.

Id. at *18.

[26] Household, 787 F.3d at 432 (emphasis in original).

[27] The passage from Basic that the court cites as support for its position is the following:

"Any 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, will be sufficient to rebut the presumption of reliance. ... For example, a plaintiff who believed that Basic's statements were false ..., and who consequently believed that Basic stock was artificially underpriced, but sold his shares nevertheless ..., could not be said to have relied on the integrity of a price he knew had been manipulated."

Id. (quoting Basic, 485 U.S. at 248-49).

[28] Other circuit courts speaking to this issue after Basic have stated in dicta that the presumption is rebutted if it can be shown that the claimant would have paid the same price he did, had he known the undisclosed information. See Fine v. American Solar King Corp., 919 F.2d 290, 299 (5tch Cir. 1990) ("The presumption of reliance can be rebutted by showing ... that the Plaintiffs would have purchased at the same price had they known the information that was not disclosed."); Hanon v. Dataproducts Corp., 976 F.2d 497, 507 (9th Cir. 1992) ("It is true that one way to rebut the fraud-on-the-market theory is to show that the plaintiff would have bought his stock at the same price had he known the information that was not disclosed or misrepresented."). The Third Circuit, in a pre-Basic case, took the same view expressed in Household, namely that the reliance presumption could be rebutted if it could be shown that "plaintiff would have purchased the stock even at the price it would have been at but for the misrepresentations." Peil v. Speiser, 806 F.2d 1154, 1163 (3rd Cir. 1986).

[29] 15 U.S.C § 78u-4(e)(i).

[30] 15 U.S.C § 78bb(a).

[31] Assume an investor holds one share purchased before the class period, when inflation was $0, and sells during the class period when inflation is $7. His gain from inflation is $7. He purchases another share during the class period, when inflation is still at $7, holds over a corrective disclosure, and sells at $0 inflation. The $7 loss from inflation the investor realized from holding the second purchased share over the corrective disclosure is offset by the $7 gain from inflation from the investor's in-class sale. The investor's recognized losses sum to $0.

[32] Assume an investor purchases a share of stock at a price of $29 during the class period, when inflation is $7 per share, then sells at $30 also during the class period (when inflation is still $7 per share) for a nominal gain of $1 ($30 less $29). The investor then purchases a second share of stock at $27 while inflation is still $7, holds that share over a correctives disclosure, and sells at $25, for a loss from inflation of $7. Her $7 loss from inflation is reduced by $1 nominal gain she realized from the initial transaction, resulting in $6 of recognized losses.

[33] See Cornerstone/Goodwin Report, supra note 8, at 3.

[34] Vivendi, 765 F. Supp. 2d at 365-66.

[35] Household, 756 F. Supp. 2d at 935 ("out-of-pocket damages are limited to actual damage such that plaintiffs' losses must be netted against any of their profits attributable to the same fraud.").

[36] See Cornerstone Research/Goodwin Procter Report, supra note 8, at 1.

[37] Nominal gains limitations are likely to be less significant in most cases, in part because they occur when class period inflation is increasing and there are multiple disclosure events — a less common paradigm.

[38] Assume a share is purchased at $27 during the claim period when inflation is at $5 per share, and sold after a corrective disclosure at $25. Damages are limited to $2 — the difference between the purchase price and the "profit" achieved — without regard to the original $5 inflationary amount.

[39] For shares sold prior to the expiration of the 90-day period, the average price from the corrective disclosure to the sale date is used. See 15 U.S.C § 78u-4(e)(2).

[40] See Joseph A. Grundfest, Damages and Reliance Under Section 10(b) of the Exchange Act, 69 Bus. Law. 307, 351 (2014); Bradford Cornell & James C. Rutten, Market Efficiency, Crashes, and Securities Litigation, 81 Tul. L. Rev. 443, 469 (2006).

[41] Halliburton II, 134 S. Ct. at 2413.

[42] To illustrate, assume 100 million shares trade during the class period: one possibility is that a single share traded 100 million times, and thus is the only "damaged share"; another is that each of 100 million shares trade exactly once, resulting in 100 million damaged shares. Reality is obviously somewhere in between. In a case where there is only one alleged corrective disclosure, it is only the person left holding the "hot potato" at the end of the class period that suffers cognizable legal damage — all others suffer no harm from the inflation because they resell (at inflation) during the class period. (In cases where there are multiple "partial disclosures" before the truth is revealed the same principles apply, but the math gets more complicated.)

[43] See Daniel R. Fishel et al., The Use of Trading Models To Estimate Aggregate Damages In Securities Fraud Litigation: An Update, in AEI LEGAL CENTER BRIEFLY (AEI Nat'l Legal Ctr. for the Public Interest, Vol. 10, No. 3, 2006).

[44] See James D. Cox & Randall S. Thomas, Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure Of Financial Institutions to Participate In Securities Class Action Settlements, 58 Stanford L. Rev. 411 (2005) (percentage of participation by eligible institutional investors varied from a low of 0 percent to a high of 53.88 percent, with many in the 20-30 percent range).

[45] See "Report of Gilardi & Co. LLC Regarding Claims Administration" (Doc. #1790) in Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.

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