CARLTON FIELDS

2 New Cases Temper Post-Halliburton Expectations

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In June of this year, the U.S. Supreme Court ruled that a defendant can rebut the presumption of reliance at the class certification stage of a securities fraud class action by showing that the alleged misstatement did not impact the company's stock price. In Halliburton Co. v. Erica P. John Fund, 134 S. Ct. 2398 (2014), the court affirmed the "fraud on the market" theory of Basic Inc. v. Levinson, 485 U.S. 224 (1988), which held that classwide reliance can be presumed where material misrepresentations are publicly disseminated to an efficient market. In the months since Halliburton, few cases have ventured far in discussing its practical impact on companies defending themselves from securities fraud class actions. Defense counsel understand that they have received a new weapon, namely an earlier opportunity to show that the alleged misstatement had no impact on stock price and, thereby, to scuttle a complaint before motions for summary judgment. But two recent cases have tempered expectations as to this new weapon's power. The first opinion shows that the Halliburton defense will be challenged to succeed in the classic "confirmatory statement" case, in which the alleged false statement was meant to either wrongfully prop up the stock price or to keep it artificially low. The second case shows that a court may interpret Halliburton's no-price-impact rebuttal by its terms — to succeed, the defendant must prove a complete absence of price impact. These cases should caution the defense litigator considering a Halliburton rebuttal at class certification. **The Limitation of the Halliburton Defense as Applied to Confirmatory Statements** In August, the U.S. Court of Appeals for the Eleventh Circuit remanded a class certification for further consideration in light of Halliburton, and, in the process, deflated hopes for the rebuttal's success in confirmatory statement cases. In Local 703, I.B. of T. Grocery & Food Employees Welfare Fund et al. v. Regions Financial Corp. et al., 762 F.3d 1248 (11th Cir. 2014), shareholders sued Regions Financial Corp. and certain corporate officers, alleging that officers had made misstatements in 2008 regarding the company's financial stability and losses from real estate investments. When the company revealed $5.6 billion in such losses in January 2009, the stock price dropped to 20 percent of the price at the outset of the class period. The district court granted class certification, and defendants appealed. The court first affirmed the district court's holding that plaintiffs had met the Basic presumption, over defendants' argument that the market could not have been efficient since the alleged misrepresentations did not have an immediate effect on the stock price. The circuit explained that a shareholder plaintiff can show an efficient market even without showing that a false

disclosure moved the stock price, when the company's alleged false "disclosures were designed to prevent a more precipitous decline in the stock's price, not bring about any change to it." The shareholders argued that the purported misstatements were intended merely to keep propped up an artificially inflated stock price. This is known as a "confirmatory misstatement," which, as the court explained "is like an omission, because it is an affirmative representation that omits negative information" and such a misstatement "would likely yield price stability rather than volatility." Having found the Basic presumption met and having already discussed confirmatory misstatements, the court then turned to defendants' rebuttal to the presumption, a similar argument that classwide reliance was inappropriate because the alleged misstatements had no impact on the stock price at the time they were made. Further analysis was mooted because the parties had all agreed that remand was appropriate in light of the intervening Halliburton decision. Defendants, who had already presented evidence that the stock price did not change in response to any of the alleged false statements in connection with their market-efficiency argument, would have a chance for consideration of those arguments before the district court as a rebuttal to the presumption. The remand was not without caution from the court of appeals: "We are mindful, and the District Court is no doubt aware, that its work on remand will be limited in scope." The court of appeals cited Halliburton for the proposition that defendants "may seek to defeat the Basic presumption" with evidence that the misrepresentations did not impact the price, adding its own emphasis on the word "may" in the Supreme Court's language. The circuit explained that Halliburton "by no means holds that in every case in which such evidence is presented, the presumption will always be defeated. Indeed, this court has recognized the distinct role that confirmatory information may have in this analysis." This language, in addition to the court's discussion of confirmatory information in the market-efficiency portion of the opinion, makes it unlikely that the district court would find the rebuttal standard met based on defendants' repeating the same argument — the absence of price impact at the time the confirmatory statements were made. A silver lining for the defense bar is that the court of appeals did not address the corrective disclosure stage. There is still hope in such cases, then, for an argument that the alleged misrepresentation, when revealed later to be false, had no impact on dropping the stock price if it was caused by other information in the purported corrective disclosure. **No Price Impact Means No Price Impact**

A few weeks after Local 703, the U.S. District Court for the Southern District of Florida granted class certification in a securities fraud case over an attempt at such a Halliburton rebuttal. Unlike in Local 703, both parties submitted event studies and the issue was ripe for decision. The court's language in granting class certification is a powerful warning as to the standard that courts may require a defendant to meet to show lack of price impact. In Aranaz v. Catalyst Pharmaceutical Partners, No. 13-cv-23878, _ F.R.D. _, 2014 U.S. Dist. LEXIS 136684 (S.D. Fla. Sept. 29, 2014) (Ungaro, J.), shareholders sued Catalyst, a drug manufacturer, and its CEO alleging false statements in a press release announcing (1) the Food and Drug Administration's designation of Catalyst's new drug as a "breakthrough therapy," meaning it could be a substantial improvement over current treatment; and (2) that there was no other effective and available treatment for the particular ailment. On the day of the press release, the stock price rose 42 percent, after which the purported class purchased its

shares. A few weeks later, a news article contradicted the press release, naming a similar drug therapy being offered for free and essentially attacking Catalyst as a greedy corporation. The stock price then fell by 42 percent. The parties agreed that the FDA had, in fact, designated the drug, but disputed the impact that the second statement, about the uniqueness of the drug, had on the share price. The court found that plaintiffs were entitled to the Basic presumption of reliance, and defendants responded with two main arguments. First, defendants asserted a "truth on the market" defense, stating that the availability of the similar drug therapy "was already known to the public and that the alleged misrepresentation therefore could not have impacted the price of Catalyst common stock." It was presumably through researching public sources, after all, that the article was written, which tanked the stock. The court rejected this argument, not because it was factually inaccurate but in reliance on Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S.Ct. 1184 (2013), which held that a materiality defense should be left to the merits stage as it does not bear on predominance requirement of Rule 23(b)(3). In this way, a powerful argument against liability was kicked until much later in the case. Applying Amgen here takes the edge off an otherwise powerful explanatory component of a Halliburton rebuttal — explaining why the alleged misstatement had no impact on price. Second, defendants submitted expert materials showing, among other things, that Catalyst's increase in market capitalization after the press release was consistent with the expansion of market capitalization of 22 other companies whose drugs were designated as Breakout Therapies, arguing that the uniqueness portion of the press release therefore had no price impact. To explain the later price drop, defendants, through their expert, argued that the price drop was based entirely on bad press and market overreaction rather than on a true corrective disclosure, adding that no analyst who covered the stock changed their price targets after the article was published. The court rejected these price-impact arguments. As to the rise in stock price, the court explained that defendants failed to show "that price impact is inconsistent with the results of their analysis," that is, "[t]hat the alleged misrepresentation did not contribute at all to the 42 percent spike in the price of Catalyst common stock." The court also found fault with the defense expert's methodology. As to the fall in stock price, the court said that neither expert "conducted any of the accepted quantitative analyses used to determine whether price movements were caused by market overreaction." The opinion is surprising in the force with which it rejected defendants' reasoned rebuttal arguments. To this end, the court cited Halliburton in explaining that "once a plaintiff shows entitlement to a presumption of reliance, the defendant is burdened with the daunting task of proving that the publicly known statement had no price impact." Aranz concluded that in a case with a "drastic spike following the alleged misrepresentation and an equally dramatic decline following the revelation of the truth," and where "all agree that the publications containing the misrepresentation and its revelation respectively caused those price swings," it will be "exceedingly difficult" to prove an absence of price impact. The facts of Aranaz are fairly stark and show, for the mine-run securities fraud class action, that Halliburton will allow a defendant to attempt to rebut the Basic presumption but that meeting the rebuttal's standard of "no price impact" will be a challenge. There is no benefit to just chipping away at it; the successful defendant will have to eliminate it entirely. **Conclusion**

There are a number of reasons that a defendant should think carefully before asserting a Halliburton

rebuttal at class certification. Defense counsel should weigh the risk of previewing loss causation arguments at the class certification case against the opportunity for escaping the lawsuit on the facts of their case through the narrow window afforded by the Halliburton rebuttal. Event studies are not inexpensive reports for an expert to create nor for an attorney to litigate, and, in most cases, shareholder plaintiffs will respond with one of their own, deepening plaintiffs' investment costs and inevitably impacting settlement value. Additionally, event studies and other expert materials will be scrutinized and flaws read in the plaintiffs' favor. It may be worth waiting to deploy expert analyses until the more favorable standard of summary judgment applies. As part of these considerations, and in light of the above cases, defense counsel should examine whether theirs is a confirmatory-statement case and whether their event study can eliminate any and all impact that the alleged misstatement had on the share price. *The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice. Originally published on Law360*

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