



Securities Litigation ADVISORY ■

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Supreme Court Vacates Class Certification in Goldman Suit

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On June 21, 2021, in a decision delivered by Justice Amy Coney Barrett, the U.S. Supreme Court vacated the Second Circuit's opinion affirming the district court's class certification for further proceedings in the *Goldman* securities class action.¹ In reaching its opinion, the Court held that district courts may consider the generic nature of alleged misrepresentations as evidence of lack of price impact at the class certification stage. The Court also held that defendants bear the burden of persuasion to prove lack of price impact when seeking to rebut the presumption of reliance established in *Basic Inc. v. Levinson*.²

Summary of the *Goldman* Case on Appeal

The *Goldman* appeal arises out of a 2011 securities class action brought against Goldman Sachs Group, Inc. and three of its executives in the U.S. District Court for the Southern District of New York. The plaintiffs alleged that the company's aspirational statements concerning its procedures and controls designed to identify potential conflicts of interest were false and misleading and that those statements artificially "inflated" Goldman's stock price until certain conflicts were allegedly revealed to the market.

After the district court twice certified the shareholder class, and on the second appeal to the Second Circuit, a divided three-judge panel affirmed the order granting class certification.³ The majority rejected Goldman's attempt to rebut the *Basic* presumption based on an argument that the alleged misstatements were too generic to have impacted share price, which the majority found was a question of materiality common to all class members and therefore not properly before the court at class certification. In addition, the

¹ *Goldman Sachs Group, Inc., et al., Petitioners v. Arkansas Teacher Retirement System, et al.*, No. 20-222.

² 485 U.S. 224 (1988).

³ *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020). Judges Richard C. Wesley, Denny Chin, and Richard J. Sullivan sat for the panel, with Judge Wesley authoring the majority opinion and Judge Sullivan dissenting.

majority relied on the Supreme Court's prior decision in *Amgen*, which held that a plaintiff need not prove the materiality of the alleged misstatements to prevail at class certification.⁴

Judge Sullivan dissented, arguing that Goldman had presented "persuasive and uncontradicted evidence" to rebut the *Basic* presumption and that such evidence must be considered at class certification under *Halliburton II*, even if it was also relevant at the merits stage to materiality.⁵ Under the majority's decision, Judge Sullivan concluded, the *Basic* presumption would be "truly irrebuttable."

Goldman filed a petition for a writ of certiorari with the U.S. Supreme Court in August 2020, arguing that the Second Circuit's decision "effectively strips defendants of any ability to rebut the *Basic* presumption in class actions..." The holding, Goldman argued, would all but guarantee certification whenever shareholder plaintiffs argue that the share price "had been improperly maintained by boilerplate aspirational statements that nearly all companies make." Goldman's petition was supported by a number of amici industry groups that foreshadowed the potentially deleterious impact of the Second Circuit's holding, which, they argued, would create undue pressure on defendants to settle even meritless claims. On December 11, 2020, the Court granted Goldman's petition, and it held oral argument in March.

Overview of the Court's Opinion

On the question of whether the generic nature of a misrepresentation is relevant to price impact at the class certification stage, the Court noted that any daylight between the parties' positions had "largely evaporated" by the time of the Court's opinion. Although it initially maintained that generic statements could not, as a matter of law, serve as the basis of a shareholder class action, at oral argument Goldman contended that lower courts must consider the generic nature of the alleged misrepresentation as one factor in weighing whether statements affected a defendant's share price. Arkansas Teacher Retirement System, in turn, conceded in its merits brief that courts may take generic statements into account, but argued that these determinations should be left up to expert witness assessments.

As a result, the Court concluded that the only question left for it to decide on this point was whether the Second Circuit actually considered the generic nature of Goldman's alleged misrepresentations. Finding that the Second Circuit's opinion was unclear, the Court remanded to the Second Circuit to "take into account *all* record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue."

As to whether the Second Circuit erred by requiring Goldman to bear the burden of persuasion on price impact, the Court held that its prior holdings in *Halliburton II*⁶ and *Basic* stand for the proposition that defendants bear the burden of persuasion to prove a lack of price impact. Despite this, the Court said that the burden "is unlikely to make much difference on the ground," as both plaintiffs and defendants in the typical securities fraud cause usually submit competing expert evidence on price impact. As a result, the Court directed district courts "simply to assess all the evidence of price impact." The Court concluded that the burden should only come into play when a district court finds that the competing evidence is equal, a situation that it thought would "rarely arise."

⁴ *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013).

⁵ *Id.* at 275.

⁶ 573 U.S. 258 (2014).

Some had hoped the Court would take this opportunity to address the “price maintenance theory,” which allows plaintiffs to argue not that the defendants’ misrepresentation artificially inflated the company’s share price, but that the misrepresentations allowed the defendant company to maintain its share price. The Supreme Court has never considered whether this theory is sustainable, and it declined to do so in the *Goldman* opinion. Instead, Justice Barrett noted only that the “Court has expressed no view on [the price maintenance theory’s] validity or its contours” and that it “need not and [did] not do so in this case,” leaving that issue open for a later decision.

Potential Impact of the Court’s Ruling

Although the *Goldman* decision placed the burden of persuasion as to price impact on defendants, the Court’s instruction that district courts must assess all evidence of price impact, including evidence that might overlap with materiality, is a positive for securities class action defendants. In addition, the Court’s decision left no doubt that the generic nature of an alleged misstatement may be considered at the class certification stage, an argument that we expect to see class action defendants use with more frequency. Although the precise impact of the *Goldman* opinion remains to be seen, it is clear that class certification will remain a critical and hotly contested stage for securities class action cases for the foreseeable future.

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