ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XXI No. 3 *Fall 2014*

The Current State of the Court Funding Crisis and Its Impact on The San Diego Superior Court

By: Morgan P. Suder

Judge Danielsen

On July 29, 2014, Presiding Judge David J. Danielsen discussed the impact of the judicial budget crisis on the administration of justice in the San Diego Superior Court.

Judge Danielsen provided a brief history of the budget crisis, explained the process of the California budget and the amount of funding allocated to San Diego, discussed the need for the new Central Courthouse, and offered advice to those considering a career in the legal profession.

History of the Budget Crisis

According to Judge Danielsen, the current situation is the result of a three-part framework: historical, economical, and political. First, the realignment of the state and county government impacted the court system in the late 1990s and created a new funding model. Before 1998, California's trial courts consisted of superior and municipal courts, each with its own jurisdiction and each funded by the County. Some county courts were better funded than others. In 1998, the superior and municipal courts merged into a single superior court. Currently, California has 58 trial courts, one located in each county. After unification, the courts became state funded with budgets essentially based upon the historical county funding levels and with many services and benefits for support staff remaining intertwined with county systems.

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The Fraud-on-the-Market Presumption Is Alive and Well

By: Richard Gluck and Lucas Gilmore

Richard Gluck

Lucas Gilmore

Twenty-five years ago, the United States Supreme Court in *Basic, Inc. v. Levinson*,[1] held that investors are entitled to rely on the integrity of the prices of securities that trade on well-developed markets like the New York Stock Exchange and NASDAQ. The Court adopted a rebuttable presumption under which investors who purchase stock in a company that makes material misrepresentations about its business are presumed to have relied on those misrepresentations. This "fraud-on-the-market" presumption, which is founded on the economic theory that the prices of securities traded on well-developed markets reflect all publicly available information, has become the linchpin of modern securities class actions by enabling plaintiffs to prove reliance on a class-wide basis without having to

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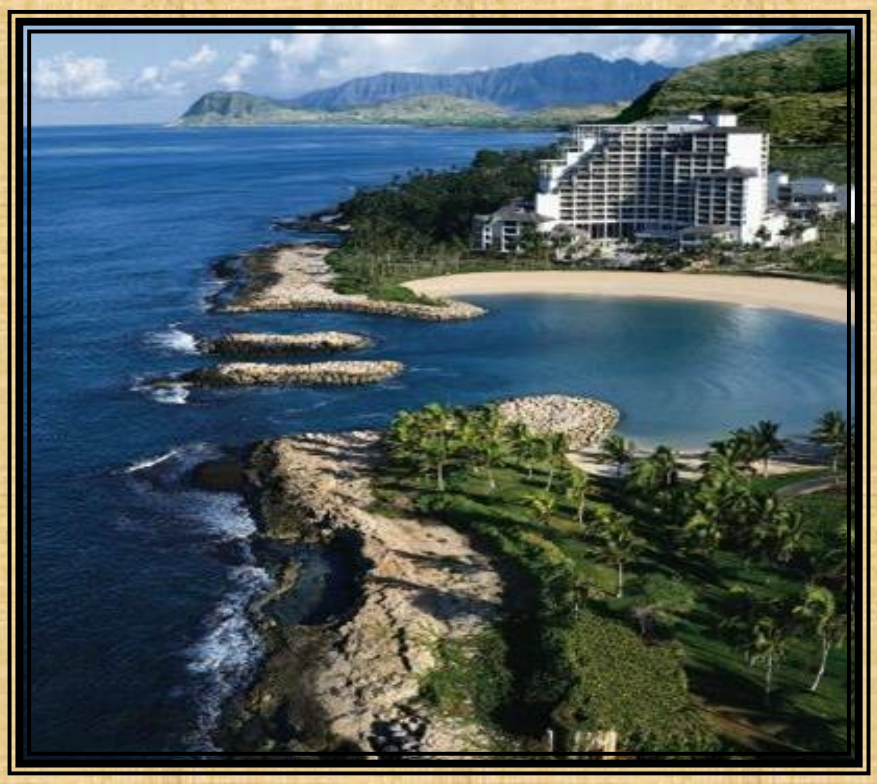

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President's Letter

By Marisa Janine-Page

Continuing the 2014 focus on an open dialogue with the Bench, last Tuesday night the ABTL-SD held its first judicial-interactive dinner program, featuring 22 of our local state Superior Court judges (many thanks to the federal and appellate judges who contributed to the discussions as well). Breaking out into 8-10 person intimate table discussions on Law and Motion A to Z and other tips from the Bench, these judges shared insights into when to demur, how to meet and confer, why some hearings are scheduled six months out and other six weeks, how to use tentative rulings and make effective oral argument, and the proper use of objections (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512). The program was one of ABTL's best ever and the format is sure to be repeated in years to come!

Help Your Clients and Community Get Informed!

This year, the ABTL-SD is taking its open dialogue to the community. Fair and impartial courts are the tenet of democracy and our profession – yet state courts around the nation are under siege by political motives and special interests. In a very real sense, it is our clients - -businesses – that have a proportionally larger stake in the issue of fair courts because businesses are the repeat users of the judicial system. Our clients need to be confident that the judge hearing their cases is competent, fair and impartial, and will follow the law and not bend to political or special interest pressures. Only with fair and impartial courts can we maintain predictability, certainty, and consistency in the rule of law.

It is for these reasons that all chapters of the ABTL have partnered with the National Association of Women Judges on its Informed Voters Fair Judges project. The IVP is a state-wise, multi-organizational nonpartisan effort to educate voters on the judicial branch of government and how to find accurate information about judicial candidates.

This is an important judicial election year in California. We have three California Supreme Court justices and ten Fourth District Court of Appeal justices on the Ballot. Let's take the initiative to educate our clients and community that a specific candidate's philosophical or political interest has not place on the Bench -- the only selection criteria that matter are the judge's competence, ethics, and integrity.

The IVP has prepared seven short messages in English, Spanish, and Chinese that can be easily e-mailed to clients, stuffed in envelopes with monthly invoices, distributed at community group meetings, or made available for download on your website. Samples are included with this Newsletter and all messages are available at www.ivp.nawj.org or by request to abtlsd@abtl.org. Likewise, the ABTL has a subcommittee of volunteer judges and attorneys trained to make short presentations at community gatherings, HOA meetings, PTA associations, Rotary Clubs, and other group settings. If you have one of these events coming up, please invite our volunteers to make a presentation. Requests should be sent to abtlsd@abtl.org.

The ABTL Takes its Mock Trial Mentoring to the Law Schools!

The ABTL is taking its open dialogue to the local law schools. This November, the ABTL will be sponsoring its Inaugural Mock Trial Competition between mock trial teams from California Western School of Law, Thomas Jefferson School of Law, and the University of San Diego School of Law. The judges are lined up, the hypothetical is drafted, the evidence is being prepared, and spirited competition among the mock teams has ensued. Now we just need volunteer attorneys to judge, a supportive audience, and mentors – i.e. YOU!

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Save The Date!

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www.abtl.org

President's Letter

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The preliminary seeding rounds will be held at California Western School of Law on November 7th and 8th and the final round will be held at the federal courthouse on November 10th. Directly following the final round we will have an awards ceremony. The teams are competing for a perpetual trophy that will be engraved and displayed in the winning school's trophy case from year to year. In addition to serious bragging rights, the teams will also be awarded $5,000, $2,000 and $1,000 scholarships for First, Second, and Third place, respectively. We still need volunteers to act as attorney judges, scorekeepers and timers, and mentors. If you are interested please e-mail Jack Leer at jrl@chplawfirm.com. Look for the announcement of the winning school in the next ABTL Report.

Let the games begin!

State of the Court

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Second, the economic downturn in 2008 led to four straight years of budget cuts for the California state courts. Courts mitigated the cuts to prevent severe decreases in services by utilizing reserves and "one time" monies. In 2012, the San Diego Superior Court took an enormous hit when approximately $30 million was cut from the court's budget, with a disproportionate amount of cuts to the civil and family law courts. As a result, court staff has been reduced by 25 percent, and, according to Judge Danielsen, the freeze on hiring new staff is looking more and more likely to be considered permanent.

Third, Judge Danielsen explained that there is a political unwillingness to provide adequate funding to the state court system. The reason, he believes, for such reluctance is unclear, but it appears the Governor believes that the courts have enough resources and that efficiency reforms will restore access to justice.

"As a result of the decrease in funding, changes to the court system that were once thought to be temporary in nature are likely to become permanent."

The 2014 California Budget and Its Impact in San Diego

Coming into the 2014 budget cycle, it was clear that the California court system is no longer able to function efficiently and there is a critical need to restore funds to allow the courts to remain operational. The courts required an additional $266 million just to "tread water" and operate at their current reduced funding level.

Before addressing the 2014 budget, Judge Danielsen explained how the process for California's annual budget works. First, the Governor releases his proposed budget for the coming fiscal year in January. In May, the Governor releases an updated budget based upon changes in the state's revenues and expenditures. The Legislature typically gets involved after the May revision of the state budget. After approval from each House and following the Governor's signature, the budget bill goes into effect in July.

In January of this year, Governor Brown proposed $100 million in new money for the trial courts. The May Revise increased that amount to $160 million, and the final budget provided $223 million for California's judicial system. This amount, although positive, is still not enough to maintain status quo. According to Judge Danielsen, much of this money is not available for trial court operations; approximately $1 million will go directly to the county for security, new collaborative and specialty courts will receive approximately $15 million on a grant basis, and approximately $40 million will replace money the state has borrowed from the construction fund for new court facilities. In reality, trial courts need $64.8 million for increased employee benefit, healthcare, and retirement costs. Additionally, the Department of Finance miscalculated the projection of income from court fines and fees, resulting in a $67 million funding loss to the trial courts. Approximately $30.9 million was allocated to offset this revenue shortfall.

At the end of the day, the 2014 budget provides $129 million in new money to the California trial courts—not even half of what was needed to maintain current court services. This new money will then be divided among the 58 trial courts. The portion of the budget pledged to the trial courts will not have a positive impact on San Diego.

This budget is also the first for the application of a new model for allocating funds to the trial courts based on current workload and designed to address some historical inequities in county funding. Prior to this new system, courts received a percentage of funding based on county funding and their workload back when unification occurred. Under the new allocation formula, San Diego's share of the total budget has decreased from eight percent to seven percent. Judge Danielsen explained that San Diego is now a "donor court," rather than a "recipient court." The reallocation of funds will help other courts, like San Bernardino and Riverside, who have experienced a significant amount of growth over the years and will receive a modest increase in funding.

Current Effects of the Ongoing Budget Cuts

As a result of the decrease in funding, changes to the court system that were once thought to be temporary in nature are likely to become permanent. For example, the closing of

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State of the Court

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the civil departments in East County and South Bay has caused the Central Division's caseloads to rise from 500 to 600 cases per judge to 900 to 1,100 cases per judge, according to the San Diego County Bar Association's 2014 State of the Judiciary Report. This increase in caseload combined with the continued reduction in operating expenses has led to a backlog of cases and additional wait times for basic court services. Specifically, law and motion delays have grown substantially. The report also addresses cutbacks to the number of court reporters and commissioners, Family Court Services and Family Law Facilitator delays, and the increased amount of time needed to process default judgments and misdemeanor warrants.

"According to Judge Danielsen, the San Diego Superior Court is going to suffer up to $9 million in additional, ongoing shortfalls over the next two years."

According to Judge Danielsen, the San Diego Superior Court is going to suffer up to $9 million in additional, ongoing shortfalls over the next two years. An executive committee is looking at how to address this deficit with the least amount of compromise to court services and access to justice for individuals and businesses. It will not be an easy decision, as potential solutions could also have negative and long-lasting consequences on the court system.

Silver Lining: The New San Diego County Central Courthouse

Despite the ongoing cuts to the state court system, Judge Danielsen remains optimistic. He stressed the positive changes to San Diego County, such as the implementation of a new case management system and construction of the new Central Courthouse.

San Diego broke ground on the new 22 story, 71 courtroom courthouse in March. The project is funded by the Senate Bill 1407 court construction program, which finances new and renovated court facilities using court fees, penalties, and assessments rather than taxpayer revenues.

The County Courthouse, which was built in 1961, is unsafe, outdated, and inadequate for operations like so many courthouses around the state. The courthouse does not have an in-custody transfer system, which forces deputies to escort prisoners through public areas. The building cannot be retrofitted to allay seismic concerns because it contains asbestos. The main reason San Diego's project is getting built at all, the trump card according to Judge Danielsen, is that an active seismic fault line lies directly beneath the courthouse, increasing the risk of severe damage to the building and financial exposure to the state from an earthquake.

Completion of the courthouse is scheduled for December 2016. The project will consolidate multiple facilities, including the County Courthouse, the Family Courthouse, and the Madge Bradley Courthouse.

After the court occupies the new building, the old County Courthouse will be demolished. The block facing Broadway is owned by the state and will be sold for private development. Any income from the sale for redevelopment will likely go back to the state court construction fund. The middle block is scheduled to be open space or a paid parking structure with a park on the top level. The county owns the block between B Street and A Street, which could be a logical site for a County of San Diego court services annex building.

Advice to the San Diego Legal Community

When asked what advice he would offer to someone contemplating going to law school, Judge Danielsen said the current situation should not deter anyone who has a passion for learning and who wants to fight for other people's rights.

He explained, however, that the budget crisis has impeded real people's access to justice. Without a fully funded court system, our local courts cannot resolve matters in a timely and effective matter, and thus justice cannot really be served. He encouraged the local community to contact their legislators to advocate for additional court funding to serve a core American value–access to justice.

Morgan P. Suder is an associate with Wilson Turner Kosmo LLP where she specializes in employment litigation.

The ABTL Partners With NAWJ On Its Informed Voters Project

By: Lynn Beekman

The ABTL recently voted to partner with the National Association of Women Judges (NAWJ) to promote its Informed Voters Project (IVP), a ground breaking voter education project with the goal of educating the public about the role voters play in ensuring our courts remain fair and impartial. The Project aims to increase public awareness about how the judicial system works and how to obtain nonpartisan information about judicial candidates to ensure that judges are elected based on their integrity, professional competence and experience. ABTL Board of Governors' member, Justice Joan Irion, and Presiding Justice Judith McConnell, are the NAWJ IVP Co-Chairs and have prepared a strategic outreach plan of action in collaboration with numerous organizations including all ABTL chapters.

As attorneys we have seen firsthand that over the last decade special interest groups have increasingly mounted expensive campaigns to replace sitting judges in an attempt to impose their influence on the courts. The NAWJ reports that the Brennan Center for Justice at New York University School of Law following the trend has seen "an 'explosion' of private money pouring into state judicial elections in recent years." This is a nationwide concern that NAWJ has elected to "Spotlight" at its upcoming 36th Annual Conference to be held October 15 – 19 at the Westin Gaslamp Quarter in San Diego. NAWJ conference subcommittee chair and former ABTL Board Member, Judge Katherine Bacal, notes that the Conference will include a panel that, "will focus on the challenges we face, given the lack of current awareness by the public of the need for fair and impartial courts and will discuss various IVP programs being undertaken to enhance civic learning on the state and national level, as well as trends and challenges to judicial independence, including increasing attempts to politicize the courts."

An independent judiciary is critical to our democracy and to the administration of justice. Our system of checks and balances will fail if we allow special interests to gain influence over the selection and retention of judges. By getting voters educated we can ensure fair courts and equal justice. ABTL is committed to helping NAWJ take this important message into our community.

The ABTL IVP Committee encourages ABTL members to go to http://ivp.nawj.org/ (there is also a link on ABTL's website) and click on the "Get Involved" tab to download Fact Sheets that can be distributed to clients, friends and family. The centerpiece of this important civics education campaign is a public service announcement titled "Fair and Free" featuring former U.S. Supreme Court Justice Sandra Day O'Connor. The video can be viewed at https://www.youtube.com/watch?v=aTeFLkueTkQ. The video won an Emmy from the National Capital Chesapeake Bay Chapter of the National Academy of Television Arts & Sciences. Feel free to disseminate this video to colleagues and clients as well. The ABTL IVP Committee, which includes ABTL Judicial Advisory Board Chair Judge Randa Trapp, plans on sharing key IVP messages with media contacts, giving brief educational presentations to organizations and creating judicial profiles linked to ABTL's website. If you would like to get involved in sharing IVP's key messages please contact ABTL IVP Co-Chair Lynn Beekman at lbeekman@psdslaw.com.

Lynn Beekman is an attorney with the law firm of Pyle Sims Duncan & Stevenson where she practices commercial, business and bankruptcy litigation on behalf of creditors.

Articles of Interest in Other ABTL Reports

Northern California

- "Civil Discovery Sanctions in California Courts – The 3:10 to Discoveryville" – Hon. Socrates P. Manoukian
- "Judgments and Pre-Judgments: Trying the Case in Court after the Trial by Public Opinion" – Allen Ruby
- "Exercising Your ADR Options" – Michael P. Carbone

Los Angeles

- "The Continuing Tug of War between the U.S. and California Supreme Courts over Arbitration Law" – Felix Shafir
- "Damages in 'Idea Submission' Cases" – Jay M. Spillane
- "Summary of Pending California Supreme Court Cases" – David M. Axelrad

Orange County

- "Q&A with the Hon. James V. Selna" – Kristin Murphy
- "Towards a 'Manageability' Standard in Private Attorneys General Act Discovery" – Matthew M. Sonne and Kevin P. Jackson
- "The Risk of Snatching Defeat from the Jaws of Victory – Lane v. Francis Capital Management and Using or Losing Federal Arbitration Act Preemption" – James P. Carter

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Fraud-on-the-Market

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show that each class member individually relied on the misrepresentation.

Critics of the presumption contend that new economic research casts doubt on the efficiency of securities markets. And if the markets are not efficient, they argue, the whole premise of the fraud-on-the-market presumption is flawed. Those critics took hope when four Justices in concurring and dissenting opinions issued last year in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,[2] questioned the wisdom of *Basic* and suggested that it might be time to reconsider it. When the Court granted cert in *Halliburton Co. v. Erica P. John Fund, Inc.* just a few months later to do just that, pundits predicted the presumption's demise. But to paraphrase Mark Twain, stories of the presumption's demise were greatly exaggerated. The Supreme Court in *Halliburton* not only reaffirmed *Basic*, it did so in a way that arguably strengthened the presumption.[3]

Background of the *Basic* Presumption

Securities class actions against publicly traded companies typically involve claims under Section 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5. To prevail on these claims, investors must prove, among other things, that they relied on defendant's misrepresentations. The Supreme Court held in *Basic* that investors could under certain circumstances satisfy this reliance element by invoking a rebuttable presumption that the stock price reflected all material public information, including defendant's misstatements. To invoke the presumption, a plaintiff must show that (1) the alleged misrepresentation was publicly known; (b) the alleged misrepresentation was material; (c) the security traded on an efficient market; and (d) the plaintiff traded the security between the time when the defendant made the misrepresentation and when the truth was revealed. Once invoked, anyone who bought or sold the stock at mar-

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ket price would be deemed to have relied on the misstatements without having to show individually that he actually relied on them.[4]

A number of legal scholars and economists have criticized *Basic* and the efficient-market theory on which it is premised. Some have claimed that whether a market for a particular stock is efficient is not "a binary, yes-or-no question" because some markets are more efficient than others and even the same market may process certain types of information more efficiently than others. Others have questioned *Basic's* premise that investors invest in reliance on the integrity of the market price. These criticisms reached a crescendo when four Justices in *Amgen* joined the chorus suggesting that it was time for the Court to reconsider *Basic*.[5]

The *Halliburton* Decision

In *Halliburton*, the lead plaintiff in a putative securities-fraud class action alleged that Halliburton and one of its executives made a series of misrepresentations about the company's business in order to inflate its stock price. The stock price dropped substantially when the company later revealed the truth. The trial court certified the proposed class, finding that the *Basic* presumption applied and that it was prohibited from considering defendants' evidence that none of the misrepresentations had affected the stock price. The U.S. Court of Appeals for the Fifth Circuit affirmed, and the Supreme Court granted cert to resolve a conflict among the circuits over whether a defendant may rebut the *Basic* presumption at class certification with evidence that the alleged misrepresentations had no price impact. More significantly, the Court also agreed to reconsider the *Basic* presumption itself.

In urging the Court to overrule *Basic*, Halliburton contended that securities-fraud plaintiffs should always have to prove direct reliance, and that the *Basic* presumption contravened Congress's intent when it enacted the 1934 Exchange Act. It argued further that more recent economic research had discredited the efficient-market theory on which the presumption is grounded. Justice Roberts, writing for five other justices, concluded that neither of these arguments "so discredits *Basic* as to constitute 'special justification' for overruling the decision."[6]

First, the Court quickly rejected Halliburton's Congressional-intent argument, noting that "[t]he *Basic* majority did not find that argument persuasive then, and Halliburton has given us no new reason to endorse it now."[7]

Next, the Court turned to Halliburton's contention that *Basic* should be overruled because recent research supposedly had discredited each of the two major premises on which it is grounded: that the stock markets efficiently incorporate public information into stock prices and that investors invest in reliance on the integrity of those prices. Citing studies purporting to show that market prices often don't incorporate public information immediately, Halliburton argued that "overwhelming empirical evidence now suggests that capital markets are not fundamentally efficient" and that *Basic's* fundamental error was ignoring that some markets are more efficient than others and that the efficiency of even a single market can vary depending on how widely the information is spread or how easily it is understood.[8] Halliburton also insisted that because "price integrity" is largely irrelevant to certain types of investors (value investors being one example), "courts should not presume that investors rely on the integrity of those prices and any misrepresentations incorporated into them."[9] The Court did not find either of these arguments persuasive.

The Court found Halliburton's focus on the economic debate over how quickly securities markets incorporate public information into stock prices largely beside the point. The *Basic* presumption was not based on acceptance of any particular theory of how efficiently markets incorporate public information. Rather, it was based on the "fairly modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.'"[10] The Court noted that "[e]ven the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices."[11] And since the underlying premise of *Basic* is that false statements affect stock prices — thereby causing losses to investors — any debate over the degree to which the false statements affect stock prices is largely irrelevant to whether investors should be presumed to have relied on the misstatements.

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The Court also rejected the notion that the existence of investors for whom stock prices supposedly are less relevant than others warrants scrapping the general presumption that investors rely on the integrity of market prices and any misrepresentations incorporated into them. The Court noted that *Basic* never denied the existence of such investors. Rather, *Basic* concluded "only that 'it is reasonable to presume that *most* investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information.'"[12] Even "value" investors, the Court noted, "implicitly rel[y] on the fact that a stock's market price will eventually reflect material information."[13] Value investors also presumably try to estimate the extent to which the stock is over or undervalued. If the stock price is tainted by fraud, then those estimates will be distorted. Therefore, the existence of "value" and other types of investors for whom price integrity may not be as important does not warrant overruling *Basic*.

Defendants May Rebut the Presumption at Class Certification

As an alternative to overruling *Basic* altogether, Halliburton asked the Court to require plaintiffs to prove that the alleged misrepresentations impacted the stock price in order to invoke the presumption. Doing so made sense, Halliburton argued, because without price impact the whole premise of the *Basic* presumption collapses. If the misrepresentation did not impact the stock price, then there is no reason to presume that investors indirectly relied on the misrepresentation through their reliance on the integrity of the stock price.

The Court rejected that idea, concluding that it "would radically alter the required showing for the reliance element of the Rule 10b-5 cause of action."[14] The whole idea of the presumption is that a plaintiff is entitled to presume that the misrepresentation impacted the stock price if he can show that the misrepresentation was public and material and that the stock traded on an efficient market. Requiring plaintiff to prove that the misrepresentation actually impacted the stock price would effectively gut the presumption of any real meaning.

The Court agreed with Halliburton, however, that a defendant must be allowed at class certification to rebut the presumption by showing that the alleged misstatements did not impact the price. The Court noted that there was no dispute that defendants may introduce such evidence at the merits stage. After all, "*Basic* itself 'made clear that the presumption was just that, and could be rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock."[15] There

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Editor: Lois M. Kosch - (619) 236-9600 | lkosch@wilsonturnerkosmo.com
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also was no dispute that defendants may introduce at class certification evidence of a lack of price impact to counter plaintiff's showing of market efficiency. Not allowing defendants to rely on that same evidence to rebut the *Basic* presumption altogether therefore made little sense and was "inconsistent with *Basic's* own logic."[16] Accordingly, "defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."[17]

Practical Implications of *Haliburton*

In refusing to overrule *Basic*, the *Halliburton* Court ensured that class actions will remain an important tool for vindicating the rights of investors injured by securities fraud. The decision is equally important for investors pursuing individual 10b-5 actions that may have difficulty proving "eye-ball" reliance, like investors that follow indexing or other passive investment strategies that don't rely on fundamental or technical analysis of a company's stock price or public filings. The Court's opinion indicates that even these types of investors are entitled to the *Basic* presumption so long as they can show that the misrepresentation was public and that the market was efficient.

The decision also seemingly loosens the market-efficiency requirement. For years, defendants have attempted to defeat the *Basic* presumption by showing that the market for a particular security was not efficient because the Company's stock price did not move instantly in response to new information. But *Halliburton* repeatedly emphasizes that plaintiffs need show only that the stock traded in a "generally efficient market," and that it is enough for the market price to incorporate material information "eventually" and "within a reasonable period."[18] These remarks reflect a more expansive view of market efficiency than those expressed in several district court decisions before *Halliburton*, and suggest a seemingly low evidentiary standard for investors to meet.

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The U.S. Court of Appeals for the Eleventh Circuit recently adopted that more expansive view in the first circuit court opinion applying *Halliburton.* In *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.*,[19] the court held that a plaintiff need not prove that the alleged misrepresentations immediately impacted the stock price in order to prove market efficiency. Indeed, market efficiency may be shown even where the alleged misrepresentations did not move the stock price. It is enough, the court explained, for plaintiff to show that defendant's misrepresentations confirmed market expectations, thereby keeping share prices at the same artificially inflated levels.[20]

Halliburton also leaves open questions about future litigation over the *Basic* presumption. One such question is what standard applies in determining whether a defendant has met its burden to rebut the *Basic* presumption at class certification. Does a defendant meet its burden simply by submitting an event study purporting to show that the misrepresentation did not impact the stock price? What if plaintiff submits a competing event study showing that the misrepresentation did impact the price? Is the Court permitted to choose which event study or which expert it finds more credible? If past is prologue, the answer seems to be that defendants will bear the burden of proving lack of price impact by a preponderance of evidence. That is the standard that courts have applied in the analogous situation of deciding whether plaintiffs have met their burden of establishing market efficiency in order to invoke the *Basic* presumption.[21] Under that standard, a defendant would seem not to have satisfied its burden where the court is presented with two equally credible event studies that reach exactly opposite conclusions. That is the conclusion that a district court reached in a post-*Halliburton* decision certifying a class after reviewing dueling expert reports on price impact and finding that "[d]efendants have not submitted evidence sufficient to rebut the presumption of reliance."[22]

Conclusion

Both sides of the securities-litigation bar have declared victory in *Halliburton,* parsing the decision's every word to support their views. But while reasonable minds may differ on the decision's impact or on the answers to some of the questions left in its wake, one thing is certain; the *Basic* presumption is alive and well and remains a powerful tool for investors in securities-fraud lawsuits.

Richard Gluck is of counsel to Bernstein Litowitz Berger & Grossmann, where he prosecutes class and direct actions under the federal and state securities laws on behalf of institutional investors.

Lucas Gilmore is an associate at Bernstein Litowitz Berger & Grossmann, representing institutional investors in securities fraud actions.

ENDNOTES

1 *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).
2 *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184 (2013).
3 *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).
4 *Basic*, 485 U.S. at 245.
5 *See Amgen*, 133 S. Ct. at 1204-16.
6 *Halliburton*, 134 S. Ct. at 2408.
7 *Id*. at 2409.
8 *Id*.
9 *Id*. at 2410.
10 *Id*.
11 *Id*.
12 *Id*. at 2411 (quoting *Amgen*, 133 S.Ct. at 1192) (emphasis added).
13 *Id*.
14 *Id*. at 2414.
15 *Id*.
16 *Id*. at 2415.
17 *Id*. at 2417.
18 *Id*. at 2411, 2414.
19 *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp*., 2014 WL 3844070 (11th Cir. Aug. 6, 2014).
20 *Id*. at *5.
21 *See, e.g., In re Winstar Commc'ns Sec. Litig*., 290 F.R.D. 437, 445 (S.D.N.Y. 2013).
22 *IBEW Local 98 Pension Fund v. Best Buy Co., Inc*., No. 11-429 DWF/FLN, slip op. (D. Minn. Aug. 6, 2014).

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