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Update on the Halliburton Fraud-on-the-Market Case

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Editor's Note: John F. Savarese and George Conway are partners in the Litigation Department at Wachtell, Lipton, Rosen & Katz. This post is based on a Wachtell Lipton firm memorandum by Mr. Savarese, Mr. Conway, and Charles D. Cording. The Supreme Court's expected reconsideration of *Basic* is also discussed in a Harvard Law School Discussion Paper by Professors Lucian Bebchuk and Allen Ferrell, Rethinking *Basic*, discussed on the Forum here.

As we have described in our prior posts and memos (here and here), in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, the Supreme Court will decide whether or not to abandon the "fraud on the market" presumption of reliance that has facilitated class-action treatment of claims brought under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5. The case will be argued before the Court on March 5, and a decision will likely come by the end of June. As our earlier memos explained, *Halliburton* is potentially the most important securities case that the Court has heard in a long time.

Last week, various amici curiae supporting the overturning of the fraud-on-the-market presumption filed briefs in the Supreme Court. Our Firm and Stanford law professor Joseph Grundfest filed a brief (available here; printed copies available on request) on behalf of a distinguished group of law professors and former commissioners and officials of the SEC, arguing that, under settled principles of statutory interpretation, the Exchange Act should not be read to permit a presumption of reliance. Our brief argues that the judicially created right of action under Section 10(b) should be construed similarly to the comparable, express right of action established in Section 18(a) of the Exchange Act. Because Section 18(a) requires proof of actual reliance, we argue that Section 10(b) should likewise require it. Our brief also rebuts the argument that the fraud-on-the-market presumption deserves stare decisis effect, as well as the argument that Congress, by failing to overturn the presumption, has acquiesced in it.

Although it is impossible to predict, there is some reason to think that these arguments will be the ones upon which the case will turn. For example, defendant Halliburton's opening brief

prominently cites the certiorari-stage brief we submitted to the Court last October, as well as an article written by Professor Grundfest last August (discussed on the Forum here), both of which also argued that Section 10(b) should be construed to require proof of actual reliance in accordance with Section 18(a).

We will continue to keep you posted on this very important case.