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# Supreme Court Rules That Proof of Materiality is Not a Prerequisite to Certification of a Rule 10b-5 Class Action

A divided Supreme Court ruled yesterday that proof of materiality is not a prerequisite to certification of a Rule 10b-5 securities fraud class action. *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, No. 11-1085 (Feb. 27, 2013).

The elements of a Rule 10b-5 claim include proof of a material misrepresentation or omission and reliance upon such misrepresentation or omission. Plaintiffs in securities fraud class actions typically seek to invoke the "fraud-on-the-market" presumption set out in *Basic Inc*. v. *Levinson*, 485 U.S. 224 (1988) to establish reliance. In *Basic*, a case in which only a bare quorum of six Justices participated, a bare majority of four Justices permitted plaintiffs who trade in an impersonal and efficient market to invoke a rebuttable presumption of reliance on public, material misrepresentations, and thus proceed with a class action even absent proof of individual reliance.

The majority in *Amgen* recognized that materiality was an essential predicate of the *Basic* fraud-on-the-market theory. But the Court concluded that proof of materiality was not required at the class certification stage in order to ensure that common questions will predominate over any questions affecting only individual class members. In the Court's view, even if the plaintiffs were to ultimately fail to present sufficient evidence of materiality to defeat a summary judgment motion or to prevail at trial, this still would not cause individual reliance questions to predominate because the failure of proof of materiality would simply end the case. The Court also ruled that, at the class certification stage, the defendant cannot even seek to rebut the *Basic* fraud-on-the-market presumption by presenting evidence that the alleged misrepresentations or omissions were not material. That, too, must await the summary judgment stage or trial.

While the *Amgen* majority opinion holds that materiality need not be proven in order to secure class certification, other matters must still be demonstrated at the class certification stage. For example, the putative class representative must establish that it executed a trade between the time when the alleged misrepresentation was made and the time the truth was subsequently revealed. Thus, precise identification of those times may be required to determine if a putative class representative satisfies the typicality and adequacy requirements of Rule 23.

Notably, four Justices expressed a willingness to revisit *Basic's* fraud-on-the-market presumption. Justice Thomas' dissent (in which Justices Kennedy and Scalia joined all or in part) stated that the *Basic* decision is "questionable". Justice Thomas noted that only four Justices had joined the portion of the *Basic* opinion adopting the fraud-on-the-market theory and that two other Justices had dissented from that portion of *Basic* and had expressed concern that the Court had replaced "traditional legal analysis" "with economic theorization". Indeed, one law professor (whose article Justice Thomas referenced) has described the line-up of Justices that decided *Basic* as "remarkably skewed". Justice Alito concurred in the majority opinion, but on the understanding that whether the Court should revisit *Basic's* fraud-on-the-market presumption was not before the Court in *Amgen* and, he too, stated that "reconsideration of the *Basic* presumption may be appropriate".

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