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Challenging Basic's Fraud-on-the-Market Presumption of Reliance

The Supreme Court is considering whether to grant certiorari in a case challenging the fraud-on-the-market presumption of reliance in securities class actions. Adopted by the Supreme Court in 1988 in Basic v. Levinson, that presumption is the lynchpin of the modern securities class action under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Because it eliminated the need for plaintiffs to prove individual reliance on alleged misstatements, the Basic presumption allows common issues to predominate over individual issues, and thus facilitates class-action certification under Federal Rule of Civil Procedure 23(b)(3). Without Basic, private class action securities litigation would not have become the massive industry that it is today.

The defendants who filed the certiorari petition in the case now pending before the Court, Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317, urge the Court to take their case in order to consider whether Basic should be overruled. In doing so, they have stressed that four members of the Court in separate opinions earlier this year in Amgen Inc. v. Connecticut Ret. Plans and Trust Funds (see our client memo here), all signaled their willingness to reconsider Basic.

Last week, on behalf of a group of 14 distinguished law professors and former commissioners and officials of the Securities and Exchange Commission, we filed an amicus curiae brief supporting the petition and urging the Supreme Court to grant certiorari to overrule or substantially limit Basic. A copy of our amicus brief can be found here (and if you would like a hard copy of the brief, please let us know and we would be pleased to send you one).

We cannot predict what the Supreme Court will do. But if the Court were to grant certiorari, Halliburton would likely prove to be a very significant decision for the future of private securities litigation. The Basic presumption of reliance revolutionized private securities litigation, and it has fueled the multi-billion dollar shareholder claims that are so common today. We will closely monitor developments in Halliburton, and will keep you posted.

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