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Halliburton II: A Missed Opportunity to Right the Wrong in Rule 10b-5 based Class Actions

*Erich L. Schmitz**

I. INTRODUCTION

In June 2014, many large, publicly traded corporations likely awaited the decision in *Halliburton Co. v. Erica P. John Fund*¹ in the hopes of transforming securities class action litigation and ending over two decades of unjust relief for class action securities fraud plaintiffs. But, the outcome provided little difference as class action securities fraud suits continue to fuel itself as a multi-billion dollar industry.² Between 1996 and 2013, the industry has produced nearly \$80 billion in settlements, while between 1996 and 2012 the average settlement amount was approximately \$42 million.³ It is no wonder then that the measly little investor would strike fear among many large corporations.

An investor may rely on countless sources when deciding to purchase stock in a publicly traded corporation, whether it is insight from a friend, The Wall Street Journal, or merely his own ideals which may align with a particular company. Regardless of the mode of information and whether it was ancillary to the transaction, there is a chance that this investor may have acted on incomplete or inaccurate information.⁴ Nevertheless, the purchase of a security results in two obvious outcomes for investors: their actions may result in a gain, or consequently, their actions may result in a loss. But, the fact that the investor has acted on incomplete or inaccurate information and has suffered a resulting loss does not mean that they have been defrauded or misled.⁵

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1. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

2. See Greg Stohr, *Investor Class Actions Seen at Risk in Halliburton Case*, BLOOMBERG BUSINESS (Feb. 27, 2014, 1:59 PM), <http://www.bloomberg.com/news/articles/2014-02-27/investor-class-actions-seen-at-risk-in-halliburton-case>.

3. See Laarni T. Bulan, Ellen M. Ryan, Laura E. Simmons, *Securities Class Action Settlements, 2013 Review and Analysis*, CORNERSTONE RESEARCH, <https://www.cornerstone.com/Publications/Research/Post-Reform-Act-Settlements> (last visited Nov. 22, 2015).

4. See *Basic Inc. v. Levinson*, 485 U.S. 224, 252 (1988) (White, J., concurring in part and dissenting in part) (quoting *Dirks v. SEC*, 463 U.S. 646, 667 n. 27 (1983)).

5. *Id.* at 248.

Since *Basic Inc. v. Levinson* in 1988, nearly all federal courts have upheld the ability for class-action investors to recover damages by simply showing that their stock was re-sold at a loss.⁶ This resulted from a precedential rule of law set out in *Basic* (“*Basic* presumption”), which assists investors in overcoming the main roadblocks associated with Rule 10b-5 securities fraud class-action lawsuits; namely, proof of the element of the cause of action that the investor plaintiffs *relied* on a company’s alleged misstatement when purchasing the security, and that questions of law or fact common to investor plaintiffs predominate over individual questions under Federal Rule of Civil Procedure (“FRCP”) Rule 23.⁷ The *Basic* presumption essentially reduces the burden for class-action plaintiffs that individual plaintiffs would otherwise have to prove. Without the presumption, class actions would be unwarranted as judges would be compelled to conduct multiple personalized inquiries for each plaintiff.⁸

It has been over twenty-five years since *Basic* was decided. Strides in research on securities markets and investor interaction, as well as a fundamental understanding of law helps prove that the *Basic* presumption no longer stands as good law. This article attempts to demonstrate that the recent *Halliburton* Court missed the opportunity to rid the *Basic* presumption.⁹ Further, this article attempts to rebut the *Halliburton* majority’s reasoning for upholding the *Basic* presumption and to demonstrate their erroneous oversight and improper application of the evidence.

Part II provides an educational introduction to fraud-on-the-market theory, the Rule 10b-5 anti-fraud provision, as well as background to *Halliburton I* and *II*. Part III discusses *Halliburton*’s first main argument regarding market efficiency and why the markets do not behave the way the *Basic* presumption assumes they do. Part IV discusses *Halliburton*’s second main argument regarding the fallacies of the ‘reliance on the integrity of the market price’ requirement and the Court’s blanket view of investors. Part V discusses *Halliburton*’s effect on the use of F.R.C.P. Rule 23 in securities fraud class-action suits.

6. *Id.* at 256.

7. See FED. R. CIV. P. 23(b)(3) (1934); Greg Stohr, *supra* note 2 (emphasis added).

8. See Greg Stohr, *supra* note 2.

9. See Donald C. Langevoort, *Halliburton II and Market Efficiency*, THE CLS BLUE SKY BLOG (July 10, 2014), <http://clsbluesky.law.columbia.edu/2014/07/10/halliburton-ii-and-market-efficiency/>.

II. BACKGROUND

A. *Basic* and the Endorsement of Fraud-On-The-Market Theory

Under the Securities Exchange Act of 1934, the Employment of Manipulative and Deceptive Practices provision (“Rule 10b-5”), is a securities anti-fraud provision that essentially renders direct or indirect attempts by companies to defraud shareholders through the use of false statement or omission of material information with the intent to deceive as unlawful and punishable conduct.¹⁰ For a plaintiff to recover damages for violations of Rule 10b-5, the plaintiff must show: 1) a material misrepresentation or omission by the defendant; 2) scienter; 3) a connection between the misrepresentation or omission and the purchase or sale of a security; 4) reliance upon the misrepresentation or omission; 5) economic loss; and 6) loss causation.¹¹

Despite the explicit language of the rule, the *Basic* court reasoned that requiring the plaintiff to prove the element of reliance was overly burdensome.¹² They reasoned that it is too difficult and speculative to ask an individual plaintiff to show facts as to how he would have acted had any omitted material information regarding a company had been disclosed or if a misrepresentation had not been made.¹³ Furthermore, since each plaintiff is unique, asking each to demonstrate these facts would effectively prevent class certification under FRCP Rule 23 because individualized questions would predominate over common ones.¹⁴ For easy facilitation of class enforcement, *Basic* ruled that securities fraud plaintiffs moving for class action certification can invoke a rebuttable presumption of reliance based on the underlying fraud-on-the-market theory whereby a company’s stock price on an open and developed securities market is determined by any and all publicly available information, including any misrepresentations.¹⁵

Plaintiffs in the *Basic* decision utilized the presumption of reliance by alleging that they relied on the integrity of the price reflected in the market which incorporates all publicly available information pursuant to the efficient market hypothesis.¹⁶ Therefore, any omission or allegedly misleading statement can defraud an investor even if that inves-

10. See 17 C.F.R. § 240.10b-5

11. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1192 (2013)); see *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317–1318 (2011).

12. *Basic Inc.*, 485 U.S. at 245.

13. *Id.*

14. *Id.*

15. *Id.* at 241 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

16. *Id.* at 247; James D. Cox, *Understanding Causation in Private Securities Lawsuits: Building on Amgen*, 66 VAND. L. REV. 1719, 1722 (2013).

tor does not directly rely on it because it is already impounded into the price of the security.¹⁷ Thus, “fraud-on-the-market theory [effectively] shifts the focus from an individual’s reliance on a misstatement to the misstatement’s effect on the security’s price, and to the [class-wide] reliance on [the] price.”¹⁸

B. *Halliburton’s First Encounter with the Supreme Court – Halliburton I (2011)*

In *Halliburton I*, plaintiff Erica P. John Fund (“EPJ”) alleged that in an attempt to inflate their stock value, defendant Halliburton made “[several] []representations regarding its potential liability in asbestos litigation, its expected revenue from certain construction contracts, and the anticipated benefits of its merger with another company.”¹⁹ Thereafter, Halliburton disclosed several corrective representations which caused their stock price to drop, resulting in a loss for investors.²⁰ EPJ subsequently sued under Section 10(b) and Rule 10b-5, moving the Court to certify class action under F.R.C.P. Rule 23(a) for all investors who purchased Halliburton common stock during the period between the alleged misrepresentations and the corrective representations.²¹ The District Court found that EPJ could satisfy the requirements of class certification under Rule 23; however, they could not prove loss causation as required by circuit precedent to invoke *Basic’s* presumption.²² The Fifth Circuit denied on the same grounds.²³ EPJ petitioned for certiorari and the Supreme Court vacated the Fifth Circuits’ judgment, explaining that “nothing in ‘*Basic* or its logic’ to justify the [circuits’] requirement that securities fraud plaintiffs prove loss causation at the class certification stage in order to invoke *Basic’s* presumption of reliance.”²⁴ The case was remanded down to the district court.

17. See *Basic Inc.*, 485 U.S. at 241-42 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

18. Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis*, 47 STAN. L. REV. 7, 20 (1994).

19. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405 (2014).

20. See *id.* at 2405-06.

21. *Id.*

22. *Id.* at 2406.

23. *Id.*

24. *Halliburton Co.*, 134 S. Ct. at 2406.

C. *Halliburton's Second Encounter with the Supreme Court – Halliburton II (2014).*

On remand, Halliburton argued that class certification was inappropriate because evidence entered earlier in the case to “disprove loss causation also showed that none of its alleged misrepresentations had actually affected its stock price.”²⁵ After showing a lack of price impact, “Halliburton contended [that] it had rebutted *Basic*’s presumption that the members of the proposed class had relied on its alleged misrepresentations simply by buying or selling its stock at the market price.”²⁶ Thus, without the presumption, Halliburton contended that class certification under Rule 23 is inappropriate and the investors must prove reliance on an individual basis.²⁷ The district court denied the argument and went forward with certifying the class under Rule 23 based on the *Basic* presumption.²⁸ The Fifth Circuit affirmed, holding that “Halliburton could not use such evidence for that purpose at the class certification stage [because] ‘price impact’ . . . ‘does not bear on the question of common question predominance, and is thus appropriately considered only on the merits after the class has been certified.’”²⁹

The Supreme Court granted certiorari again to decide whether securities fraud defendants may attempt to rebut the *Basic* presumption at the class certification stage with evidence of a lack of price impact.³⁰ Furthermore, and prompted largely by Justice Alito’s invitation in *Amgen*³¹, the Court accepted Halliburton’s request to reconsider the presumption of reliance for securities fraud claims that was previously adopted in *Basic*.³²

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Halliburton Co.*, 134 S. Ct. at 2406-07 (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 435 (5th Cir. 2013), *vacated*, 134 S. Ct. 2398 (2014)).

30. *Id.* at 2407. *See Langevoort, supra* note 9 (“Certiorari was granted largely in response to the question Justice Alito posed in *Amgen*: do developments in our contemporary understanding of stock market efficiency—particularly skepticism about how efficient they really are—call into question *Basic*’s fundamental assumptions?”).

31. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1204 (2013) (Alito, J. concurring).

32. *Halliburton*, 134 S. Ct. at 2407.

III. THE DEBATE ON MARKET EFFICIENCY

A. *The Court Erroneously Ignored Evidence that Clearly Defeats Stare Decisis Protection*

One of Halliburton's primary arguments for overturning *Basic's* presumption is that *Basic's* view of market efficiency is past its prime due to "overwhelming empirical evidence" suggesting that the "markets are not fundamentally efficient" as once thought.³³ Recall that the *Basic* court relied on the premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.³⁴ This premise stemmed from a theory known as the 'efficient market hypothesis,' which questions whether it is possible for an investor to actually beat the stock market.³⁵ Simply put, the issue is "whether an investor with access to all publicly-available information about the firm and its markets, in addition to past prices, and with sufficient analytical prowess could outperform the market."³⁶

Market efficiency can be generally identified through three theoretical models: weak-form, semi-strong form, and strong form.³⁷ *Basic* set precedence by adopting the 'semi-strong' model which insists that the price of a stock reflects historical pricing information as well as all available public information.³⁸

It was an erroneous move by *Basic* in adopting a semi-strong form of the efficient market hypothesis.³⁹ This singular view of the market is shallow and unsophisticated, and does not stand today when taking into account the mountains of evidence demonstrating that no market has true efficiency. Furthermore, this faulty assumption can also lead to grossly unfair results when considering the possibility of paying out enormous sums of damages, enough to financially ruin a company, when a vast majority of plaintiffs can show little more than a decline

33. *Id.* at 2409.

34. *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988).

35. Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 462 (2006).

36. *Id.*

37. William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in A Time of Madness?*, 54 EMORY L.J. 843, 850 (2005) ("The weak form . . . postulates that a stock's price is at least substantially independent of past price performance The semi-strong form goes further, claiming 'that current prices fully reflect public knowledge' Finally, the strong form . . . asserts that both public and private information are [sic] fully reflected in the price of a stock.").

38. See Dunbar & Heller, *supra* note 35, at 463-64.

39. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2420 (2014) (Ginsburg, J., concurring).

in stock price. In absence of “the requisite academic knowledge of empirical markets and efficient-market hypothesis” the *Basic* court “attempted to replace traditional legal analysis with economic theorization.”⁴⁰

To support its contention that markets are not efficient, Halliburton insisted that *Basic*'s fundamental error was adopting a dualistic, yes or no question to the efficiency.⁴¹ Halliburton cites to several examples and studies to show that most public information is often not incorporated with any immediacy or rationality into the market price of stock.⁴² This, in theory, would be successful in rebutting *Basic*'s fundamental premise. However, the Court responded by downplaying its importance and ignoring the evidence.

The Court explained that “the presumption of reliance was not conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price.”⁴³ Rather, the presumption is a matter of degree, which is why it is rebuttable.⁴⁴ The Court furthered their reasoning on the premise “that market professionals *generally* consider most publicly announced material statements about companies, thereby affecting stock market prices.”⁴⁵ The way they see it, Halliburton failed to take *Basic* on its own terms. The Court discounted Halliburton's arguments, stating that although “the . . . price [of a stock] may be inaccurate, [it] does not detract from the fact that false statements affect it, and cause loss, which is all that *Basic* requires.”⁴⁶ The Court admits that there are critics of the presumption, but downplayed the importance. Above all, the Court believed that *Halliburton* did not identify a significant reason for deviating from *stare decisis* protection, noting that Halliburton failed to identify a “fundamental shift in economic theory that could justify

40. *Basic Inc. v. Levinson*, 485 U.S. 224, 252-53 (1988) (White, J., concurring in part and dissenting in part) (“[W]ith no staff economists, no experts schooled in the ‘efficient-capital-market hypothesis,’ no ability to test the validity of empirical market studies, we are not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory.”).

41. *Halliburton Co.*, 134 U.S. at 2409 (quoting Brief for Petitioners at 20, *Halliburton Co.*, 134 S. Ct. 2398 (No. 13-317), 2013 WL 6907610 at *20 [hereinafter Brief for Petitioners] (quoting Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. REV. 151, 167 (2009))).

42. *See id.* at 2409 (quoting Brief for Petitioners at 17).

43. *Id.* at 2410 (quoting *Basic Inc.*, 485 U.S. at 248 n.28).

44. *Id.*

45. *Id.* at 2410 (emphasis added) (quoting *Basic Inc.*, 485 U.S. at 248 n.24).

46. *Id.* at 2410 (internal quotation marks omitted) (quoting *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010)).

overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities.”⁴⁷

B. *Studies show that the markets do not behave the way Basic assumed*

Justice Kagan struggled at oral argument to rebut Halliburton’s counsel, Mr. Aaron Streett, and their contention that *Basic’s* binary process to market efficiency is unwarranted and inequitable.⁴⁸ The ‘yes or no’ answer to market efficiency is far too extreme when accounting for how the markets realistically operate. This is because no market is truly efficient. Even the great Warren Buffet once said that he would “be a bum on the street with a tin cup if the markets were efficient.”⁴⁹ Doubts about market efficiency are more commonplace today than they were when *Basic* was decided, lending to the fact that the presumption was certainly acceptable and sound theory at one time.⁵⁰ Today however, the *Halliburton* Court failed to admit that each market processes information with variable efficiency depending on factors such as the mode of dissemination, the reach of dissemination, and how easily the information is comprehended.⁵¹ Instead, the majority relied on mere assumptions of the market instead of properly weighing strong evidence to the contrary.

A court cannot simply answer yes or no to the market efficiency question. This is because well-developed markets such as the New York Stock Exchange do not uniformly reflect market prices of securities.⁵² In fact, no market is completely efficient, for there are many types of public information not incorporated rapidly into the price of a stock.⁵³ As it turns out, the type of information as well as the ability to comprehend it assists in explaining the rate at which the information will be impounded into the price of a security.⁵⁴

47. *Halliburton Co.*, 134 U.S. at 2410.

48. See Oral Argument at 5:28, *Halliburton Co.* 134 U.S. 2398 (No. 13-317), available at http://www.oyez.org/cases/2010-2019/2013/2013_13_317.

49. Kevin Johnston, *Examples of Market Inefficiency*, AZCENTRAL, <http://yourbusiness.azcentral.com/examples-market-inefficiency-3712.html> (last visited Apr. 22, 2015).

50. *Halliburton Co.*, 134 U.S. at 2421 (Thomas, J., concurring in part and dissenting in part) (quoting Langevoort, *supra* note 41, at 175).

51. See *id.* at 2409 (quoting Brief for Petitioners at 20–21).

52. See *id.* at 2421 (Thomas, J., concurring).

53. Brief of Law Professors as Amici Curiae in Support of Petitioners at 15, *Halliburton Co.*, 134 U.S. 2398 (No. 13-317), 2014 WL 60721 at *15 [hereinafter Brief of Law Professors].

54. See Cox, *supra* note 16, at 1731; see also Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 597-98 (1984) (discussing information costs and market efficiency).

Studies have found that when information is released regarding stock splits or dividend changes, the price reflects the information with immediacy, especially when it is a very large, publicly traded company, like Apple or Exxon Mobil.⁵⁵ However, these types of information are straightforward, easily understood, and widely disseminated.⁵⁶ The idea drops off the ledge when an investor must expend their large amounts of time and money into assessing information that is difficult to comprehend.⁵⁷

Easily digestible information such as merger announcements, stock splits, or even Wall Street Journal articles may be incorporated quickly, while information that is broadly applicable or technical such as certain SEC filings may be incorporated at a snail's pace, and possibly even ignored.⁵⁸ Professor Donald Langevoort, a well-known scholar on the subject, has noted that “[o]ne of the most common types of material disclosures - an earnings surprise - actually takes a while to be fully impounded, even for large-cap stocks, and even varies depending on whether it is good news or bad.”⁵⁹ These findings tend to show that an increase in difficulty in comprehending a given piece of information, i.e., information that requires special knowledge, prolongs the process of impounding that information into the price of a security.⁶⁰ Additionally, other studies have found alternative variables that affect the process time including the costs of processing, the number of analysts studying the specific stock or company, and even the presence of arbitrageurs.⁶¹

A study by Saeyoung Chang and David Suk demonstrates that information that is difficult to obtain or understand, yet publicly available, can fail to be impounded with immediacy. To examine informational efficiency, the two initiated a study by observing changes in the stock price at two different time intervals after company insiders filed a Section 16 report with the SEC.⁶² The first time interval that the price on was measured was the day in which the Sec-

55. See Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635, 653 (2003).

56. See *id.* at 653.

57. See *id.* at 653–56.

58. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2421 (2014) (Thomas, J., concurring).

59. Brief of Law Professors at 16 (quoting Langevoort, *supra* note 41, at 170).

60. See Stout, *supra* note 55, at 656.

61. See Cox, *supra* note 16, at 1732.

62. See Stout, *supra* note 55, at 653-54. Essentially, Section 16 filings “convert formerly unavailable ‘private’ information” known only to corporate insiders “into available ‘public’ information that can be incorporated into [the] market price.”

tion 16 report was filed.⁶³ At this point, the information became public. The second time interval that the price was measured on was the day in which the report was republished in the Wall Street Journal, which on average was completed ten days after the initial filing and price measurement.⁶⁴ Chang and Suk observed a drastic price change in both dates.⁶⁵ They further found that the market's initial response⁶⁶ to the filings were incomplete and delayed even though the information was publicly available.⁶⁷

The Brief for Petitioners in *Halliburton* points to an interesting instance regarding a front-page New York Times article which featured EntreMed, a pharmaceutical company.⁶⁸ The front-page story covered recent innovations in cancer research which highlighted the EntreMed company.⁶⁹ At the closing of the market on the following Monday after the article was released, EntreMed stock, which had closed the previous Friday at \$12 per share, had shot up to \$52 per share.⁷⁰ The catch here is that this front-page story did not run new news.⁷¹ The actual substantive story ran approximately five months prior in two different journals: a scientific journal called 'Nature' and another journal called 'Times'.⁷² This observance tends to show that drastic deviations from what is deemed an efficient market occur even for large companies with widely traded stocks.⁷³

The Brief for Petitioners bolsters its arguments by referencing this specific deviation from the efficient market hypothesis, which occurred right in front of *Basic* court's eyes. However, all except Justice White failed to acknowledge it in the *Basic* opinion.

Mere weeks before oral argument, Black Monday occurred.⁷⁴ On October 19, 1987, the securities and futures markets around the world

63. *See id.* at 653.

64. *Id.*

65. *See id.* (quoting Saeyoung Chang & David Y. Suk, *Stock Prices and the Secondary Dissemination of Information: The Wall Street Journal's "Insider Trading Spotlight" Column*, 33 FIN. REV. 115-17 (1998)).

66. "Although the SEC generally makes Section 16 filings available to the public on same day they are received, to read them an interested investor must go to the SEC's reading room or subscribe to an online service. Alternatively, if the investor is willing to wait a few days, she can get the same information by buying a Wall Street Journal."

Stout, *supra* note 55 at 654 (quoting Chang & Suk, *supra* note 65, at 115-17).

67. *See id.* at 653 (quoting Chang & Suk, *supra* note 65, 115-17).

68. Brief for Petitioners at 17.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See Langevoort, supra* note 41, at 175.

74. Brief for Petitioners at 18.

crashed, resulting in record drops on several different exchanges.⁷⁵ “The market crash of 1987 is a significant event not just because of the swiftness and severity of the market decline, but also because it showed the weaknesses of the trading systems themselves . . . how they could be strained” . . . while contemporaneously demonstrating the “difficulty in gathering information” in such a “rapidly changing and chaotic environment.”⁷⁶ Black Monday demonstrated that exchanges, even the New York Stock Exchange, are not fundamentally efficient because, as they point out, “it is impossible to locate any information that could be responsible for a twenty-two percent devaluation of corporate assets on that single day, or a thirty-six percent devaluation from the market’s peak in late August.”⁷⁷ Other recent market changes further demonstrate the wild inefficiencies of the market. For instance, the ‘Dot-com Bubble’⁷⁸ demonstrates inefficiency in the market where the ‘tech’ securities were far overvalued.⁷⁹ The Great Recession of 2008 is another demonstration.⁸⁰ Thus, market swings and drastic deviations call into question the sure-noted idea of market efficiency as well.⁸¹ While large exchanges like the NYSE may be the most efficient, they are not efficient enough to justify *Basic*’s presumption and the underlying efficient market hypothesis.⁸²

The above studies and examples demonstrate that new information is impounded into the price of a security at a rate much slower and even more incompletely than a conventional view of market efficiency suggests.⁸³ “[N]ot all public information will be impounded in a security’s price with the same alacrity, or perhaps with any specific quickness at all.”⁸⁴ Thus, the Court should have overturned *Basic* as the above examples demonstrate a fundamental shift in the knowledge

75. Mark A. Carlson, *A Brief History of the 1987 Stock Market Crash with a Discussion of the Federal Reserve Response, Finance and Economic Discussion Series Response*, BOARD OF GOVERNORS OF THE FED. RESERVE, (Nov. 2006) available at <http://www.federalreserve.gov/pubs/feds/2007/200713/200713pap.pdf>.

76. *Id.*

77. Brief for Petitioners at 18 (quoting Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 974 (1991)).

78. *Dotcom Bubble*, Investopedia (March 19, 2015), <http://www.investopedia.com/terms/d/dotcom-bubble.asp>.

79. Brief for Petitioners at 18 (quoting Fisher, *supra* note 37, at 847, 898).

80. *Id.*

81. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2421 (2014) (Thomas, J., concurring) (quoting Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 Nw. U.L.REV. 135, 141 (2002)); see also Dunbar & Heller, *supra* note 35, at 476-83.

82. Brief for Petitioners at 18.

83. See Stout, *supra* note 55, at 653.

84. See Cox, *supra* note 16, at 1732.

and understanding of market efficiency which renders *Basic's* presumption void.

C. *The Court's Argument that the PSLRA Endorses Basic is Unfounded*

In declining to over-rule the fraud-on-the-market presumption, the *Halliburton* Court stood behind the pillars of the Private Securities Litigation Reform Act (“PSLRA”) of 1995 to bolster its reasoning.⁸⁵ The PSLRA is congressional reform of securities litigation that was enacted “to combat perceived abuses in securities litigation with heightened pleading requirements, limits on damages and attorney’s fees, a ‘safe harbor’ for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss.”⁸⁶ The Court’s rationale was that if Congress failed to modify *Basic* during the reform, the intent must be to maintain *Basic* as good law.⁸⁷ However, this argument only passes muster on a political level. Many have argued, quite reasonably, that the language is not a clear endorsement of *Basic*, but rather “acquiescence in the securities class action regime that it created.”⁸⁸ One review of this issue explains that the “natural conservative judicial move is to defer.”⁸⁹ Furthermore, the reform is inherently dependent on the “continued existence of Rule 10b-5 class actions,” for without it, there would be no PSLRA.⁹⁰ Thus, overruling *Basic* would essentially undermine the tenants that the PSLRA stands on.⁹¹ To resolve this quandary, the PSLRA would need to be scratched and a new reform built by Congress.

85. 134 S. Ct. at 2413 (2014).

86. *Id.* (“And to prevent plaintiffs from circumventing these restrictions by bringing securities class actions under state law in state court, Congress also enacted the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, which precludes many state law class actions alleging securities fraud.”).

87. *Id.*

88. *Class Actions — Presumption of Reliance Under SEC Rule 10b-5*, 128 (Vol. 1) HARV. L. REV. 291, 298 (2014) available at http://cdn.harvardlawreview.org/wp-content/uploads/2014/11/halliburton_co_v_ericap_john_fund_inc.pdf.

89. *Id.* (quoting Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 56 ARIZ. L. REV. (forthcoming 2014) (manuscript at 7), <http://ssrn.com/abstract=2475036> [<http://perma.cc/92M8-FFDT>]).

90. *Id.*

91. *Id.* at 298-99 (“For example, the PSLRA can be understood as ‘a political compromise that preserves the foundation of the fraud-on-the-market class action while making it harder for plaintiffs to bring, plead[,] and prove a successful claim,’ . . . the sort of far-reaching judicial intervention that could disturb the careful balance that Congress has struck.” (quoting Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 56 ARIZ. L. REV. (forthcoming 2014) (manuscript at 6))).

D. *The Efficient Market Hypothesis Cannot be Effectively Applied*

Can there even be an exemplary efficient market? Halliburton points to Eugene Fama, the father of the efficient-capital-markets hypothesis and recent Nobel laureate in economics to justify their point that market efficiency is simply not testable.⁹² Although Fama insists that market efficiency “must be tested jointly with some model of equilibrium” such as “an asset-pricing model,” he admits there are fallacies in attaining it.⁹³ Even for financial economists, it’s next to impossible to devise a model or calculation when there is no baseline to gauge the efficiency of a market.⁹⁴ What’s worse is that the judicial system is having an even more difficult time rationalizing it. The lower federal courts have fashioned several multi-factor tests⁹⁵ in an attempt to create parity, but it is obvious that after years of varied applications and diverse interpretations, the result is even more problematic than in the beginning.⁹⁶ The tests remain fundamentally flawed in determining market efficiency. While not bound by *Basic*, an overwhelming amount of state courts refuse to adopt its theory.⁹⁷ Most notably, the California Supreme Court was troubled in applying *Basic*’s shaky theory and commented that “permit[ting] common law claims based on the fraud-on-the-market [theory] would open the door to class action lawsuits based on exceedingly speculative theories.”⁹⁸

92. See Brief for Petitioners, *supra* note 41, at 46-47 (quoting Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575 (1991)).

93. Fama, *supra* note 84 at 1575-76; see Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 376 (2014).

94. See Brief for Petitioners, *supra* note 41, at 47 (quoting Alon Brav & James B. Heaton, *Market Indeterminacy*, 28 J. CORP. L. 517, 525 (2003)).

95. Grundfest, *supra* note 93, at 378 (“The five-factor Cammer test is the dominant technique applied by the courts to determine whether a market is efficient for purposes of supporting the fraud on the market presumption. That test considers trading volume, analyst coverage, the number of market makers and arbitrageurs, the issuer’s ability to file on Form S-3, and the responsiveness of the market price to new information.” (quoting *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989))).

96. See Brief of Former SEC Commissioners and Officials and Law Professors as Amicus Curie Supporting Petitioners at 7, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), (No 13-317) 2014 WL 69391 at *7 (quoting Mukesh Bajaj, Sumon C. Mazumdar & Daniel A. McLaughlin, *Assessing Market Efficiency for Reliance on the Fraud-on-the Market Doctrine After Wal-Mart and Amgen*, 26 RESEARCH IN LAW & ECON. (forthcoming) available at <http://ssrn.com/abstract=2302734>); Paul A. Ferillo, Frederick C. Dunbar & David Tabak, *The “Less Than” Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 ST. JOHN’S L. REV. 81, 102 (2004).

97. See Brief for Petitioners, *supra* note, 41, at 50.

98. *Id.* (quoting *Mirkin v. Wasserman*, 858 P.2d 568, 584 (Cal. 1993)).

Market efficiency is difficult for any court to answer because of its complexities and nuances deeply rooted in economic theory.⁹⁹ Requiring the courts to engage in heavy debate about whether the market is efficient in each case asks them to step into the shoes of economic scholars.¹⁰⁰ But, those shoes were not meant to fit the judiciary. Professor Donald Langevoort cautions the courts from placing too much time and effort into determining the efficiency of the market for class certification.¹⁰¹ This is because so long as the *Basic* presumption remains good law, a judge must ultimately answer the question as ‘yes or no’ in order to move to the next step of the process.¹⁰² Due to the nature and operation of the presumption, the answer can never be sometimes yes, and sometimes no. The sliding scale, then, appears to be an inequitable mode to determine market efficiency.

Nevertheless, *Basic’s* view of market efficiency no longer holds true.¹⁰³ The studies and empirical evidence of today demonstrate that the markets have simply too many levels of inefficiency and incorporate information at varying rates.¹⁰⁴ It was misapplied when it was ruled and should no longer apply today due to “‘overwhelming empirical evidence’ . . . suggest[ing] that capital markets are not fundamentally efficient.”¹⁰⁵

IV. THE DEBATE ON INVESTOR RELIANCE ON THE INTEGRITY OF A MARKET PRICE

A. *The Court’s Rebuttal to Halliburton’s Arguments is Severely Strained*

In further attempting to overrule *Basic*, *Halliburton* also argues against the underlying premise that investors invest in reliance on the integrity of the market price of a security.¹⁰⁶ That is, investors trust that the price of the security reflects its true value, which includes any fraud impounded into the price, and use it as “an unbiased reference point to decide whether to buy, sell, sell short, [or] engage in options

99. See Brief of Former SEC Commissioner and Officials and Law Professors, *supra* note 96, at 6 (quoting Grundfest, *supra* note 93, at 375).

100. See Langevoort, *supra* note 9.

101. See *id.*

102. See *id.*

103. See *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988).

104. See Brief of Former SEC Commissioner and Officials and Law Professors, *supra* note 96, at 5-6.

105. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2409 (2014) (quoting Lev & de Villiers, *supra* note 18).

106. See *id.* at 2410.

trading.”¹⁰⁷ In support of its argument, *Halliburton* identifies numerous classes of investors who essentially do not rely on the integrity of the market price.¹⁰⁸ Since many investors are indifferent to prices, the courts should not institute the blanket presumption that investors rely on the integrity of those prices.¹⁰⁹ *Halliburton* specifically points to the value investor as one who attempts to profit not on reliance in the integrity of the price, but rather on the incompleteness of that security’s price.¹¹⁰

However, the Court responds by explaining that *Basic* never denied the existence of all the investors *Halliburton* pointed to; rather, it is sufficient that *most* investors “will rely on the security’s market price as an unbiased assessment of the security’s value in light of all public information.”¹¹¹ The Court furthers its argument by attacking the value investor, stating that “[s]uch an investor implicitly relies on the fact that a stock’s market price will eventually reflect material information—how else could the market correction on which his profit depends occur?”¹¹²

B. *Do Stockholders Truly Rely on the Integrity of the Market Price?*

The Court ignores clear evidence contrary to their blanket assumption of investors. The fact is, any likelihood that “investors are likely to display similar, or common, behavior, at least in terms of relying on the market price . . . no longer holds if different investors are behaving according to different behavioral rules” and underlying reasons.¹¹³ This begs the question: how can the Court be this blind?

The idea of beating the market seems to be inherent in the minds of investors. This may be the generalized reason why many investors are

107. Langevoort, *supra* note 41, at 159-60; see *Halliburton Co.*, 134 S. Ct. at 2421.

108. *Halliburton Co.*, 134 S. Ct. at 2410.

109. *Id.* at 2411.

110. See *id.*; Value investing is:

The strategy of selecting stocks that trade for less than their intrinsic values. Value investors actively seek stocks of companies that they believe the market has undervalued. They believe the market overreacts to good and bad news, resulting in stock price movements that do not correspond with the company’s long-term fundamentals. The result is an opportunity for value investors to profit by buying when the price is deflated.

Investopedia, *Value Investing* (Feb. 25, 2015), <http://www.investopedia.com/terms/v/valueinvesting.asp?layout=org>.

111. *Halliburton Co.*, 134 S. Ct. at 2411 (emphasis added) (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013)).

112. *Id.*

113. Brief for Petitioners at 16, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2013 WL 6907610 (quoting *Dunbar and Heller*, *supra* note 35, at 521).

blinded by their emotions with the hopes of making short-term gains.¹¹⁴ However, because many investors may succumb to their emotions does not mean they rely on the integrity of the market price of a security. Recent advances in behavioral finance lends strongly to the underlying thought processes and emotions of investors. Furthermore, behavioral finance also helps us understand why investor's personal behavior rules can be an important impetus in their particular decisions.¹¹⁵ A basic, albeit shallow, idea is that an investor's thought process does not go any further than the idea of 'striking it rich,' hoping that the price of the security will go up regardless of whether the price is accurate or not. Alternatively, some emotionally-driven investors may "rationally purchase a stock on the probability that" their luck will continue before the bubble bursts.¹¹⁶ Others may "'rationally herd because they weigh more the decisions of others' than information about the stock."¹¹⁷ Thus, "the emerging field of behavioral finance suggests that differing investor assessments of value appear to be the rule, rather than the exception."¹¹⁸

Investors, even emotionally-driven investors, also tend to trade on outside factors.¹¹⁹ Risk aversion provides one outside factor. Alternative forms of trading, such as options, futures, and forward contracts allow investors to hedge against the risk that the current price of a security does not accurately reflect its true value.¹²⁰ While more advanced investors might utilize these forms of investing, they nevertheless make up a strong presence in the financial markets. Similarly, those who invest in alternate investment vehicles such as hedge funds utilize a system of identifying under or overpriced securities as well as various derivative forms of trading and arbitrage.¹²¹

Professor Lynn Stout, a leading academic in the field, has recognized that "some portion of the trading observed in secondary markets almost certainly reflects the changing liquidity needs of

114. See MFS Fund Distributors, *Emotion Drives Investor Decisions* (Dec 30, 2014), https://www.mfs.com/wps/FileServerServlet?articleId=templatedata/internet/file/data/sales_tools/mfsp_stayin_sfl&servletCommand=default.

115. See Brief for Petitioners, *supra* note 113, at 16 (quoting Dunbar and Heller, *supra* note 35, at 520-21).

116. Brief for Petitioners, *supra* note 113, at 16 (quoting Dunbar & Heller, *supra* note 35, at 521).

117. *Id.*

118. *In re PolyMedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 272 n.10 (D. Mass. 2006).

119. See *Halliburton Co.*, 134 S. Ct. at 2422.

120. See Investopedia, *Hedge* (Mar. 20, 2015), <http://www.investopedia.com/terms/h/hedge.asp?layout=org>.

121. See Rene M. Stulz, *Hedge Funds: Past, Present, and Future*, 20 J. ECON. PERSP. 175, 180 (2007).

investors.”¹²² She also points out that personal tax concerns of an investor may trigger transactions unrelated to the integrity of the price of a security.¹²³ A person can “reduce her tax liability by offsetting otherwise-taxable income,” that is, by selling a security at a price less than what she paid for it.¹²⁴ An investor’s need to balance his portfolio provides another alternative.¹²⁵ One may attempt to maintain “a desired risk level by holding a diversified portfolio of stocks in combination with some riskless asset, such as government bonds.”¹²⁶ In the alternative, “a stock might appreciate so greatly that it comes to constitute too large a portion of the investor’s portfolio,” thus prompting one to “sell off some of it to reduce [the] diversifiable risk.”¹²⁷

Many investors are not the reasonable investors *Basic* presumes them to be.¹²⁸ Today, they are often indifferent to prices based on numerous underlying factors, which undermines the integrity of security prices.¹²⁹ Furthermore, with the rise in technology, general understanding of the financial markets, individual presence in the financial markets, and the spread of alternative forms of trading, this blanket assumption that investors generally rely on the integrity security prices seems naïve. The evidence, then, appears to be at odds with *Basic*’s fundamental understanding, and prompts the need to render the *Basic* presumption void.¹³⁰

V. HALLIBURTON’S EFFECT ON F.R.C.P. RULE 23

A. Background to F.R.C.P. Rule 23

Under F.R.C.P. Rule 23(a), one or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will

122. Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 611, 657 (1995).

123. *See id.*

124. *Id.*

125. *See id.* at 658.

126. *Id.*

127. *Id.*

128. *See* Barbara Black, *Behavioral Economics and Investor Protection: Reasonable Investors, Efficient Markets*, 44 LOY. U. CHI. L.J. 1493, 1504 (2013).

129. *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2422 (2014) (Thomas, J., concurring).

130. *Id.*

fairly and adequately protect the interests of the class.¹³¹ Furthermore, and largely at issue to the interpretation of the *Basic* presumption, is that under Rule 23(b)(3), a class action may be maintained if Rule 23(a) is satisfied and if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.¹³²

B. *The Court Correctly Ruled that Halliburton Should Be Allowed to Show Evidence of Price Impact at the Class Certification Stage*

The Fifth Circuit, and similarly the trial court, disallowed Halliburton the ability to show evidence of price impact at the certification stage because, as they explained, it “does not bear on the question of common question predominance [under Rule 23(b)(3)], and is thus appropriately considered only at trial on the merits after the class has been certified.”¹³³ The lower courts, as well as EPJ argued that price impact is most similar to the materiality issue discussed in the Supreme Court’s recent ruling in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*.¹³⁴

In *Amgen*, the Court held that it is essential for securities fraud plaintiffs to prove the materiality prong of a 10b-5 cause of action at trial on the merits; however, it is not necessary for proof at class certification stage.¹³⁵ This is because any “alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class” . . . and thus, “the plaintiff class’s inability to prove materiality would not result in individual questions predominating.”¹³⁶ Therefore, “the class is entirely cohesive” and their case “will prevail or fail in unison.”¹³⁷

At the trial court and Fifth Circuit, Halliburton vigorously argued that the Court should not certify the class because it had already re-

131. FED. R. CIV. P. 23(a).

132. *Id.* § 23(b)(3).

133. *Halliburton Co.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 435 (5th Cir.), *cert. granted*, 134 S. Ct. 636 (2013), *vacated and remanded*, 134 S. Ct. 2398 (2014)).

134. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds* 133 S. Ct. 1184 (2013) (quoting *Matrix Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317 (2011)); see *Halliburton Co.*, 134 S. Ct. at 2407-08 (2014).

135. See *id.* at 1191.

136. *Id.*

137. *Id.*

butted the presumption of reliance through a previous showing of lack of price impact.¹³⁸ Halliburton reasoned that “a plaintiff class which fails to show price impact would only lose the class-wide presumption of reliance, leaving individual plaintiffs with viable fraud claims.”¹³⁹ However, the Fifth Circuit interpreted that *Amgen’s* materiality issue is most analogous to price-impact and should be treated the same – reserved for trial on the merits rather than class certification stage.¹⁴⁰

At the Supreme Court, Halliburton insisted that the lower courts erroneously denied their rebuttal.¹⁴¹ Through the very language of *Basic* itself, securities fraud defendants may “rebut the presumption by showing that the misrepresentation in fact did not lead to a distortion of price.”¹⁴² Thus, EPJ tried, but failed. The Court correctly reasoned that the essence of the *Basic* presumption is price impact.¹⁴³ Without it, a plaintiff cannot maintain class certification.¹⁴⁴ Therefore, the Court held that defendants such as Halliburton may show, directly or indirectly, evidence of price impact at the class certification stage.¹⁴⁵

C. *Repercussions of Defendants’ Ability to Rebut Price Impact in Rule 10b-5 Securities Fraud Class-Actions*

Although it was a small, hollow victory for Halliburton, there is very few benefits for defendants in these types of securities fraud class action cases. Defendants will likely see plaintiffs suffer in their wallets.¹⁴⁶ If defendants raise price impact arguments at class certification stage, there will certainly be an increase in event studies and experts to rebut defendant’s arguments.¹⁴⁷ With the increase cost of litigation, plaintiffs may second guess themselves as to whether bringing an enormous class action suit is worth the cost if they have a weaker case.¹⁴⁸ Furthermore, plaintiffs may seek to utilize different standards and presumptions that are more advantageous to their case

138. *Halliburton Co.*, 134 S. Ct. at 2406.

139. *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 434 (5th Cir.) *cert. granted*, 134 S. Ct. 636 (2013) *vacated and remanded*, 134 S. Ct. 2398 (2014).

140. *Id.*

141. See Brief for Petitioners at 49 *Halliburton Co.*, 134 S. Ct. 2398 (2014).

142. *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988)).

143. *Halliburton Co.*, 134 S. Ct. at 2407-08.

144. *Id.*

145. *Id.*

146. Douglass W. Greene, *First Take on Halliburton II: The Price-Impact Rule May Not Have Much Practical Impact*, LANE POWELL (June 24, 2014), <http://www.dandodiscourse.com/2014/06/24/first-take-on-halliburton-ii-the-price-impact-rule-may-not-have-much-practical-impact/>.

147. *Id.*

148. *Id.*

instead of the *Basic* presumption. For instance, an alternative such as a Section 11 claim may appear favorable due to the lack of a true reliance element.¹⁴⁹ Additionally, plaintiffs may elect to utilize the presumption created by *Affiliated Ute Citizens of Utah v. U.S.*¹⁵⁰, “which held that proof of reliance is not necessary to support a claim based on omissions.”¹⁵¹

Despite any advantages that potential defendants may have gained under *Halliburton*, potential plaintiffs are likely to benefit the most from this decision.¹⁵² Technically, defendants have always had, and as *Halliburton* merely reiterates, the ability to show evidence that there was no price impact at class certification based on the language in *Basic*.¹⁵³ Furthermore, because in most cases plaintiffs are already equipped to offer evidence that an alleged misstatement impacted the price, there will be no change in that respect.¹⁵⁴ While plaintiffs may be burdened by the costs in demonstrating price impact at the class certification stage, the negatives end there.¹⁵⁵ The additional costs for experts and studies at class certification may mean that plaintiffs will be better equipped to negotiate higher settlements since the defendant will be unable to show lack of price impact as plaintiffs will have already demonstrated it at certification.¹⁵⁶ The scope of this advantage does not end there. Plaintiffs will also be equipped with more assurance that their case will not get tossed out at the summary judgment stage.¹⁵⁷ As David Boies, a practicing attorney at Boies, Schiller & Flexner pointed out, “defendants who decide to raise price impact arguments to oppose class certification will have to face shareholders’ discovery demands on the merits of their defenses.”¹⁵⁸ This will “expose defendants to depositions and documents requests they won’t welcome . . . [and] plaintiffs are going to get a whole lot more information at the class certification stage.”¹⁵⁹

149. *Id.* Note that ‘tracing’ tends to function as a reliance requirement under Section 11.

150. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

151. Greene, *supra* note 146.

152. Alison Frankel, *SCOTUS Halliburton ruling could backfire for securities defendants*, REUTERS (June 23, 2014), <http://blogs.reuters.com/alison-frankel/2014/06/23/scotus-halliburton-ruling-could-backfire-for-securities-defendants/>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Frankel, *supra* note 152.

158. *Id.*

159. *Id.*

D. *The Reliance Requirement Remains in Conflict
with F.R.C.P. Rule 23*

Part of Justice Thomas' concurrence takes aim at the inconsistency between recent case law re-enforcing the proof requirement of Rule 23 and *Basic's* presumption that allows plaintiffs to circumvent the reliance requirement.¹⁶⁰ The *Basic* court once explained that placing an evidentiary burden on each individual securities fraud plaintiff to prove reliance for class certification would be oppressive and overly demanding.¹⁶¹ Today, with the way Rule 23(b)(3) is written, it doesn't make it easy for plaintiffs to "prevail on a motion for class certification" when the plaintiff must demonstrate predominance through "evidentiary proof."¹⁶² But, the way the federal courts have been enforcing Rule 23 is that if plaintiffs invoke the *Basic* presumption of reliance, plaintiffs then "bypass that requirement of evidentiary proof" and "are deemed to have met the predominance requirement of Rule 23(b)(3)."¹⁶³

Justice Thomas demonstrates his frustration with this practice and believes the courts are not giving the proper weight to individualize evidence of the class members as outlined in *Basic*. The fact is that the language of *Basic* requires an individualized inquiry, entitling the "defendant to ask each class member whether he traded in reliance on the integrity of the market price."¹⁶⁴ But the courts fail to enforce this.¹⁶⁵ The lack of enforcement severely undermines the requirements set out in Rule 23. Thus, plaintiffs who raise the *Basic* presumption are unjustly enriched through their exemption from Rule 23's proof requirement.¹⁶⁶

Justice Thomas also takes issue with the way precertification rebuttal is carried out.¹⁶⁷ "At the class-certification stage, rebuttal is only directed at the class representatives, which means that counsel only needs to find one class member who can withstand the challenge" of reliance and price impact.¹⁶⁸ If at most one can withstand, plaintiff will likely survive class certification, regardless of how many other class members may not withstand the challenge. Because of the

160. *Halliburton Co.*, 134 S. Ct. at 2423.

161. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970)).

162. FED. R. CIV. P. 23(b)(3).

163. *Halliburton Co.*, 134 S. Ct. at 2423.

164. *Id.*

165. *Id.*

166. *See id.* at 2423-24

167. *Id.* at 2424.

168. *Id.*

Court's refusal to allow for individualized inquiries, defendants are forced to surrender their individualized defenses.¹⁶⁹ Settlement pressures rise after this point, providing the defendant with no other alternative.¹⁷⁰ Thus, as Justice Thomas stated, "the so-called rebuttable presumption is largely irrebuttable."¹⁷¹

While the Court's ruling that Halliburton can rebut the presumption at class-certification by using an event study to show lack of price impact is a step in the right direction, it does not necessarily overcome the issues demonstrated above. The issue with the *Basic* presumption is that it merely facilitates class actions in securities fraud; otherwise, a class would likely not be certifiable.¹⁷² Plaintiffs can utilize this presumption as a form of circumvention for class certification to overcome evidentiary proof of the reliance requirement without actually demonstrating it.¹⁷³ A loophole, if you will.¹⁷⁴ Without a functional reliance requirement, the essential element that ensures the plaintiff has actually been defrauded, Rule 10b-5 becomes the very scheme of "investor's insurance" the rebuttable presumption was supposed to prevent.¹⁷⁵ It appears then that the treatment of the *Basic* presumption is an example of overreaching.¹⁷⁶

One alternative would be to adopt an individualized reliance requirement. Support for this alternative comes from *Basic*'s own language. Essentially, *Basic* entitles defendants to ask each class member whether he traded "in reliance on the integrity of the market price," which is by nature an inherently individualized assessment.¹⁷⁷ But, of course, plaintiffs would oppose this. As Professor and Former SEC Commissioner Joseph Grundfest points out, the main implication of adopting this requirement is that it would make it far more difficult for certification.¹⁷⁸ "A significant decline in the incidence and magnitude of class action claims under section 10(b) would likely result . . . [which] would likely stimulate calls for a legislative overhaul of the securities litigation process."¹⁷⁹ This is not such a bad thing for de-

169. *Halliburton Co.*, 134 S. Ct. at 2424.

170. *Id.*

171. *Id.*

172. Grundfest, *supra* note 93, at 361.

173. *Halliburton Co.*, 134 S. Ct. at 2424.

174. Dunbar & Heller, *supra* note 35, at 457-58.

175. *Halliburton Co.*, 134 S. Ct. at 2424-25 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 252 (1988)).

176. *Id.* at 2424.

177. *Id.* at 2423.

178. Grundfest, *supra* note 93, at 380.

179. *Id.* at 380-81.

fendants at first glance. However, Congress would likely think twice before turning off the lights on a multi-billion dollar industry.

VI. CONCLUSION

It appears as though *Halliburton* was a missed opportunity to reverse the twenty-five plus years of illegitimate hardship for securities fraud class action defendants. The Court spent an extraordinary amount of time on these two parties. As such, they had plenty of opportunities to view the evidence. Some members of the Court voiced their opinions in opposition, but it wasn't enough to overcome the others' skewed ideals. While they may feel that they have rendered a fair opinion, they are basically protecting a billion dollar industry, and diverting massive amounts of funds that could otherwise be used by the company to fuel its growth and assist with job creation. There is clear evidence that information impounded into the price of a security occurs at a rate much slower and even more incompletely than a conventional view of market efficiency suggests.¹⁸⁰ Furthermore, there is clear evidence that many investors are indifferent to prices based on numerous underlying factors, many of which disregard the integrity of the price of a security.¹⁸¹ The evidence demonstrated by this paper as well as the defense did in *Halliburton* demonstrate a fundamental shift in economic theory that justifies overturning the *Basic's* presumption.¹⁸² The *Basic* Court, then, created a monster. And, the only way to rid of it is through the termination of *Basic's* decision. While multiple individualized assessments are, admittedly, burdensome to plaintiffs and the court, it is truly the only way to provide equitability in these types of class actions. Otherwise, *Basic* just acts as a court endorsed loophole for F.R.C.P. Rule 23.¹⁸³

180. Stout, *supra* note 55, at 653.

181. *Halliburton* Co., 134 S. Ct. at 2422.

182. *Id.* at 2410.

183. Dunbar & Heller, *supra* note 35, at 457-58.

