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Class Action Monitor

Data Breach Class Action Defendants Find an Ally in Warrantless Wiretaps

By David R. Singh, Teresa Brady and Jane Lee

In This Issue

Recent high-profile data breaches, such as those at Target and Neiman Marcus, highlight the increasing difficulty businesses face keeping data secure. In 2013, The Privacy Rights Clearinghouse reported 619 data security breaches – comprising in excess of 250 million individual records – in the United States.[1] The concern over risk of data breach has become so predominant that data security is now often at the top of the due diligence list in M&A transactions. "Ten years ago the topics of privacy and data security in the context of M&A transactions was still nascent. Today, it is essential that we help our clients understand what potential vulnerabilities exist within the target's data environment prior to any acquisition and to develop a plan for remediation," said Michael Lubowitz, co-head of Weil's New York Private Equity and Mergers & Acquisitions Department. "Our clients rely on us to identify and address any deficiencies in the target company's privacy and data protection policies, and to ensure that the transfer of personal data as part of an acquisition is in compliance with applicable data privacy and security laws," said Michael Epstein, Head of Weil's Technology and IP Transactions Practice Group.

The concern over potential liabilities for a data breach is well-justified. The costs associated with a data breach can be staggering. These include expenses for investigating and repairing the breach, notifying affected parties, managing public relations and responding to government inquiries and investigations.

Another cost of a data breach is the expense of defending class action lawsuits brought by customers whose records containing sensitive information were affected by the breach. For example, after the data of as many as 70 million Target customers was compromised, Target was promptly hit with dozens of class action lawsuits, which have now been consolidated in the U.S. District Court in Minnesota.[2]

Remarkably, however, data breach defendants in class action lawsuits have been finding assistance in a 2013 U.S. Supreme Court decision involving the Fourth Amendment and wiretapping. In *Clapper v. Amnesty International*, human rights groups and public interest lawyers challenged the Foreign Intelligence Surveillance Act of 1978 as amended in 2008, claiming that the National Security Agency's warrantless wiretapping program violated their First and Fourth Amendment rights.[3] The plaintiffs could not demonstrate that their communications had actually been intercepted under the program, only that there was a possibility they could be.[4] The Supreme Court held that the plaintiffs' "highly speculative fear" that their communications were being intercepted under the wiretapping program was insufficient to establish plaintiffs' standing to bring the claims because standing requirements can be met only by showing actual harm or "certainly impending" injury.[5] The Court rejected the *Clapper* plaintiffs' alternative argument that they could establish standing based on the costs they had expended to protect the confidentiality of their communications, for example by traveling to have in-person conversations, because of the threat of surveillance.[6] "(Plaintiffs) cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[7]

Since the *Clapper* decision, numerous federal district courts around the country have cited *Clapper*'s definition of injury for purposes of standing as a basis for dismissing or denying class certification in data breach cases on the grounds that consumers cannot establish standing based on either the possibility that their personal information may be misused or the costs they have incurred to monitor their credit reports for unauthorized charges. The first court to apply *Clapper* in a data breach case was the U.S. District Court for the Northern District of Illinois in *In re Barnes & Noble Pin Pad Litig*., 12-CV-8617, 2013 WL 475988 (N.D. Ill. Sept. 3, 2013). In that case, plaintiffs filed a putative class action complaint against Barnes & Noble after "skimmers" collected credit and debit card information from the retailer's PIN pads. The Barnes & Noble plaintiffs alleged that their injuries stemmed from a loss of privacy, improper disclosure of their personal information, and all expenses incurred to mitigate the risk of future identity theft or fraud.[8] Applying *Clapper*, the court dismissed their claims for lack of standing and held that an increased risk of identity theft or fraud did not amount to an actual injury.[9] Without pleading and proving concrete facts that their personal information had actually been stolen, the court found that "the inference that their data was stolen, based merely on the security breach, is too tenuous to support a reasonable inference that can be made in Plaintiffs' favor."[10]

Applying similar reasoning, an Ohio federal court denied class certification in *Galaria v. Nationwide Mutual Insurance Co*., Case No. 2:13-cv-118 (S.D. Ohio Feb. 10, 2014), finding that plaintiffs did not sustain an injury sufficient to confer standing. In *Galaria*, plaintiffs asserted putative class claims against Nationwide Mutual Insurance for negligence, invasion of privacy, bailment, and violations of the Fair Credit Reporting Act after a hacking incident caused their personal identifiable information to be stolen from the network. They alleged that their injury was in the form of an increased risk of identity theft, identity fraud, and medical fraud as a result of the data breach, as well as any costs incurred to monitor and mitigate such risks.[11] Applying *Clapper*, the court found that plaintiffs did not allege an adequate injury-in-fact since they did not suffer any adverse consequences from the data breach. Had plaintiffs alleged that their personal information was misused or that their identities were stolen, plaintiffs may have had standing. Allegations of possible future injury, however, were too speculative to confer standing. Furthermore, the court held that any expenses incurred to monitor and prevent identity theft were not actual injuries because they were equivalent to the "manufactured standing" that the *Clapper* court rejected. Federal courts in New Jersey, Illinois and the District of Columbia have similarly applied *Clapper* to dismiss data privacy breach cases for lack of standing.[12]

It should be noted, however that the District Court in the Southern District of California recently departed from the prevailing approach when it allowed a class of breach plaintiffs to survive a motion to dismiss based on a *possibility of future harm*. In *In re Sony Gaming Networks and Customer Data Security*, MDL 11-MD-2258 AJB (MDD), 2014 WL 223677 (S.D. Cal. Jan. 21, 2014) ("*Sony II*"), plaintiffs sued Sony Corp. after discovering that hackers accessed Sony's network and stole user information, alleging injuries arising from Sony's misrepresentations about its security, the circumstances of the breach, the loss of online services, and an increased risk of identity theft.[13] The court denied Sony's motion to dismiss, finding that plaintiffs' injuries were sufficient to establish a "certainly impending" injury.[14] In so holding, the court explained that whether plaintiffs actually experienced any misuse of their personal information was immaterial because *Clapper* does not require an actual injury so long as plaintiffs could show that their injury was "certainly impending."[15] Since plaintiffs alleged that the data breach actually occurred and their personal information was stolen and disclosed, the standard had been met.[16] To date, the *Sony II* decision is the only post-*Clapper* data privacy breach case where a federal court has found standing based on a possibility of future injury.

The *Sony II* decision raises doubt regarding the presumption that consumer data breach class actions were doomed after *Clapper*, and plaintiffs may be incentivized to file more data breach class actions in the Southern District of California as a result. In addition, plaintiffs may file more actions in certain state courts with relaxed standing requirements. Recently, the Supreme Court of Appeals of West Virginia held that a class of plaintiffs did have standing to sue in a data breach case, despite the absence of any allegation that plaintiffs suffered adverse consequences from the breach. *Tabata v. Charleston Medical Center Inc. et al.*, No. 13-0766 (May 28, 2014). In *Tabata*, plaintiffs filed a putative class action asserting causes of action for breach of confidentiality, invasion of privacy, and negligence after their personal and medical information was inadvertently placed on defendants' public database.[17] As a basis for finding standing, the court stated that patients have a legal interest in protecting their private information such that the mere disclosure of such information amounts to an actualized injury.[18]

Data breach defendants sued in state courts applying less stringent standing requirements, however, would be well-advised to consider removing the case to federal court. The Class Action Fairness Act of 2005 (CAFA) requires that class actions involving more than 100 people and claims of more than $5 million be litigated in federal court, even if plaintiffs assert no federal claims; data breach class actions often satisfy these requirements, especially where plaintiffs seek penalties or damages under state unfair competition or deceptive trade practice acts or other statutes. Once in federal court, defendants should move to dismiss the class action on the grounds that the plaintiffs do not have standing, under Article III of the U.S. Constitution, to sue in federal court because they cannot show that they have been injured under the *Clapper* definition of injury.

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1. *Chronology of Data Breaches*, Privacy Rights Clearinghouse (accessed June 27, 2014), https://www.privacyrights.org/data-breach/new.
2. *In re: Target Corporation Customer Data Security Breach Litigation*, MDL No. 14-2522 (PAM/JJK).
3. *Clapper v. Amnesty Intern. USA*, 133 S.Ct. 1138 (2013).
4. *Id*. at 1148.
5. *Id*.
6. *Id.* at 1150-51.
7. *Id*.
8. *In re Barnes & Noble Pin Pad Litig*., 12-CV-8617, 2013 WL 475988, at *2 (N.D. Ill. Sept. 3, 2013).
9. *Id*. at *5.
10. *Id.* at *4.
11. *Galaria v. Nationwide Mutual Insurance Co*., Case No. 2:13-cv-118, 2014 WL 689703, at *2 (S.D. Ohio Feb. 10, 2014).
12. *See also, Polanco v. Omnicell, Inc*., Civ. No. 13-1417 (NLH/KMW), 2013 WL 6823265 (Dec. 26, 2013) (dismissing class action on grounds that mere violation of state statutes and money spent to avoid future injury did not confer standing); *In re: Science Applications International Corp. (SAIC) Backup Tape Data Theft Litigation*, Misc. Action No. 12-347 (JEB) MDL 2360, 2014 WL 1858458 (May 9, 2014) (holding that a mere loss of data without evidence of misuse is insufficient injury for standing); *Strautins v. Trustwave Holdings, Inc*., No. 12 C 09115, 2014 WL 960816 (N.D. Ill. 2014) (holding that claims were too speculative where plaintiff could not establish that her data was stolen or that anyone attempted to use it).
13. *In re Sony Gaming Networks and Customer Data Security*, MDL 11-MD-2258 AJB (MDD), 2014 WL 223677, at *2 (S.D. Cal. Jan. 21, 2014).
14. *Id*. at *9.
15. *Id*.
16. *Id*.
17. *Tabata, et al. v. Charleston Area Medical Center Inc. et al*., No. 13-0766 (May 28, 2014).
18. *Id*.

Food Manufacturers Have Waning Success in Relying on the Primary Jurisdiction Doctrine to Dismiss "All Natural" Claims

By Theodore E. Tsekerides and Melody E. Akhavan

The past few years have seen a notable uptick in consumer class actions challenging the labeling of various food products as "all natural." These suits can become very expensive very quickly, particularly because some courts have held that plaintiffs may have standing to sue for products they did not purchase, so long as they are substantially similar to products they did purchase.[1] One of the key issues that has emerged over the last year is when the primary jurisdiction doctrine can be successfully invoked by defendant manufacturers to remove these "all natural" labeling issues from the purview of the courts. A review of the recent decisions in "all natural" consumer fraud suits reveals that different defendants have had varying levels of success limiting labeling claims by relying on the primary jurisdiction doctrine. At first blush, some of these decisions seem inconsistent with one another, but a closer look reveals a pattern in how district courts are applying the primary jurisdiction doctrine in "all natural" labeling suits—a pattern of limited, waning success for defendants.

The Primary Jurisdiction Doctrine

The primary jurisdiction doctrine is a discretionary doctrine that "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency."[2] In deciding whether to apply the primary jurisdiction doctrine, courts traditionally weigh the following four factors: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration."[3]

The Current Regulatory Framework

In the context of these "all natural" consumer fraud suits, the relevant administrative agency is the Food and Drug Administration (FDA), and the relevant statute is the Food, Drug, and Cosmetics Act, which gives the FDA the authority to establish a uniform federal scheme of food regulation to ensure that certain food labeling standards are met. To date, the FDA's guidance with respect to what "natural" means in the food labeling context is contained in non-binding guidance issued in 1993.[4] This regulation defines "natural" as "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." The very general language of this guidance, together with the fact that it is not binding on food manufacturers, has created much room for debate over the scope of the "natural" definition, as well as fertile ground for litigation of this issue.

Plaintiffs' "all natural" claims can be roughly divided into three categories that range in specificity: (1) claims regarding foods that contain genetically modified organisms (GMOs); (2) claims regarding foods that contain synthetic ingredients; and (3) claims regarding products that are allegedly misleading because they are labeled as containing "evaporated cane juice" (ECJ) instead of sugar. Defendants' success in staying or dismissing food labeling claims using the primary jurisdiction doctrine has varied by category.

Genetically Modified Organism Cases

Last year, multiple district courts[5] referred to the FDA the specific issue of whether products containing genetically modified corn could be labeled as "natural," citing the primary jurisdiction doctrine. These courts acknowledged that no official federal regulation or rule defines the term "natural" as it concerns GMOs, and called on the FDA to provide a definitive interpretation. In January of this year, the FDA responded[6] to these referrals by declining to offer a formal definition of the term "natural" with respect to foods, noting that should the FDA wish to formalize its policy on "natural" foods, it would "not do so in the context of litigation between private parties," but would rather be handled through a public process.

Subsequently, a New York federal judge rejected J.M. Smucker Co.'s motion to dismiss a putative class action contesting the "all natural" label on Crisco cooking oils that are made using genetically modified crops.[7] J.M. Smucker Co. had argued that the court should defer to the FDA's primary jurisdiction in food labeling. But the court denied the motion, finding that the FDA's refusal to consider the question of whether foods containing GMOs may be labeled "natural" weighed against siding with the defendants. Significantly, the court also found that the question of whether a label is misleading is more of a legal issue than a scientific one.[8] Under this court's reasoning, defendants seeking to bypass the adjudication of "natural" mislabeling claims of GMO-containing products through the primary jurisdiction doctrine would be out of luck, unless and until the FDA announces that it will issue specific guidance regarding the classification of GMO products.

Synthetic Ingredient Cases

Food manufacturers defending false labeling claims with respect to foods containing synthetic ingredients may also have a difficult time successfully relying on the primary jurisdiction doctrine. For instance, in *Garrison v. Whole Foods Market Group, Inc.*, No. 13-cv-05222-VC (N.D. Cal. June 2, 2014), a case in which plaintiffs claimed that several Whole Foods products were misleadingly labeled "all natural" when they contained sodium acid pyrophosphate, a synthetic ingredient, the court found that the primary jurisdiction doctrine was inapplicable. Finding that "there is no clear indication the [FDA] intends to revisit [its decision not to issue a formal opinion on the word "natural" by means of its January 6, 2014 letter]" there would be no "resolution of the issue pending before the Agency to which the Court could defer." *Id*. at *3. The court further held that "allegations of deceptive labeling do not require the expertise of the FDA to be resolved ... as every day courts decide whether conduct is misleading." This decision echoes the reasoning of the *J.M. Smucker* court and dampens hopes that defendants can rely on courts to defer to the FDA's potential regulation of the term "natural" in light of its January 6 letter.

Evaporated Cane Juice Cases

In contrast to GMO and synthetic ingredient cases, defendants in cases concerning evaporated cane juice have experienced some success in relying on the primary jurisdiction doctrine to stay their proceedings. In these ECJ cases, plaintiffs have alleged that companies are misleading consumers when they use the term "evaporated cane juice" on the ingredient list, because ECJ is nothing more than added sugar. Significantly, the FDA issued a notice in the Federal Register on March 5, 2014, re-opening the comment period for draft guidance on the use of the term ECJ. The notice indicated that the FDA would issue a final regulation after the close of the comment period. In light of this fact, several courts have dismissed or stayed ECJ suits under the primary jurisdiction doctrine.[9]

For example, the court in *Swearingen v. Attune Foods, Inc*. granted the defendant's motion to dismiss in a case where plaintiffs alleged that the defendant's labeling of many of its cereal products violated FDA regulations because the use of the term ECJ instead of sugar was deceptive. The court held that "[f]ood labeling is within the special competence of the FDA, the FDA has not resolved the issue of whether ECJ is the common or usual name of the ingredient involved in this case, the FDA is engaged in active rulemaking on this issue, and deferring to the FDA for resolution of this issue will allow courts to benefit from the FDA's expertise on food labeling and will ensure uniformity in administration of the FDA's regulations."[10] This reasoning will likely provide relief to defendants defending ECJ labeling suits.

Conclusion

Ultimately, it has become clear over the past year that defendants' opportunities to successfully rely on the FDA's primary jurisdiction to stay or dismiss "all natural" labeling claims are waning. The FDA's refusal to define "natural" for the time being has signaled to several courts that a court's pronouncement on whether the "natural" labeling is misleading will not interfere with federal policy. This reasoning will likely apply in the foreseeable future to both labeling of GMO products and those products containing synthetic ingredients. Defendants may find relief, however, in countering ECJ suits so long as the comment period for the FDA's ECJ regulation is ongoing. That being said, perhaps the best advice for food manufacturers is to be extremely cautious in its food labeling. "All natural" labeling is under heavy scrutiny, and the big question in light of the uncertainty and heavy litigation in this area is whether it is worth the risk.

1. *See, e.g., Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 868-71 (N.D. Cal. 2012) (citing *Stephenson v. Neutrogena*, No. 12-cv-00426 PJH, 2012 U.S. Dist. LEXIS 1005099 (N.D. Cal. July 27, 2012); *Astiana v. Dreyer's Grand Ice Cream, Inc.*, No. C-11-2910 EMC, 2012 WL 2990766 at *11 (N.D. Cal. July 20, 2012); *Anderson v. Jamba Juice*, 888 F. Supp. 2d 1000, 1005-06 (N.D. Cal. 2012)).
2. *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).
3. *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).
4. 58 Fed. Reg. 2303, 2407 (Jan. 6, 1993).
5. *Cox v. Gruma Corp.*, No. 4:12-06502 (N.D. Cal.); *Barnes v. Campbell Soup Co.*, No. 12-05185 (N.D. Cal.), and *In re General Mills, Inc. Kix Cereal Litigation*, No. 12-00249 (D.N.J.).
6. Letter from the Food and Drug Administration to The Hon. Yvonne Gonzalez Rogers, The Hon. Jeffrey S. White, and The Hon. Kevin McNulty re: Referrals to the United States Food and Drug Administration (Jan. 6, 2014).
7. *Ault v. J.M. Smucker Co., et al.*, 2014 WL 1998235 (S.D.N.Y. May 15, 2014).
8. *Id*. at *5 ("Furthermore, the primary jurisdiction doctrine does not apply because 'the issue at stake is legal in nature and lies within the traditional realm of judicial competence.' ... The issue is whether the use of the phrase 'All Natural' was 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'").
9. *See, e.g., Swearingen v. Attune Foods, Inc.*, 2014 WL 2094016, No. C 13-4541 SBA (N.D. Cal. May 19, 2014) (citing *Figy v. Lifeway Foods, Inc.*, 2014 WL 1779251 (N.D. Cal.); *Swearingen v. Santa Cruz Natural Inc.*, 2014 WL 1339775 (N.D. Cal. 2014); *Reese v. Odwalla*, 2014 WL 1244940 (N.D. Cal. 2014)).
10. *Swearingen v. Attune Foods, Inc*. at *3.

Halliburton II: The Securities Fraud-On-The-Market Presumption is Here to Stay

By Miranda Schiller and David Schwartz

As anticipated, a majority of the U.S. Supreme Court declined to overrule the fraud-on-the-market presumption of *Basic v. Levinson*.[1] The Court rejected Halliburton's opening argument that the presumption is misplaced because today many investors do not assume market efficiency or base their investment decisions on the premise that a security's price reflects all material, public information. Instead, the Court adopted the middle ground approach urged by a number of *amici* and by Halliburton as its fallback position, and held that defendants may rebut the fraud-on-the-market presumption of reliance at class certification by showing a lack of price impact. An overturning of *Basic*'s reliance presumption, the Court admonished, may only be done by Congress which, as the Court noted, has twice before responded to the proliferation of securities fraud class actions by enacting laws intended to curtail such actions with heightened pleading requirements and preempting certain state law securities fraud class actions.[2] Ultimately, 10b-5 cases will continue to survive but substantive expert proceedings regarding price impact will be critical.

The Majority's Decision

The plaintiff in *Halliburton II* alleged that Halliburton inflated its share price by misrepresenting its potential liability in asbestos litigation and its projected revenue from construction contracts, as well as certain benefits it anticipated from a merger. When disappointing news about these events came to pass and was publicly reported, the plaintiff alleged that Halliburton's stock price dropped.

In its first trip to the Supreme Court in 2011, Halliburton argued, unsuccessfully, that it was entitled to defeat class certification with economic evidence showing that the misrepresentations alleged by plaintiff did not cause its losses and that its stock price declined due to other factors.[3] Halliburton argued that since loss causation is an essential element of a § 10(b) claim, this sufficed to defeat class certification as the predominance requirement of Rule 23(b)(3) was not satisfied. The Supreme Court disagreed and held that loss causation goes to the merits of a § 10(b) claim and that a plaintiff need not prove the merits of its claim at the class certification phase of the case.[4]

Following remand of *Halliburton I* to the district court, Halliburton argued that it was entitled to rebut the reliance presumption at class certification with evidence that the alleged misrepresentations had no impact on its stock price. Halliburton used the same economic evidence it had developed on loss causation, an event study and expert testimony, to argue that there was no artificial price inflation and therefore the reliance presumption was rebutted. Under the fraud-on-the-market theory, if the market for a security is efficient then all material public information regarding the value of that security is promptly reflected in its market price. By extension, if there is no artificial price inflation, investors are not entitled to the reliance presumption.

The district court declined to consider Halliburton's argument. The Fifth Circuit, citing recent Supreme Court precedent that class certification proceedings should not be turned into merits trials, agreed and held that any rebuttal of the reliance presumption had to await the merits phase of the case.[5]

While a majority of the Supreme Court rejected Halliburton's request to overrule *Basic*'s fraud-on-the-market theory, it adopted the alternative middle ground approach, allowing defendants to rebut reliance at class certification with proof that defendants' statements did not inflate the stock price.

The Court reasoned that since plaintiffs and defendants already are allowed to submit price impact evidence prior to class certification for the purpose of proving or disproving market efficiency, such evidence should be allowed to rebut the presumption of reliance, as well. "Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact." *Id*. at 20. The Court saw no reason to limit defendants' ability to rebut the presumption since "[p]rice impact is thus an essential precondition for any Rule 10b-5 class action." *Id*. at 21.

The Court rejected plaintiff's argument that evidentiary challenges to price impact allegations necessitate an impermissible merits determination of whether their alleged misrepresentations were material.

The tension between the Supreme Court's recent holding in *Amgen*,[6] that a merits-based resolution of claims (there, materiality) must await the merits phase of the case, and two other recent rulings in class actions, that class certification may at times require courts to address the merits of plaintiffs' claims, was at play again in *Halliburton II*. The Court side-stepped this seeming inconsistency – explaining that price impact "differs from materiality in a crucial respect. ... The fact that a misrepresentation 'was reflected in the market price at the time of [the] transaction' – that it had price impact – is '*Basic*'s fundamental premise.' It thus has everything to do with the issue of predominance at the class certification stage." *Id*. at 21-22 (citation omitted).

Three Justices, Scalia, Thomas and Alito, concurring in name only, called "*Basic*'s reimagined reliance requirement ... a mistake, and the passage of time has compounded its failings." Concurrence Op. at 5. Plaintiff's argument that Congress ratified the reliance presumption via legislative inaction at the time of the PSLRA and SLUSA was criticized as "speculative at best." *Id*. at 17.

What Effect Will Halliburton II Have On Securities Class Action Litigation?

Now that the Court has given the green light to defendants to challenge price inflation claims at class certification, we can expect more protracted *Daubert* style evidentiary hearings at class certification with battling financial economists and events studies.

Since the Court did not impose on plaintiff the burden of proving price impact at class certification, plaintiffs will still have leeway to present expert reports which do little more than opine generally about the efficiency of the market for the securities at issue. In this situation, defendants may not have the benefit of plaintiff's work product on price inflation when they depose plaintiff's expert or when they prepare their own expert rebuttal report. Defense counsel may have to cross examine the plaintiff's expert at the class certification hearing without the benefit of having deposed the plaintiff's expert about his price impact analysis, which presumably will not be undertaken until plaintiff responds to defendants' expert reports and/or testimony, if at all. Disaggregating other confounding news that impacted stock prices is properly addressed at class certification.

Given the importance that event studies at class certification will continue to hold, consistent judicial guidance on the parameters of what constitutes a reliable methodology for event studies, such as the helpful guidance provided in the recent First Circuit decision in *Credit Suisse*,[8] will be important. Even in cases where some but not all of the challenged statements impacted the price of a security, it may still be worthwhile for defendants to challenge the price impact of these statements since eliminating some but not all claims may help to reduce both damages and the size of the class. On the other hand, price impact is entwined with the question of materiality. Thus, a grant of class certification with a finding that the alleged misrepresentations inflated stock prices may effectively foreclose a summary judgment motion on this point and delay ultimate resolution of materiality until the time of trial when the issue is presented to the jury.

Plaintiffs may be well advised to whittle down disclosure claims in their complaint: rather than pleading 200 false statements, few of which caused any stock price movement, they may wish to focus on those statements that did precipitate a significant price movement now that those disclosure dates will be subject to expert testimony and cross examination early in the case, at class certification.

In sum, *Halliburton II* gave a little something to all constituents, but mainly to financial economists who are in the business of providing expert advisory services. Recognizing this boon to consulting firms, one insurer, AIG, just announced that it is now offering a class certification event study endorsement to its D&O insurance policy holders which provides coverage for the cost of class certification event studies with no deductible.

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1. *Halliburton Co. v. Erica P. John, Inc.*, No. 13-317, slip op. (U.S. June 23, 2014) ("*Halliburton II*"); see also Basic Inc. v. Levinson, 485 U.S. 224 (1988).
2. *Id*. at 16 (referencing the Private Securities Litigation Reform Act of 1995 ("PSLRA") and Securities Litigation Uniform Standards Act of 1998 ("SLUSA")).
3. *Erica P. John Fund, Inc. v. Halliburton Co*., 131 S. Ct. 2179 (2011) ("*Halliburton I*").
4. *Id*. at 2186-87.
5. *Erica P. John Fund, Inc. v. Halliburton Co*., 718 F.3d 423, 435 (5th Cir. 2013).
6. *See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013).
7. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).
8. *See Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, No. 12-1750, 2014 WL 1910961 (1st Cir. May 14, 2014).

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