

# Securities Litigation Alert

## Eighth Circuit Reverses Class Certification In *Best Buy* Securities Fraud Action

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Since the Supreme Court endorsed the “fraud-on-the-market” theory in *Basic v. Levinson*, 485 U.S. 224 (1988), plaintiffs have been entitled to a rebuttable class-wide presumption of reliance on the alleged misstatements—critical to class certification—in securities fraud class actions. In the Supreme Court’s 2014 landmark decision in *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398 (2014) (“*Halliburton II*”), the Court held that *at the class certification stage*, defendants can rebut the presumption by showing that the alleged misrepresentations did not have an impact on the company’s stock price. In its highly anticipated post-*Halliburton* decision in *IBEW Local 98 Pension Fund v. Best Buy Co.*, the Eighth Circuit reversed the district court’s decision certifying a securities fraud class, holding that the *Basic* presumption was successfully rebutted. Specifically, the Eighth Circuit held that expert testimony showing a lack of movement in Best Buy’s stock price immediately after the alleged misstatements at issue severed the link, presumed by *Basic*, between the alleged misstatement and the price at which plaintiffs purchased the stock.

*Best Buy* is notable for being the first federal appellate decision to provide substantive guidance on *Halliburton II*’s application, and it serves as a powerful reminder that defendants facing securities fraud class actions can significantly narrow or extinguish liability during the class certification phase based on price impact evidence.

### Background

To prevail on a Section 10(b) claim for securities fraud, an investor must prove reliance on a material misrepresentation or omission by a defendant. To maintain a Section 10(b) claim on behalf of a class under Fed. R. Civ. P. 23(b)(3), the investor also bears the burden of establishing that “questions of law or fact common to class members predominate over any questions affecting only individual members” for the claim(s) asserted. The *Basic* presumption, routinely invoked in putative securities fraud class actions, is based on the theory that “the market price of shares traded on well-developed markets reflect all publicly available information” and therefore “[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price” even if he or she does not directly know about, or rely, on the statements at issue.

The *Basic* presumption was never intended to be irrefutable, but how and when a defendant may rebut the presumption has been an area of significant debate. In *Halliburton II*, the Supreme Court explained that price impact is a fundamental precondition to invoking the *Basic* presumption because an investor cannot be said to have indirectly relied on a misstatement if it is not reflected in the price of a stock. It further held that “defendants must be afforded an opportunity *before* class certification to defeat the [*Basic*] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.” While acknowledging that defendants may rebut the *Basic* presumption at the class certification stage, *Halliburton II* stopped short of providing any guidance on how to do so.

### The *Best Buy* Decision

The operative complaint in *Best Buy* asserted Section 10(b) claims against Best Buy and three of its executives for three alleged misstatements in a press release and subsequent conference call on September 14, 2010. Specifically, plaintiffs alleged that Best Buy’s full year earnings per share (“EPS”) guidance in a press release issued at 8:00am on September 14, 2010 was false and misleading. Plaintiffs also alleged that management’s statements that earnings were “in line” with expectations and the company was “on track to deliver and exceed EPS guidance” during an investor call two hours later were also false and misleading. Plaintiffs claimed the “truth” of the alleged misstatements was revealed when Best Buy reduced its annual EPS guidance three months later, and its stock price fell nearly 15%.

The district court held that the statements in the 8:00am press release were forward-looking statements protected by the PSLRA’s safe harbor provision, but that the later earnings call statements were “actionable as a statement of present condition.” A year later, after awaiting a decision in *Halliburton II*, the district court granted plaintiffs’ motion for class certification, concluding that defendants failed to rebut the *Basic* presumption of reliance.

On appeal, defendants argued that expert evidence showed that the stock price increase on September

14 occurred immediately after the press release and, critically, *before* the investor call. Thus, the “on track” and “in line” earnings call statements “had no discernible impact on Best Buy’s stock price” and the *Basic* presumption was rebutted. Plaintiffs’ expert opined that the “economic substance” of the three September 14 statements was “virtually the same,” that the EPS guidance had an immediate impact on the stock price, and that the earnings call statements “had no additional impact.” Plaintiffs argued that the stock price decline after the alleged corrective disclosure showed that the earnings call statements “maintained” the artificially inflated price and thus evidenced the requisite price impact.

The Eighth Circuit agreed with defendants and reversed the district court. The Circuit highlighted that both experts agreed that the earnings call statements had no *additional* price impact on the stock price. This, along with the opinion by plaintiffs’ expert that investors gave the non-actionable press release “great weight,” was “direct evidence that investors did not rely on the executives’ confirming statements two hours later.” The Circuit rejected plaintiffs’ theory based on the post-corrective disclosure stock price decline, finding that “the theory provided no evidence that refuted Defendants’ overwhelming evidence of no front-end price impact.” Without the benefit of the *Basic* presumption, an investor class could not be certified.

### Key Takeaways

- Price impact can potentially serve as an important defense to meaningfully narrow or defeat a securities fraud action at the class certification stage for issuers of all sizes.
- Consideration of price impact may meaningfully inform strategy even at the onset of the case, including at the motion to dismiss stage. If certain statements are more amenable to dismissal (e.g., as protected forward-looking statements or statements of opinion), defendants may have a second bite at the apple for statements that are not dismissed but had no discernable price impact at the class certification phase.

## Developments to Monitor

This past July, the Northern District of Texas held that Halliburton successfully rebutted the *Basic* presumption for a number of disclosures at issue in that litigation following remand from *Halliburton II*. That decision is now on appeal to the Fifth Circuit. More recently, the Second Circuit granted a petition to hear an appeal of a class certification decision from the district court in the ongoing *In re Goldman Sachs Group, Inc. Securities Litigation* that rejected a price impact argument. It will be interesting to see how these cases play out, and whether they align with the decision by the Eighth Circuit in *Best Buy*.

To view the court's opinion, please follow this [link](#).

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