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THE SECURITIES FRAUD CLASS ACTION AFTER *GOLDMAN SACHS*

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This article analyzes a significant Supreme Court securities law decision from the 2020 term, *Goldman Sachs v. Arkansas Teachers Retirement System* (*Goldman*). *Goldman* was a blockbuster class action, brought by shareholders seeking $13 billion in damages from Goldman Sachs based on claims that date back to the 2008 financial crisis. This article proceeds by taking an in-depth look at the case history of *Goldman* from start to finish. In the process, it shows that the Supreme Court's recent decision was more impactful than has been widely appreciated. Rather than being a recap of existing precedents, the Court's holding in *Goldman* made significant changes to some of the core doctrines in securities law that were first set forth in 1988 when the modern securities class action was created by *Basic v. Levinson*. This article also looks beyond doctrinal categories to assess how the *Goldman* decision can be understood as the latest chapter in the Supreme Court's longstanding role as a leading policymaker in the law of securities class actions. Lastly, the article explains how the precedent set in *Goldman* will affect securities litigation on the ground going forward. As a result of *Goldman*, it will be argued, the class certification stage in shareholder securities fraud suits has been moved closer to an open-ended totality of the circumstances test, in which the federal courts have an increasing number of tools to act as gatekeepers on the merits of a litigation.

INTRODUCTION

The Supreme Court closed out its latest October 2020 term by issuing one of the most significant securities law decisions in years: *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*.[1] The *Goldman* case arose from one of the more notorious episodes in the 2008 financial crisis, Goldman Sachs' dealings in connection with a complex financial transaction known as Abacus.[2] On July 15 of 2010, Goldman Sachs entered into a settlement with the Securities and Exchange Commission (SEC) based on Abacus, which resulted in a then-record breaking $550

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[1] 141 S. Ct. 1951 (2021).

[2] *See infra* Part II.A (providing an overview of the Abacus transaction and ensuing controversies).

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million fine.[3] The SEC settlement was also highly symbolic. It was announced a week before the passage of the Dodd-Frank Act[4] and proved to be an opening salvo in the long wave of post-financial crisis enforcement actions that followed.

The *Goldman* case began a year after the SEC settlement, when shareholders brought a class action against the firm and its executives seeking thirteen billion dollars in damages.[5] The class complaint alleged that Goldman Sachs was liable for securities fraud for failing to disclose conflicts of interest associated with Abacus in its public financial statements.[6] In deciding *Goldman*, the Supreme Court revisited core legal questions that revolved around its famous fraud-on-the-market doctrine,[7] which has been the controlling standard governing securities class actions since the Court's seminal 1988 case, *Basic Inc. v. Levinson*.[8] Although *Goldman* turns on seemingly technical issues about rules of evidence and the burden of proof for certification of shareholder class actions, its import is quite broad. In practice, those procedural details are often decisive and essentially determine the scope for private enforcement of the federal securities laws.[9]

This article presents a comprehensive analysis of the Supreme Court's *Goldman* decision and its implications for the future of securities litigation. In doing so, it makes three contributions to the scholarship on securities law. First, it provides a careful review of the underlying case from start to finish. The story of Goldman Sachs at the Supreme Court is compelling in itself, but it also reveals important insights about the Supreme Court's policymaking role in securities law. The legal literature on securities law jurisprudence often picks up where the Court has left off, parsing the language in the particular opinion or line of precedents at hand. What is abstracted away in this process is a nuanced understanding of the factual background, procedural history, and evidentiary battles that define complex commercial litigations including securities class actions.[10] On the rare occasion such cases reach the Court, they then become a platform to craft public policy through

[3] *See* U.S. SEC. & EXCH. COMM'N, RELEASE NO. 2010-59, SEC CHARGES GOLDMAN SACHS WITH FRAUD IN STRUCTURING AND MARKETING OF CDO TIED TO SUBPRIME MORTGAGES (Apr. 16, 2010) (announcing the enforcement action); U.S. SEC. & EXCH. COMM'N, RELEASE NO. 2010-123, GOLDMAN SACHS TO PAY RECORD $550 MILLION TO SETTLE SEC CHARGES RELATED TO SUBPRIME MORTGAGE CDO [hereinafter SEC RELEASE NO. 2010-123] (July 15, 2010) (announcing the settlement).

[4] *See* R. Allen Stanford, *The SEC's Impeccable Timing*, WALL ST. J. (Apr. 20, 2010), https://www.wsj.com/articles/SB10001424052748704671904575194172722146804.

[5] *See* Consolidated Class Action Complaint for Violations of Federal Securities Laws, *In re* Goldman Sachs Grp., Inc. Sec. Litig., 1:10-cv-03461 (PAC) (S.D.N.Y. July 25, 2011) 2015 WL 5613150 [*hereinafter* Consolidated Amended Complaint].

[6] *See id.*; *see also infra* Part II.B (detailing the allegations in the class complaint).

[7] For an overview of the fraud-on-the-market doctrine, *see* Part I.A, *infra.*

[8] 485 U.S. 224 (1988).

[9] *See* JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION: CASES AND MATERIALS 785 (8th. ed. 2017) ("A significant portion of the private litigation under the securities laws occurs through the class action procedures of Federal Rule of Civil Procedure 23.").

[10] *Cf.* CONTRACT STORIES *vii* (Douglas Baird ed., 2007) ("To be sure, cases matter and so too the legal principles they embody, but neither can stand alone. Context always matters, and much is lost when controversies are reduced to simple hypotheticals and blackletter maxims . . . . [particularly when] [t]he narrative in a judicial opinion occupies a privileged place.")

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doctrinal innovations that are only loosely related to what was at stake in the original legal dispute.[11]

Goldman is a classic example of how this dynamic unfolds. As will be shown, the case was arguably a frivolous strike suit that could have been dismissed at the outset under well-settled pleading standards.[12] *Goldman* thus adds an ironic twist to the proverbial wisdom that hard cases make bad laws. Easy cases, which reach the Court for reasons far removed from their underlying merits, can also generate precedents that inadvertently deepen a doctrinal quagmire.

The second contribution of this article is to examine how the precedent set in *Goldman* reshapes the Supreme Court's existing doctrine on securities fraud class actions. At first glance, the case resulted in a consensus decision that did not appear to break much new ground. The majority opinion of Justice Barrett reversed the Second Circuit for failing to consider the "generic" nature of Goldman Sachs' alleged misstatements for purposes of class certification, and was joined by all eight justices on that point.[13] A six-vote majority of the Court also held that, as an evidentiary matter, the burden of persuasion rests on corporate defendants once a class of shareholder plaintiffs has invoked the fraud-on-the-market presumption.[14]

Despite its narrow framing and consensus tone, however, the *Goldman* decision glosses over a number of tensions with the Supreme Court's line of precedents on securities class actions. The tradeoff those cases have tried to strike since *Basic* was decided in 1988 is as follows. Without resort to the *Basic* fraud-on-the-market presumption, it is nearly impossible for plaintiffs to organize a securities class action; this result would leave shareholders with limited legal recourse against misleading corporate statements, [15] which the disclosure-based rules that define modern securities law aim to deter.[16] At the same time, if corporate defendants do not have a meaningful opportunity to rebut the *Basic* presumption, the securities class action could devolve into an attorney-driven tool for vexatious litigation.[17]

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[11] *See* Matthew C. Turk & Karen Woody, *Leidos and the Roberts Court's Improvidence Securities Law Docket*, 70 STAN. L. REV. ONLINE 89, 90 (2017).

[12] *See infra* Part II.B.

[13] Goldman Sachs Grp., Inc. v. Ark. Teachers Ret. Sys., 141 S. Ct. 1951, 1957 (2021). For the underlying Second Circuit decision, *see* Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. (*ATRS II*), 955 F.3d 254 (2d Cir. 2018).

[14] *Goldman*, 141 S. Ct. at 1963. A concurrence written by Justice Gorsuch, joined by Justices Thomas and Alito, argued that the burden of persuasion is held by the plaintiff class seeking certification, not defendants. *Id.* at 1965-70 (Gorsuch, J., concurring). Justice Sotomayor, while agreeing with the majority's holding on both points of law, wrote a separate concurrence questioning whether remand to the Second Circuit was necessary. *Id.* at 1963-65 (Sotomayor, J., concurring).

[15] *See* COX ET AL., *supra* note 9, at 785 ("Characteristic of so many of the suits under Rule 10b-5 for false corporate announcements by a publicly traded company is that most purchaser or sellers have relatively small amounts at stake. When there are numerous investors who have suffered a common misrepresentation, the class action device is often the only economically viable means of achieving the compensatory and deterrent goals underlying the private action.").

[16] *See* Brent J. Horton, *In Defense of a Federally Mandated Disclosure System: Observing Pre-Securities Act Prospectuses*, 54 AM. BUS. L. J. 743, 746 (2017); *see also* Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L. J. 407, 407 (2018); Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L. J. 645, 646 (2019).

[17] *See* John Coffee, *Understanding the Plaintiff's Attorney: The Implication of Economic Theory for Private Enforcement Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 n.3 (1986).

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The *Goldman* decision subtly shifts the Court's prior balancing of this dilemma in two ways. First, *Goldman* supplements the Court's most recent controlling interpretation of *Basic*, a 2015 decision known as *Halliburton II*.[18] *Halliburton II* held that defendants may rebut the fraud-on-the-market presumption by showing that an alleged misstatement did have a "price impact" on the value of its stock, but the decision was notoriously vague on what kind of evidence is required under that standard.[19] By explicitly allocating the burden of proof on price impact to defendants, *Goldman* raises the previously ambiguous evidentiary bar for rebutting class certification under *Halliburton II*. Second, in holding that the Second Circuit must consider the "generic" nature of Goldman Sachs' misstatements, the Court arguably overruled much of its own *Amgen* decision from 2013.[20] While *Amgen* held that the materiality of a corporate misstatement is irrelevant at the class certification stage,[21] the question of whether a statement is generic may overlap with the issue of materiality in many cases.

The third contribution of this article is to look beyond doctrinal categories to assess how the precedent set in *Goldman* will affect securities litigation on the ground going forward. As a practical matter, the impact of *Goldman* will largely depend on how it is used by federal courts to weigh expert evidence in the class certification stage. In securities class actions, expert evidence usually consists of complex statistical analyses, known as event studies, which generalist federal judges are not always well equipped to evaluate.[22] Here again, context matters. The background of *Goldman* in the lower courts is telling, because it illustrates the indeterminacy that can occur when courts grapple with the technicalities of event studies and modern financial markets in general.[23]

As a result of *Goldman*, federal judges deciding securities class actions will have greater latitude to sidestep the details of statistical expert evidence in ways that cut for and against shareholder plaintiffs. When ruling against class certification, courts can fall back on familiar judicial notions of materiality by pointing to generic language on the face of alleged misstatements. When ruling in favor of class certification, courts can emphasize the burden of persuasion that defendants must meet to rebut the fraud-on-the-market presumption under *Halliburton II*. The resulting legal framework moves class certification in shareholder securities fraud suits closer to an open-ended totality of the circumstances test, in which the federal courts have an increasing number of tools to act as gatekeepers on the merits of litigation.

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[18] Halliburton Co. v Erica P. John Fund, Inc. (*Halliburton II*), 573 U.S. 258 (2014).

[19] *See generally* Jill E. Fisch, *The Trouble with* Basic: *Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895 (2013); Merritt B. Fox, Halliburton II: *It All Depends on What Defendants Need to Show to Establish No Impact on Price*, 70 BUS. LAW. 437 (2015) [hereinafter Fox, *It All Depends*]; Merritt B. Fox, Halliburton II: *What It's All About*, 1 J. FIN. REG. 135 (2015); Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on* Amgen *and the Second Coming of* Halliburton, 57 ARIZ. L. REV. 37 (2015); A.C. Pritchard, Halliburton II: *A Loser's History*, 10 DUKE J. CONST. L. & PUB. POL'Y 27 (2015); Victor E. Schwartz & Christopher E. Appel, *Rebutting the Fraud on the Market Presumption in Securities Fraud Class Actions:* Halliburton II *Opens the Door*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 33 (2015).

[20] Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455 (2013).

[21] *Id.* at 457.

[22] *See* Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX. L. REV. 553, 556 (2018).

[23] *See infra* Part II.C (analyzing the use of expert evidence by the trial court in *Goldman*).

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From a big picture normative perspective, the future of securities fraud class actions after *Goldman* raises more questions than answers. A notable subtext in the Court's *Goldman* opinions is a sense of exhaustion with the doctrinal framework governing securities class actions.[24] There is little discernable effort to square the holding in *Goldman* with the conceptual problems that have plagued the fraud-on-the-market presumption since its advent in *Basic*.[25] This leaves the prospect of further judicial innovation, at least in the form of bright-line rules, unlikely.[26] Improving the deterrence function of securities law may therefore require a more creative rethinking of the relative role between private and public enforcement through policymaking outside the courts via legislation or administrative rulemaking.[27]

This article is organized as follows. Part I presents background on the law of securities fraud class actions. Part II traces the *Goldman* litigation as it proceeded through the lower courts. Part III examines the Supreme Court's majority and concurring opinions in *Goldman*. Part IV reflects on the implications of *Goldman* for securities fraud class actions going forward. A final section briefly concludes.

I. OVERVIEW OF SECURITIES FRAUD CLASS ACTIONS

Federal law on securities fraud dates to the 1934 Securities & Exchange Act (Exchange Act).[28] Specifically, Section 10(b) of the Exchange Act makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[29] Section 10(b) was fleshed out by the SEC when it promulgated the implementing regulation, Rule 10b-5, in 1942.[30]

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[24] *See infra* Part IV.C (elaborating on the Supreme Court's role as policymaker in the securities class action context).

[25] *See generally* Donald Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151 (2009) (providing an overview of the Supreme Court case law on the fraud-on-the-market rule following *Basic*).

[26] *See* John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Jan. 22, 2019).

[27] *See* M. Todd Henderson & Adam C. Pritchard, *From* Basic *to* Halliburton, REG., Winter 2014-2015, at 20 ("When thinking about the efficiency of the private litigation system, the relevant comparison is not to an enforcement vacuum, but rather to government enforcement of antifraud prohibitions. . . . Absent a system of private suits, presumably the government would pick up some of the slack."). *See also* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1586 (2006); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1349 (2008).

[28] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2006).

[29] *Id.* § 78j.

[30] Employment of Manipulative and Deceptive Devices, 17 C.F.R. 240.10b-5 (1942) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act,

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Notably, neither Rule 10b-5 nor the Exchange Act contains any provision that explicitly authorizes private litigants to bring suits under Section 10(b). Instead, an implied private right of action was read into the statute by a line of federal court decisions beginning in the early 1940s.[31] Private securities law is a judge-made law; in Justice Rehnquist's famous words, it is "a judicial oak which has grown from little more than a legislative acorn."[32]

The core of any securities fraud claim under Section 10(b) and Rule 10b-5 is that a corporate securities issuer deceived shareholders about the value of its stock by making misleading statements about the financial status of the company. Specifically, federal courts have drawn on the common law of fraud to develop six elements that an investor must prove when bringing a securities fraud claim under Section 10(b).[33] They are: "(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."[34] As explained below, the *Goldman* case raises key questions about the interplay between the materiality, reliance, and loss causation elements in securities fraud class actions.

A. Class Certification under the Basic *Fraud-on-the-Market Presumption*

Under Federal Rule 23, certification of a class action requires that a numerous group of plaintiffs have a legal claim in which common questions of law and fact predominate.[35] From one

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practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.").

[31] *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 , 514-15 (E.D. Pa. 1946) (providing the earliest statement that a private right of action exists under Rule 10b-5). Federal courts have also read a private right of action into several other provisions of the Exchange Act. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (finding an implied right of action for private plaintiffs in connection with Section 14(a) of the Exchange Act); Geismar v. Bond & Goodman, Inc., 40 F. Supp. 876, 878 (S.D.N.Y. 1941) (creating a private right of action under Section 29 of the Exchange Act). For the scholarly debate on these judicial interpretations, *see generally* Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Law: The Commission's Authority*, 107 HARV. L. REV. 961 (1994); Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Law: The Commission's Authority"*, 108 HARV. L. REV. 438 (1994).

[32] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

[33] *See* Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 343 (2005) ("Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions." (citing L. LOSS & J. SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 910-18 (5th ed. 2004)); Halliburton Co. v Erica P. John Fund, Inc. (Halliburton II), 573 U.S. 258, 286 n.1 (2014) ("As the private Rule 10b-5 action has evolved, the Court has drawn on the common-law action of deceit to identify six elements a private plaintiff must prove.").

[34] *See* Stoneridge Inv. Partners, LLC, v. Scientific-Atlanta, 552 U.S. 148, 157 (2008) (citing 544 U.S. at 341–42).

[35] FED. R. CIV. P. 23(a) ("(a) Prerequisites. 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 fairly and adequately protect the interests of the class."); FED. R. CIV. PRO. 23(b)(3) ("A class action may be maintained if Rule23(a) is satisfied and if . . . (3) 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.").

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perspective, the Rule 23 class certification requirements appear uniquely easy to meet in the securities law context: all common shareholders in a stock are, almost by definition, similarly situated with respect to the corporate issuer. The reliance element in securities fraud claims raises serious complications for organizing class actions, however. As originally interpreted by federal courts analogizing to the common-law of fraud, shareholders bringing a Rule 10-b claim were required to prove that they subjectively relied on the alleged corporate misrepresentation.[36] Yet it is difficult to establish as a factual matter that all shareholders individually relied on a corporate misstatement, such as a misleading press release, the same way—or that they were even aware of its existence.[37]

The securities fraud class action therefore stalled until the Supreme Court's seminal 1988 decision, *Basic v. Levinson.*[38] In *Basic*, the Supreme Court largely mooted the reliance element in Rule 10b-5 claims by adopting what is known as the "fraud on the market" doctrine.[39] After *Basic*, a putative class of plaintiff shareholders need not establish individualized reliance on an alleged corporate misstatement through direct evidence. Such evidence was inapposite, the *Basic* majority explained, because "modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases."[40] Due to the scale and anonymity of modern securities markets, demanding direct evidence of subjective reliance "place[s] an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market."[41]

In place of direct evidence, *Basic* held that a shareholder class could establish a common issue of reliance indirectly, based on a presumption that a fall in the defendant's stocks price provides "the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[42] All that was needed to invoke the fraud-on-the-market presumption was proof that the stock in question traded in an efficient market.[43] Here, the Court relied on recent research in financial economics, known as the "efficient market hypothesis," which asserts that the prices in liquid securities markets tend to incorporate all publicly available information.[44] In the Court's view, a "common sense" implication of the efficient market hypothesis is that investors rely on the

[36] *See* List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965) (holding that reliance on an alleged misrepresentation must be "a substantial factor in determining the course of conduct which results in the [plaintiff's] loss" in order "to certify that the conduct of the defendant actually caused the injury."); *see also* Castona v. Am. Tobacco Co., 84 F.3d 734, 735 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be at issue.").

[37] *See* Fox, *It All Depends*, *supra* note 19, at 439 ("Under this traditional rule [for establishing reliance], securities fraud actions were extremely difficult to prosecute on a class basis.").

[38] Basic Inc. v. Levinson, 485 U.S. 224 (1988).

[39] *Id.* at 243. As the *Basic* decision notes, various versions of the fraud-on-the-market doctrine had been circulating in lower courts for over a decade. *Id.* at 229–30, 244–45.

[40] *Id.*at 243–44.

[41] *Id.* at 245.

[42] *Id.* at 243.

[43] *Id.* at 245.

[44] *Id.* at 246 ("Recent empirical studies have tended to confirm [the efficient-market-hypothesis] premise that the market price of shares traded on well-developed markets reflects all publicly available information[.]").

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integrity of stock prices to accurately aggregate information about firms.[45] Thus, when corporate issuers make misleading statements to the public about the financial status of their company, it is safe to presume that investors relying on the informational value of stock prices have been defrauded as a whole.[46]

The majority opinion in *Basic* also noted that the fraud-on-the-market presumption was rebuttable by "any showing which severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[47] For example, if publicly available information contradicted the alleged misstatement, or if a plaintiff otherwise believed the defendant corporation's statement was false.[48] Overall, however, the motivation for judicial acceptance of the fraud-on-the-market doctrine was to facilitate securities class actions. As the four-justice majority in *Basic* stated, the Supreme Court's prior interpretation requiring individualized proof "effectively would have prevented" the *Basic* plaintiffs and similarly situated shareholders "from proceeding with a class action."[49] And the decision achieved that goal. *Basic* opened floodgates for the modern securities fraud class action.[50]

B. Fraud-on-the-Market from Basic *to* Halliburton II

An immediate concern post-*Basic* was that the floodgates had been opened too wide. Once a shareholder class is certified, the settlement value of any securities fraud case rises dramatically.[51] After *Basic*, plaintiffs lawyers could invoke the fraud-on-the-market presumption to more easily bring strike suits with limited merit but high nuisance value for corporate defendants.[52]

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[45] *Id.* at 246–47.

[46] *Id.* at 247 ("An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b–5 action.").

[47] *Id.* at 248.

[48] *Id.* at 249.

[49] *Id.* at 242. Writing in dissent, Justice White, joined by Justice O'Connor, cautioned against abandoning the existing interpretation of class reliance on a number of grounds. *See id.* at 250–62 (White, J., dissenting). Most broadly, Justice White claimed that the majority's decision in *Basic* would transform Rule 10b-5 into a "scheme of investor's insurance." *Id.* at 252, (White, J., dissenting).

[50] *See* Fox, Halliburton II: *It All Depends*, *supra* note 19, at 439 (observing that fraud-on-the-market class actions "currently give rise to the bulk of all the damages paid out in settlements and judgments pursuant to private litigation under the U.S. securities laws[.]"); Fox, Halliburton II: *It All Depends, supra* note 19, at 440 n.12; Henderson & Pritchard, *supra* note 27, at 20 ("Securities class actions really took off after *Basic* . . . the "fraud on the market" presumption. . . . [M]eant that certifying a class action became much easier for plaintiff lawyers, while defendants would face enormous cost from litigating and settling suits.").

[51] *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."); *see also* Stoneridge Inv. Partners, LLC, v. Scientific-Atlanta, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.").

[52] *See* Henderson & Pritchard, *supra* note 27, at 20 (noting that, after *Basic*, "[t]he incentives to bring cases for nuisance value alone were enormous.").

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In response, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA).[53] Among other things, the statute raised the pleading standard in fraud claims to require particularized allegations that specifically identify each alleged misstatement, allow for a "strong inference" of scienter, and articulate a theory of loss causation.[54] The PSLRA also provided a safe harbor for forward-looking statements in corporate financial disclosures,[55] as well as an automatic stay of discovery on the merits until after a defendant's motion to dismiss has been adjudicated.[56] In 1998, Congress further tightened the ambit of securities class actions with the Securities Litigation Uniform Standards Act,[57] which made the vast majority of state securities fraud claims removable to federal court (and thereafter subject to PSLRA).[58]

Although the PSLRA purported to rein in the use of strike suits in securities class actions, its results were less than satisfying to some observers.[59] Over a decade later, the Supreme Court returned to the fray in its 2013 case, *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds* (*Amgen*).[60] The issue raised on appeal in *Amgen* was whether shareholders seeking to invoke the *Basic* fraud-on-the-market presumption must also establish that an alleged misstatement is material.[61] A six-vote majority opinion, written by Justice Ginsburg, answered that question in the negative, drawing a bright line between the elements of reliance and materiality. The Court held that proof of materiality is a merits issue that must be addressed on a motion to dismiss but is irrelevant at the class certification stage.[62] However, the *Amgen* decision also included a series of

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[53] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

[54] 15 U.S.C. §§ 78u-4(b)(1), (2), (4) (1995); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737 (amending Exchange Act Section 21D(b)(1)–(2)).

[55] Under the PSLRA, forward-looking statements about the future cannot be grounds for liability, so long as they are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement," or are otherwise immaterial. 15 U.S.C. § 78u-5(c)(1)(A)(i).

[56] 15 U.S.C. § 78u-4(b)(3)(B); Private Securities Litigation Reform Act, Pub. L. No. 104-67, § 101, 109 Stat. 737 (amending Securities Act Section 27(b)(1) and Exchange Act Section 21D(b)(3)(B)).

[57] Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

[58] 15 U.S.C. § 78bb(f)(1)–(2); *see also* Chadbourne & Park LLP v. Troice, 571 U.S. 377 (2014) (interpreting the scope of the SLUSA's removal provisions).

[59] One source of criticism was that many of the PSLRA's seemingly novel provisions were redundant with settled rules of securities litigation and civil procedure. For example, fraud claims of any kind must be plead with particularity pursuant to Federal Rule 9(b). FED. R. CIV. P. 9(b). Likewise, even before the PSLRA, courts tended to find that fraud claims based on forward-looking statements fell short of traditional materiality standards, because corporate projections about the future generally do not involve misrepresentations of known facts. *See* Adam C. Pritchard, *Should Congress Repeal Securities Class Action Reform?*, POL'Y ANALYSIS, Feb. 27, 2003, at 1.

[60] 568 U.S. 455 (2013).

[61] *Id.* at 459 ("According to Amgen, certification must be denied unless Connecticut Retirement proves materiality, for immaterial misrepresentations or omissions, by definition, would have no impact on Amgen's stock price in an efficient market.").

[62] *Id.* ("While [plaintiffs] certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification.").

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dissents and concurrences—joined variously by Justices Scalia, Thomas, Kennedy, and Alito—all of which suggested that the *Amgen* majority's holding was dubious because the underlying reasoning in *Basic* itself was flawed.[63] This invited a wholesale challenge to the precedent set forth in *Basic*.

That challenge arrived a year later in the Supreme Court's 2014 case, *Halliburton Co. v Erica P. John Fund, Inc.* (*Halliburton II*).[64] *Halliburton II* was another 6-3 decision, with Chief Justice Roberts writing on behalf of the majority. Chief Justice Roberts' majority opinion declined to overrule *Basic* outright, largely on *stare decisis* grounds.[65] The *Halliburton II* decision, however, did represent a significant effort to narrow the scope of the fraud-on-the-market doctrine.[66] Although the majority opinion in *Basic* noted that the fraud-on-the-market presumption was rebuttable, in practice, it was viewed as automatic—publicly traded companies in the United States enjoy the deepest and most liquid securities market in the history of the world, if investors cannot rely on the informational integrity of stock prices *there*, then the efficient market hypothesis has no real-world application at all.[67] *Halliburton II* attempted to flesh out a realistic means for defendant's to rebut the *Basic* presumption, even when a plaintiff class is able to establish the minimal condition of market efficiency.

Specifically, *Halliburton II* held that a corporate defendant has an opportunity to rebut the *Basic* fraud-on-the-market presumption by showing that its alleged misstatement lacked "price impact."[68] In other words, "[d]efendants 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."[69] The Court's reasoning on this point was that, "[u]nder *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 . . . . But an indirect proxy should not preclude direct evidence when such evidence is available."[70] Thus, "[w]hile *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not

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[63] *Id.* at 482-83 (Alito, J., concurring) ("As the dissent observes, more recent evidence suggests that the presumption may rest on a faulty economic premise. In light of this development, reconsideration of the *Basic* presumption may be appropriate.") (internal citations omitted); *id.* at 486 (Scalia, J., dissenting) ("The fraud-on-the market theory approved by *Basic* envisions a demonstration of materiality not just for substantive recovery but for certification. Today's holding does not merely accept what some consider the regrettable consequences of the four-Justice opinion in *Basic*; it expands those consequences from the arguably regrettable to the unquestionably disastrous."); *id.* at 486-502 (Thomas, J., dissenting) (arguing that the fraud-on-the-market presumption in *Basic* requires plaintiffs to establish materiality).

[64] 573 U.S. 258 (2014). *Halliburton II* was the sequel to a prior fraud-on-the-market case, which the Court recertified for review in light of *Amgen*. *See* Halliburton Co. v Erica P. John Fund, Inc., (*Halliburton I*) 563 U.S. 804, 807 (2011) (interpreting the loss causation pleading requirement for class certification).

[65] *Halliburton II*, 573 U.S. at 274-77.

[66] *See generally* Langevoort, *supra* note 25.

[67] *Halliburton II*, 573 U.S. at 266–67.

[68] *Id.* at 279.

[69] *Id.* at 284.

[70] *Id.* at 281.

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actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply."[71]

C. Securities Fraud Class Actions after Halliburton II

Halliburton II sought to clarify the conceptual issues raised by the fraud-on-the-market presumption announced in *Basic.* By most accounts, however, it only deepened the doctrinal muddle.[72] For one, the key variable in *Halliburton II*, "price impact," is nowhere to be found among the elements of a securities fraud claim under Rule 10b-5.[73] Moreover, the price impact concept maps uneasily onto the six elements that do exist. On one hand, price impact has little to do with reliance in the traditional sense used in the common law of fraud. On the other hand, it is essentially the mirror image of loss causation; yet the role of loss causation was minimized in the Court's *Halliburton I* decision on class certification.[74] Price impact also bears a close relationship to the materiality element—the rational market envisioned in *Basic* should not be expected to move prices based on immaterial information—but materiality was read out of the class certification standard in *Amgen*.[75]

As a practical matter, *Halliburton II* proved a mixed success as well. Chief Justice Robert's majority opinion in the case purported to articulate a realistic means for corporate defendants to rebut the fraud-on-the-market presumption. According to a recent empirical analysis, however, federal district courts certified security class actions at a higher rate after *Halliburton II*.[76] At least one contributing factor is that the *Halliburton II* decision is silent on the evidentiary burden defendants must meet to rebut the *Basic* presumption. The majority opinion simply states that defendants are entitled to show a lack of price impact "through evidence."[77] This left open whether defendants must satisfy the burden of persuasion or merely meet the lower burden of production as called for under Federal Rule of Evidence 301.[78]

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[71] *Id.* at 282.

[72] *See supra* note 19 and accompanying text.

[73] *See supra* note 34 and accompanying text.

[74] *See* Halliburton Co. v Erica P. John Fund, Inc., (*Halliburton I*) 563 U.S. 804, 807 (2011); *see also* Evan Hill, *The Rule 10b-5 Suit: Loss Causation Pleading Standards in Private Securities Fraud Claims After* Dura Pharmaceutical, Inc. v. Broudo, 78 FORDHAM L. REV. 2659, 2659 (2010); Mark A. Perry & Kellam M. Conover, *The Interrelationship Between Price Impact and Loss Causation After* Halliburton I & II, 71 N.Y.U. ANN. SURV. AM. L. 189, 190–91 (2015).

[75] *See* Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 459 (2013); *see also Halliburton II*, 573 U.S. at 282–83 (2014) (attempting to distinguish materiality from price impact).

[76] *See* Noah Weingarten, Halliburton II *at Four: Has it Changed the Outcome of Class Certification Decisions*?, 25 FORDHAM J. CORP. & FIN. L. 459, 462 (2020) ("With regard to *Halliburton II's* impact, it is clear that class certification has been granted at a conspicuously higher rate than pre-*Halliburton II*.").

[77] *Halliburton II*, 573 U.S. at 279. In concurrence, Justice Ginsburg suggested more strongly that "the Court recognizes that it is incumbent upon the defendant to show the absence of price impact." *Id.* at 284.

[78] FED. R. EVID. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.").

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That ambiguity has sown inconsistency in the lower courts. The Eighth Circuit held in 2016 that defendants seeking to rebut the fraud-on-the-market presumption only have to meet the burden of production.[79] A year later, the Second Circuit ruled that defendants must satisfy the burden of persuasion—holding that "defendants seeking to rebut the *Basic* presumption must… [do so]… by a preponderance of the evidence at the class certification stage rather than [by] merely meet[ing] a burden of production."[80] Several other courts have avoided giving a clear answer.[81] Early empirical evidence on post-*Halliburton II* cases suggests that how courts set the evidentiary burden on price impact could be decisive in the context of class certification.[82]

A second factor affecting the high rate of class certification after *Halliburton II* has been plaintiffs' frequent reliance on the "price maintenance" theory of corporate misrepresentations when bringing securities fraud claims.[83] In a traditional securities fraud case, an alleged misrepresentation involves the disclosure of a misleading piece of goods news—the approval of a valuable patent, for example—from the corporate issuer.[84] As a result, the defendant's stock price will temporarily be inflated above the level at which it would trade if investors had the correct information. That inflation is known as a positive "front-end" price impact. Once the falsity of the good news is revealed, the stock price then drops back down to its pre-disclosure level. Investors who bought stock in the period between the defendant's misleading disclosure and its later correction may sue for damages based on the amount of front-end price impact that was caused by the earlier corporate misstatement.[85]

Securities price maintenance claims involve a scenario in which the price impact from an allegedly false disclosure occurs on a somewhat different timeline. With price maintenance claims, the relevant misrepresentation is a corporate disclosure that omits or suppresses bad news—for example, the failure of a pending patent application that was previously announced.[86] The effect of hiding bad news is not an inflationary uptick in the stock price; instead, the issuer is deceiving

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[79] IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775, 782 (8th Cir. 2016) (holding that "defendants had the burden to come forward with evidence showing a lack of price impact").

[80] Waggoner v. Barclays PLC, 875 F.3d 79, 101 (2d Cir. 2017). The Second Circuit's reasoning in *Waggoner* is largely based on stray language in *Halliburton II*. *See id.* at 101-13; *see* Weingarten, *supra* note 76, at 491. The Second Circuit also explicitly noted conflict with Best Buy. *Waggoner,* 875 F.3d at 104 n.38 ("To the extent that the Eighth Circuit imposed only a burden of production on defendants, we disagree with its conclusion.").

[81] *See, e.g.*, Aranaz v. Catalyst Pharm. Partners Inc., 302 F.R.D. 657, 672 (S.D. Fla. 2014); McIntire v. China MediaExpress Holdings, Inc., 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014).

[82] *See* Weingarten, *supra* note 76, at 494 ("Despite the small number of cases, these statistics suggest highly favorable odds for plaintiffs to obtain a grant of class certification when courts impose both burdens [of production and persuasion] on defendants. Additionally, the data suggests that when the post-*Halliburton II* courts impose an ambiguous standard on defendants, it has the same effect on the results obtained by defendants as if the court imposed both burdens.").

[83] *See id. at* 478 (noting that, post-*Halliburton II*, plaintiffs relied on class periods that focus on the date of stock drops, a requisite for price maintenance claims, "in the vast majority of cases").

[84] *See, e.g.*, Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 665 (5th Cir. 2004) (observing that price impact "ordinarily" requires "an increase in stock price immediately following the release of positive information.").

[85] *See* Weingarten, *supra* note 76, at 478-80 (discussing the distinction between front-end and back-end price impact).

[86] *See id.* at 479.

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investors by "maintaining" its stock price at an artificially high level.[87] Propping up a stock through misleading omissions means that a negative price impact takes place on the "back-end," when the bad news that had been suppressed eventually becomes known.[88]

The price maintenance theory of securities fraud is uncontroversial in certain respects. It is black letter law that a material omission can create liability under Rule 10b-5, just as an affirmative misstatement can.[89] The use of price maintenance claims by private securities plaintiffs is relevant to class certification under *Halliburton II*, however, because it potentially complicates a corporate defendant's ability to rebut the *Basic* fraud-on-the-market presumption by showing a lack of price impact.[90] This is especially so, since some courts have adopted a relatively broad interpretation of the kinds of omissions that can maintain an inflated stock price,[91] most notably, the Second Circuit in its 2016 decision, *In re Vivendi, S.A. Securities Litigation.*[92] Post-*Halliburton II* decisions from the Seventh and Eleventh Circuits have also taken a similarly broad approach.[93] The Fifth and Eight Circuits, meanwhile, have issued opinions that construe the scope of price maintenance claims more narrowly,[94] as have a handful of district court decisions from the Sixth and Ninth circuits.[95]

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[87] *See id.*

[88] *See id.* at 478.

[89] *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."); *see also* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 90 (1999) (analyzing the relationship between omissions and materiality standards in securities fraud claims).

[90] *See* Weingarten, *supra* note 76, at 462 ("It is difficult for most corporate defendants to show a lack of back-end price impact because plaintiffs typically plead back-end dates where there was demonstrable price impact.").

[91] *See id.* at 480 ("Courts are currently split on whether to adopt the price maintenance theory.").

[92] *In re* Vivendi, S.A. Sec. Litig., 838 F.3d 223 (2d Cir. 2016) (holding that defendant Vivendi maintained an artificially inflated stock price by issuing statements that failed to disclose internal concerns about the company's liquidity risk).; *see also* Waggoner v. Barclays PLC, 875 F.3d 79, 87 (2d Cir. 2017) (holding that defendant Barclays maintained an inflated stock price by downplaying its clients' exposure to high-frequency trading); *In re* Pfizer Inc. Sec. Litig., 819 F.3d 642, 659 (2d Cir. 2016) (holding that defendant Pfizer had maintained an inflated stock price, after acquiring the rights to certain anti-inflammatory drugs, by failing to disclose concerns over side-effects that were directed at the drug developer prior to acquisition).

[93] *See* Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 418-19 (7th Cir. 2015) (holding that front-end price inflation claims and back-end price maintenance claims are "fundamentally" indistinguishable from a legal perspective); FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1315, 1317 (11th Cir. 2011) (holding that "[d]efendants whose fraud *prevents* preexisting inflation in a stock price from dissipating are just as liable as defendants whose fraud introduces inflation into the stock price in the first instance."); Schleicher v. Wendt, 618 F.3d 679, 683 (7th Cir. 2010) (holding that there may be liability where an "unduly optimistic statement stops a [stock] price from declining").

[94] *See* IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775, 783 (8th Cir. 2016) (rejecting plaintiff's price maintenance claim because "that theory provided no evidence that refuted defendants' overwhelming evidence of no price impact)"; Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 665 (5th Cir. 2004) (requiring plaintiffs to demonstrate that a "positive statement actually affected a stock's price").

[95] *See* Willis v. Big Lots, Inc., 242 F. Supp. 3d 634, 653 (S.D. Ohio 2017) (rejecting a price maintenance claim on grounds that lack of front-end price impact is sufficient to rebut the *Basic* presumption); *In re* Finisar Corp. Sec. Litig., No. 5:11-cv-01252, 2017 WL 6026244, at *7 (N.D. Cal. Dec. 5, 2017) (rejecting a price maintenance claim on grounds that lack of front-end price impact is sufficient to rebut the *Basic* presumption).

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As will be shown directly below, *Goldman* represents a perfect storm that combines nearly all the leading doctrinal muddles in the law of private securities fraud actions. Ever since *Basic*, the Supreme Court has struggled to formulate a coherent answer to the critical question: how can corporate securities fraud defendants rebut the fraud-on-the-market presumption that otherwise allows for near-automatic class certification? With *Halliburton II*, the Court signaled that the answer has something to do with price impact. Yet, as Professor Fox has aptly stated, the meaning of *Halliburton II* "all depends on what defendants need to show to establish no impact on price."[96] The *Goldman* case highlights that ambiguity on a number of levels: it reopens issues about the relative burden of proof, the scope of price maintenance claims, the role of expert testimony, and more.

II. *GOLDMAN* IN THE LOWER COURTS

In practice, the law of private securities fraud largely revolves around the class certification process. That process is governed by a complicated web of doctrinal categories crafted over the years in the federal courts. Assessing those formal doctrines in the abstract is often a mistake, because they cannot be evaluated without a realistic understanding of how securities class actions actually play out on the ground. This part therefore analyzes the *Goldman* case as it developed in the lower courts. Part A of this Section traces the roots of the *Goldman* lawsuit to the financial crisis of 2008. Part B covers the road to class certification in the Southern District of New York. Part C reviews the Second Circuit's ruling upholding class certification on appeal.

A. Goldman Sachs, Abacus & the Financial Crisis

The *Goldman* case arose from Goldman Sachs' dealings in complex financial instruments during the 2000s housing bubble and ensuing financial crisis.[97] In particular, the primary focus of the case is Goldman Sachs' involvement with a synthetic collateralized-debt obligation (CDO), known as ABACUS 2007 AC-1 (Abacus).[98] The Abacus transaction ultimately sparked a firestorm of scrutiny for Goldman Sachs and generated one of the biggest scandals to emerge from the financial crisis. The specific timeline of that scandal, sketched below, formed the basis for the core allegations in the *Goldman* class complaint.

At a high level, CDOs are built from a pool of credit default swaps, which are contracts that essentially function as insurance policies on a separate basket of reference securities.[99] Synthetic CDOs have an inherently two-sided structure.[100] One investor must take a long position

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[96] *See* Fox, *It All Depends*, *supra* note 19, at 437.

[97] For a full account of the Abacus deal, *see generally* Steven M. Davidoff, Alan D. Morrison & William J. Wilhem Jr., *The SEC v. Goldman Sachs: Reputation, Trust, and Fiduciary Duties in Investment Banking*, 37 J. CORP. L. 529 (2012); *see also* William W. Bratton & Adam J. Levitin, *A Transactional Genealogy of Scandal: From Michael Milken to Enron to Goldman Sachs*, 86 S. CAL. L. REV. 783, 847–63 (2013).

[98] Davidoff et al., *supra* note 97, at 530.

[99] For a technical overview of the mechanics of CDOs, *see generally* Laure S. Goodman, *Synthetic CDOs*, J. DERIVATIVES, Spring 2002, at 60.

[100] *See id.* at 61.

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on the reference securities; the long investor profits on a regular stream of "insurance premiums" that are paid out under the credit default swaps.[101] Another investor takes a short position. For the short investor, profits from the deal are more speculative: the short position only receives a payout if the underlying reference securities are written-down or enter default.[102]

The path to Abacus began in late 2006, when hedge fund manager John Paulson approached Goldman Sachs about structuring a deal that would allow him to short subprime mortgage-backed securities.[103] Goldman Sachs, then acting as an intermediary, identified two counterparties willing to take a long position: IKB Deutsche Industriebank AG (IKB Deutsche) and ACA Management LLC (ACA).[104] At various points in the process, all three investors participated in selecting the portfolio of mortgage-backed securities referenced in the CDO.[105] Goldman Sachs also retained a modest long position in the reference securities, a standard practice for market-makers in CDOs and similar structured financial products.[106]

Paulson was the clear winner on the Abacus bet. When the housing bubble began to burst over the course of 2006 and 2007, many mortgage-backed securities—even those with a AAA rating—suffered a massive drop in value.[107] The junk grade mortgage-backed securities referenced in the Abacus CDO did too. As a result, Paulson made spectacular profits off the deal, netting over a billion dollars in 2007 alone.[108] IKB Deutsche and ACA, meanwhile, incurred substantial losses, and to a lesser degree Goldman Sachs did as well.[109]

Abacus soon gained the interest of federal regulatory authorities. In August of 2008, the SEC notified Goldman Sachs that it had initiated an investigation into the deal.[110] Then on July 29, 2009, the SEC issued Goldman Sachs a Wells Notice—an administrative document which notifies parties that SEC staff attorneys are contemplating the commencement of a formal enforcement action and provides for a final opportunity to respond through what is known as a Wells Submission.[111] Not satisfied with Goldman's rebuttal, the SEC filed a complaint against Goldman Sachs for civil securities fraud in the Southern District of New York on April 16, 2010.[112] The complaint alleged that Goldman Sachs had defrauded IKB Deutsche and ACA by failing to disclose Paulson's role as the short investor in Abacus, thereby allowing Paulson to skew the CDO

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[101] *See id.*

[102] *See id.*

[103] *See* Davidoff et al., *supra* note 97, at 535.

[104] *See id.*

[105] *See id.* at 536.

[106] *See id.*

[107] *See id.* at 536–68.

[108] *See id.*

[109] *See id.*

[110] *See id.* at 531.

[111] *See* WHX Corp. v. S.E.C., 362 F.3d 854, 860 (D.C. Cir. 2004) (citing 17 C.F.R. §202.5(c)) (discussing the purpose of a Wells Submission); *In re* Initial Pub. Offering Sec. Litig., No. 21 MC 92 (SAS), 2004 WL 60290, at *1 (S.D.N.Y. Jan. 12, 2004) (explaining the legal significance of a Wells Notice).

[112] Complaint, SEC v. Goldman Sachs & Co., No. 1:10-cv-3229 (S.D.N.Y. Apr. 16, 2010) 2010 WL 1508202.

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toward reference securities that he knew would fail.[113] The SEC complaint also named Fabrice Tourre, a mid-level trader at Goldman Sachs who was responsible for designing the Abacus transaction.[114]

Goldman Sachs' troubles from Abacus quickly escalated after the SEC filed its complaint in April of 2010. Later the same month, Goldman executives were called for testimony before the Senate Homeland Security Committee at a contentious multi-day hearing.[115] Among other things, the Senate hearing publicized an email that Tourre had sent to his girlfriend, in which he referred to himself as the "Fabulous Fab" and bragged about the inevitable collapse of the financial system.[116] The following week, the Wall Street Journal reported rumors of a criminal investigation into Goldman Sachs by the Department of Justice.[117] On July 14, 2010, Goldman Sachs entered into a $550 million settlement with the SEC, which at the time was the largest enforcement penalty ever paid by a Wall Street bank.[118] The Financial Industry Regulatory Authority (FINRA), a private regulatory organization for the securities broker-dealer industry, also fined Goldman Sachs for $650,000 on November 9, 2010.[119]

Despite its role as a cause célèbre of the financial crisis, however, the Abacus transaction was surprisingly unremarkable. As Professor Davidoff and co-authors have noted, "The ABACUS transaction was not particularly innovative, and its execution was not unusual."[120] Indeed, in structuring the deal, Goldman Sachs largely conformed to "received norms and ways of doing

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[113] *Id.* ¶ 3("In sum, GS&Co arranged a transaction at Paulson's request in which Paulson heavily influenced the selection of the portfolio to suit its economic interests, but failed to disclose to investors, as part of the description of the portfolio selection process contained in the marketing materials used to promote the transaction, Paulson's role in the portfolio selection process or its adverse economic interests.").

[114] *Id.* ¶ 9.

[115] *Wall Street and the Financial Crisis: Role of Inv. Banks: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. III (2010); Andrew Clark, *Goldman Sachs: Fabrice Tourre Defends his 'Frankenstein products'*, GUARDIAN (Apr. 27, 2010) ("In an unusually gruelling political examination of a single company, senior Goldman executives struggled to justify seemingly flawed deals struck at the height of the credit crunch.").

[116] *See* Complaint, *supra* note 112, at ¶ 18 ("More and more leverage in the system, The whole building is about to collapse anytime now . . . Only potential survivor, the fabulous Fab . . . standing in the middle of all these complex, highly leveraged, exotic trades he created without necessarily understanding all of the implications of those monstruosities!!!").

[117] *See* Matt Phillips, *Goldman Shares Down on Criminal Probe Report, Downgrade*, WALL ST. J. (Apr. 30, 2010). The Department of Justice announced that it had dropped its investigation of Goldman in April of 2012. *See* David Ingram & Aruna Viswanatha, *U.S. Justice Department Drops Goldman Financial Crisis Probe*, REUTERS (Aug. 9, 2012), https://www.reuters.com/article/uk-usa-goldman-no-charges/u-s-justice-department-drops-goldman-financial-crisis-probe-idUKBRE87903520120810.

[118] *See* SEC RELEASE NO. 2010-123, *supra* note 3. In its settlement agreement, Goldman Sachs did not admit liability, but did include an acknowledgment that its marketing materials for the Abacus CDO contained "incomplete information" about the portfolio selection process. *See id.* Tourree went to trial and was found liable for civil securities fraud in 2013. *See* Justin Baer, Chad Bray & Jane Eaglesham, *'Fab' Trader Liable in Fraud; Jury Finds Ex-Goldman Employee Tourre Misled Investors in Mortgage Security*, WALL ST. J. (Aug. 2, 2013).

[119] *See* Press Release, Nancy Condon & George Smaragdis, FINRA, Goldman Sachs to Pay $650,000 for Failing to Disclose Wells Notices (Nov. 9, 2010).

[120] *See* Davidoff et al., *supra* note 97, at 531.

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investment-banking business."[121] The purportedly defrauded parties, IKB Deutsche and ACA, were highly sophisticated investors who had staked millions (or even billions) in similar financial instruments. If anything, John Paulson, a little-known outsider at the time, was a relative amateur by comparison.[122] And as mentioned, Goldman Sachs itself lost money on the deal.[123] The Washington Post therefore offered a reasonable assessment when it called the SEC's enforcement action "flimsy."[124] The Financial Times also described the agency as playing a "high risk game" on "uncertain ground."[125] From these inauspicious beginnings in one of the more misunderstood episodes of the financial crisis, the *Goldman* case soon made its way into federal court.

B. Proceedings in the Southern District of New York

Goldman Sachs shareholders started filing a series of private securities class actions against the firm and its executives as early as April of 2010, while the Senate's Abacus hearings were still ongoing.[126] On March 25, 2011, the cases were consolidated in the Southern District of New York before Judge Paul Crotty.[127] The amended class complaint—brought on behalf of all purchasers of Goldman Sachs stock in the period from February 5, 2007 to June 10, 2010—sought $13 billion

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[121] *See id.*; *see also* Joseph A. Grundfest, *The United States Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre*, STAN. U.: ROCK CTR. FOR CORP. GOVERNANCE (Apr. 27, 2010) ("The more you know about the market, the less likely you are to side with the SEC's interpretation of events."). The economist Darrell Duffie, who is arguably the world's leading authority on CDOs, took a similar view. *See* Bill Snyder, *Stanford Professors Assess Landmark SEC-Goldman Suit*, STAN. GRADUATE SCH. BUSINESS (April 1, 2010) ("'It would be a different story if Goldman conspired with Paulson to put bad collateral into the structure in order to take advantage of an unsophisticated investor, but I myself have seen no evidence of it yet,' Duffie said in an interview after the discussion. 'Despite the popular impression that Goldman held a short position on Abacus, it did not,' Duffie said.").

[122] *See generally* GREGORY ZUCKERMAN, THE GREATEST TRADE EVER: THE BEHIND-THE-SCENES STORY OF HOW JOHN PAULSON DEFIED WALL STREET AND MADE FINANCIAL HISTORY 3 (2010) (describing Paulson as "a relative amateur in real estate, and not a celebrated mortgage, bond, or housing specialist[.]"). To the extent Goldman Sachs surreptitiously helped Paulson pack the Abacus CDO with toxic securities, that was a wasted effort. The entire market for subprime mortgage-backed securities collapsed in 2007, and the reference portfolio selected for Abacus did not underperform equivalent securities at the time. *See* Richard Stanton & Nancy Wallace, *ABX.HE Indexed Credit Default Swaps and the Valuation of Subprime MBS*, U.C. BERKELEY: FISHER CTR. FOR REAL EST. & URB. ECON. (Feb. 15, 2008), https://escholarship.org/uc/item/5s75x0ns#author.

[123] *See supra* note 109 and accompanying text.

[124] Sebastian Mallaby, *Goldman's Non-Scandal*, WASH. POST (April 21, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042003528.html.

[125] Brooke Masters, *SEC Engages in High Risk Game*, FIN. TIMES (Apr. 19, 2020), https://www.ft.com/content/b594015e-4bd4-11df-a217-00144feab49a ("SEC is on particularly uncertain ground because it has questioned a transaction involving professional investors, rather than the retail clients it most often protects.").

[126] *See* Class Action Complaint, Draft v. Goldman Sachs Group, Inc., No. 10 CV 4812 (S.D.N.Y. June 21, 2010) 2010 WL 2652367; Complaint for Violation of the Federal Securities Laws, Richman v. Goldman Sachs Group, Inc., No. 10 CIV 3461 (S.D.N.Y. Apr. 26, 2010) 2010 WL 1654115.

[127] Richman v. Goldman Sachs Grp., Inc.,, 274 F.R.D. 473, 475 (S.D.N.Y. 2011) (explaining the basis for a consolidated class).

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in damages based on a claim that Goldman Sachs was liable for federal securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5.[128]

1. Allegations in the Class Complaint

The crux of the class complaint was that Goldman Sachs had made two broad classes of material misstatements to its shareholders. First, the Complaint alleged that Goldman Sachs had failed to properly disclose the details of regulatory investigations into Abacus.[129] Although SEC filings by Goldman Sachs in 2010 refer to "requests . . . from various governmental agencies" for information as part of "investigations presently underway,"[130] the Complaint argued that such disclosures were rendered misleading because they omitted any mention of the SEC Wells Notice from July of 2009.[131] In addition, the Complaint asserted that Goldman had an affirmative duty to disclose receipt of the Abacus Wells Notice under SEC Regulation S-K[132] and applicable FINRA rules.[133]

Second, the Complaint points to a series of "business principles" statements made by Goldman Sachs from February of 2007 to June 2010 and argues that they functioned to "hid[e] . . . the Company's improper business practices with respect to Abacus."[134] Because these alleged misstatements went on to form the core of plaintiffs' case, and of the ensuing legal disputes that sent *Goldman* to the Supreme Court, they are worth quoting in full:

- "[W]e increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client."[135]
- "We have extensive procedures and controls that are designed to . . . address conflicts of interest."[136]
- "Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow."[137]

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[128] An amended complaint was filed shortly after the case was consolidated, on July 25, 2011. Consolidated Amended Complaint, *supra* note 5, ¶¶ 338-40 (citing Section 10(b) and Rule 10b-5 as a cause of action). The claims against three Goldman Sachs executives—Lloyd Blankfein (CEO), Gary Cohn (President and COO), and David Viniar (CFO)—were brought under the "control person" liability provisions in Section 20(a) of the Exchange Act. *Id.* ¶¶ 342–43.

[129] *Id.* ¶ 49.

[130] *Id.* ¶ 129.

[131] *Id.* ¶¶ 127–31.

[132] *Id.* ¶¶ 113–14. Item 103 of Regulation S-K requires reporting firms to disclose "legal proceedings known to be contemplated by governmental authorities." 17 C.F.R. § 229.103 (2012).

[133] Consolidated Amended Complaint, *supra* note 5, ¶¶ 95, 100–103.

[134] *Id.* ¶ 132.

[135] *Id.* ¶134 (quoting Goldman Sachs' 2007 Annual Report).

[136] *Id.* ¶ 135 (quoting Goldman Sachs' Annual Reports for 2008, 2009, and 2010).

[137] *Id.* ¶ 154 (quoting Goldman Sachs' Annual Reports from 2006 to 2010).

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- "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard."[138]
- "Integrity and honesty are at the heart of our business."[139]
- "Most importantly, and the basic reason for our success, is our extraordinary focus on our clients."[140]
- "Our reputation is one of our most important assets."[141]

The Complaint frames the legal significance of the allegedly misleading statements listed above within a price maintenance theory of securities fraud. The reasoning is as follows. Goldman Sachs defrauded its private investors in Abacus—ACA and IBK Deutsche—by failing to disclose conflicts of interests that allowed John Paulson to participate in the CDO on favorable terms.[142] Goldman Sachs defrauded its public investors, in turn, by espousing business principles that were inconsistent with its dealings in Abacus.[143] In making those statements, Goldman Sachs was able to maintain an artificially inflated stock price, above the level that its shares would have traded had the true nature of its cutthroat business model (exemplified by the Abacus transaction) been known.[144]

The Complaint further asserts that Goldman Sachs' artificially inflated stock price collapsed when the falsity of its public statements was exposed on four dates in 2010:[145]

- On April 16, when the SEC filed its enforcement action on Abacus, Goldman's stock dropped 13%.[146]
- On April 26, after damaging emails were released at the Senate Abacus hearings, Goldman's stock dropped 3.5%.[147]
- On April 29, when the Wall Street Journal reported on a possible criminal investigation by the Department of Justice, Goldman's stock dropped 9.5%.[148]
- On June 10, amid reports that the SEC was expanding its investigation beyond Abacus to other CDOs, Goldman's stock dropped 2%.[149]

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[138] *Id.* (quoting Goldman Sachs' Annual Reports from 2006 to 2010).

[139] *Id.* (quoting Goldman Sachs' Annual Reports from 2006 to 2010).

[140] *Id.* (quoting Goldman CFO David Viniar from a 2007 investors conference call).

[141] *Id.* (quoting Goldman Sachs' Annual Reports from 2006 to 2010).

[142] *Id.* ¶ 2.

[143] *Id.* ¶¶ 19–20.

[144] *Id.* ¶ 29 ("Goldman's materially false and misleading statements and omissions caused Goldman's stock to trade at artificially inflated levels during the Class Period.").

[145] *Id.* ¶ 330 ("The inflation in Goldman's stock was dissipated through a series of partial disclosures of the truth that revealed that, contrary to its representations, the Company had engaged in the abused conduct of placing the Company's interests above its own clients.").

[146] *Id.* ¶ 331.

[147] *Id.* ¶ 333.

[148] *Id.* ¶ 334.

[149] *Id.* ¶ 335.

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The Complaint references $13 billion in damages, an amount equal to the decrease in market capitalization that Goldman Sachs experienced on April 16, as a lower bound for the total losses imposed on Goldman Sachs shareholders due to its misstatements.[150]

2. The Motion to Dismiss

Goldman Sachs moved to dismiss the Complaint on October 6, 2011.[151] The motion to dismiss argued that Goldman had no affirmative duty to disclose the timeline of the SEC Wells Notice process.[152] It also argued that the alleged misrepresentations regarding Goldman's business principles were immaterial—in effect, they amounted to statements of opinion, puffery—and that plaintiff had therefore put forward an unactionable claim based on generalized assertions of corporate mismanagement.[153] Lastly, the motion to dismiss claimed that plaintiffs had failed to adequately plead loss causation.[154] According to Goldman, its stock price fell on the four dates in question because investors responded to news that the firm was exposed to potentially costly regulatory investigations and associated penalties, rather than information contradicting its past public statements.[155]

On June 21, 2012, the district court issued an order denying the motion to dismiss in part.[156] Judge Crotty agreed with Goldman Sachs that its failure to disclose the SEC's Wells Notice was not actionable and dismissed the class plaintiff's claims as to those allegations.[157] Although firms are under a duty to disclose material pending legal actions, the court reasoned, a Wells Notice is no such thing.[158] "At best, a Wells Notice indicates not litigation but only the desire of the Enforcement staff to move forward, which it has no power to effectuate."[159] However, the district court denied Goldman's motion to dismiss the claims based on its statements of business principles.

[150] *Id.* ¶¶ 331–32.

[151] Defendant's Memorandum of Law in Support of Their Motion to Dismiss the Consolidated Complaint, *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 1:10-cv-03461 (S.D.N.Y. Oct. 6, 2011) 2011 WL 7628045.

[152] *See id.* at 11–12.

[153] *See id.* at 2–3, 20–21. The motion to dismiss also contended that Goldman Sachs's public financial statements contain extensive disclosures describing its internal procedures for screening conflicts of interest. *Id.* at 9–10, 19.

[154] *See Id.* at 27–29.

[155] *See id.*; *see also* Defendant's Reply Memorandum of Law in Further Support of Their Motion to Dismiss the Consolidated Complaint at 14–15, *In re* Goldman Sachs Group, Inc. Sec. Litig., No. 1:10-cv-03461, (S.D.N.Y. Dec. 12, 2011) 2011 WL 7628047.

[156] *See* Richman v. Goldman Sachs Grp., Inc., 868 F. Supp. 2d 261, 276, 280 (S.D.N.Y. 2012).

[157] *Id.* at 276.

[158] *Id.* at 272 ("A Wells Notice may be considered an indication that the staff of a government agency is considering making a recommendation [to bring an enforcement action], but that is well short of litigation.").

[159] *Id.* at 274. The district court further noted that—while Goldman may have been required to disclose the Well Notice under failure to comply with the disclosure requirements of Regulation S-K and FINRA represents a regulatory violation—it does not imply a related duty to disclose to investors that could give rise to a private right of action for fraud under Section 10(b). *Id.* at 275.

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Judge Crotty's sharpest words were directed at Goldman Sachs' contention that its business principles statements were immaterial: "Goldman's arguments in this respect are Orwellian. Words such as 'honesty,' 'integrity,' and 'fair dealing' apparently do not mean what they say; they do not set standards; they are mere shibboleths. If Goldman's claim of 'honesty' and 'integrity' are simply puffery, the world of finance may be in more trouble than we recognize."[160] As a result, "[t]he Court cannot say that Goldman's statements that it complies with the letter and spirit of the law and that its success depends on such compliance, its ability to address 'potential' conflict of interests, and valuing its reputation, would be so obviously unimportant to a reasonable investor."[161]

The district court also determined that the Complaint had adequately pled loss causation.[162] Judge Crotty stated that, "[w]hile Defendants argue that the lawsuits and investigations themselves cause the stock decline, these suits and investigations can more appropriately be seen as a series of 'corrective disclosures,' because they revealed Goldman's material misstatements—and indeed pattern of making misstatements—and its conflicts of interest."[163] Accordingly, "[p]laintiffs' allegations are thus sufficient at this juncture to show that Goldman's misstatements and omissions caused, or at least contributed to, Plaintiffs' losses."[164]

Although the district court's ruling on the duty to disclose a Wells Notice was essentially sound,[165] its analysis of the materiality issue is questionable. For one, a materially misleading statement must be a statement of fact. Goldman Sachs' business principles, as obnoxious as they may be, are hard to read as anything more than vacuous platitudes for that same reason. Taken literally, they are not even mutually consistent. If Goldman's success depends on always putting its client's interest first—and also on its unswerving adherence to ethical principles—the implication is that none of its Wall Street clients ever put money over ethics.[166] In 2009, when Goldman CEO Lloyd Blankfein infamously claimed the bank was "doing God's work,"[167] those remarks were received with ridicule rather than a mistaken belief that he was operating a religious institution.

Material statements in the securities laws are also understood as factual assertions that are compelling enough to alter a reasonable investor's buy-sell calculus in light of the "total mix of information" that is publicly available in the marketplace.[168] In other words, a reasonable investor could justify a decision to buy or hold Goldman Sachs stock based on the aspirational statements in its SEC disclosures. Such credulity is far-fetched at a time when the firm was being called a

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[160] *Id.* at 277 n.8.

[161] *Id.* at 280 (citing Lapin v. Goldman Sachs Grp., Inc., 506 F.Supp.2d 221, 240–41 (S.D.N.Y. 2006)).

[162] *Id.* at 280–81.

[163] *Id.* at 282 (citing *In re* Bristol Myers Squibb Co. Sec. Litig., 586 F.Supp.2d 148, 164 (S.D.N.Y. 2008)).

[164] *Id.* at 283 (citing Emergent Capital Inv. Mgmt., LLC v. Stoneparth Grp*., Inc*., 343 F.3d 189, 197 (2d Cir. 2003)).

[165] *See* Alison B. Miller, *Navigating the Disclosure Dilemma: Corporate Illegality and the Federal Securities Laws*, 102 GEO. L.J. 1647, 1654 (2014) (reviewing the caselaw on the duty to disclose enforcement actions).

[166] *See supra* notes 137 & 138 and accompanying text (quoting the class complaint).

[167] *See Goldman Sachs Boss Says Banks Do "God's Work"*, REUTERS (Sept. 23, 2009).

[168] *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 38 (2011) (reciting the standard definition for materiality in similar terms).

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"great vampire squid wrapped around the face of humanity"[169] in the press. Arguing materiality in this context is akin to purchasing a used car of uncertain quality *because* the dealership has posted a sign declaring that "we always put the customer first and our job is to get you the best deal in town." The business principles cited by the class Complaint are analogous to the dealership banner, and in fact were largely cut-and-paste from a vision statement released by Goldman executives John Whitehead and John Weinberg in 1979.[170]

More straightforwardly, the district court's ruling on materiality ran afoul of controlling precedent. In a 2009 case involving nearly identical facts, the Second Circuit held that JP Morgan's statements about its "stand-setting reputation for integrity" were immaterial.[171] Ironically, in light of the decade of litigation to follow, the clearest legal error in *Goldman* was never subject to appeal. Judge Crotty denied Goldman Sachs' motion for reconsideration of the motion to dismiss.[172] The district court rejected a subsequent motion for interlocutory appeal to the Second Circuit as well.[173]

3. Class Certification

Judge Crotty's denial of the motion to dismiss also proved pivotal because it triggered an end to the PSLRA's stay on discovery and kicked off a prolonged battle of experts before the trial court. Three years later, after the production of seven million documents and thirty-six sworn depositions,[174] plaintiffs moved for class certification.[175] The battle of experts during this stage of the litigation entangled the district court in the core doctrinal questions in securities law as well as the legal issues that ultimately reached the Supreme Court for review.

Plaintiffs' motion for class certification invoked the fraud-on-the-market presumption under *Basic* and submitted the report of an expert witness, Professor John Finnerty, in support.[176]

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[169] Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE, July 9, 2009, at 52. *See generally* WILLIAM D. COHAN, MONEY AND POWER: HOW GOLDMAN SACHS CAME TO RULE THE WORLD (2012).

[170] GOLDMAN SACHS: OUR FIRM HISTORY, *Goldman Sachs Introduces 14 Business Principles that Define the Firm*, https://www.goldmansachs.com/our-firm/history/moments/1979-business-principles.html.

[171] *See* ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 205–06 (2d Cir. 2009) (holding that JP Morgan's statements concerning its "standard-setting reputation for integrity" and "highly disciplined risk management" were immaterial as a matter of law because "a reasonable investor would not depend on [such statements] as a guarantee that [the bank] would never take a step that might adversely affect its reputation"); *see also In re* Citigroup, Inc. Sec. Litig., 330 F.Supp.2d 367, 375 (S.D.N.Y. 2004) (holding that the business principles in Citigroup's financial statements were immaterial despite its preceding entanglements with the Enron scandal).

[172] *See In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC), 2014 WL 2815571, at *6 (S.D.N.Y. June 23, 2014) (denying motion for reconsideration).

[173] *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC), 2014 WL 5002090, at *3 (S.D.N.Y. Oct. 7, 2014) (rejecting motion for interlocutory appeal).

[174] *See* Defendant's Memorandum of Law in Support of Their Motion for Summary Judgment at 1, No. 1:10-cv-03461-PAC (S.D.N.Y. Nov. 6, 2015) 2015 WL 7894706 [hereinafter Summary Judgment Memo] (describing the extent of discovery prior to class certification).

[175] *See* Plaintiff's Motion for Class Certification Opinion and Order, *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC) (S.D.N.Y. Jan. 30, 2015).

[176] *See id.* at 18–20; *see also* Declaration of John D. Finnerty, Ph.D. in Support of Lead Plaintiff's Motion for Class Certification, No. 1:10-cv-03461-PAC (S.D.N.Y. Jan. 30 2015) 2015 WL 2881329. Rebuttal Declaration of John D.

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Professor Finnerty's expert report first found that Goldman Sachs' stock traded in an efficient market, as required by *Basic*.[177] The Finnerty Report then presented a series of event studies to demonstrate that Goldman's stock experienced statistically significant (negative) abnormal returns on three of the four key dates cited in the Complaint.[178] Lastly, it described the loss causation methodology that Prof. Finnerty would use to estimate damages for the class based on the economic loss per share.[179]

In opposition, Goldman Sachs did not seriously contest the market efficiency point; instead, it attempted to rebut the *Basic* presumption by showing lack of price impact under *Halliburton II*.[180] Evidence from three expert witnesses was produced to that end. One expert report by Professor Stephen Choi sought to isolate the impact of regulatory investigations on share prices by collecting a sample of 117 SEC enforcement actions.[181] The Choi Report then ran event studies around the announcement of those actions and found that, among the SEC enforcements with characteristics most similar to that of the Abacus investigation, the result was an average stock price decline of 8.07% (a figure comparable to Professor Finnerty's finding of 9.27%).[182] Another expert report, by financial accountant Charles Porten, reviewed the commentary of stock market analysts reporting on Goldman Sachs' financial disclosures during the class period.[183] The Porten Report found that, of the 884 analyst reports in its sample, no reference to Goldman Sachs' business principles statements appeared in discussions of its stock price.[184]

A third expert report, provided by Professor Paul Gompers, critiqued plaintiffs' Finnerty Report directly.[185] The Gompers Report ran event studies around the 18 dates on which the alleged misstatements cited in the Complaint were made and found no positive inflationary impact on Goldman's stock price.[186] The Gompers Report also analyzed 34 dates on which Goldman Sachs' received negative publicity regarding its business practices or conflicts of interests—all prior to the SEC's announcement of its Abacus action—and found no negative impact on its stock price for those dates.[187] Lastly, the Gompers Report argued that Professor Finnerty's damages

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Finnerty, Ph.D. in Support of Lead Plaintiffs' Motion for Class Certification, No. 1:10-cv-03461-PAC, (S.D.N.Y. May 15, 2015) 2015 WL 13778797.

[177] *See* Declaration of John D. Finnerty, Ph.D, *supra* note 176, at 4–11. The standard legal test for market efficiency for purposes of invoking the *Basic* presumption is based on five "*Cammer* factors" set forth in Cammer v. Bloom, 711 F. Supp. 1264 (D.N.J. 1989).

[178] See Declaration of John D. Finnerty, Ph.D, *supra* note 176, at 20–31. April 26, 2010, the date of the Senate hearings on Abacus, was the one event that did not reflect a statistically significant stock price drop. *Id.* at 25–26.

[179] *See id.* at 44–45.

[180] *See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification at 15–21, *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 1:10-cv-03461-PAC (S.D.N.Y. Apr. 6, 2015) 2015 WL 13696686.

[181] *See* Declaration of Stephen Choi, Ph.D., (S.D.N.Y. Apr. 6, 2015) 2015 WL 11661898.

[182] *See id.* ¶¶ 34–35, 47.

[183] *See* Declaration of Charles Porten, CFA, No. 1:10-cv-03461-PAC (S.D.N.Y. Apr. 6, 2015) 2015 WL 5177848.

[184] *See id.* ¶¶ 20–23.

[185] *See* Declaration of Paul Gompers, Ph.D., No. 1:10-cv-03461-PAC (S.D.N.Y. Apr. 6, 2015) 2015 WL 5177846.

[186] *See id.* ¶¶ 27–47.

[187] *See id.* ¶¶ 48–60.

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calculation was unreliable because it assumed the entirety of plaintiffs' economic loss from Goldman's stock price declines could be attributed to its prior alleged misstatements, without providing any methodology for establishing a causal relationship between those two events.[188]

On September 24, 2015, the district court issued an order granting class certification.[189] Judge Crotty's opinion first determined that Plaintiffs triggered *Basic* presumption based on the Finnerty Report's findings of market efficiency.[190] It then found that Goldman Sachs bore the burden of proving lack of price impact under *Halliburton II*,[191] and after reviewing the expert evidence, held that "Defendants have failed to demonstrate a complete lack of price impact."[192] The district court opinion explained that the Gompers Reports' analysis of 34 dates when Goldman's business practices received negative publicity amounts to a "'truth on the market' defense" which "is not appropriate at the class certification stage" because it "speaks to the statements' materiality and not price impact."[193] Judge Crotty further stated that "Dr. Choi's report . . . [analyzing] the announcements of enforcement actions . . . fails to demonstrate that it would cause the entirety of the decline that occurred here."[194] Regarding Professor Gompers criticism of the Finnerty Report's loss causation methodology, the district court concluded that "[t]he link [between Goldman's misstatements and its stock price decline] is obvious, and Defendants have failed to conclusively sever this link."[195]

Shortly thereafter, Goldman Sachs exercised the automatic right of interlocutory appeal on class certification orders provided under Federal Rule 23(f).[196] On January 12, 2018, a Second Circuit panel—consisting of Judges Wesley, Cabranes, and Sessions—unanimously vacated the district court's order granting class certification.[197] Judge Wesley's opinion on behalf of the panel began by observing that, although Goldman Sachs bore the burden of persuasion under Second Circuit precedents,[198] the district court's language that Goldman Sachs had not "conclusively"

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[188] *See id.* ¶¶ 118–34. The skirmish between the parties' experts concluded with an additional pair of rebuttal reports from Profs. Finnerty and Gompers. *See* Rebuttal Declaration of John D. Finnerty, Ph.D*, supra* note 176; Reply Declaration of Paul Gompers, Ph.D, 1:10-cv-03461-PAC (S.D.N.Y. June 23, 2015).

[189] *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC), 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015).

[190] *Id.* at *6.

[191] *Id.* at *4 n.3 ("Defendants must demonstrate a lack of price impact by a preponderance of the evidence.").

[192] *Id.* at *6.

[193] *Id.*

[194] *Id.* at *7.

[195] *Id.*; *see also id.* at *8 ("[A]t the class certification stage, Plaintiffs must only show that their damages model "actually measure[s] damages that result from the class's asserted *theory* of injury . . . . The possibility that Defendants could prove that some amount of the price decline is not attributable to Plaintiffs' theory of liability does not preclude class certification."); *id.* ("Finally, Dr. Finnerty asserts that his methodology will be able to account for any so-called inflation from the enforcement actions and Defendants have not suggested that such disaggregation would be impossible to determine.").

[196] Docketing Notice, Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. (*ATRS I*), 879 F.3d 474 (2d Cir. 2018) No. 16-250 (Goldman Sachs' notice of civil appeal). Goldman Sachs also moved for summary judgment while its interlocutory appeal was pending. *See* Summary Judgment Memo, *supra* note 174.

[197] *ATRS I*, 879 F.3d 474 (2d Cir. 2018).

[198] *Id.* at 484 (citing Waggoner v. Barclays PLC, 875 F.3d 79, 101 (2d Cir. 2017)).

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proved a "complete absence of price impact" appeared to set a bar above the preponderance of the evidence standard.[199] The Second Circuit also held that the district court committed legal error by characterizing the Gompers Report as an inadmissible "truth on the market" defense, rather than relevant evidence concerning lack of price impact.[200] After noting that Judge Crotty had granted class certification "[w]ithout holding an evidentiary hearing or oral argument,"[201] the Second Circuit remanded the case back to the district court for additional evidentiary hearings and a fuller reconsideration of whether Goldman had met the applicable burden of proof for rebutting the fraud-on-the-market presumption under *Halliburton II*.[202]

As directed on remand, Judge Crotty accepted supplemental briefing from the parties and held a hearing on the expert evidence. On August 14, 2018, the district court issued an order recertifying the plaintiff class.[203] In a brief opinion supporting the decision, Judge Crotty's appraisal of the expert evidence remained essentially unchanged and expressed continued skepticism of the case put forth by Professors Gompers and Choi.[204] Class certification was therefore appropriate, the district court held, because Goldman Sachs had "failed to rebut the *Basic* presumption by a preponderance of the evidence."[205] Goldman Sachs then exercised its automatic right of appeal to the Second Circuit for a second time.[206]

Although it is beyond the scope of this article to walk through the expert evidence in comprehensive detail, my review of those documents suggests that Goldman Sachs came about as close to proving lack of price impact as any defendant can. Most broadly, it is telling that the one event which provided maximal reputational damage to Goldman Sachs' business integrity—the revelation of salacious emails at a highly public Senate hearing—was found to have no statistically significant impact on Goldman's stock price by plaintiffs' own expert Professor Finnerty.[207] The three events that did all involved federal enforcement actions.[208]

By requiring a hearing on the expert evidence, the Second Circuit's remand at best added a veneer of procedural regularity to the class certification process, without altering its underlying rigor. For example, neither district court opinion evaluated the implications of defendant's Porten Report, outside of the passing observation that "Dr. Finnerty argues that Mr. Porten applied an

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[199] *Id.* at 485.

[200] *Id.* at 485–86.

[201] *Id.* at 482.

[202] *Id.* at 478.

[203] *In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC), 2018 WL 3854757 at *2 (S.D.N.Y. Aug. 14, 2018).

[204] *Id.* at *5 ("Neither Dr. Gompers nor Dr. Choi credibly explains how such hard evidence [of Goldman's wrongdoing alleged in the SEC Abacus complaint] did not contribute to the price decline following the first correct disclosure.").

[205] *Id.* at *6.

[206] *See* Docketing Notice , Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. (*ATRS II*), 955 F.3d 254 (2d Cir. 2018) No. 18-3667 (order granting leave to appeal).

[207] *See* Reply Declaration of Paul Gompers, Ph.D, *supra* note 188, at 1 (making this same observation).

[208] *See id.*

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unreliable methodology to his examination."[209] But the allegation that Goldman Sachs was able to maintain a massively inflated stock price through the disclosure of statements that—as Mr. Porten demonstrated—were never considered relevant in over a hundred professional analyses of its stock is damning as well. Thus, the *Goldman* case (though admittedly only a single data point) represents a cautionary tale on the role of expert evidence in securities class actions. Most generally, it illustrates how there is often no guarantee that federal courts will weigh such evidence in a sophisticated or thorough manner.

C. Appeal to the Second Circuit

Goldman Sachs' second appeal to the circuit court presented two grounds for reversing the district court.[210] First, it argued that the district court applied an overly expansive version of past Second Circuit cases accepting a price maintenance theory of securities fraud.[211] In contrast to the general business principles statements cited in the Class Complaint, the circuit's leading price maintenance precedents all involved companies that maintained an inflated stock price with specific misrepresentations of material financial information, which were directly contradicted by subsequent corporate disclosures.[212] Second, the appeal argued that the district court abused its discretion in determining that Goldman Sachs had failed to present sufficient evidence to rebut the *Basic* presumption based on the price impact standard set forth in *Halliburton II*.[213]

On April 7, 2020, the Second Circuit issued a 2-1 decision upholding the district court's order on class certification, with a majority opinion once again written by Judge Wesley and joined by Judge Chin.[214] A dissenting opinion was issued by Judge Sullivan.[215] Despite its split decision, the Second Circuit panel was largely in agreement on the substantive merits of the case. The majority opinion, as will be seen below, took a more formalistic approach that upheld the district court by relying on a narrowly circumscribed scope of review. The thrust of Judge Sullivan's dissent was that such analysis "perhaps misses the forest for the trees."[216]

On the first question presented for appeal, the Second Circuit declined "Goldman's proposed revision of our inflation-maintenance doctrine."[217] Goldman Sachs' focus on the general nature of its alleged misstatements was irrelevant, Judge Wesley wrote, because the "inflation-

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[209] *See In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC), 2015 WL 5613150 at *5 (S.D.N.Y. Sept. 24, 2015).

[210] *See* Brief and Special Appendix for Defendant-Appellants, *ATRS II*, 955 F.3d 254 (No. 18-3667).

[211] *See id.* at 2.

[212] *See id.* at 5–7 (citing Waggoner v. Barclays PLC, 875 F.3d 79, 87 (2d Cir. 2017), *In re* Vivendi, 838 F.3d 223, 232, 255–56 (2d Cir. 2016)).

[213] *See id.* at 2, 7–9.

[214] *See ATRS II*, 955 F.3d at 258 (2d Cir. 2018) ("The question before us is whether the district court abused its discretion by certifying the shareholder class, either on legal grounds or in its application of the *Basic* presumption. For the following reasons, we hold that it did not.").

[215] *See id.* at 275–79 (Sullivan, J., dissenting).

[216] *Id.* at 275.

[217] *Id.* at 267 (majority opinion).

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maintenance theory does not discriminate between general and specific statements."[218] If it did make such a distinction, the doctrine would "essentially [be] requiring courts to ask whether the alleged misstatements are . . . immaterial as a matter of law."[219] That inquiry is foreclosed by the Supreme Court's precedent in *Amgen*, Judge Wesley explained, which held that materiality is not an appropriate consideration at the class certification stage.[220] Notably, the majority opinion further observed that, "right or wrong, we lack the authority to review that decision at this time."[221]

On the second question presented, the Second Circuit majority began by observing that Goldman Sachs bore the burden of persuasion.[222] It reviewed the district court's fact-finding on the expert evidence under a "clearly erroneous" standard.[223] Here again, the procedural posture on appeal was arguably determinative. As Judge Wesley wrote, "[i]t might well be that were one of us given the same task as that of the district judge we would conclude otherwise, but we cannot say there can only be one conclusion from the record presented."[224]

In dissent, Judge Sullivan argued that the class certification represented an abuse of discretion by the district court because the battle of experts was more one-sided than the panel majority recognized.[225] While "Dr. Finnerty was retained to determine whether Goldman's stock traded in an efficient market," Judge Sullivan wrote, "Defendants never disputed the efficiency of the market; they presumed as much."[226] Rather than the availability of the fraud-on-the-market presumption, Goldman's case rested on evidence on price impact (or lack thereof). On that point, "Dr. Finnerty made no serious attempt to refute Dr. Choi's analysis, let alone his conclusion that the stock drop was caused by the announcement of the SEC and DOJ enforcement actions rather than the underlying factual allegations . . . [and] this failure to engage with Dr. Choi undermined the very purpose of the evidentiary hearing[.]"[227] The dissent went on to conclude that, "[i]f such evidence can be neutralized by the mere assertion that the SEC's repackaging of those disclosures must have 'at least contributed to the stock price declines,' then the *Basic* presumption is truly irrebuttable and class certification is all but a certainty in every case."[228]

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[218] *Id.* at 270.

[219] *Id.* at 267.

[220] *Id.* at 267 (citing Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 474 (2013)).

[221] *Id.* at 269; *see also id.* at 269 n.16 ("We express no opinion on whether the misstatements at issue here are material."). While stating that "Rule 23 does not give defendants a do-over on materiality," the Second Circuit also noted that defendants have a right to seek interlocutory appeal of motions to dismiss on that issue, albeit with the district court's permission. *Id.* at 269, 269 n.17.

[222] *Id.* at 271.

[223] *Id.* at 270, 271 ("We find no clear error in the district court's weighing of the evidence."); *see also id.* at 273 ("The court reviewed the evidence, traced the price declines back to Goldman's alleged misstatements, and credited Dr. Finnerty's report.").

[224] *Id.* at 275 (Sullivan, J., dissenting).

[225] *Id.* ("I believe that the majority uncritically accepted the district court's conclusions regarding what rebuttal evidence is necessary to overcome the *Basic* presumption.").

[226] *Id.* at 277.

[227] *Id.*

[228] *Id.* at 278.

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Judge Sullivan's dissent also drew attention to the generalized language in Goldman Sachs' alleged misstatements. His dissent closes by observing that the "majority tiptoes around" the fact "that no reasonable investor would have attached any significance to the generic statements on which Plaintiff's claims are based."[229] In light of "the generic quality of Goldman's alleged misstatements . . . . The most obvious explanation, consistent with Dr. Choi's report, is that the drop [in Goldman's share price] was caused by news that the SEC and DOJ were pursuing enforcement actions against Goldman."[230] Moreover, a "rigid compartmentalization" of the issues of price impact and materiality is not possible in the context of expert evidence offered at the class certification stage.[231] Nor are they legally required under the Supreme Court's precedents in *Amgen* and *Halliburton II*: "Once a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations to assess their impact on price. The mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper."[232]

Judge Sullivan's dissent is consistent with this article's analysis of the proceedings in the Southern District, and could be considered an authoritative statement on the *Goldman* case as a whole. It also provides important context for the subsequent Supreme Court decision. With its decision to grant review, the Supreme Court was taking up a litigation that probably should have ended at the motion to dismiss stage, or alternatively with a denial of class certification, under a straightforward application of settled doctrine on private securities class actions. Yet, as will be shown below, the ultimate result was for the Court to revisit—and then substantially modify—some of the foundational principles in federal securities law.

III. GOLDMAN SACHS AT THE SUPREME COURT

The Court's *Goldman* opinion was received without much fanfare and generally interpreted as a narrow, consensus decision.[233] As discussed below, however, *Goldman* was more impactful than has been widely appreciated, and in fact made three substantial changes to the Court's existing securities law doctrine. First, the Court's holding on the relevance of generic statements modified prior precedents on the interplay between materiality and class certification. Second, Justice Barrett's majority opinion contains language that undercuts the Second Circuit's interpretation of its price maintenance theory. Third, the *Goldman* decision resolves previously unsettled questions on the burden of proof for defendants seeking to rebut the fraud-on-the-market presumption under *Halliburton II*.

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[229] *Id.*

[230] *Id.* at 278–79.

[231] *Id.* at 278.

[232] *Id.*

[233] *See* Ronald Mann, *Justices Curb Securities-Fraud Class Actions, Albeit Gently*, SCOTUSBLOG.COM (June 22, 2021), https://www.scotusblog.com/2021/06/justices-curb-securities-fraud-class-actions-albeit-gently/ ("The Supreme Court's Monday decision in *Goldman Sachs Group v. Arkansas Teacher Retirement System* will not be remembered as one of the court's seminal securities cases. Indeed, it might not even change the result in the case before it. But it does provide another chapter in the court's continuing efforts to tighten the standards by which the lower courts evaluate securities-fraud class actions.").

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This part analyzes the Supreme Court's opinion in *Goldman*. Part A briefly reviews the certiorari petition and questions presented on appeal to the Supreme Court. Part B summarizes the Court's majority opinion written by Justice Barrett. Parts C and D review the concurring opinions of Justice Sotomayor and Justice Gorsuch, respectively.

A. Certiorari Petition & Parties Briefing

Goldman Sachs' petition for certiorari began by claiming that it raised "the most important securities case to come before the Court since [*Halliburton* II]."[234] More specifically, Goldman's petition argued that its case presented two questions on appeal. First, whether a defendant may rebut the *Basic* fraud-on-the-market presumption "by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality."[235] Second, whether a defendant only bears the burden of production or also the ultimate burden of persuasion when attempting to do so.[236] Although the certiorari petition did not challenge the price maintenance theory directly, it did point to its underlying significance in the case, concluding that the Second Circuit's decision "effectively strips defendants of any ability to rebut the *Basic* presumption in class actions premised on the inflation-maintenance theory." [237]

In opposition, Arkansas Retirement System argued that Goldman Sachs' cert petition misframed the Second Circuit's opinion, which merely held defendants cannot recast arguments of materiality as evidence concerning price impact.[238] It also focused on the lack of circuit split on that issue.[239] Lastly, the class plaintiffs' opposition brief argued that defendants had overstated the practical significance of the case for public companies subject to securities class actions, noting that "neither question presents an issue of recurring importance. A defendant's inability to raise a materiality objection at class certification will not matter if district courts do their duty and dismiss immaterial claims at the motion-to-dismiss stage."[240] Nevertheless, the Supreme Court decided to take the case for its 2020-2021 Term with an order granting a writ of review on December 11,

[234] *See id.* at 3.

[235] *See id.* at (I).

[236] *See id.*

[237] *See id.* at 6.

[238] *See* Brief in Opposition to Petition for Writ of Certiorari at 1, *Goldman*, 141 S. Ct. 950 (No. 20-222), 2020 WL 6275381 ("Goldman asks this Court to grant certiorari in this case to hold the opposite – *i.e.*, that a defendant *can* defeat class certification by showing that its challenged statements are immaterial, so long as it labels that argument a 'price impact,' rather than a 'materiality,' defense. No court has ever accepted that position, and Goldman does not even try to assert a circuit conflict.").

[239] *See id.* The Opposition brief also observed that the Court had previously rejected a similar certiorari petition on the evidentiary burden issue within the past year. *Id.* at 2 ("Goldman also asks the Court to decide whether a defendant has the burden of production or persuasion on price impact. This Court has previously denied certiorari on that question.") (citing Barclays PLC v. Waggoner, 138 S. Ct. 1702 (2018)).

[240] *Id.*; *see also id.* ("Despite its breathless claims that the Second Circuit's decision 'will have devastating practical consequences for public companies,' Goldman points to no evidence that district courts routinely allow immaterial claims to proceed to class certification.").

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2020.[241] The justices then held oral argument on March 29, 2021[242] and issued a decision on June 21, 2021.[243]

B. Justice Barrett's Majority Opinion

Justice Barrett's majority opinion split the two issues presented on appeal, reversing the Second Circuit in part. On the first question presented, the Court held that "the generic nature of a misrepresentation often is important evidence of price impact that courts should consider at class certification."[244] As a result, it ruled that "[b]ecause we conclude that the Second Circuit may not have properly considered the generic nature of Goldman's alleged misrepresentations, we vacate and remand for the Court of Appeals to reassess the District Court's price impact determination."[245] On the evidentiary issue, the Court stated that "our precedents require defendants to bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence."[246] In doing so, however, Justice Barrett noted that "[w]e emphasize, though, that the burden of persuasion should rarely be outcome determinative."[247]

1. Role of Generic Statements

The Court's reasoning on the role of generic statements more or less followed Judge Sullivan's dissent in the Second Circuit. Justice Barrett wrote that "courts may assess the generic nature of a misrepresentation at class certification even though it also may be relevant to materiality, which *Amgen* reserves for the merits."[248] Moreover, "[i]n assessing price impact at class certification, courts 'should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense.'"[249] The majority opinion cast its holding in light of the Court's recent line of precedents on class actions in other legal contexts,[250] writing that the general nature of alleged misstatements is relevant at the class certification stage. Accordingly, the majority held that, "[o]n remand, the Second Circuit must take into account *all* record evidence

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[241] Certiorari Granted, Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. (*ATRS II*), 955 F.3d 254 (2d Cir. 2018) *cert. granted*, 141 S. Ct. 950 (U.S. Dec. 11, 2020) (No. 20-222) 2020 WL 7296815.

[242] Transcript of Oral Argument, Goldman Sachs Grp. Inc., v. Ark. Teacher Ret. Sys., 141 S. Ct. 1951 (2021) (No. 20-222).

[243] *Goldman*, 141 S. Ct. 1951.

[244] *Goldman*, 141 S. Ct. at 1957.

[245] *Id*.

[246] *Id.*

[247] *Id.*

[248] *Id.* at 1960.

[249] *Id.* (quoting *In re* Allstate Corp. Securities Litig., 966 F.3d 595, 613, n.6 (7th Cir. 2020)).

[250] *Id.* at 1960-62 ("As we have repeatedly explained, a court has an obligation before certifying a class to 'determine that Rule 23 is satisfied, even when that requires inquiry into the merits.' . . . Because the Second Circuit's opinions leave us with sufficient doubt on this score," the Court concluded, "we remand for further consideration.") citing Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011); NLRB v. Transportation Management Corp., 462 U.S. 393, 404 n.7 (1983)).

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relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue.[251]

Justice Barrett's majority opinion also expanded on the relationship between generic misstatements and class allegations that rely on a price maintenance theory of securities fraud, writing that "[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory." [252] In those cases, Justice Barrett explained, the court's ability to infer price maintenance "starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure."[253] Moreover, the majority argued, such mismatch may occur in cases that involve the kinds of alleged misstatements at issue in *Goldman* "when the earlier misrepresentation is generic (*e.g.,* 'we have faith in our business model') and the later corrective disclosure is specific (*e.g.,* 'our fourth quarter earnings did not meet expectations')."[254]

In ruling on the first question presented, the Court's majority at no point suggests it is breaking new legal ground. But that is precisely what it does, in two respects. First, the *Goldman* majority came close to overruling the Second Circuit *sua sponte* on its interpretation of the price inflation-maintenance theory. The Second Circuit's appellate decision written by Judge Wesley held that the "inflation-maintenance theory does not discriminate between general and specific statements,"[255] and that particular language did not make its way into the questions certified for review in the Supreme Court's writ of certiorari. And yet, the Court's majority explicitly pointed out the special significance of general versus specific statements in price maintenance securities cases.[256] Justice Barrett's opinion, somewhat strangely, disclaimed taking any stance on the issue: "Although some Courts of Appeals have approved the inflation-maintenance theory, this Court has expressed no view on its validity or its contours. We need not and do not do so in this case."[257] But a close reading of the *Goldman* decision indicates that the Court provided an important new statement on the contours of the price maintenance theory, the bounds of which have been contested in the circuit courts ever since *Halliburton II*.[258]

Second, the *Goldman* decision also came very close to overruling the Court's precedent set in *Amgen*[259] regarding the relevance of materiality at the class certification state. The *Amgen* decision stated that, while private securities plaintiffs "must prove materiality to prevail on the

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[251] *Id.* at 1961.

[252] *Id.* at 1961.

[253] *Id.*

[254] *Id. See also id.* (concluding that "[u]nder those circumstances, it is less likely that the specific disclosure actually corrected the generic misrepresentation, which means that there is less reason to infer front-end price inflation—that is, price impact—from the back-end price drop.").

[255] Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. (*ATRS II*), 955 F.3d 254, 270 (2d Cir. 2018). *See also supra* note 218 and accompanying text.

[256] *See Goldman*, 141 S. Ct. at 1961.

[257] *Id.* at 1959 n.1.

[258] *See* discussion *supra* Part I.C (reviewing the appellate caselaw on securities price maintenance claims).

[259] Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455 (2013).

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merits, we hold that such proof is not a prerequisite at class certification."[260] The reasoning for that holding, as explained in Justice Ginsburg's majority opinion, flows from the function of class certification: "As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry."[261] Again, the majority opinion in *Goldman* suggested that it is fully in accord with *Amgen.*

At the same time, however, the *Goldman* majority repeatedly emphasized that the general nature of alleged misstatements closely overlaps with the question of their materiality and should be considered at the class certification stage. If not in direct conflict with *Amgen*, the *Goldman* decision is at least in considerable tension with the bright-line rule on materiality established in Justice Ginsburg's opinion in that case. The *Goldman* decision is also incompatible with the underlying rationale used to justify the bright-line rule in *Amgen*: as with the issue of materiality, the import of generic language in an alleged misstatement is a question that will "prevail or fail in unison" with the entire class as a whole.

2. The Burden of Proof

On the second question presented, the majority opinion rebuffed Goldman Sachs' argument that the burden of production applies pursuant to Federal Rule of Evidence 301. Justice Barrett's opinion stated that "Rule 301 'in no way restricts the authority of a court . . . to change the customary burdens of persuasion' pursuant to a federal statute." [262] Furthermore, the majority held, "[w]e conclude that *Basic* and *Halliburton II* did just that,"[263] because "we read *Basic* and *Halliburton II* as a clear departure from that general rule [that presumptions shift only the burden of production.]" [264] As support of this conclusion, Justice Barrett's opinion highlighted language from *Basic* that states defendants' must "'*show* that the misrepresentation *in fact* did not lead to a distortion in price[,]'"[265] and that they can successfully rebut the fraud-on-the-market presumption with " 'any *showing* that *severs the link* between the alleged misrepresentation and . . . the price received or (or paid) by the plaintiff.'"[266] Similarly, the *Goldman* majority quoted *Halliburton II* for the proposition that defendants can rebut the *Basic* assumption "by *showing* . . . that the particular misrepresentation at issue did not affect the stock's market price." [267] The Court also noted that appellate decisions from the Seventh and Second Circuits have interpreted *Basic* and *Halliburton II* in the same manner.[268]

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[260] *Id.* at 459.

[261] *Id.*

[262] *Goldman*, 141 S. Ct. at 1961 (quoting NLRB v. Transportation Management Corp., 462 U.S. 393, 404 n. 7 (1983)).

[263] *Id.*

[264] *Id.* at 1962 n.4.

[265] *Id.* at 1962 (quoting Basic v. Levinson, 485 U.S. 224, 248 (1988)) (emphasis in original).

[266] *Id.* (quoting *Basic*, 485 U.S. at 248) (emphasis in original).

[267] *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 279 (2014)) (emphasis in original).

[268] *Id.* at 1962–63 (citing Waggoner v. Barclays PLC, 875 F.3d 79, 99–104 (2d Cir. 2017), *In re* Allstate, 966 F.3d 595, 610–11 (7th Cir. 2020)).

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The majority opinion also closed by identifying policy reasons for applying the burden of persuasion rather than production, in addition to language from the Court's past precedents. Namely, Justice Barrett argued that the applicable burden of persuasion will not matter much in practice:

> Although the defendant bears the burden of persuasion, the allocation of the burden is unlikely to make much difference on the ground. In most securities-fraud class actions, as in this one, the plaintiffs and defendants submit competing expert evidence on price impact. The district court's task is simply to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentations had a price impact. The defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise.[269]

As will be shown below, however, Justice Gorsuch's concurrence pushed back on both the doctrinal and policy grounds for the majority's holding on this question and does so in compelling fashion.

C. Justice Sotomayor's Concurrence

Justice Sotomayor's concurrence joined both of the majority's holdings on the legal questions presented.[270] At the same time, Justice Sotomayor's concurrence departed from the majority's conclusion that its holding warrants a reversal of the Second Circuit: "I do not, however, join the Court's judgment to vacate and remand because I believe the Second Circuit properly considered the generic nature of Goldman's alleged misrepresentations."[271] That is because, "[i]n declining to adopt Goldman's proposed rule that generic misstatements cannot have a price impact (as a matter of law), the Second Circuit nowhere held that the generic nature of an alleged misstatement could not serve as evidence of price impact (as a matter of fact)."[272] Instead, Justice Sotomayor wrote, the circuit court considered that argument as part of its abuse of discretion analysis upholding district court: "the Second Circuit did not address whether the generic nature of a misstatement may be used as evidence to disprove price impact for a simple reason: Goldman identified no error in the District Court's treatment of such evidence."[273]

Alternatively, Justice Sotomayor's concurrence argued Goldman Sachs did not properly preserve the issue of generic statements for appeal. "Goldman did not press the argument in the Second Circuit that it now urges here, and the Second Circuit did not reject the proposition that this Court now adopts. Thus, the argument Goldman seeks to press on remand is unpreserved, and

[269] *Id.* (citing Medina v. California, 505 U.S. 437, 449 (1992) for the proposition that the preponderance of evidence burden matters "only in a narrow class of cases where the evidence is in equipoise")).

[270] *Id.* (Sotomayor, J., concurring) ("I agree with the Court's answers to the questions presented[.]").

[271] *Id.* at 1964.

[272] *Id.*

[273] *Id.* at 1965.

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nothing in the Second Circuit's opinion misstates the law."[274] "Take, for example, the Second Circuit's statement that 'whether alleged misstatements are too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones.' Fairly read in light of Goldman's appellate briefing, that sentence addresses only Goldman's argument that general statements are always *per se* irrelevant."[275]

Justice Sotomayor's reasoning on both points—the ruling in the Second Circuit and the availability of appellate review—is creative, yet somewhat convoluted. Notably, neither line of argument was raised by the parties in their briefing to the Supreme Court. At the same time, a similar line of argument *was* raised at oral argument by the Acting Solicitor General on behalf of the government, after the Department of Justice moved to appear as amicus curiae in the case.[276] In following the position laid out by the Solicitor General, however, Justice Sotomayor's concurrence attempted to salvage the Second Circuit's decision on narrow procedural grounds that are not entirely consistent with the record below. A fair reading of the Second Circuit's opinion indicates that it considered, and then rejected, Goldman Sachs' claim that the generic nature of its alleged misstatements are relevant at the class certification stage.[277] In addition, both parties to the case, along with eight Supreme Court justices, all found that issue properly preserved on appeal.[278]

D. Justice Gorsuch's Concurrence

Justice Gorsuch's concurrence, joined by Justices Thomas and Alito, agreed with the Court's majority on the relevance of generic statements while objecting to its holding on the evidentiary

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[274] *Id.*

[275] *Id.* at 1964 (quoting Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. (*ATRS II*), 955 F.3d 254, 268 (2d Cir. 2018)).

[276] *See* Motion of the United States for Leave to Participate in Oral Argument as Amicus Curiae and for Divided Argument, *Goldman*, 141 S. Ct. 1951 (2021) (No. 20-222); Transcript of Oral Argument, *supra* note 242, at 36-58 (transcribing the oral argument of Sopan Joshi for the United States as amicus curiae supporting neither party).

[277] *See ATRS II*, 955 F.3d at 264 ("Goldman argues for reversal on two general grounds. *First*, it contends that the district court misapplied the inflation-maintenance theory, which it asks us to modify."); *id.* at 268 (rejecting "Goldman's proposed rule . . . [that its] alleged misstatements are too general to demonstrate price impact."); *see also* Transcript of Oral Argument, *supra* note 242, at 20 ("Mr. Shanmugan: 'Justice Sotomayor, there were certainly points below where we made the more ambitious argument that the nature of the statements should be dispositive. But I think that there is no doubt that we also made the argument that the nature of the statements is relevant to the analysis in the way that we've been discussing today. And, indeed, that was really the central focus of the first part of the oral argument before the court of appeals, and that is, of course, the argument that we made in our cert petition and the argument that we're making now.'").

[278] In contrast to the significant back-and-forth between majority opinion of Justice Barrett and concurrence of Justice Gorsuch on the merits, the procedural theories presented by Justice Sotomayor were received without comment in the other Justices' writings. In its briefing to the Supreme Court, plaintiff-respondent Arkansas Teachers Retirement System also conceded, or at least took for granted, that there was nothing procedurally defective about Goldman Sachs' appeal. *See, e.g.*, Brief of Respondents at 1, *Goldman*, 141 S. Ct. 1951 (2021) (No. 20-222) (2021) ("This case presents two questions regarding the certification of securities fraud lawsuits as class actions . . . The first question presented addresses how the court's determination of price impact should account for the "generality" of the challenged statements.").

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burden of proof issue.[279] Justice Gorsuch's concurrence provided three reasons why the burden of production rather than persuasion should apply.

First, Justice Gorsuch chided the majority for putting too little weight on the traditional evidentiary meaning of presumptions, writing that "[t]his Court has long recognized that a 'presumption' properly used refers only to a device for allocating the production burden,"[280] and that "[t]he Court has explained that nearly 'all presumptions' operate in this way."[281] The concurrence went on to note that the Federal Rules of Evidence merely codify the long-standing practice of using presumptions to shift the burden of production[282] and highlights the burden-shifting procedures in Title VII anti-discrimination claims as a prominent example.[283]

Second, Justice Gorsuch argued that the fraud-on-the-market presumption established in *Basic* "matches traditional understandings too."[284] The concurrence stated that the majority "splices" together stray clauses from *Basic* regarding defendant's obligation to make a "showing" that severs the presumption of reliance, without explaining how those clauses are relevant to the burden of persuasion.[285] The majority's reading of *Halliburton II* never identifies language in that decision that makes the connection, either.[286] "The Court has no answer to any of this," Justice Gorsuch concluded, "[i]nstead it replies only by touting the fact that two Court of Appeals decisions have read *Basic* and *Halliburton II* as it does."[287] Yet the "Court does not suggest that a pair of lower court opinions represents some robust judicial consensus. Nor does the Court suggest those opinions free us from having to interpret the law for ourselves."[288]

Lastly, the concurrence took issue with the majority's speculation about the practical consequences of its decision: "Perhaps recognizing the incongruity of its conclusion, the Court goes out of its way to downplay its significance."[289] Justice Gorsuch's closing remarks on this are worth quoting in full:

> This is a curious disavowal. Obviously, the Court thinks the issue important enough to spend the time and effort to rejigger the burden of persuasion. Now, though, it says none of this matters because most cases come down to a dispute over evidence of price impact irrespective of the presumption. The Court's suggestion that the

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[279] *See Goldman*, 141 S. Ct. at 1965 (Gorsuch, J., concurring).

[280] *Id.* at 1966 (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U. S. 248, 255 n.8 (1981)).

[281] *Id.* (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993)).

[282] *Id.* ("The Federal Rules of Evidence confirm the point too.").

[283] *Id.* ("Title VII practices offers a familiar illustration of these principles. There, the plaintiff bears the ultimate burden of proving that his employer intentionally discriminated against him because of his race or some other unlawful factor.").

[284] *Id.* at 1967.

[285] *Id.* at 1968.

[286] *Id.* at 1968–69 ("If *Basic* doesn't command today's result, the Court offers a backup theory. Separately, it insists, *Halliburton II* requires us to shift a burden of persuasion to the defendant.").

[287] *Id.* at 1969.

[288] *Id.*

[289] *Id.*

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> burden of persuasion will "rarely" make a "difference" misses the point too. The whole reason we allocate the burden of persuasion is to resolve close cases by providing a tie breaker where the burden *does* make a difference. [290]

Moreover, the fact that "close cases may not be common ones is no justification for indifference about how the law resolves them."[291]

Justice Gorsuch's concurrence is persuasive on this point. Among other weaknesses in the majority opinion, there is no mention of the fact that *Basic* explicitly cites Federal Rule 301 when announcing the fraud-on-the-market presumption of reliance. [292] Moreover, the majority's argument on precedential grounds primarily relied on a 2017 Second Circuit decision applying *Basic*,[293] which is an odd source of authority for a higher court to invoke while sitting in review of the Second Circuit. It is therefore hard to argue with the concurrence's claim that "[i]f a majority of the Court today really believes some novel new burden of persuasion *should* be placed on the defendant, it ought to say so."[294]

The upshot is a third legal innovation from the *Goldman* decision. In addition to novel holdings about the relevance of generic misstatements and their role in price inflation-maintenance claims, the Court also crafted a new burden of proof that had never been squarely addressed since *Basic* created the fraud-on-the-market presumption in 1988. Thus, while *Goldman* was received as an underwhelming decision by most Court commentators, it in fact set a precedent that has changed the law of securities fraud along multiple important dimensions.

IV. Reflections on the Securities Fraud Class Action after *Goldman Sachs*

The preceding parts have presented what could be considered a forensic analysis of the *Goldman* litigation, from its roots in the financial crisis to the recent decision by the Supreme Court. That undertaking is useful not only because *Goldman* is a frequently misunderstood case, but also because, in many respects, it represents microcosm of securities law as a whole. Accordingly, this part closes by situating *Goldman* within the broader legal context reviewed in Section I and exploring its implications for securities fraud class actions going forward. Part A begins by examining the doctrinal impact of the *Goldman* decision. Part B turns to the practical consequences that those doctrinal changes will have for securities litigation on the ground. Part C closes with a discussion of the lessons that *Goldman* carries for the Supreme Court's role as a policymaker in federal securities law.

A. Doctrinal Issues

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[290] *Id.* at 1969–70.

[291] *Id.* at 1970.

[292] Basic v. Levinson, 485 U.S. 224, 245 (1988) ("Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties.") (citing Fed. R. Evid. 301; EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 968–69 (3d ed. 1984))

[293] *Goldman*, 141 S. Ct. at 1963 (citing Waggoner v. Barclays PLC, 875 F.3d 79, 99–104 (2d Cir. 2017)).

[294] *Id*. at 1969 (Gorsuch, J., concurring).

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Given the recency of the Supreme Court's *Goldman* decision, the precise contours of its reception in the lower courts remains to be seen. Some early breadcrumbs, however, can be discerned. For one, the Second Circuit has already issued a decision upon remand.[295] In its order, which remanded the case back to the district court for reconsideration, a *per curium* opinion by the Second Circuit panel stated that, "[a]lthough the Supreme Court did not disturb our legal conclusions, it supplemented them with new ideas."[296]

In particular, the Second Circuit identified three "new ideas" in the Supreme Court's *Goldman* decision. First, the panel opinion notes that the Supreme Court "made explicit that expert testimony as well as 'common sense' should inform courts' evaluation of the evidence," [297] on price impact, including the generic nature of a defendant's alleged misstatements.[298] In addition, the Second Circuit observed that the Supreme Court "specified that the inference required for the inflation-maintenance theory [of price impact] starts to break down," [299] when there is a mismatch between generic misstatements on the front-end and more particularized disclosures on the back-end. Lastly, the Second Circuit stated that "on the burden of persuasion, the Court agreed with our holding that Goldman bears the burden but explained that . . . . 'The defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise.'" [300]

Although the Second Circuit downplayed the significance of the Supreme Court's decision—to the point of denying that its holding included a finding of reversible legal error[301]—some immediate impact on lower court precedents and decision-making can already be discerned. For example, in light of the Supreme Court's ruling on the burden of proof, prior influential decisions such as the Eighth Circuit's "*Best Buy*" case, which held that defendants only bear the burden of production, are no longer good law.[302] At the same time, the Supreme Court's language highlighting that the burden of persuasion is only outcome determinative where the evidence is in equipoise—which is otherwise a truism of black letter law and legal procedure—may have caught the attention of lower courts as well. Some evidence on that point comes from a recent class certification decision from the Southern District of New York, *In re Allergen*.[303] While ruling that defendants had failed to rebut the *Basic* presumption, the *In re Allergen* decision cites *Goldman* for the applicable burden of proof and further notes that, contrary to language in prior South District precedents, "defendants do not need to prove a lack of price impact with scientific

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[295] Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc., 11 F.4th 138 (2d Cir. 2021).

[296] *See id.* at 143.

[297] *See id.*

[298] *See id.*

[299] *See id.*

[300] *See id.*

[301] *See id.* at 143 (describing the Supreme Court's opinion as providing "new ideas" that "supplemented" the prior Second Circuit decision under review).

[302] IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775, 782 (8th Cir. 2016) ("We agree with the district court that, when plaintiffs presented a *prima facie* case that the *Basic* Presumption applies to their claims, defendants had the burden to come forward with evidence showing a lack of price impact."); *see also* Aranaz v. Catalyst Pharmaceutical Partners, Inc., 302 F.R.D. 657, 670 (S.D. Fla. 2014) (leaving the burden of persuasion/production ambiguous).

[303] *See In re* Allergen PLC Sec. Litig., No. 18 Civ. 12089, 2021 WL 4077942 (S.D.N.Y. Sep. 8, 2021).

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certainty."[304] Thus, as *In re Allergen* indicates, *Goldman*'s statement on the relevant evidentiary burden may rein in certain circuits that have previously held the burden of persuasion applies, while applying that burden in a heavy-handed manner.

The major open question, in terms of lower courts' response to *Goldman*, is the impact of the Supreme Court's interpretation of the price-inflation maintenance doctrine. As noted above,[305] the Fifth, Eighth, Sixth, and Ninth Circuits have all issued decisions that narrowly construe the ability for plaintiff's to plead a price-inflation maintenance case.[306] The noncommittal, yet critical attention paid to the price-inflation doctrine in *Goldman* may well reinforce the tendency of those circuits to take a skeptical view of class certification motions that rely on price maintenance allegations. Meanwhile, the expansive view of those claims taken by the Second Circuit, in particular with its *In re Vivendi* precedent, [307] will no doubt be tested in the coming years.[308]

Lower courts will also likely soon be forced to navigate the viability of *Amgen*'s restriction on questions of materiality at the class certification stage, after those waters have been muddied by the *Goldman* decision's discussion on the weakness of securities fraud claims that rely upon "generic" misstatements. In the eyes of at least one early commentary on *Goldman*, the Supreme Court's opinion in that case could mean that "materiality is back at class certification."[309]

B. Securities Class Actions in Practice

From a predictive perspective, the consequences of *Goldman* for private securities litigation remain to be seen. One clear outcome is to reinforce the centrality of price impact as the guiding merits question in private securities actions, along with the tendency for the class certification process to serve as a mini-trial on that issue. *Halliburton II* was largely perceived as "broaden[ing] the scope of economic evidence that courts must consider at the class certification stage."[310] In the wake of *Goldman*, the scope of relevant evidence on price impact has been broadened even further. As commentators on the *Goldman* have noted, "[t]he decision not only gives Goldman Sachs a renewed opportunity to defeat class certification in this long-running class action suit; it also is

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[304] *See id.* at *13 (*quoting* Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC, 310 F.R.D. 69, 95 (S.D.N.Y. 2015) ("The failure of an event study to find price movement does not prove lack of price impact with scientific certainty."); *see also In re* Signet Jewelers Ltd. Sec. Litig., No. 6 Civ. 6728, 2019 WL 3001084 (S.D.N.Y. July 10, 2019) applying a similarly stringent burden of persuasion, arguably above the normal preponderance of the evidence standard).

[305] *See* Part I.C, *infra*.

[306] *See* IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775, 782 (8th Cir. 2016); Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 665 (5th Cir. 2004); Nathenson v. Zonagen, Inc., 267 F.3d 400, 419 (5th Cir. 2001); Willis v. Big Lots, Inc., 242 F. Supp. 3d 634, 653 (S.D. Ohio 2018); *In re* Finisar Corp. Sec. Litig., No. 5:11-cv-01252, 2017 WL 6026244, at *7 (N.D. Cal. Dec. 5, 2017).

[307] *See In re* Vivendi, S.A. Sec. Litig., 838 F.3d 223 (2d Cir. 2016) (holding that defendant Vivendi had maintained an artificially high stock price by failing to provide affirmative cautionary statements about that state of its balance sheet liquidity).

[308] *See* Note 92, *and accompanying text* (discussing the Second Circuit's holding in *In re* Vivendi and related cases).

[309] *See* Jason Halper, Adam K. Magin, & Matthew Karlan*, Supreme Court's Vacation of Class Certification Order in Decades-Long Class Action*, HARV. L. SCH. F. ON CORP. GOV. (July 15, 2021).

[310] *See* Kristin Feitzinger, Amir Rozen, & Shaama Pandya, ECONOMIC ANALYSIS AS THE CLASS CERTIFICATION STAGE OF EXCHANGE ACT SECURITIES CLASS ACTIONS 3 (2020).

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likely to create a new front in the class certification battleground."[311] Moreover, "the battle over *Basic*—already one of the main events in securities class-action litigation—is likely to grow even more heated in *Goldman*'s wake."[312]

Whether *Goldman* tilts those mini-trials in favor of plaintiffs or defendants less clear. On one hand, the decision provides federal district courts with a new tool for filtering out non-meritorious cases by allowing trial judges to consider the relevance of generic misstatements for price impact.[313] *Goldman* also highlights how that filter is particularly important when evaluating price impact in the growing population of price inflation-maintenance fraud claims.[314] On the other hand, the decision explicitly shifts the previously ambiguous burden of proof on price impact defendants.[315]

A common implication of *Goldman* under either scenario is that district courts will have more latitude to arrive at a decision on class certification without extensively parsing out the expert evidence. A trial judge presiding over a battle of experts can sidestep the complex statistical evidence involved by crediting a defendant's claim that the plain language of its alleged misstatement is excessively generic. The same battle of experts can also be resolved in favor of the plaintiffs by declaring the parties' dueling event studies in equipoise, in which case the burden of proof controls. From a normative perspective, the desirability of judicial discretion of this kind depends on whether it enables district courts to consistently identify false positives (by certifying strike suits) and false negatives (by declining class certification in meritorious cases).

C. Supreme Court as Policymaker in Securities Law

From a big picture perspective, *Goldman* can be seen as marking the end of an era for the federal courts as a policymaking institution in securities law. That era began in the mid-1960s when the Supreme Court announced that the 1934 Exchange Act provided shareholders with a private right of action against publicly traded corporations for securities fraud.[316] Because there was no statutory basis for determining when private plaintiffs could bring a securities fraud claim, the courts improvised by drawing on familiar elements found in the common law of fraud—materiality, scienter, reliance, and so on.[317] In the following two decades, it became clear that private securities fraud claims were only viable if they could be organized as aggregate litigations. It also became clear that when a conventional interpretation of the reliance element for fraud was

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[311] *See* Halper et al., *supra* note 309.

[312] *See id.*

[313] *See* Noelle Reed & Peter Morrison, *Goldman Ruling Is a Boon for Class Action Defendants*, LAW360 (June 21, 2021) ("The [*Goldman*] decision could also serve as a broader mandate to the lower courts to consider all relevant evidence at the class certification stage, even if the same evidence is also relevant to a merits question such as materiality."); *see also* David Priebe & John J. Clarke, Jr., *In* Goldman Sachs *Decision, Supreme Court Expands Methods for Challenging Class Certification in Securities Fraud Cases*, DLA PIPER (June 23, 2021).

[314] *See id.*; *see also supra* Part I.B (surveying the lower court caselaw on price inflation-maintenance claims prior to *Goldman Sachs*).

[315] *See supra* Part III; *see also supra* Part I.B (reviewing the lower court caselaw on evidentiary burdens of proof prior to *Goldman Sachs*).

[316] *See supra* note 31 and accompanying text.

[317] *See supra* note 33 and accompanying text.

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applied to the procedural requirements for class certification, securities class actions would rarely be successful.

The response was a second phase of judicial policymaking, initiated with the Supreme Court's 1988 decision in *Basic*, which allowed class plaintiffs to sidestep the question of individualized reliance by invoking a fraud-on-the-market presumption.[318] The principal policy dilemma in private securities law flipped after *Basic.* Rather than the issue of how to make the securities class action possible, the most pressing question was how to place meaningful limits on the newfound potential for protracted and frivolous class claims. Congress was the first mover, with 1990s legislation such as the Private Securities Litigation Reform Act, which did not prove completely satisfactory.[319] The Court then retook the policymaking reins with a line of decisions that sought to refine the fraud-on-the-market presumption and related doctrinal issues—namely, *Halliburton I* (2011), *Amgen* (2013) and *Halliburton II* (2014).[320]

With *Goldman*, the Supreme Court has arguably reached the endpoint of its post-*Basic* era. Notably absent from the three opinions written in *Goldman* is any argument from first principles about the proper scope of securities class actions or the fraud-on-the-market doctrine in particular. At times during the oral argument, the Justices appeared flummoxed or simply uninterested in such broader questions.[321] Rather than attempting to impose intellectual coherence on the existing body of securities law doctrine, the "judicial oak" that Justice Rehnquist famously described in *Blue Chip Stamps*[322] is largely taken for granted as a Frankenstein's monster that will not be tamed any time soon. This stands in contrast to the lengthy, and often heated, philosophical debates that can be found in opinions from cases like *Amgen* or *Halliburton II*.[323] Instead, the Court in *Goldman* has taken a more pragmatic turn. As detailed above, the majority opinion glosses over tensions with past precedents like *Amgen*, downplays the practical consequences of its holding, and frames its ruling as a narrow application of common sense.[324]

The experience of *Goldman* in the lower courts suggests that an open-ended totality of the circumstances standard could perform reasonably well compared to other alternatives that were before the Court. Although a rigorous weighing of expert statistical evidence might be preferred in a perfect world, class certification rulings in *Goldman* by the district court highlight the reasons why that task can often strain the institutional capacity of generalist federal judges.[325] Meanwhile,

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[318] *See supra* Part I.B (discussing the PSLRA of 1995 and Securities Litigation Uniform Standards Act of 1998).

[319] *See supra* Part I.A.

[320] *See id*.

[321] *See* Transcript of Oral Argument, *supra* note 242, at 41, ("Justice Breyer: I just would like your view, if you can, because this is an area I don't know thoroughly. It's filled with, if not jargon, specialized terms, I think more than are necessary, but that's just an opinion. But let me go into this.); *see also id.* at 8 ("Chief Justice Roberts: So what is the debate between -- between two parties on whether a statement is sufficiently generic? What does it look like? I mean, you have a statement of the sort at issue here. I mean, does one side say, well, you can tell from common sense that this is -- is -- is -- is too generic and the other side says, no, my common sense says it's not?").

[322] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). *See also supra* note 33 and accompanying text (explaining the context of Justice Rehnquist's remarks).

[323] *See supra* Part I.B.

[324] *See supra* Part III.

[325] *See supra* Part II.B.2 (analyzing the district court's rulings on expert evidence in *Goldman Sachs*).

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Judge Sullivan's dissent in the Second Circuit illustrates the benefits of a more pragmatic approach that relies on judicial intuition to see the forest for the trees.[326]

CONCLUSION

This article has told the story of Goldman Sachs at the Supreme Court. By taking an in-depth look at the case history of *Goldman* from start to finish, it has shown that the Supreme Court's recent decision was more impactful than has been widely appreciated. Rather than being a recap of existing precedents, the holding in *Goldman* made significant changes to some of the core doctrines in securities law that were first set forth in 1988 when the Court created the modern securities class action with *Basic v. Levinson*. This article's analysis also carries broader lessons about the role of federal courts as policymakers in securities law. With cases such as *Goldman*, it can be seen that the Court continues to grapple with an increasingly convoluted doctrinal web of its own making. The result, as a practical matter, is a delegation of discretion to federal trial courts, which must navigate the class certification process by yielding a combination of legal fictions and judicial intuitions regarding investor behavior in contemporary capital markets.

[326] *See supra* Part II.C (discussing the Second Circuit's decision in *Goldman Sachs*).

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