

CLIENT UPDATE

SUPREME COURT REJECTS PROOF OF MATERIALITY AS REQUIREMENT FOR CERTIFYING SECURITIES CLASS ACTIONS

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On Wednesday, the Supreme Court ruled that plaintiffs in securities class actions can obtain class certification without proving at that stage that the allegedly false statements were material. The ruling, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, resolves a Circuit split that had given rise to the possibility in some jurisdictions, including the Second Circuit, that defendants could meaningfully challenge class action status in securities lawsuits on this ground. The *Amgen* decision comes less than two years after the Court's opinion in *Erica P. John Fund v. Halliburton Co.*, which held that securities plaintiffs also need not demonstrate loss causation at the class certification stage, and reinforces the difficulties defendants face in attempting to defeat class certification in securities actions, notwithstanding the Supreme Court's declaration in *Wal-Mart Stores, Inc. v. Dukes* that district courts should conduct a rigorous analysis before certifying a class.

The plaintiff in *Amgen* alleged the Company had violated section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 through material misrepresentations and omissions concerning two of its drugs, thereby artificially inflating the price at which the plaintiff and other class members purchased Amgen stock. In opposing class certification, Amgen argued that the plaintiff could not rely on the rebuttable presumption of class-wide reliance established by the Supreme Court's 1988 decision in *Basic v. Levinson*, because the plaintiff had failed to establish that Amgen's allegedly false statements about the two drugs were material.

The presumption established in *Basic* applies only to material misstatements, because an immaterial misstatement would not be expected to affect the price of a company's securities. Absent the *Basic* presumption, Amgen argued, the plaintiff could not satisfy Fed. R. Civ. P. 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual class members." Both the District Court in California and the Ninth Circuit rejected Amgen's argument.

In affirming the Ninth Circuit's ruling, Justice Ginsburg, writing for a six-justice majority, accepted as "indisputabl[e]" the proposition that materiality is an essential predicate of *Basic*, but found that the "pivotal inquiry" was whether proof of materiality was necessary to ensure the predominance of common over individual questions required by Fed. R. Civ. P. 23(b)(3). The Court found such proof unnecessary, for two reasons: Because materiality raises an objective question, it can be proven through common evidence; and there is "no risk whatever" that a failure of proof of materiality at trial would result in individual questions predominating, because such a failure of proof "would end the case for one and for all," leaving no claim in which individual reliance issues would need to be litigated. The Court also rejected Amgen's argument that the substantial pressure to settle a securities class action following certification should require proof of materiality as a condition of certification, noting that Congress had already addressed these settlement pressures through enactment of the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998.

Justice Thomas, writing for himself and two others, not only rejected the majority's reasoning on the class certification issue, but stated that "[t]he *Basic* decision itself is questionable" and noted that "[t]he Court retains discretion over the contours of *Basic* unless and until Congress sees fit to alter them." Justice Alito, who joined the majority opinion, also said that "reconsideration of the *Basic* presumption may be appropriate." Thus, although today's ruling clearly shows that a majority of the Court remains committed to *Basic* and its presumption, these statements suggest that four justices could be persuaded to rethink *Basic*. If the attitudes of any other members of the majority were to change, any decision to step back from the *Basic* presumption could make securities class actions much harder, if not impossible, for plaintiffs to litigate.

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Please do not hesitate to contact us with any questions.

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