金融商品取引法研究会
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市場に対する詐欺に関する米国判例の動向について

公益財団法人 日本証券経済研究所
金融商品取引法研究会

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（平成 26 年 11 月 26 日開催）

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（敬称略）

市場に対する詐欺に関する米国判例の動向について

前田副会長　定刻になりましたので、第４回金融商品取引法研究会を始めさせていただきます。

本日は、会長の神田秀樹先生が司会をなされる予定でしたが、やむを得ないご事情でご欠席ですので、前田が司会をさせていただきます。

まず、人事異動に伴いまして、オブザーバーに変更がありましたのでご紹介させていただきます。今回より、SMBC 日興証券法務部長の鎌塚正人様にご参加いただくことになりました。どうぞよろしくお願いいたします。

既にご案内のとおり、本日は、早稲田大学の黒沼悦郎先生より「市場に対する詐欺に関する米国判例の動向について」というテーマでご報告をいただくことになっています。それでは、黒沼先生、よろしくお願いいたします。

［黒沼委員の報告］

黒沼委員　早稲田大学の黒沼でございます。

本日は、最近の米国判例３つを取り上げてご紹介し、また、学説の議論なども少し紹介したいと思っております。

お手元に配付資料として、その３つの判決の原文とレジュメを配付しておりますので、このレジュメに沿って話をしていきたいと思います。

Ⅰ．はじめに

アメリカの判例を取り上げてどういう意味があるのかということなのですけれども、１つには、アメリカに上場している日本企業もあって、その日本企業にとっては証券クラス･アクションは関心の高い対象だろうと思います。もう１つは、日本には証券クラス・アクションはないわけですけれども、虚偽記載に基づく民事責任の追及が最近は盛んになっておりますので、その法理を考える上で参考になるのではと思います。

Ⅱ．34 年法規則 10ｂ－５の要件

早速内容に入っていきます。

34 年法規則 10ｂ-５は、1934 年証券取引法 10 条（ｂ）項に基づいて、1942 年に SEC が制定した詐欺防止条項でありまして、判例はこの 10 条（ｂ）項及び規則 10ｂ-５、以下、総称して「Rule 10ｂ-５」といいますが、これが私人が損害賠償を請求する根拠となること、すなわち私的訴訟原因が含意されていると認めてきました。もっとも、Rule 10ｂ-５の文言からはその要件を読み取れませんので、判例はコモン・ロー上の詐欺の要件をかりて、私的訴訟原因の要件を判断してきました。判例によれば、私人が Rule 10ｂ-５に基づいて損害賠償を得るには、「被告による重要な不実表示または省略」、「欺罔の意図」（scienter）、「不実表示または省略と証券の売買との関係」（in connection with）、「不実表示または省略への信頼」（reliance）、「経済的損失」、「損害因果関係」（loss causation）を証明しなければなりません。

これらの要件のうち、重要性、信頼、損害因果関係及び経済的損失の要件は、不実表示と損害賠償責任とを結ぶ重要な要件であり、原告が訴訟のどの段階でどの要件をどの程度証明しなければならないかが裁判で争われてきました。

最初に最高裁が取り上げたのは信頼の要件です。信頼とは「特定の原告が投資判断を行うにあたり、不実表示を重要な要素と考えたこと」を意味し、省略あるいは不開示と言ったほうがいいかもしれませんけれども、不開示の場合は「開示されなかった事実を知らされていたら原告が異なった行動をするような影響を受けたであろうこと」を意味します。信頼の要件は不実表示と原告の行為とを結ぶ因果関係なので、取引と損失を結ぶ損害因果関係に対して、取引因果関係とも呼ばれます。この点について判断したのが 1988 年の Basic 判決です。

Ⅲ．Basic 判決（1988 年）

（Basic Inc., v. Levinson, 485 U. S. 224（1988）. 解説として、拙稿「会社情報の開示と民事責任― Basic 判決を中心として―」名古屋大学法政論集 133 号（1990）1 頁。）

【事実】

Basic 社が合併の交渉中であるという事実を隠し、合併交渉をしていないとの声明を発　表したことに対し、Basic 社株を売却した株主が会社及び取締役の責任を追及するクラス・アクションを提起した。

連邦民事訴訟規則 23 条（ｂ）項（３）号によると、個々の原告に関する個別の問題よりも、クラスに共通の法律問題または事実問題が支配的でなければクラスの認可は認められないところ、連邦地方裁判所は信頼の推定を認めクラスを認可した。第７巡回区控訴裁判所はクラス認可を維持したので、最高裁は、合併交渉に適用される重要性の基準がいかにあるべきかということとともに、クラスの認定の際に、裁判所が表示に対する直接的な信頼をクラス・メンバーに要求せず、信頼の推定を及ぼしたことが適切かどうかについて裁量上訴を認めた。

以下、レジュメに掲げた判旨は、要約かつ意訳をしたものでありますので、その点ご注意ください。

【判旨】

法廷意見

市場に対する詐欺理論（fraud on the market theory）とは、公開市場において会社の株価は、会社およびその事業に関する情報に基づいて決定されるとの前提に立ち、原告が不実表示に直接依拠しなかった場合でも、被告の不実開示と原告の証券購入との間の因果関係を認める理論である。我々の仕事は、市場に対する詐欺理論の有効性を一般的に評価することで

はなく、裁判所が、部分的に市場に対する詐欺理論に依拠して、信頼の反証可能な推定を認めたことが適当かどうかを考察することにある。

原告に、開示されなかった事実が開示されたとしたら、あるいは、不実表示がなかったとしたら、どのように行動していたかを立証させることは、公開市場で取引をした原告に、不必要かつ非現実的な立証責任を課すことになる。信頼の推定は、公正、公序、蓋然性、および訴訟経済の観点から見ても、当事者間で立証責任を分配する有用な方法である。本件で採用された信頼の推定は、Rule 10b－5訴訟を促進することになるが、それは、証券市場の誠実性（integrity）に対する投資者の信頼を促進するという1934年法の立法政策とも整合的である。

推定は、コモンセンスおよび蓋然性からも支えられている。最近の実証研究は、高度に発達した市場で取引される株式の市場価格が、すべての公開情報を反映しており、したがって、重要な不実表示をも反映していることを示している。…市場で形成された価格で株式を売買する投資者は、当該価格の誠実性を信頼して売買を行っている。多くの（most）公開情報は市場価格に反映されているから、公開された重要な不実表示に対する投資者の信頼は、Rule 10b－5訴訟の関係において、推定されうるのである。

【White判事、O’Connor判事の反対意見】

経済理論を法原則に取り入れるとしても、それは、裁判所よりも専門家の助けを得ることのできる議会が、法律改正によって行うべきである。

投資者が「株価をその株式の価値を反映するものとして信頼していること」は疑問である。多くの投資者は、株価が会社の価値を反映していないと信じるからこそ株式の売買を行うのではないか。

市場に対する詐欺理論は、34年法18条（a）項が要求する厳格な信頼の要件を骨抜きにする点、および情報をみない投資者を保護する点で、34年法の立法目的に反している。

このBasic判決は、当該事件の控訴裁判所が採用した「推定」を適切であるとし、推定が認められるための要件を明示していませんが、控訴審では、推定が認められるためには、原告は、（１）被告の不実表示が公表されていること、（２）不実表示が重要であること、（３）株式が効率的な市場で取引されていること、（４）不実表示が、投資家に株式の価値を誤って評価されるものであること、（５）原告が、不実表示がなされてから真実が発覚するまでの間に株式の取引を行ったことを主張し、証明しなければならないとします。ただし、（４）については、後の判例では要件から除外されていて、通常４つの要件が必要だと言われています。

これを前提に判決は、「不実表示と原告の受け取った（または支払った）価格との間の繋がり、または不実表示と市場価格で取引を行うという原告の決定との間の繋がりを断ち切るいかなる証明も、信頼の推定を覆す」として、推定が覆される例として、①マーケット・メーカーが真実を知っており、市場価格が不実表示の影響を受けなかった場合、②真実の情報が市場に到達しており、不実表示の影響を打ち消していた場合、③原告は、市場の誠実性を信じたのでなく、他の理由で取引を行った場合を挙げています。

Ⅳ．Halliburton Ⅰ判決（2011年）

（Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179（2011）. 解説として、藤林大地「市場における詐欺理論の適用と損害因果関係の立証の要否」商事1979号（2012）53頁。）

【事実】

EPJ Fundが、Halliburton社が、アスベスト訴訟の潜在的な範囲、ある建設契約から生じる予想収益、及び他の会社との合併の便益について、故意にさまざまな虚偽の開示を行ったと主張して、1999年６月３日から2001年12月７日までにH社の株式を購入した者を代表してクラス・アクションを提起した。

却下の申立て（motion to dismiss）を退けたのち、地方裁判所は、EPJ

Fund は、請求に係る損害因果関係を証明しておらず、連邦民事訴訟規則23 条（ｂ）項（３）号の要件を満たさないとして、クラスの認可を拒絶した。第５巡回区の先例は、クラス認可を得るために、原告は損害因果関係の証明をしなければならないと求めていたからである。そこで、クラス認可のために損害因果関係の立証が必要かどうか、巡回区レベルで裁判例が一致していなかったので、その不一致を解消するために、最高裁が裁量上訴を認めた。

【判旨】　破棄差戻し。

本件下級審は、クラス認可における共通性の要件を充たすために、信頼の立証が必要であり、信頼の証明のためには損害因果関係の証明が必要と考えた。

しかし、控訴裁判所の要件は、Basic 判決の論理からは正当化されない。損害因果関係は、投資家が不実表示を信頼したか否かとは関係のない事柄に関するものである。後の損失が不実表示の発覚以外の要因によって生じたという事実は、投資家が最初の段階で不実表示を信頼したかどうか（それが直接であれ、推定される場合であれ）とは関係がない。

Halliburton は、本件下級審が損害因果関係の名の下で実際に問うたのは、主張された不実表示が最初の段階で市場価格に影響を与えたか、すなわち価格影響性（price impact）の有無であったと主張する。しかし、控訴裁判所が言おうとしたことを Halliburton がどう考えるにせよ、実際に言ったのは損害因果関係である。

判決の内容は当然のようにも思えるのですが、これは Amgen 判決や Halliburton Ⅱ判決への伏線となっていて、実はそう単純な問題ではないということが後でわかります。

Ⅴ．Amgen 判決（2013 年）

（Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184（2013）. 解説として、藤林大地「証券集団訴訟の認可と不実表示の重要性の立証の要否」商事 2015 号（2013）38 頁。）

【事実】

コネチカット州の退職年金ファンドが、バイオテック会社 Amgen とその役員（併せて Amgen という）に対し、証券クラス・アクションを提起し、信頼の要件については「市場に対する詐欺」推定を援用し、クラス・アクションの認可を求めた。地裁はクラスを認可し、第９巡回区控訴裁判所は、退職ファンドはクラス認可の前に虚偽記載または省略の重要性を証明する必要があるとの Amgen の主張を退け、クラスの認可を維持した。同裁判所は、また、クラス認可の段階で Amgen が提出した、重要性の反証となる証拠を考慮することを地裁が拒絶した点に誤りはなかったと判示した。最高裁は、クラス認可のために重要性を立証する必要があるかどうかについて、巡回区の不一致を解消するために、裁量上訴を認めた。

【判旨】

重要な問題は、クラスに共通する法または事実の問題が、個々のメンバーのみに影響する問題に対して支配的であるといえるためには、重要性の証明が必要かどうかである。その答えは２つの理由により「否」である。

第１に、重要性は客観的な基準に従って判断できるので、クラスに共通の証拠によって証明され得るからである。したがって、重要性は、23 条（ｂ）項（３）号にいう「共通の問題」（common question）である。

第２に、原告が略式判決の申立てや本案において、重要性の十分な証拠を提出できなかったときは、個々人の信頼の問題がクラスに共通の問題に優越するという事態を招くことはない。重要性の要件の証明に失敗したときには、すべての者にとって訴訟は終了し、個々人の信頼という争点が支

配的になるような請求が残ることはない。

Amgen は、市場に対する詐欺理論の前提条件はクラス認可の前に充たされなければならないから、前提条件の一つである重要性もクラス認可の前に証明されなければならないという。しかし、重要性と異なり、市場の効率性および不実表示が公表されたことは、Rule 10ｂ－５の欠くことのできない要素ではない。後２者が証明されなくても、信頼の個別的立証が許されるが、重要性が証明されなければクラスの請求全部が棄却される。市場の効率性や公表の争点と異なり、重要性の争点が証明できなければ、個別問題が共通問題に優越することはないので､重要性は 23 条（ｂ）項（３）号のクラス認可の前に証明される必要はない。

Amgen は、クラス認可は和解への大きな圧力となるから、認可前に重要性を争えないと、重要性を争う場面がなくなると主張する。しかし、その点は、不実表示や損害因果関係の要件についても同じである。議会は和解の圧力に対して、クラス認可段階で重要性の証明を求めること以外の手段によって対処したのであり、これに加えて裁判所が 23 条（ｂ）項（３）号の再解釈により調整を行う必要はない。

Amgen は、原告の申立てに対して、重要性の反証を提出できないとした点に地裁判決の誤りがあると主張する。しかし、主張された不実表示が最終的に重要でないとされる可能性があることは、共通問題が支配的であることを妨げるものではない。本件の地方裁判所が、Amgen の反証の考慮を略式判決または事実審（トライアル）にとっておいたのは正しい。

本判決では、Thomas 判事が反対意見を記載し、Kennedy 判事がこれに同調、Scalia 判事もその一部に同調しています。

解説を加えておきますと、不実表示の重要性は、市場に対する詐欺理論による信頼の推定を認める要件の１つなのに、クラス認可の段階で証明を要しないのはなぜか。判決はこの問題に対して、重要性が客観的証拠によって証明できるという点で共通の問題であること、仮に本案において重要性が証明

されなかった場合には訴訟は終了するので、改めてクラスの認可を判断する必要がないことをもって答えています。

クラス認可の段階で重要性の証明が不要だとすると、被告は重要性を反証する証拠を提出できないという不利益を受けるわけですが、裁判所はそれもやむを得ないと考えたわけです。ただ、この点はHalliburton Ⅱ判決で、実質的に一部変更されたと見る余地もあるように思います。

Ⅵ．Halliburton Ⅱ判決（2014年）

（Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398（2014）. 解説として、池谷誠「Halliburton事件最高裁判決の検討」商事2042号（2014）41頁。）

【事実】

Halliburton Ⅰの差戻審において、被告は、損害因果関係の反証として提出していた証拠は、不実表示が価格に影響を与えていなかったことの証拠であると主張した。地裁はHalliburtonの主張を取り上げることを拒否し、第５巡回区控訴裁判所も、価格影響性（price impact）の反証は事実審のみで認められるとした。最高裁は、①Basic判決の信頼の推定を覆したり、修正したりすべきかどうか、②もし修正しない場合、被告は、クラス認可の段階で、価格影響性の欠如を証明することにより、推定を反証する機会を与えられるべきかどうかの２点について、裁量上訴を認めた。

【判旨】（市場に対する詐欺に関連しない部分は紹介を省略）

【法廷意見】 Roberts判事ほか６名の裁判官

１　信頼の推定法理の維持

Hallibertonは、Basic判決の２つの前提が今日では成り立たないので、判例が変更されるべきだと主張する。

第１に、今日では、効率的資本市場仮説（efficient capital market

hypothesis）が成り立たない証拠がいくらであるという。たしかに、ある証券についての市場は他の証券についての市場よりもより効率的であり、ある一つの市場も、種類の異なる情報に対しては、より効率的であったり、効率的でなかったりする。

Halliburton は、市場の株価が会社の公開情報を反映する程度に関する経済学者の議論に焦点を当てるが、Basic 判決の裁判所は議論があることは認めており、信頼の推定を認めることは、公開情報がどれだけ早く正確に反映するかについての特定の理論を採用することを意味するものではないと述べている。裁判所は、一般的にいって、市場のプロが、会社に関する公表された重要な情報、従って市場価格に影響を与えるような情報の多くを（most）考慮しているという穏健な前提を置いているだけである。Halliburton が引用する学説は、このような穏健な前提を否定するものではない。

第２に、Halliburton は、投資者が市場価格の誠実性（integrity）を信頼して投資を行うという、Basic 判決が仮定に置いている命題を攻撃する。Halliburton は多くの例を引用するが、そのうち重要なのは、株式が過小評価または過大評価されていると信じているバリュー投資家（value investor）であろう。しかし、Basic 判決はバリュー投資家の存在を否定するものではない。そのような投資家は、株価が最終的には重要な情報を反映すると暗黙のうちに信頼しているのである。（そのような市場修正がないとしたら、どうやってバリュー投資家は利益を得るのか？）。たしかに、バリュー投資家は取引の時には価格を信頼していない。しかし、信頼の推定を受けるためには、合理的な期間内に市場が情報を反映すると信じていれば足りる。

Halliburton およびその賛同者は、Basic 判決は、証券クラス・アクションを促進することにより、深刻で害のある結果を引き起こしてきたと主張する。しかし、そのような心配は議会によって対応されるべきものであり、すでに 1995 年の私的証券訴訟改革法によって対処されてきた。

２　クラス認可段階における反証

Halliburton は、Basic 判決を変更する２つの提案をしている。

第１は、信頼の推定を発動させるために、原告は、不実表示の価格影響性を証明しなければならないというものである。たしかに、Basic 判決が採用した信頼推定の４つの要件（公表、重要性、市場の効率性、取引の時期）のうち、前３者は価格影響性に向けられたものである。しかし、Basic 判決の信頼推定の要件は２つの構成要素からなる。第１に、原告が、不実表示が公表されており、重要であり、かつ原告が、一般的に効率的な市場で取引をしたことを証明した場合には、彼は不実表示が価格に影響を与えたとの推定を受けることができる。第２に、原告が、関連する期間に市場価格で株式を購入したことを証明した場合には、彼は不実表示を信頼して株式を取得したとの推定を受けることができる。原告が価格影響性を直接に証明しなければならないという Halliburton の提案は、第１の構成要素を原告から奪うことになる。市場の効率性はあるかないかの命題ではないから、一般的に効率的な市場において、重要な不実表示が株価に影響を与えないこともあり得る。だからこそ、Basic 判決は、特定の不実表示が価格に影響を与えなかったという反論の機会を被告に与えている。我々は、Basic 判決を半分廃棄することになる原告の主張を認めることはできない。

第２に、Halliburton は、クラス認可段階で、不実表示が株価に影響を与えなかったという証拠により、推定を覆すことを認めるべきだと提案する。我々はこの提案に賛成する。

従来から、クラス認可の段階で被告が価格影響性を否定する証拠を提出することは、それが、推定の反証ではなく、市場の効率性を反証する目的を持つ限り、認められてきた。しかし、このような制限は意味がなく、奇妙な結果を招く。たとえば、クラス認可の段階で、被告が６つのイベントに関するイベント・スタディを提示し、そのうちの１つが被告の不実表示であったとする。地裁が、市場は効率的であったが、不実表示に対しては

市場の反応がなかったと認定した場合、これは信頼の推定を覆すものではないという理由でクラスを認可することはおかしい。

このようなおかしな結果はBasic判決の論理とも矛盾する。Basic判決の市場に対する詐欺理論の下で、信頼の推定を発動させる市場の効率性と他の前提条件は、価格影響性を間接的に証明するものである。そうだとすれば、被告には、価格影響性の直接的な反証を認めるべきである。

控訴裁判所は、Amgen判決に依拠して、Halliburtonはクラス認可の段階で価格影響性の反証を提出できないと判断した。しかし、Amgen判決は、クラス認可の段階で原告が重要性を証明しなければならないかどうかについて判示したものである。重要性はBasic判決の推定の前提条件であるが、それは連邦民訴訟事規則23条（a）項（3）号の支配性の要件と関連しないので、本案まで持ち越されると我々は判示した。EPJ Fundは、価格影響性の要件も重要性の要件と同じあるという。しかし、価格影響性は重要性と重要な点で異なる。価格影響性は、Basic判決の基本的な前提であり、クラス認可段階の支配性の争点と深く関係している。

他の要件がクラス認可の段階で証明されているのであれば、クラスに共通する要件である重要性を本案段階に持ち越したとしても、クラスの認可をあとで覆すような事態には至らない。これに対し、価格影響性については、クラス認可段階ですでに間接的な証拠が提示されているのであり、クラス認可段階で、直接的な証拠による価格影響性の反証を認めない理由はない。

【Ginsburg判事、Breyer判事、Sotomayor判事による賛成意見】

価格影響性の考慮を本案段階からクラス認可へ早めることは、認可段階で利用できるディスカバリーの範囲を拡げることになる。もっとも、価格影響性がないことの立証責任は被告が負うので、本判決は証券訴訟の原告に追加的負担を課すものではない。以上の理解を前提として法廷意見に賛成する。

【Thomas 判事、Scalia 判事、Alito 判事の意見（実質的反対意見】

Basic 判決による信頼の推定は誤りであった。その理由は第１に、裁判所が、争いのある経済理論と投資家の行動についての誤った直観に依拠したからであり、第２に、それが、クラス認可を求める原告に、個別の争点より共通の争点が支配的であるという要件の立証を求める連邦民事訴訟規則 23 条に関する判例法に反するからである。第３に、推定された信頼は、ほとんど反証することが不可能であり、信頼の要件を廃止するのに等しいからである。

Basic 判決が前提とする事実のうち、公表情報が市場価格に反映されているという点は、効率的資本市場仮説に立脚したものであるが、Basic 判決以来、その経済理論は広く批判にさらされている。また、市場が公表情報を反映するにしても、正確に反映するとは限らないことを示す多くの実証研究がある。

Basic 判決が前提とするもう一つの事実、すなわち投資家は市場の誠実性を信頼しているという点は、誤りであり。多くの投資家は、市場が株式を過大評価または過小評価していると信じているからこそ、取引をしているのであるし、他の投資家は、価格と関係のない理由で、たとえば流動性の需要、税金の考慮、ポートフォリオの組換えのために取引している。

多数意見は、穏健な前提を置くことで理論と現実を架橋しようとする。しかし、そのような穏健な前提は、Basic 判決の判決文言と整合しない。また、多数意見は、市場が過大評価･過小評価しているバリュー投資家も、将来、市場価格が公表情報を反映することを信じているというが、取引の際に市場価格が公表情報を反映していなければ、投資家は、公表情報が彼を取引に誘い込んだと主張することはできないはずである。

Basic 判決は、被告に反証の機会を与えているようにみえる。しかし、クラス認可の段階では、反証はクラス代表に対してのみ、なされるので、クラス代表の信頼を反証することは難しい。クラス認可後は、裁判所は信頼の要件の反証を拒絶してきた。信頼の反証を認めた事例は、何千もの

Rule 10b－5訴訟中６件しかないという。Basic判決は、信頼の要件を実質的に廃棄するのに等しい。

そこで、解説といいますか、コメントに近いことを述べます。

１　信頼の推定

（１）効率的資本市場仮説に依拠するものでないこと

Basic判決が出された1988年以降、情報に対する証券市場の効率性については、疑義を呈する実証研究が多数公表されており、市場に対する詐欺理論の基礎が揺らいできました。多数意見は、市場に対する詐欺理論は、市場の効率性を前提とするものではないとしてBasic判決を維持しました。Basic判決が特定の経済理論に依拠しているものでないことは確かにそのとおりです。しかし、「市場の効率性」は依然として信頼の推定のための要件の１つとされているわけであります。本判決によっても、その立場は変更されていません。

学説では、Basic判決は、市場に対する詐欺理論と効率的市場仮説を結びつけたけれど、本来、ある証券の市場価格が詐欺情報を反映している限り、市場に対する詐欺理論により信頼を推定するために、証券市場が一般的に効率的であることを示す必要がないという点は比較的早くから指摘されてきました（Jonathan R. Macey et al., Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of Basic v. Levinson, 77 Va. L. Rev. 1017, 1021（1991）等）。Halliburton Ⅰ及びHalliburton Ⅱでは、多くの学者が裁判所の友（amici curiae）として意見を寄せていますが、それらの多くも、裁判所は市場が効率的であるかどうかではなく、特定の不実表示が市場価格に影響を与えたかどうかに着目すべきであるとしています。

（２）Bebchuk & Ferrellの見解

ここでは、市場の効率性と信頼の推定との関係を例証しようとしている

Bebchuk と Ferrell の論稿（Lucian A. Bebchuk & Allen Ferrell, Rethinking Basic, 69 Bus. Law. 671（2014））、これは 2014 年 6 月に公表されて、この判決に間に合わなかったようですが、それ以前に SSR N にその草稿が載っていて、多くの学者の意見もこれに依拠しているもので、最も詳しいということから、これを紹介したいと思います。

この論文では次のようなことが述べられています。

一般に、市場は、利益を得る裁定機会（arbitrage opportunity）がない場合に効率的であると定義されてきた。

しかし、第 1 に、裁定機会の存在は、詐欺による市場価格の歪曲（fraudulent distortion）の存在を否定するものではない（市場が効率的でなくても、詐欺による市場価格の歪曲は起こり得る）。

市場の効率性は 3 つの分野で争われてきた。①市場は長期的な収益を過大評価している。②過剰なボラティリティ、③情報に対する市場の反応の鈍さ、である。

まず、過大評価設例として、次のような例が挙げられています。

市場の株価収益率が歴史的に 15 倍であったところ、現在、市場が長期的収益を過大評価し、20 倍となっていた。企業が収益を 1 ドルのところ 2 ドルと不実表示した。株価は 20 ドルから 40 ドルに上昇し、不実表示の発覚により株価は 20 ドルに戻った。その後、市場は長期的な過大評価を修正し、株価収益率は 15 倍に戻り、株価は 15 ドルとなった。クラスワイドな信頼を認めるかどうかにとって、不実表示によって株価が上昇したことが重要であり、株価収益率が過大評価されていたかどうかは関係がないのは、この例を見れば明らかではないか。

次に、過剰なボラティリティの設例です。

上の例で、株価が 20 ドルから 40 ドルへ上昇した。過剰なボラティリティのせいで、株価は、 1 時間ごとにランダムに 38 ドルから 42 ドルの間で変動していた。不実表示の発覚により株価は 20 ドルに戻ったが、同じ理由で、

19 ドルから 21 ドルの間で変動していた。クラスワイドな信頼を認めるかどうかについて、過剰なボラティリティの有無は関係がない。たしかに過剰なボラティリティは利益の機会を生じるが、不実表示によって価格が歪められていたことに変わりはない。

３つ目は、鈍い市場反応設例です。

上の例で、良い情報に接して株価は 20 ドルから 35 ドルに上昇したが、翌週１週間かけて 40 ドルまで上昇した。不実表示が発覚すると株価は 20 ドルに戻った。不実表示の開示を受けて当該株式を取得した者が、市場価格の歪みの結果、15 ドルないし 20 ドル余分に支払った事実には変わりがない。

反応が遅いために、裁定の機会があったとしても、因果関係は認められるはずであるというわけです。

第２に、裁定機会がない、すなわち市場が効率的であることは、不実表示が市場価格の歪みをもたらさない場合があること否定するものではないとして、２つの例を挙げています。この例はややわかりにくくて、私も十分理解しているとは言えないんですけれども、議論の材料になるかと思ってご紹介するところです。

第１は公表された情報の設例であります。

インターネット企業が、四半期収益を公表した。その数日後、サイトへの来訪者数が 75％上昇したとの不実表示を公表した。アナリストは来訪者数の情報を分析して、それが企業の収益性に与える影響を分析した。不実表示を公表したときも、それが不実であると発覚したときも株価に変化はなかった。

この場合、価格の歪みがないからクラスワイドな信頼は与えられない。市場が開示情報に反応しなかった理由（情報が重要でなかった、四半期収益の情報で株価が決定されていた、市場が虚偽情報を信頼していなかった等）はなんであれ、重要なのは市場価格に歪みが生じたかどうかである。

第２は、埋没した情報設例です。

企業が、環境政策に関する公表された報告書（投資家の興味を惹かなかった）の中で、財務情報について不実表示をした。不実表示をしたときも、その発覚のときも、市場価格に変化はなかった。

クラスワイドな信頼は与えられない。情報が価格に反映されなかった理由は重要でない。重要なのは市場価格の歪みが生じていないこと。

Bebchuk & Ferrell は、今の例を含めていろいろな議論をした後に、信頼の推定法理は次のように改訂されるべきであるとしました。レジュメで二重取り消しがかかっているところは削除すべきところで、太字のところは追加すべきところという意味です。

変更後の法理というのは、（１）市場で取引されている市場の価格は、公開され利用可能な会社に関するいくつかの情報を反映する。全てではなくて some ということです。（２）したがって、市場における市場の買主は、購入するに際して、当該市場価格が詐欺的に歪められていないことを、たとえば、不実表示がなかったとしても異なる価格ではないことを信頼したと推定されることができる。（３）そして、証券の市場が詐欺的に歪められていないとき、原告はクラスワイドな信頼の推定を起動させることができない。

（３） 判旨の検討

Halliburton Ⅱ判決は、判旨２で価格影響性（price impact）という概念を用いましたが、これは今紹介した Bebchuk & Ferrell の言うところの詐欺による歪曲と同義だろうと思います。多くの学説が主張するように、最高裁は、市場に対する詐欺理論を市場の効率性を価格影響性に置きかえたものに修正すべきだったと思います。しかし、判例を変更しなくても信頼の推定を認めるという結論には変わりがないので、最高裁は Basic 判決の修正を避けたものと思われます。

この結果、Halliburton Ⅱ判決によると、信頼の推定を受けるためには、市場が効率的であることを依然として原告側が示す必要があります。一般に

市場の効率性の証明方法としては、Cammer 判決（Cammer v. Bloom, 711 F. Supp. 1264（1989））の示した５要因テストが用いられていると言われており、そこでは株式の取引量、当該株式をフォローしていたアナリストの数、マーケット・メーカーの数、S－３の登録要件を充たすかどうか、予期しない新事象に対する株価の反応を基準として、当該株式の市場が効率的であるか否かが決定されています。裁判実務上、このような効率性の検証が引き続き行われるようであれば、それは学説から批判される余地があろうかと思います。

（４）市場の誠実性に対する信頼というレトリック

法廷意見は、バリュー投資家も、いずれは市場価格が情報を反映すると考えて投資しているから、市場の誠実性を信頼していると説明しています。これに対し反対意見は、バリュー投資家が取引のときに市場の誠実性を信頼していたかどうかが問題なのだとします。

この議論は反対意見に分があります。ただ、そもそも市場の誠実性に対する信頼を問題にすること自体、レトリックにすぎないと思われます。バリュー投資家は、効率的でない市場の投資家像を反映したものであり、現実の市場には、市場価格が情報を反映していると考えて取引を行う投資家と、そう考えないがゆえに取引を行う投資家が併存することは否定できません。いずれの投資家についても、不実表示によって影響を受けた市場価格で取引を行えば、不実表示と取引との間の因果関係が認められると理解すれば足ります。最高裁は、市場の効率性を前提とするという理解のもとで Basic 判決を変更しなかったので、こういったレトリックを用いざるを得なかったわけです。

２　クラス認可段階での価格影響性の反証

（１）価格影響性と損害因果関係

多数意見は、価格影響性という概念を用いて、価格影響性は重要性と異なり、クラス認可段階で反証可能であるとしました。果たして、価格影響性は

重要性と異なるのか。また、損害因果関係とは異なるのかということが問題になります。

まず、損害因果関係との関係です。損害因果関係というのは、投資家の取引と、彼がこうむった損失との間の因果関係のことをいいます。正確には「損失因果関係」と訳したほうがいいのかもしれないのですが、私もずっと損害因果関係と訳しており、何となくそれが定着していますので、ここでは「損害因果関係」という言葉を使っています。

損害因果関係があると言えるためには、有価証券の取得時に不実表示によって市場価格が不当につり上げられていたことを証明するのでは足りないとするのが判決（Dura 判決、Dura Pharmaceuticals, Inc. v. Broudo, 544 U. S. 336 (2005)）であり、不実表示の発覚が株価を下落させたことを示すことは、損害因果関係の立証の一方法と考えられています。

また、価格影響性とは「被告の不実表示が実際に株価に影響を与えたか」ということですが、これも不実表示がされた時点のイベント・スタディを行うことは難しいことが多いので、不実表示の発覚時のイベント・スタディにより確認することになるでしょう。そうすると、価格影響性と損害因果関係とは実は同じ問題ではないかと思われます。

Coffee 教授は、コロンビア大学のホームページで公開されているブログの中で次のように述べています（John C. Coffee Jr., "Death by One Thousand Cuts", Columbia Law School's Blog on Corporations and the Capital Markets (June 30, 2014), at http://clsbluesky.law.columbia.edu/2014/06/30/death-by-one-thousand-cuts/）。

「Halliburton Ⅰは、損害因果関係はクラス認可の段階では争えないとした。Halliburton Ⅱは、これを実質的に変更して、『価格影響性』はクラス認可段階で争えるとした。同じ証拠が損害因果関係の反証にも価格影響性の反証にも使えるのだから、法はいつもラベル貼りの問題である」。

Fox 教授も同じ媒体でコメントを公表しているのですが、「価格影響性と損害因果関係とは実質的に同じ争点である」とします（Merritt B. Fox,

“Halliburton II: Who Won and Who Lost All Depends on What Defendants Need to Show to Establish No Impact on Price”, Columbia Law School’s Blog on Corporations and the Capital Markets（June 30, 2014）, at http://clsbluesky.law.columbia.edu/2014/06/30/halliburton-ii-who-won-and-who-lost-all-depends-on-what-defendants-need-to-show-to-establish-no-impact-on-price/）。

これに対し、Bebchuk & Ferrell は例を挙げて、価格影響性、彼らの言うところの詐欺的歪曲と損害因果関係とは異なるとします。

FDA 承認設例

企業が、FDA（アメリカ食品医薬品局）が医療機器を承認するだろうという虚偽の公表をした。株価は直ちに 10％上昇した。原告は、不実表示が市場価格に影響を与えたことを証明した。

この場合、クラスワイドな信頼は認められる。しかし、詐欺的歪曲が経済損失を生じさせたことはまだ証明されていない。Dura 判決は、価格のつり上げだけでは経済損失の近因にならないとする。価格影響性は、損害因果関係の必要条件であるが十分条件ではない。

もっとも、この例は不実表示時のイベント・スタディで詐欺的歪曲を証明できる事例を前提としており、重要な事実を隠した場合、これは不開示に限らず、虚偽記載の場合でもそういった例はありますが、両者は同じではないかという疑問はなお残るように思います。

（2）価格影響性の反証の程度

次に重要なのは、クラス認可の段階でどの程度の反証の負担があるのかという点です。

Coffee 教授は、先ほどのブログで次のような問題を設定しています。例えば「訂正情報の開示の際に市場価格が下落したが、その有意性は、通常求め

られる 95％のレベルではなく 90％のレベルであった。被告は、価格影響性を反証したと認められるか？」。

Fox 教授も、実質同じ問題について述べているのですが、その表現が違うので紹介します。

「クラス認可段階での被告による価格影響性の反証について、本案段階での原告による損害因果関係の立証と同程度のものを求めるとしたら、被告の反証権は意味のないものとなる。すなわち、95％の信頼水準を要求するのでは意味がない。これに対し、原告が損害因果関係の立証ができないであろうことを被告が裁判所に説得することだけで、信頼の推定が反証されるのだとしたら、本判決は被告にとって意味がある。この場合には、価格影響性と実質的に同じ争点である損害因果関係を、クラス認可の段階で、被告に立証責任を負わせて行うことになる」。

これは、立証責任が転換されているということを表現したものだろうと思います。その限りで、反証の程度も本案段階の原告による証明と同程度のものは求められないだろうということです。

価格影響性の反証の程度の問題は、今後下級審判例に委ねられた課題であると言えます。

（3）不開示の場合とのバランス

発行者等が開示すべき情報を開示しなかった不開示の場合には、厳格な信頼の要件を課すと、原告は不開示の対象について、それが存在しないと信頼したことを立証しなければならないけれども、その証明はほとんど不可能です。そこで、判例は開示義務の存在と秘匿された事実の重要性の要件が満たされるならば、因果関係の要件は充足されるとしました（Affiliated Ute Citizens v. United States, 406 U. S. 128 (1972)）。

この事件は対面取引の事例でしたが、その後の裁判例は、公開市場取引についても、不開示の場合には信頼の要件は不要である旨判示しています。このように不開示の場合には信頼の要件の充足が不要であり、クラス認可が認

められるとすると、積極的な不実表示の場合に、クラス認可段階で価格影響性の反証が認められることとのバランスが問題になります。

Bebchuk & Ferrell は、詐欺的歪曲の有無を基準とするアプローチを不開示の場合に適用しない理由はなく、統一的なアプローチをとることで、不実表示と不開示のどちらに当たるかという恣意的な区分を解消することになるとします。不開示の場合には、ある事実が開示されなかったことが市場価格に影響を及ぼし、投資家の取引の原因となっているわけですから、価格影響性の反証も認められるべきでしょう。

（4）価格影響性と重要性

重要性とは、合理的な投資家が投資判断に当たって、当該表示を重要と考えたことを意味し、重要と考えたかどうかは、当時利用可能な情報の総体を大きく変えるかどうかで判断されます。情報が重要であれば市場価格に影響を与えますから、価格影響性と重要性の異同が問題になります。本判決は価格影響性と重要性とは異なるとしますが、判旨が掲げる価格影響性と重要性の相違は、性質の相違というよりもクラス認可の段階で証拠が提出されているかどうかの相違にすぎず、理由づけとして余り説得的でないように思います。

Bebchuk & Ferrell は、価格影響性と重要性とは異なり、価格影響性の反証を認めることは重要性の要件の審理を先取りすることにはならないとして、次の例を挙げます。

鉱山設例

アメリカの鉱山会社がオーストラリアに金鉱を所有している。CEO が鉱山を訪れ、鉱山技師と会話をし、帰国後、「鉱山技師と会話をした。金鉱はとても良いと思う（feel great about the gold mine）」と発言した。株価は 10％上昇した。後になって、当該金鉱で金を産出することが不可能であると判明した。原告は、CEO の虚偽発言と市場に対するインパク

トを証明した。

クラスワイドな信頼は認められる。しかし、本案の段階で、被告は表示の重要性を争う余地がある。なぜなら、事実の争点は、技師がCEOに話した内容はなにか、その内容（情報）は金鉱をどれだけ有望なものにするか、その情報はCEOの発言を導いたかといった点にあるから。市場に対する影響度と、表示が重要な点で誤解を生じるものを含んでいたかどうかは別問題である。

この設例と説明が説得的であるかどうかよくわからないので、ご意見を伺えれば幸いです。

3　クラス・アクションへの影響

以上が判決そのものの検討ですが、その影響について簡単に述べたいと思います。

クラス・アクションへの影響が一番重要な点だと思いますが、アメリカでも余り資料が公表されていないので、議論の状況はよくはわかりません。以下では、私が知り得たところのみを述べます。

従来、NYSEやNasdaqで取引されている株式に関するクラス・アクションでは、クラス認可は自動的に与えられてきました。こういった市場は一般的に効率的であると認められるからです。ところが、クラス認可段階で、被告は価格影響性を争えるようになるため、クラス認可段階がミニ・トライアル化すると言われています。クラス認可の段階でも、資料として専門家の証言を提出するなどディスカバリー類似の手続が行われるようです。

この結果、原告の費用負担は増え、訴訟は減少する可能性があります。

被告は、①棄却の申立て（motion to dismiss）、②クラス認可の申立て、③略式判決の申立ての３段階で争うことができるようになる。従来、証券クラス・アクションは略式判決申立ての前後で和解になることが多かったが、それよりも前で争うことが可能になったということです。

以上は、主としてCoffee教授の前記コメントによるものです。

また、別の実務家が書いたものでは、D&O保険について触れています。

「被告が価格影響性を争えるので、保険者の支払件数は減少するだろうが、価格影響性をめぐる争いが防御費用を増加させるだろう。保険業界において、クラス認可段階における価格影響性のイベント・スタディの費用を付保範囲とすべきについて議論がされるだろう」。

4　日本法への示唆

日本法に照らすと、信頼の要件及び損害因果関係の要件は、相当因果関係の一部をなすものであり、不実表示の重要性という要件も相当因果関係に関連するものです。また、明文で信頼の要件を課す条文は日本にはなく、証券クラス・アクション制度もありませんので、クラス・アクションの認可との関係で信頼の要件が問題とされるということもありません。

もっとも、不実表示に基づく投資家の損害は、不実表示と投資家の損害との間に、投資家による投資決定という要因が入り込むため、因果関係を、取引因果関係、損害因果関係に分けて分析することは、日本においても有用です。アメリカの判例法の動向は、信頼、損害因果関係、重要性の概念の相互の関係について、一定の示唆を与えてくれるように思われます。

かつて、Fischel教授は、市場に対する詐欺理論の論理を受け入れれば、公開市場での証券詐欺事件において、重要性、信頼、因果関係及び損害賠償額を別々に審査する必要はなくなり、不実表示が市場価格に人為的な影響を与えたかどうかのみが問題となると主張しました（Daniel R. Fischel, Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. Law. 1, 13 (1982)）。つまり、因果関係を構成する全ての要件が価格影響性に収れんするという主張です。この議論は、市場の効率性を前提としたものでした。

今日、Halliburton Ⅱ判決が出て、信頼の推定を行うには、市場は効率的である必要はなく、不実表示の価格影響性があれば足りるということが判例・

学説の共通理解となりました。このように、信頼の推定を行う前提条件を市場の効率性から価格影響性へと緩めた、あるいは変更した場合に、価格影響性があれば不実表示は重要で、不実表示と損害との間に因果関係が認められ、損害賠償額は価格に対する影響の幅によって決定されると言ってよいでしょうか。それとも、Bebchuk & Ferrell の指摘するように、重要性、信頼、因果関係は本来異なる概念であり、市場が効率的である場合にもそれぞれの要件は別個に判断されなければならないのでしょうか。こういった問題を検討することが重要になるように思います。

直観的には、価格影響性があれば、不実表示の重要性、信頼の要件、損害因果関係を認めてよいが、市場が効率的でない限り、価格に対する影響の幅が直ちに損害賠償額になるとは言えないように思われます。

検討の点は甚だ不十分ですが、報告は以上です。よろしくご教示をお願いします。

討　議

前田副会長　黒沼先生、貴重なご報告をいただき、どうもありがとうございました。

それでは、ただいまの黒沼先生のご報告につきまして、いつもどおり、どこからでも結構でございますので、ご質問、ご意見をよろしくお願いいたします。

中東委員　大変興味深いお話、ありがとうございました。

ご解説いただいた「信頼の推定」とともに、最後に私見としておっしゃった点にも関係すると思うのですが、「効率性」と「不実表示の価格影響性」とは、実態としてどのように使い分けられているのか、教えていただけませんでしょうか。市場が一定程度効率的でなければならないことが価格影響性の問題であるのかとも思えました。つまり、効率的資本市場仮説でいえば、セミストロング型ではあってほしい。そうでなければ価格影響性はない。ただ、ストロング型になってしまうと、そもそも因果関係がなくなってしまう

ので、そういう形であってはいけない。ではウイーク型でいいかというと、ウイーク型になると価格影響性がなくなってしまう。こういう話とも理解できるのかなと拝聴しました。もしそうならば、取引因果関係と損害因果関係を分けるというのは、まさにそこに意味があるのかなと理解しました。

黒沼委員　この判決が言おうとしているところは、市場が一般的に効率的であるということを証明すれば信頼は推定されるけれども、個別に当該不実表示が市場価格に影響を与えなかったということを被告の側で反証した場合には、その推定が覆されるということです。そこで扱われているのはセミストロング型の効率性の概念だけれども、効率性があるかないかが最後まで争点になるのではなく、一般的に効率的であることを証明するのと、それに対して個別に反応しなかったかどうかを問題にする、そういう関係になると思います。

中東委員　よくわかりました。その意味では、信頼性の推定法理が改訂されるべきであるという Bebchuk 教授らの見解のご説明のところで、「効率的な」という言葉を取って全ての情報を反映するのではなく、幾つかの情報を反映するという形に書きかえるのが、先生のご理解を反映したものと考えてよろしいでしょうか。

黒沼委員　私の理解がどうかというより、きょうの報告では余り述べていないのですが、裁判所は Basic 判決を覆さなかったということで、一般的に効率的であるということを今でも前提にしているわけですが、Bebchuk らの議論は、市場が一般的に効率的であることではなく、個別の不実表示が市場価格に影響を与えたことが重要だとしている。彼らは立証責任については、論理必然的にこうなるはずだとは言えないと言っているので、立証責任は争点になりますが、価格影響性がなければ信頼の推定が覆されるという議論だと思います。

前田副会長　Basic 判決のところで、不実表示と原告の証券購入との間の因果関係が問題になっていますが、不実表示と購入との因果関係と一口に言っても、不実表示がなければより低い価格で買っていただろうという場合と、

不実表示がなければそもそも取引がなかっただろうという場合と、２つあると思います。日本でいえば高値取得損害か全部取得損害かという問題です。きょうの黒沼先生のご報告は、不実表示がなければより低い価格で買っていただろうという意味で分析をなさったという理解でよろしいでしょうか。

少し気になりましたのは、Basic 判決についてご解説、レジメ３ページ「反証の例」の③として「原告は、市場の誠実性を信じたのではなく、他の理由で取引を行った場合」が挙げられていることです。どうせ取引はしていただろうとは言えても、もっと低い価格で買っていただろうと言える場合には、これは反証にならないように思うのです。十分整理できずに質問させていただいているのですが、もっと低い価格で買っていただろうという場合と、そもそも買っていなかっただろうという場合と、きょうの先生のご報告の中での位置づけをご説明いただけるでしょうか。

黒沼委員　御指摘ありがとうございます。アメリカで議論されている Basic 判決における信頼の推定というものはクラス・アクションを前提にした議論なので、前田先生がおっしゃった高値取得損害の場合、虚偽記載がなければ違った価格で取得していたであろうという場合を念頭に置いたものだと思います。Rule 10ｂ－５は、それ以外に証券会社の従業員による詐欺的な勧誘の場合にも適用がありますが、その場合だと、アメリカでも取得自体損害的な考え方がとられています。そのときには、Basic 型の信頼の推定は認められておらず、その不実表示の影響を受けて取引を行ったことが必要になるという理解だと思います。その点から言うと、Basic 判決が挙げている最後の点の反証、こういう反証を認めるべきなのかどうかというのは議論の余地が大きいと思っております。

市場取引で取得自体損害が認められる場合はどういう場合かというと、私が知る限り、アメリカでもそれほど判例があるわけではなくて、むしろ日本のほうが議論が進んでいるのではないかと思います。上場のための書類に虚偽記載があったために上場されてしまったという事例では、Basic 判決とは違うタイプですが、市場に対する詐欺という概念を用いて取得自体損害の回

復を認める古い裁判例があります。取得自体損害が市場取引で全く認められないわけではないけれども、少なくともクラス・アクションで問題となるような場合には高値取得損害を想定している。それを前提にした議論だろうと思います。

加藤委員　クラス・アクションの認定の段階で、市場における詐欺理論に基づいて原告が立証しなければいけない要件は、Amgen 判決を踏まえると、重要性は落ちることになるという理解でよろしいでしょうか。

黒沼委員　Amgen 判決を踏まえると、落ちているということです。

加藤委員　効率的な市場で取引されているということは言わなければいけないけれども、先ほど中東先生との質疑応答であったとおり、被告側が不実表示は株価に影響を与えなかったということを反証した場合には信頼の推定は得られなくなるという理解ですから、つまり重要性に関する要件が落ちたけれども、Halliburton Ⅱは復活したという理解になるのでしょうか。

黒沼委員　そこはアメリカの判例法理の複雑怪奇なところです。Halliburton Ⅱが Halliburton Ⅰを実質的に覆したということは Coffee 教授も言っているのですが、Amgen を覆したとは言っていないのです。そこをどう理解するかというのはなかなか難しい。

加藤委員　つまり、Coffee 教授や Fox 教授が損害因果関係と価格影響性というのは事実上同じだと言っているけれども、重要性は別の要件である。彼らの理解はそういうことでよろしいですか。

黒沼委員　彼らの理解はそうは明言していないのですが、Bebchuk らはそのように言っています。その違いを、取引時に価格をつり上げたかどうかというのが重要性の問題で、損害因果関係のほうは、発覚時に株価が下落したかどうかという問題だという捉え方をしているのです。その捉え方自身、Dura 判決という判例法理がとった考え方で、それまでは取引時に価格をつり上げたことが重要性であり、かつ損害であると考えられていました。だから、Bebchuk らが言っていることが理論的に正しいのかどうかというのはよくわかりません。

中村委員　判決を契機にしたBebchukたちの考え方をもうちょっとよく理解したいということで、レジュメ11ページの「信頼の推定法理は次のように改訂されるべきである」というところについて質問です。（1）は、判決の言っている「穏健な前提」と同じなので特に問題ないと思います。（2）は、単に彼らの考えを言っているだけです。そうすると、実際に裁判でどうこの法理が使えるかというところは、（3）だけに意味があるのではないかと受けとめました。証券の市場が詐欺的にゆがめられていないということが要件になっていますが、ささいなところでは、「証券の市場」なのですか、それとも「証券の価格」が詐欺的にゆがめられていないときですか。市場と価格をどう考えるべきかという点が、1つ、規範として気になりました。

もう1つは、詐欺的にゆがめられていないときというのは一体何なのか。価格影響性と詐欺的歪曲がほぼイコールということをレジュメの「(3) 判旨の検討」の下にお書きいただいています。レジュメの13ページの真ん中あたりのBebchukのところで、「価格影響性は、損害因果関係の必要条件であるが十分条件ではない」とされています。これも納得はできるのですが、では詐欺的にゆがめられていないときというのは何を立証すればいいのか。価格影響性だけでなくプラスアルファとは何なのかという点で、裁判規範としては使えないおそれがあります。価格ないし市場がゆがめられているというのは何を立証すればよいのか、Bebchukがどう考えているのかということについて、もしご見解があればご教示いただきたいと思います。

黒沼委員　読み返してみないとわからないのですが、詳しくは述べられていません。信頼の推定法理が改訂されるべきであるというのは、彼らがこれを余り変更しないで使えるということを示すためにこういうことを述べているのであって、彼らの主張の内容からすると、証券の市場が詐欺的にゆがめられていないというのは、市場が一般的に不実表示によって影響を受けないとかそういうことではなく、個別の証券の価格が個別の不実表示によって変動を受けていないということを意味しているのではないかと思います。先生が明確でないと言うのはそのとおりで、このように書くと、一般的な市場の性

質のことを言っているように見えますが、彼らの論旨からすると個別の当該不実表示の影響のことを言っているはずです。

中村委員　詐欺的にゆがめられていないというのは、重要事項非開示の場合と不実の開示と両方ありますが、それと価格への影響というのはわかりますが、それにプラスアルファが必要ですか。

黒沼委員　そうは考えていないと思います。２と同じです。不実表示がなかったとしても価格は異ならなかったということと同じだと思います。これは不開示の場合にも当てはまるので、不開示の場合には開示があった場合の価格と同じであったであろうということを証明すれば、詐欺的な歪曲はなかったということになります。

中村委員　レジュメの 13 ページで、Dura 判決は価格のつり上げだけでは経済損失の近因にはならなくて、「価格影響性は、損害因果関係の必要条件であるが十分条件ではない」と言ってはいるものの、不実の開示等が価格に影響しない場合があり得ることをもってのみ十分条件ではないと言っていることになるのですか。

黒沼委員　いや、価格に影響したというだけでは十分条件ではない。取引時の価格をつり上げたというだけでは十分条件ではない。Dura 判決はそう言っているので、それを繰り返しています。

中村委員　そうすると、不実の開示と、それによって価格が変動したという事実のほかに……。

黒沼委員　例えば、不実表示によって市場価格が現に上がったとしても、それが不実であることが開示されたときに下がらなかったら損害がないというのか、損害の立証としては不十分だというのが Dura 判決の考え方です。

加藤委員　記憶が曖昧なのですが、Dura 判決というのはかなり特殊な事案だと思います。Dura 判決は、たしか製薬会社の不実表示です。２つの連続してなされた不実表示が問題になっていまして、第１不実表示と第２不実表示と呼ぶことにしますが、Dura 判決の最高裁判例で問題になったのは、第２不実表示の影響を受けて買った人による損害賠償請求です。ところが、第

１不実表示が発覚したときは株価が下がったのですが、その直後に第２不実表示が発覚したとき、株価は下がらなかったのです。

このような特殊な事案であるということを踏まえると、株価が発覚したときに下がらなかったことにどれぐらい意味があるのか。つまり、第１不実表示の発覚のときに第２不実表示の分も合わせて下がっていたのかもしれない。第１不実表示の発覚の段階で、第２不実表示分も下がっていたかもしれないけれども、最高裁判決はそういうことは問題にはしていません。中村先生のご懸念は、不実表示がなされたときに価格影響性があると言いつつ、結局損害因果関係が認められない場合が本当にあるのかどうか、逆に価格影響性がないけれども損害因果関係がある場合があるのかどうか。私は、価格影響性と損害因果関係の関係は、アメリカの判例法理においても、明確に説明されていないのではないかという印象を持っています。

中村委員　そういう整理というよりは、むしろ信頼の要件が満たされたために、ちょっとこだわるようですが、不実の情報の存在と価格の影響性が認められれば、Bebchuk の言う信頼の要件は実は満たされたことになるのではないか。結局、価格影響性が認められれば信頼の要件が認められるけれども、損害因果関係のほうでは、証拠の共通があるために影響はするけれども十分ではない。済みません、問題を解決しました。

永井オブザーバー　クラス・アクションのクラスの認定の申立て段階で、被告側が事実上の本案審理の一部を争えるようになったというのは、今までクラス・アクションが余りに容易に認められてきたことが改められるという意味で、この決定を歓迎したいと思います。私的証券訴訟改革法でも、クラス・アクションの利用は行き過ぎているとされ、制限的に運営される方向にあるので、これをさらに実質的に推し進めるものとして、私はこの部分を評価したいと思います。黒沼先生はどのようにお考えになられてここで評釈されているのか、お伺いしておきたいと思いました。

黒沼委員　私はどちら側ということもありませんが、クラス・アクションという制度に付随するいろいろな問題を考えなければいけないので、これはい

ずれ立証しなければいけないけれども、どの段階でどちらが責任を負って立証するかという問題なのです。クラス・アクションとの関係で問題になる。幾つかの考慮要素があります。

きょうの報告で言わなかったけれども、一つ言われていることは、クラス認可の前か後かによって、裁判官が判断するのか陪審員が判断するのかが違ってくる。被告は特に裁判官に判断してもらいたいという意向があるから、できるだけ認可前を望む。motion to dismiss とクラスの認可と略式裁判の申立ての順番がどうなっているのかよくわからなかったのですが、レジュメに書いてあるように、恐らく motion to dismiss が最初で、次にクラスの認可、次に正式審理に入ったけれども略式判決の申立てという順番になるのではないかと思います。

従来は、認可前に訴答の段階で十分に請求が述べられていないということで、motion to dismiss が申立てられて、そこでだめだともう和解してしまうという例もあったのですが、クラス認可のところで争えるようになったというのは被告にとっていいことですし、私も濫訴を防止するためには望ましいことだろうと思います。ただ、そのために、この部分がミニ・トライアル化するとかディスカバリーが行われるということも言われていますので、正式審理のディスカバリーとは違うとは思いますが、訴訟のあり方としてそれがいいのかどうかというのは、また別個の問題なのかもしれません。

飯田委員　15 ページの上の、先生が説得的だろうかとおっしゃった「鉱山設例」です。Bebchuk 教授たちの考えでいくと、株価が 10％上昇した時点でクラスワイドな信頼というか、価格が動いたから信頼の要件は認められるけれども、「金鉱はとても良いと思う」という情報が投資判断に影響を与えるかどうかということは、なお詰めて考える余地のある話だということで、別の重要性の要件で重要性がないと判断する余地もあるという議論をしているように思えます。そうだとすれば、説得力があると言ってもいいのかなと思いました。先生が説得的ではないのではないかとおっしゃった趣旨をもう少し敷衍していただければと思います。

黒沼委員　この情報によって株価が動いたならば、それは重要性を認めてもいいんじゃないですか。この設例では、虚偽発言であることを証明したと言っているのです。ですから、「とても良いと思う」というのは虚偽表示とは言わないというのであれば話は別ですが、それが不実表示であるならば、直ちに重要性が認められてもいいように思います。ここに書いてあるようなことを判断しないと重要性の要件は認めるべきではないということですかね。

飯田委員　レジュメに「なぜなら」と書いてあるようなことを？

黒沼委員　そうです。

飯田委員　確かに、ここに書いてある「なぜなら」以下の事実の争点が重要性の要件で今まで語られてきたものとは違うものであるように私も思いますが、概念として別であるという話とか、会話をして「金鉱はとても良いと思う」という発言を市場がニュースとして受けとめて株価が勝手に上がった。ニュースに反応したにすぎないのであって、不合理な株価の動きにすぎなかったという議論は、可能性はあるのではないかと思ったのですが。

黒沼委員　それは価格影響性でもないということですか。

飯田委員　価格影響性とは違うものではないかと思います。

黒沼委員　他の要因で上がったのであれば、価格影響性はなかったということになるような感じがするのですが。

飯田委員　この発言をしたこと自体で株価が上がっているということは、価格影響性の要件を満たすものであるということです。重要性というのはもう少し規範的に評価するものではないかと思いました。

黒沼委員　ちょっと考えてみます。

中東委員　私も、飯田先生と同じように思いました。CEO が「金鉱はとてもよいと思う」と発言したとしても、金鉱から金を掘り出す費用等も考えて、事業ベースに乗るかどうかという話とはまた別の問題である可能性があると思います。ですので、CEO が「金鉱はとても良いと思う」と言ったことに規範的な問題として重要性があるかというと、ほかに何を発言したかなども考えなければならないと思います。

加藤委員　私は、黒沼先生と同じような疑問を抱きました。確かに、CEOの発言によって株価が10％動いたということを規範的に評価することが重要性の問題であると思いますが、株価が動いた理由は、一応「金鉱はとても良いと思う」という情報の内容と、恐らく会社のCEO（社長）が発言したということ自体の影響も含まれていると思います。そう考えた場合、例えば重要性というものをある程度熟した情報についての不実開示だけと捉える考え方も間違いではないかなという気もしますが、やはり社長の発言はミスリーディングであってはいけないということで、社長の発言によって株価が過度に動いた以上、重要性はあるという結論もあり得るのではないかと考えました。

飯田委員　最初の中東先生との応答の中で黒沼先生がセミストロングフォームの効率性は必要なのではないかとおっしゃったところに関して、もしかしたら私の誤解かもしれないのですが、Halliburton Ⅱはセミストロングである必要もないと言ったのではないかと思いましたが、そういう理解でよろしいでしょうか。

黒沼委員　私は、ここで問題とされている市場の効率性はセミストロングの話であると思います。Halliburton判決自身は価格影響性について当事者がクラス認可の段階で争ってよいと言っているのですが、Basicを変更しなかったということからすると、市場の効率性とその他のことを言えば推定される、価格影響性の間接的な証明になるという線は維持しているので、市場の一般的な効率性を主張、立証すればいいというのは、これからも続いていく話ではないかと言ったのです。

飯田委員　その一般的な効率性というのが必ずしも理解しにくいのです。何かグッドニュースがあって少し株価が上がったとかではなくて、適切な水準で株価が即座に上がるということまで要求するような概念であれば、セミストロングの効率性を要求しているということとイコールだと思いますが、そこまで言っているのでしょうか。

黒沼委員　一般的な効率性というのは、ここではニューヨーク証券取引所の

市場は効率的である、ニューヨーク証券取引所で取引をしている株式である、そういうことを言っているのにほぼ等しいと言われています。具体的には、先ほど紹介したような５要素などを見ているようですが、その点については本当の意味の効率性とは違うのではないかという批判はあると聞いています。ただ、実務では、効率性が認められなかったという例はほとんど聞かないので、そういう場合には、クラス認可はほぼ自動的に与えられてきたと言われています。

中村委員　今の点に関連して質問が１点と、追加で１点です。

１点目は、例えば日本の Jasdaq 証券市場に置きかえてみた場合、いつも値がついている株式といつも値がつかない株式があっても、Jasdaq 証券市場で取引されているというだけで一般的な効率性が認められることになるのでしょうか。

２点目は、クラスワイドの信頼の要件と個別の投資家の信頼の要件を分けて考えることができる。これを日本に置きかえた場合、例えばレジュメの中にもお書きいただいていましたが、ポートフォリオのリバランスのために取引する場合とか、高速取引をする場合とか、不実の情報と関係ない動機で売買される場合において、相当因果関係を取引因果関係と損害因果関係に分けて分析するかどうかにもかかわってくると思いますが、相当因果関係が認められないという結論に結びつき得るものかどうか。これについてお考えがあればお聞かせください。

黒沼委員　私は、以前から Basic 判決は効率的資本市場仮説を実質的には採用したものだと考えてきましたし、効率的な市場ではどういう法理が成り立つかを研究してきたのですが、改めて考えてみると、このような因果関係が認められるためには、市場は効率的である必要は必ずしもないというのはそのとおりだと感じます。

Jasdaq の効率性は仮定の話になりますが、効率性という概念を用いて、だから損害賠償額がこうなるでしょうというときには、当該有価証券について効率的な市場が成立していたということが前提になるので、どちらが立証

責任を負うかということが問題だけれども、一般的な取引所のそのセクションの効率性といったものでは本来は足りない話だと思います。

日本の場合に置きかえて一般的に因果関係の問題を考えていくときには、日本の条文には信頼の要件はありませんが、不実表示が取引を引き起こしたという関係は別に必要ではなくて、先ほど前田先生が言われたように、不実表示がなければ異なった価格で取引をしたであろうという主張をしている限りは、不実表示が価格に影響を与えて、当該価格で取引をしたということのみが問題なわけです。他の理由で取引をしたということは、因果関係の反証にはならないのではないかと個人的には思います。

中村委員　１点目は同感で、２点目についてはまた勉強してみたいと思います。

前田副会長　大きな質問になってしまって恐縮ですが、日本の場合、不実表示があって、一般不法行為責任が追及されるような事例であれば、信頼の問題とか、相当因果関係を詰めて問題にしなければならないのでしょうけれども、現在の金商法に基づく会社の責任とか役員等の責任については、損害賠償額が法定され因果関係の立証も不要とされ、あるいは損害額とか因果関係の推定規定が置かれるという形で、きょう先生がご報告くださったアメリカの判例法に比べると、きめ細かな議論が余りされていないように思います。立法論として考えた場合、アメリカの法制と比べて、日本の現在の金商法の虚偽記載があった場合の責任規定は、どう評価したらいいのでしょうか。

黒沼委員　大変難しい問題で、実際には極めて重要な問題だと思います。日本の場合には、かつては判例もなかったわけですが、21 条の２ができてから、判例もふえてきました。ただ、21 条の２は推定規定になっているので、因果関係の反証ということが問題になって、その限りで幾つかの判例法理が出てきています。

しかし、これがあるために、例えば取締役の責任と会社の責任を同時に追及しているときに、発行者の責任については 21 条の２が適用されて、取締役については 24 条の４になるので、立証責任も違うし、推定額もあるかな

いかの違いがある。しかし、事実は１つの事実で、そこから生じた因果関係のある損害とは何かということが問題になっているのは同じなのに、そこで違った結論が出てくる。推定規定で裁判所が因果関係の反証を認めずに判決を出してしまったら、それは 24 条の４の訴訟でも全く同じ額を使うことになるのかとか、そのあたりの裁判例がどうなるのか、よくわからないところです。裁判例が積み重なって判例法理が出てくれば、日本は理論的にも非常におもしろい状況になるだろうと思っています。

アメリカと日本のどちらがいいのかという点については、推定規定を置いたために、ちょっとアンバランスなことが起こっている。ほかの条文にも推定規定を置いてほしいと言ったのですが、それは実現しなかったのです。その点ではやや変則的だけれども、訴訟で争われて、最後までいって判決が書かれる例は、実は日本のほうが多いわけです。そういう意味では、実際に賠償が命じられる損害額は何かということを真剣に議論する場が日本では置かれています。そういう意味では、日本はいい状況ではないかと思います。

アメリカでは、因果関係の訴答段階とか略式裁判の段階で専門家の鑑定が出てくることはありますが、判決がそれに依拠して損害額を算定するという裁判はほとんどなくて、最後に陪審にいってしまうと判例集に載らないのです。因果関係、損害賠償額についての判例法理がきちんと裁判にあらわれるという点では、日本は恵まれているというか、いい状況ではないかと思います。

飯田委員　日本の 21 条の２の２項の損害の推定等を考えるに際して、市場は効率的であるということが前提となっていると考えるべきなのかということについて、最終的には被告側で因果関係がないことを立証すればいいということなのでしょうけれども、その辺について黒沼先生のご意見があれば教えていただきたいと思います。

黒沼委員　今回のアメリカの判例を改めて勉強し直してみて、確かに学説は以前から市場の効率性ということは言わなくてもいいと指摘していたようで、言われてみればそのとおりだなと思うところはあります。そういう意味

では、不実表示が市場価格に影響を与えている限りは、そういう推定規定を置くことに合理性はあると思いますので、市場が効率的でないような場合であっても、不実表示が価格に影響を与えたという要件が満たされれば、推定規定を及ぼす基礎はあると思います。

そこから先は考え方の違いといいますか、推定規定が取得時差額を念頭に置いてそれを算定するための規定なのか、それとも市場下落が損害であって、それを算定するための式なのかによっても考え方はさらに違ってくるのですかね。市場下落が損害だということになると、それは市場が効率的であってもなくてもそれだけの損害をこうむったと考えるということになれば、推定規定そのままということになります。取得時差額の場合は、取得時差額がそのまま移っているという考え方に基づいていますから、反証の仕方が少し違ってくるのかもしれません。

ただ、ライブドア事件判決によると、推定規定を設けるときの反証といいますか、損害額の減額の判断においても、ろうばい売りによる損害も含むという考え方をとっています。そういう考え方をとる以上、仮に市場が効率的ではないということを被告の側で証明したとしても、それは反証にはならないのではないかと思います。

飯田委員　そうすると、市場の効率性が前提となっているという議論ではない方向に判例法理は向かっている、というご理解と伺いました。ありがとうございました。

黒沼委員　飯田先生のお考えをお聞かせいただければ。

飯田委員　それはまた別の機会にさせていただければと思います。

神作委員　黒沼先生からご紹介・分析をいただいた判例や学説が、アメリカ証券法の他の領域や全体に与える影響の有無についてご質問させていただきます。

アメリカの証券規制の考え方は、市場の効率性に関する理論を前提にしていると思います。不実開示による損害賠償といった本日取り扱われた論点だけでなく、たとえば内部者取引規制や、そもそも強制的なディスクロージャー

制度のあり方など、いろいろなところで市場の効率性に関する理論を前提にした規律があると思います。そういう意味で、ご紹介いただいたアメリカの判例法理が首の皮一枚か二枚かわかりませんが、市場の効率性および市場に対する信頼の推定を維持しているのは、何とかそれによって、アメリカ証券規制が理論的な前提にしてきたと思われる市場の効率性を通じた投資者保護のあり方に関する従来の議論との接続を図ったためであるような気もします。しかし、実質的には、一連の判例は、これまでのアメリカの証券法を支える基本的な理念の部分を相当切り崩しているような印象も受けます。不実開示に係るこれら一連の判例が、証券法のほかの分野あるいはアメリカの証券規制全体に対して及ぼすインパクトについて、アメリカでは一体どのように受けとめられているのかについて、ご感触を伺えればと思います。

黒沼委員　私が当たった資料では、残念ながらそういうことを論じているものはありませんでした。せいぜいクラス・アクションの件数がふえるか減るかとか、保険会社の支払いがふえるか減るかとか、この判決でそれぞれの裁判官が証券訴訟に対してどういう見方をしているかとか、誰がどうなるかとか、そういう実務的な関心が多かったです。

しかし、もともとこの分野は判例法が規律している分野で、95年の改革法が、一部訴答要件を厳格化したりして、損害賠償請求をやりにくくしました。ただ、アメリカ全体の判例法や制定法の動きを大ざっぱに言うと、時代によって波があります。クラス・アクションの弊害が強く言われたので95年に改革したけれども、そのことが遠因になって、エンロンとかワールドコムの事件が起きたと言われます。サーベンス・オックスレー法では、証券法がコーポレート・ガバナンスにも介入するような規制の強化を生みました。ですから、行ったり来たりしているというのが実情ではないかと思います。これを機会に判例がどういう方向に進むかという点も、判例変更はしなかったけれども、一部発行者に有利な争う手段を広げるような判示をしたという意味で、実質的にどちらが喜んでいるかということも見解は分かれているようです。

お答えにならなくて申しわけないのですが。

永井オブザーバー　先ほど飯田先生もおっしゃいましたが、市場の効率性というのはすべからくの上場株式に対して言えるものでは当然なくて、株式の発行数とか時価総額の大きさとか、影響の及ぶ範囲がそれぞれ違う。ですから、先ほど中村先生がおっしゃったように、Jasdaq とか取引規模が小さい会社に関しては、その前提はもともと余り議論されておらず、市場の効率性は余り働かないことを前提に、もともと議論されているのではないか。そうすると、市場の効率性をあくまでも前提としなければならない、と言われると、私はそのようには思わず、それの与える影響度合いがどの程度の人に広く影響していくかということのほうが、むしろ重要ではないかと思います。その点、感想めいた話で申しわけないのですが、いかがでしょうか。

黒沼委員　そのとおりだと思います。それと関係するかどうかわからないのですが、例えば、アメリカでは５要素テストがあって、S－３の対象になっているかどうか。これは、日本でいうと参照方式です。そのような要件が挙がっているわけです。アメリカでは、参照方式を導入するときに、各銘柄の市場の効率性についての実証研究をしています。ところが、日本で参照方式や組込方式を入れたときには、それはやっていないわけです。しかも、その後の規制緩和で参照方式の適用範囲を広げたりしています。むしろ、市場の効率性は、そういう制度設計のほうに影響を及ぼすべき話というか、きちんと考慮してやるべき話であって、お答えにはならないのですが、そういう意味で重視していく面があるかもしれません。

前田副会長　まだ若干時間がございますが、ほかはいかがでしょうか。特になければ、これで質疑応答を終わらせていただきます。黒沼先生、どうもありがとうございました。

それでは、今後の研究会のアナウンスをさせていただきます。第５回会合は、平成 27 年の１月 28 日、午後２時から、飯田秀総先生がご報告くださり、第６回会合は、平成 27 年３月 23 日、午後２時から、山田剛志先生がご報告くださることになっています。

それでは、本日の研究会はこれで閉会とさせていただきます。どうもありがとうございました。

［報告者レジュメ］

市場に対する詐欺に関する米国判例の動向について

黒沼　悦郎

1　はじめに

2　34 年法規則 10b-5 の要件

1934 年証券取引所法（Exchange Act of 1933）10 条(b)項、34 年法規則 10b-5

詐欺防止条項（anti-fraud provision）　総称して Rule10b-5 という。

黙示の私的訴訟原因（implied private cause of action）

要件

(1)　被告による重要な不実表示または省略

(2)　欺罔の意図（scienter）

(3)　不実表示または省略と証券の売買との関係（in connection with）

(4)　不実表示または省略への信頼（reliance）

(5)　経済的損失（economic loss）

(6)　損害因果関係（loss causation）

信頼の要件

特定の原告が投資判断を行うにあたり、不実表示を重要な要素と考えたこと

省略（不開示）：開示されなかった事実を知らされていたら原告が異なった行動をするような影響を受けたであろうこと

取引因果関係（transaction causation）とも呼ばれる。

3　Basic 判決（1988 年）[1]

【事実】

Basic 事件では、Basic 社が合併の交渉中であるという事実を隠し、合併交渉をしていないとの声明を発表したことに対し、Basic 社株を売却した株主が会社および取締役の責任を追及するクラス・アクションを提起した。

連邦民事規則 23 条(b)項(3)号によると、個々の原告に関する個別の問題よりも、クラスに共通の法律問題または事実問題が支配的で（predominate）なければ、クラスの認可（certification）は認められないところ、連邦地方裁判所は、信頼の推定を認めクラスを認可した。第 7 巡回区控訴裁判所はクラスの認可を維持したので、最高裁は、合併交渉に適用される重要性の基準（がいかにあるべきか）とともに、クラスの認定の際に、裁判所が、

[1] Basic Inc., v. Levinson, 485 U. S. 224 (1988). 解説として、拙稿「会社情報の開示と民事責任－Basic 判決を中心として―」名古屋大学法政論集 133 号（1990）1 頁。

表示に対する直接的な信頼をクラス・メンバーに要求せず、信頼の推定を及ぼしたことが適切かどうかについて裁量上訴を認めた。

【判旨】

法廷意見

市場に対する詐欺理論（fraud on the market theory）とは、公開市場において会社の株価は、会社およびその事業に関する情報に基づいて決定されているとの前提に立ち、原告が不実表示に直接依拠しなかった場合でも、被告の不実開示と原告の証券購入との間の因果関係を認める理論である。我々の仕事は、市場に対する詐欺理論の有効性を一般的に評価することではなく、裁判所が、部分的に市場に対する詐欺理論に依拠して、信頼の反証可能な推定を認めたことが適当かどうかを考察することにある。

原告に、開示されなかった事実が開示されたとしたら、あるいは、不実表示がなかったとしたら、どのように行動していたかを立証させることは、公開市場で取引をした原告に、不必要かつ非現実的な立証責任を課すことになる。信頼の推定は、公正、公序、蓋然性、および訴訟経済の観点から見ても、当事者間で立証責任を分配する有用な方法である。本件で採用された信頼の推定は、Rule10b-5 訴訟を促進することになるが、それは、証券市場の誠実性（integrity）に対する投資者の信頼を促進するという 1934 年法の立法政策とも整合的である。

推定は、コモンセンスおよび蓋然性からも支えられている。最近の実証研究は、高度に発達した市場で取引される株式の市場価格が、すべての公開情報を反映しており、したがって、重要な不実表示をも反映していることを示している。・・市場で形成された価格で株式を売買する投資者は、当該価格の誠実性を信頼して売買を行っている。多くの（most）公開情報は市場価格に反映されているから、公開された重要な不実表示に対する投資者の信頼は、Rule10b-5 訴訟の関係において、推定されうるのである。

White 判事、O'Connor 判事の反対意見の要旨

経済理論を法原則に取り入れるとしても、それは、裁判所よりも専門家の助けを得ることのできる議会が、法律改正によって行うべきである。

投資者が「株価をその株式の価値を反映するものとして信頼していること」は疑問である。多くの投資者は、株価が会社の価値を反映していないと信じるからこそ株式の売買を行うのではないか。

市場に対する詐欺理論は、34 年法 18 条(a)項が要求する厳格な信頼の要件を骨抜きにする点、および情報をみない投資者を保護する点で、34 年法の立法目的に反している。

【解説】

Basic 判決は、当該事件の控訴裁判所が採用した「推定」を適切であるとしたが、控訴審

では、推定が認められるためには、原告は、

(1) 被告の不実表示が公表されていること、

(2) 不実表示が重要であること

(3) 株式が効率的な市場で取引されていること

(4) 不実表示が、投資家に株式の価値を誤って評価させるものであること

(5) 原告が、不実表示がなされてから真実が発覚するまでの間に株式の取引を行ったことを主張し、証明しなければならないとする。ただし、(4)は後の判例では要件から除外されている。

不実表示と原告の受け取った（または支払った）価格との間の繋がり、または不実表示と市場価格で取引を行うという原告の決定との間の繋がりを断ち切るいかなる証明も、信頼の推定を覆す。

（反証の例）

① マーケット・メーカーが真実を知っており、市場価格が不実表示の影響を受けなかった場合

② 真実の情報が市場に到達しており、不実表示の影響を打ち消していた場合

③ 原告は、市場の誠実性を信じたのではなく、他の理由で取引を行った場合

4 Halliburton I 判決（2011 年）[2]

【事実】

EPJ Fund が、Halliburton 社が、(1)アスベスト訴訟の潜在的な責任の範囲、(2)ある建設契約から生じる予想収益、および(3)他の会社との合併の便益について、故意に、さまざまな虚偽の開示を行ったと主張して、1999 年 6 月 3 日から 2001 年 12 月 7 日までに H 社の株式を購入した者を代表してクラス・アクションを提起した。

却下の申立て（motion to dismiss）を退けたのち、地方裁判所は、EPJ Fund は、請求に係る損害因果関係を証明しておらず、連邦民事規則 23 条(b)項(3)号の要件を充たさないとして、クラスの認可を拒絶した。第 5 巡回区の先例は、クラス認可を得るために原告に損害因果関係の立証を求めていた。

クラス認可のために損害因果関係の立証が必要かどうか、巡回区の不一致を解消するために、最高裁は裁量上訴を認めた。

【判旨】 破棄差戻し

本件下級審は、クラス認可における共通性の要件を充たすために、信頼の立証が必要で

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[2] Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011). 解説として、藤林大地「市場における詐欺理論の適用と損害因果関係の立証の要否」商事 1979 号（2012）53 頁。

あり、信頼の証明のためには損害因果関係の証明が必要と考えた。

しかし、控訴裁判所の要件は、Basic 判決の論理からは正当化されない。損害因果関係は、投資家が不実表示を信頼したか否かとは関係のない事柄に関するものである。後の損失が不実表示の発覚以外の要因によって生じたという事実は、投資家が最初の段階で不実表示を信頼したかどうか（それが直接であれ、推定される場合であれ）とは関係がない。

Halliburton は、本件下級審が損害因果関係の名の下で実際に問うたのは、主張された不実表示が最初の段階で市場価格に影響を与えたか、すなわち価格影響性（price impact）の有無であったと主張する。しかし、控訴裁判所が言おうとしたとことを Halliburton がどう考えるにせよ、実際に言ったのは損害因果関係である。

5　Amgen 判決（2013 年）[3]

【事実】

コネチカット退職年金ファンドが、バイオテック会社Amgen とその役員（併せて Amegen という）に対し、証券クラス・アクションを提起し、信頼の要件については「市場に対する詐欺」推定を援用し、クラス・アクションの認可を求めた。地裁はクラスを認可し、第 9 巡回区控訴裁判所は、退職ファンドはクラス認可の前に虚偽記載または省略の重要性を証明する必要があるとの Amgen の主張を退け、クラスの認可を維持した。同裁判所は、また、クラス認可の段階で Amgen が提出した、重要性の反証となる証拠を考慮することを地裁が拒絶した点に誤りはなかったと判示した。最高裁は、クラス認可のために重要性を立証する必要があるかどうかについて、巡回区の不一致を解消するために、裁量上訴を認めた。

【判旨】

重要な問題は、クラスに共通する法または事実の問題が、個々のメンバーのみに影響する問題に対して支配的であるといえるためには、重要性の証明が必要かどうかである。その答えは 2 つの理由により「否」である。

第 1 に、重要性は客観的な基準に従って判断できるので、クラスに共通の証拠によって証明され得るからである。したがって、重要性は、23 条(b)項(3)号にいう「共通の問題」（common question）である。

第 2 に、原告が略式判決の申立てや本案において、重要性の十分な証拠を提出できなかったときは、個々人の信頼の問題がクラスに共通の問題に優越するという事態を招くことはない。重要性の要件の証明に失敗したときには、すべての者にとって訴訟は終了し、個々人の信頼という争点が支配的になるような請求が残ることはない。

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[3] Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013). 解説として、藤林大地「証券集団訴訟の認可と不実表示の重要性の立証の要否」商事 2015 号（2013）38 頁。

Amgen は、市場に対する詐欺理論の前提条件はクラス認可の前に充たされなければならないから、前提条件の一つである重要性もクラス認可の前に証明されなければならないという。しかし、重要性と異なり、市場の効率性および不実表示が公表されたことは、Rule10b-5 の欠くことのできない要素ではない。後２者が証明されなくても、信頼の個別的立証が許されるが、重要性が証明されなければクラスの請求全部が棄却される。市場の効率性や公表の争点と異なり、重要性の争点が証明できなければ、個別問題が共通問題に優越することはないので、重要性は 23 条(b)項(3)号のクラス認可の前に証明される必要はない。

Amgen は、クラス認可は和解への大きな圧力となるから、認可前に重要性を争えないと、重要性を争う場面がなくなると主張する。しかし、その点は、不実表示や損害因果関係の要件についても同じである。議会は和解の圧力に対して、クラス認可段階で重要性の証明を求めること以外の手段によって対処したのであり、これに加えて裁判所が 23 条(b)項(3)号の再解釈により調整を行う必要はない。

Amgen は、原告の申立てに対して、重要性の反証を提出できないとした点に地裁判決の誤りがあると主張する。しかし、主張された不実表示が最終的に重要でないとされる可能性があることは、共通問題が支配的であることを妨げるものではない。本件の地方裁判所が、Amgen の反証の考慮を略式判決または事実審（トライアル）にとっておいたのは正しい。

本判決では、Thomas 判事が反対意見を記載し、Kennedy 判事がこれに同調、Scalia 判示もその一部に同調している。

【解説】

不実表示の重要性は、市場に対する詐欺理論による信頼の推定を認める要件の一つなのに、クラス認可の段階で証明を要しないのはなぜか。

← 重要性が客観的証拠によって証明できるという点で「共通の問題」である。
仮に本案において重要性が証明されなかった場合には、訴訟は終了するので、改めてクラスの認可を判断する必要がない。

クラス認可の段階で重要性の証明が不要→被告は重要性を反証する証拠を提出できない

6　Halliburton Ⅱ判決[4]

【事実】

Halliburton Ⅰの差戻審において、被告は、損害因果関係の反証として提出していた証拠は、不実表示が価格に影響を与えていなかったことの証拠でもあると主張した。地裁はHalliburtonの主張を取り上げることを拒否し、第5巡回区控訴裁判所も、価格影響性（price impact）の反証は事実審でのみ認められるとした。最高裁は、①Basic判決の信頼の推定を覆したり、修正したりすべきかどうか、②もし修正しない場合、被告は、クラス認可の段階で、価格影響性の欠如を証明することにより、推定を反証する機会を与えられるべきかどうかの2点について、裁量上訴を認めた。

【判旨】

【法廷意見】（Roberts判事ほか6名）

1　信頼の推定理論の維持

Halliburtonは、Basic判決の2つの前提が今日では成り立たないので、判例が変更されるべきだと主張する。

第1に、今日では、効率的資本市場仮説（efficient capital market hypothesis）が成り立たない証拠がいくらでもあるという。たしかに、ある証券についての市場は他の証券についての市場よりもより効率的であり、ある一つの市場も、種類の異なる情報に対しては、より効率的であったり、効率的でなかったりする。

Halliburtonは、市場の株価が会社の公開情報を反映する程度に関する経済学者の議論に焦点を当てるが、Basic判決の裁判所は議論があることは認めており、信頼の推定を認めることは、公開情報がどれだけ早く正確に市場価格に反映するかについての特定の理論を採用することを意味するものではないと述べている。裁判所は、一般的にいって、市場のプロが、会社に関する公表された重要な情報、従って市場価格に影響を与えるような情報の多くを（most）を考慮しているという穏健な前提を置いているだけである。Halliburtonが引用する学説は、このような穏健な前提を否定するものではない。

第2に、Halliburtonは、投資者が市場価格の誠実性（integrity）を信頼して投資を行うという、Basic判決が仮定に置いている命題を攻撃する。Halliburtonは多くの例を引用するが、そのうち重要なのは、株式が過小評価または過大評価されていると信じている価値投資家（value investor）であろう。しかし、Basic判決は価値投資家の存在を否定するものではない。そのような投資家は、株価が最終的には重要な情報を反映すると暗黙のうちに信頼しているのである（そのような市場修正がないとしたら、どうやって価値投資家は利益を得るのか？）。たしかに、価値投資家は取引の時には価格を信頼していない。しかし、信頼の推定を受けるためには、合理的な期間内に市場が情報を反映すると信じていれ

[4] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014). 解説として、池谷誠「Halliburton事件最高裁判決の検討」商事2042号（2014）41頁。

ば足りる。

Halliburton およびその賛同者は、Basic 判決は、証券クラス・アクションを促進することにより、深刻で害のある結果を引き起こしてきたと主張する。しかし、そのような心配は議会によって対応されるべきものであり、すでに 1995 年の私的証券訴訟改革法（Private Securities Litigation Reform Act of 1995）によって対処されてきた。

２　クラス認可段階における反証

Halliburton は、Basic 判決を変更する２つの提案をしている。

第 1 は、信頼の推定を発動させるために、原告は、不実表示の価格影響性を証明しなければならないというものである。たしかに、Basic 判決が採用した信頼推定の４つの要件（公表、重要性、市場の効率性、取引の時期）のうち、前３者は価格影響性に向けられたものである。しかし、Basic 判決の信頼推定の要件は２つの構成要素からなる。第 1 に、原告が、不実表示が公表されており、重要であり、かつ原告が、一般的に効率的な市場で取引をしたことを証明した場合には、彼は不実表示が価格に影響を与えたとの推定を受けることができる。第 2 に、原告が、関連する期間に市場価格で株式を購入したことを証明した場合には、彼は不実表示を信頼して株式を取得したとの推定を受けることができる。原告が価格影響性を直接に証明しなければならないという Halliburton の提案は、第 1 の構成要素を原告から奪うことになる。市場の効率性はあるかないかの命題ではないから、一般的に効率的な市場において、重要な不実表示が株価に影響を与えないこともあり得る。だからこそ、Basic 判決は、特定の不実表示が価格に影響を与えなかったという反論の機会を被告に与えている。我々は、Basic 判決を半分廃棄することになる原告の主張を認めることはできない。

第 2 に、Halliburton は、クラス認可段階で、不実表示が株価に影響を与えなかったという証拠により、推定を覆すことを認めるべきだと提案する。我々はこの提案に賛成する。

従来から、クラス認可の段階で被告が価格影響性を否定する証拠を提出することは、それが、推定の反証ではなく、市場の効率性を反証する目的を持つ限り、認められてきた。しかし、このような制限は意味がなく、奇妙な結果を招く。たとえば、クラス認可の段階で、被告が６つのイベントに関するイベント・スタディを提示し、そのうちの１つが被告の不実表示であったとする。地裁が、市場は効率的であったが、不実表示に対しては市場の反応がなかったと認定した場合、これは信頼の推定を覆すものではないという理由でクラスを認可することはおかしい。

このようなおかしな結果は Basic 判決の論理とも矛盾する。Basic 判決の市場に対する詐欺理論の下で、**信頼の推定を発動させる市場の効率性と他の前提条件は、価格影響性を間**

接的に証明するものである。そうだとすれば、被告には、価格影響性の直接的な反証を認めるべきである。

控訴裁判所は、Amgen 判決に依拠して、Halliburton はクラス認可の段階で価格影響性の反証を提出できないと判断した。しかし、Amgen 判決は、クラス認可の段階で原告が重要性を証明しなければならないかどうかについて判示したものである。重要性は Basic 判決の推定の前提条件であるが、それは連邦民事規則 23 条(a)項(3)号の支配性の要件と関連しないので、本案まで持ち越されると我々は判示した。EPJ Fund は、価格影響性の要件も重要性の要件と同じであるという。**しかし、価格影響性は重要性と重要な点で異なる**。価格影響性は、Basic 判決の基本的な前提であり、クラス認可段階の支配性の争点と深く関係している。

他の要件がクラス認可の段階で証明されているのであれば、クラスに共通する要件である重要性を本案段階に持ち越したとしても、クラスの認可をあとで覆すような事態には至らない。 これに対し、価格影響性については、クラス認可段階ですでに間接的な証拠が提示されているのであり、クラス認可段階で、直接的な証拠による価格影響性の反証を認めない理由はない。

【Ginsburg 判事、Breyer 判事、Sotomayor 判事による賛成意見】

価格影響性の考慮を本案段階からクラス認可段階へ早めることは、認可段階で利用できるディスカバリーの範囲を拡げることになる。もっとも、価格影響性がないことの立証責任は被告が負うので、本判決は証券訴訟の原告に追加的負担を課すものではない。以上の理解を前提として法廷意見に賛成する。

【Thomas 判事、Scalia 判事、Alito 判事の意見（実質反対意見）】

Basic 判決による信頼の推定は誤りであった。その理由は第 1 に、裁判所が、争いのある経済理論と投資家の行動についての誤った直観に依拠したからであり、第 2 に、それが、クラス認可を求める原告に、個別の争点より共通の争点が支配的であるという要件の立証を求める連邦民事規則 23 条に関する判例法に反するからである。第 3 に、推定された信頼は、ほとんど反証することが不可能であり、信頼の要件を廃止するのに等しいからである。

Basic 判決が前提とする事実のうち、公表情報が市場価格に反映されているという点は、効率的資本市場仮説に立脚したものであるが、Basic 判決以来、その経済理論は広く批判にさらされている。また、市場が公表情報を反映するにしても、正確に反映するとは限らないことを示す多くの実証研究がある。

Basic 判決が前提とするもう一つの事実、すなわち投資家は市場の誠実性を信頼しているという点は、誤りである。多くの投資家は、市場が株式を過大評価または過小評価していると信じているからこそ、取引をしているのであるし、他の投資家は、価格と関係のない理由で、たとえば流動性の需要、税金の考慮、ポートフォリオの組換えのために取引している。

多数意見は、穏健な前提を置くことで理論と現実を架橋しようとする。しかし、そのような穏健な前提は、Basic 判決の判決文言と整合しない。また、多数意見は、市場が過大評価・過小評価している価値投資家も、将来、市場価格が公表情報を反映することを信じているというが、取引の際に市場価格が公表情報を反映していなければ、投資家は、公表情報が彼を取引に誘い込んだと主張することはできないはずである。

Basic 判決は、被告に反証の機会を与えているようにみえる。しかし、クラス認可の段階では、反証はクラス代表に対してのみ、なされるので、クラス代表の信頼を反証することは難しい。クラス認可後は、裁判所は信頼の要件の反証を拒絶してきた。信頼の反証を認めた事例は、何千もの Rule10b-5 訴訟中 6 件しかないという。Basic 判決は、信頼の要件を実質的に廃棄するのに等しい。

【解説】

1　信頼の推定

（1）効率的資本市場仮説に依拠するものでないこと

Basic 判決が出された 1988 年以降、情報に対する証券市場の効率性については、疑義を呈する実証研究が多数公表されており、市場に対する詐欺理論の基礎が揺らいできた。

多数意見は、市場に対する詐欺理論は、市場の効率性を前提とするものではないとして、Basic 判決を維持した。Basic 判決が特定の経済理論に依拠しているものでないことは、たしかにその通りである。しかし、「市場の効率性」は、依然として、信頼の推定のための要件の一つとされている。

学説では、Basic 判決は、市場に対する詐欺理論と効率的市場仮説を結びつけたが、本来、ある証券の市場価格が詐欺情報を反映している限り、市場に対する詐欺理論により信頼を推定するために、証券市場が一般的に効率的であることを示す必要がないことが、比較的早くから指摘されてきた[5]。Halliburton Ⅰ および Halliburton Ⅱ では、多くの学者が裁判所の友（amici curiae）として意見を寄せたが、それらの多くも、裁判所は市場が効率的であるかどうかではなく、特定の不実表示が市場価格に影響を与えたかどうかに着目すべきで

[5] Jonathan R. Macey et al., Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of Basic v. Levinson, 77 Va. L. Rev. 1017, 1021 (1991).

あるとしている。

（2）Bebchuk & Ferrell の見解[6]

一般に、市場は、利益を得る裁定機会（arbitrage opportunity）がない場合に効率的であると定義されてきた。

しかし、第 1 に、裁定機会の存在は、詐欺による市場価格の歪曲（fraudulent distortion）の存在を否定するものではない（市場が効率的でなくても、詐欺による市場価格の歪曲は起こり得る）。

市場の効率性は 3 つの分野で争われてきた。①市場は長期的な収益を過大評価している。②過剰なボラティリティ。③情報に対する市場の反応の鈍さ。

① 過大評価設例

市場の株価収益率が歴史的に 15 倍であったところ、現在、市場が長期的収益を過大評価し、20 倍となっていた。企業が収益を 1 ドルのところ 2 ドルと不実表示した。株価は 20 ドルから 40 ドルに上昇し、不実表示の発覚により株価は 20 ドルに戻った。その後、市場は長期的な過大評価を修正し、株価利益倍率は 15 倍に戻り、株価は 15 ドルとなった。

→ クラスワイドな信頼を認めるかどうかにとって、不実表示によって株価が上昇したことが重要であり、株価収益率が過大評価されていたかどうかは関係がない。

② 過剰なボラティリティ設例

上の例で、株価が 20 ドルから 40 ドルへ上昇した。過剰なボラティリティのせいで、株価は、1 時間ごとにランダムに 38 ドルから 42 ドルの間で変動していた。不実表示の発覚により株価は 20 ドルに戻ったが、同じ理由で、19 ドルから 21 ドルの間で変動していた。

→ クラスワイドな信頼を認めるかどうかについて、過剰なボラティリティの有無は関係がない。たしかに過剰なボラティリティは利益の機会を生じるが、不実表示によって価格が歪められていたことに変わりはない。

③ 鈍い市場反応設例

上の例で、良い情報に接して株価は 20 ドルから 35 ドルに上昇したが、翌週 1 週間かけて 40 ドルまで上昇した。不実表示が発覚すると株価は 20 ドルに戻った。

→ 不実表示の開示を受けて当該株式を取得した者が、市場価格の歪みの結果、15 ドルないし 20 ドル余分に支払った事実には変わりがない。

第 2 に、裁定機会がない（市場が効率的である）ことは、不実表示が市場価格の歪みをもたらさない場合があることを否定するものではない。

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[6] Lucian A. Bebchuk = Allen Ferrell, Rethinking Basic, 69 Bus. Law. 671 (2014).

① 公表された情報設例

インターネット企業が、四半期収益を公表した。その数日後、サイトへの来訪者数が 75%上昇したとの不実表示を公表。アナリストは来訪者数の情報を分析して、それが企業の収益性に与える影響を分析した。不実表示を公表したときも、それが不実であると発覚したときも株価に変化はなかった。

→ この場合、価格の歪みがないからクラスワイドな信頼は与えられない。市場が開示情報に反応しなかった理由（情報が重要でなかった、四半期収益の情報で株価が決定されていた、市場が虚偽情報を信頼していなかった等）はなんであれ、重要なのは市場価格に歪みが生じたかどうかである。

② 埋没した情報設例

企業が、環境政策に関する公表された報告書（投資家の興味を惹かなかった）の中で、財務情報について不実表示をした。不実表示をしたときも、その発覚のときも、市場価格に変化はなかった。

→ クラスワイドな信頼は与えられない。情報が価格に反映されなかった理由は重要でない。重要なのは市場価格の歪みが生じていないこと。

信頼の推定法理は次のように改訂されるべきである。

(1) ~~効率的な~~市場で取引されている証券の価格は、公開され利用可能な会社に関する~~すべて~~**いくつか**の情報を反映する。

(2) したがって、~~効率的な~~市場における証券の買主は、購入するに際して、~~公開情報を~~**当該市場価格が詐欺的に歪められていないことを、たとえば、不実表示がなかったとしても異なる価格でないことを**信頼したと推定されることができる。

(3) そして、証券の市場が~~非効率的である~~**詐欺的に歪められていない**とき、原告は~~市場に対する詐欺~~**クラスワイドな信頼**の推定を起動させることができない。

（3）判旨の検討

価格影響性（price impact）≒詐欺的歪曲（fraudulent distortion）

多くの学説が主張するように、最高裁は、市場に対する詐欺理論を、市場の効率性を価格影響性に置き換えたものに修正すべきであった。

信頼の推定を認めるという結論は変わらないので、最高裁は Basic 判決の修正を避けた。

→ 信頼の推定を受けるためには、市場が効率的であることを、依然として原告側が示す必要がある。

市場の効率性の証明方法：Cammer v. Bloom, 711 F. Supp. 1264 (1989) [7]の 5 要因テスト

(1)株式の取引量

(2)当該株式をフォローしていたアナリストの数

(3)マーケット・メーカーの数

(4)S-3 登録要件を充たすかどうか

(5)予期しない新事象に対する株価の反応

（4）市場の誠実性に対する信頼というレトリック

法廷意見：価値投資家も、いずれは市場価格が情報を反映すると考えて投資している。

反対意見：価値投資家が取引のときに市場の誠実性を信頼していたかどうかが問題。

この議論は、反対意見に分がある。

そもそも市場の誠実性に対する信頼を問題にすること自体、レトリックにすぎない。

現実の市場には市場価格が情報を反映していると考えて取引を行う投資家とそう考えないゆえに取引を行う投資家が併存することは否定できない。

→　不実表示によって影響を受けた市場価格で取引を行えば、不実表示と取引との間の因果関係（取引因果関係）が認められる。

最高裁は、市場の効率性を前提とするという理解の下で Basic 判決を変更しなかったので、レトリックを用いざるを得なかった。

2　クラス認可段階での価格影響性の反証

（1）価格影響性（price impact）と損害因果関係

損害因果関係

投資家の取引と彼の被った損失との間の因果関係

損害因果関係があるといえるためには、有価証券の取得時に不実表示によって市場価格が不当に吊上げられていたことを証明するのでは足りない（Dura 判決[8]）。

←　不実表示の発覚が株価を下落させたことを示す。

価格影響性

「被告の不実表示が実際に株価に影響を与えたか」[9]

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[7] Bebchuk = Ferrell, supra note at 27, 池谷・前掲　48－49 頁。

[8] Dura Pharmaceuticals, Inc. v. Broudo, 544 U. S. 336 (2005).

[9] Halliburton Ⅱ

← 不実表示の発覚時のイベント・スタディにより確認するのがふつう。

Coffee 教授のコメント[10]

Halliburton Ⅰは、損害因果関係はクラス認可の段階では争えないとした。Halliburton Ⅱは、これを実質的に変更して、「価格影響性」はクラス認可段階で争えるとした。同じ証拠が損害因果関係の反証にも価格影響性の反証にも使えるのだから、法はいつもラベル貼りの問題である。Fox 教授も、価格影響性と損害因果関係とは実質的に同じ争点であるとする[11]。

Bebchuk & Ferrell

価格影響性（詐欺的歪曲）と損害因果関係とは異なる。

FDA 承認設例

企業が、FDA が医療機器を承認するだろうという虚偽の公表をした。株価は直ちに 10% 上昇した。原告は、不実表示が市場価格に影響を与えたことを証明した。

→ クラスワイドな信頼は認められる。しかし、詐欺的歪曲が経済損失を生じさせたことはまだ証明されていない。Dura 判決は、価格の吊上げだけでは経済損失の近因にならないとする。価格影響性は、損害因果関係の必要条件であるが十分条件ではない。

← 不実表示時のイベント・スタディで詐欺的歪曲を証明できる事例

（2）価格影響性の反証の程度

Coffee 教授の設例

訂正情報の開示の際に市場価格が下落したが、その有意性は、通常求められる 95%のレベルではなく 90%のレベルであった。被告は、価格影響性を反証したと認められるか？

Fox 教授のコメント

クラス認可段階での被告による価格影響性の反証について、本案段階での原告による損害因果関係の立証の同程度のものを求めるとしたら、被告の反証権は意味のないものと

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[10] John C. Coffee Jr., “Death by One Thousand Cuts”, Columbia Law School's Blog on Corporations and the Capital Markets (June 30, 2014), at http://clsbluesky.law.columbia.edu/2014/06/30/death-by-one-thousand-cuts/

[11] Merritt B. Fox, “Halliburton II: Who Won and Who Lost All Depends on What Defendants Need to Show to Establish No Impact on Price”, Columbia Law School's Blog on Corporations and the Capital Markets (June 30, 2014), at http://clsbluesky.law.columbia.edu/2014/06/30/halliburton-ii-who-won-and-who-lost-all-depends-on-what-defendants-need-to-show-to-establish-no-impact-on-price/

なる。すなわち、95%の信頼水準を要求するのでは意味がない。これに対し、原告が損害因果関係の立証ができないであろうことを被告が裁判所に説得することだけで、信頼の推定が反証されるのだとしたら、本判決は被告にとって意味がある。この場合には、価格影響性と実質的に同じ争点である損害因果関係を、クラス認可の段階で、原告に立証責任を負わせて行うことになる。

価格影響性の反証の程度は、下級審裁判例に委ねられた課題である。

（3）不開示の場合とのバランス

「不開示」の場合

不開示の対象が存在しないと信頼したことを立証は、ほとんど不可能である。

→　開示義務の存在と秘匿された事実の重要性の要件の充足　→因果関係あり（判例[12]）

積極的な不実表示の場合に、クラス認可段階で価格影響性の反証が認められることとアンバランスが生じる。

Bebchuk & Ferrell

詐欺的歪曲の有無を基準とするアプローチを不開示の場合に適用しない理由はない。

統一的なアプローチをとることで、不実開示と不開示のどちらに当たるかという恣意的な区分を解消することになる。

不開示の場合：ある事実が開示されなかったことが市場価格に影響を及ぼし、投資家の取引の原因となっている（取引因果関係が認められる）のだから、価格影響性の反証も認められるべき。

（4）価格影響性と重要性

重要性

合理的な投資家が投資判断にあたって当該表示を重要と考えたこと。

重要：当時、利用可能な情報の総体を大きく変えるかどうかで判断する。

判旨の掲げる価格影響性と重要性の相違は、性質の相違というよりも、クラス認可の段階で証拠が提出されているかどうかの相違にすぎず、理由づけとして説得的でない。

Bebchuk & Ferrell

価格影響性の反証を認めることは重要性の要件の審理を先取りすることにはならない。

鉱山設例

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[12] Affiliated Ute Citizens v. United States, 406 U. S. 128 (1972).

アメリカの鉱山会社がオーストラリアに金鉱を所有している。CEO が鉱山を訪れ、鉱山技師と会話をし、帰国後、「鉱山技師と会話をした。金鉱はとても良いと思う（feel great about the gold mine）」と発言した。株価は 10%上昇した。後になって、当該金鉱で金を産出することが不可能であると判明した。原告は、CEO の虚偽発言と市場に対するインパクトを証明した。

→　クラスワイドな信頼は認められる。しかし、本案段階で、被告は表示の重要性を争う余地がある。なぜなら、事実の争点は、技師が CEO に話した内容はなにか、その内容（情報）は金鉱をどれだけ有望なものにするか、その情報は CEO の発言を導いたかといった点にあるから。市場に対する影響度と、表示が重要な点で誤解を生じるものを含んでいたかどうかは別問題である。

3　クラス・アクションへの影響

従来、NYSE や Nasdaq で取引されている株式に関するクラス・アクションでは、クラス認可は自動的に与えられてきた。クラス認可段階で、被告は価格影響性を争えるようになるため、クラス認可段階がミニ・トライアル化する。

→　原告の費用負担は増え、訴訟は減少する可能性がある。

被告は、①棄却の申立て、②クラス認可の申立て、③略式判決の申立ての 3 段階で争うことができるようになる。従来、証券クラス・アクションは略式判決申立ての前後で和解になることが多かったが、それよりも前で争うことが可能になった。（以上、主として Coffee のコメントによる）

D&O 保険について。

被告が価格影響性を争えるので、保険者の支払件数は減少するだろうが、価格影響性をめぐる争いが防御費用を増加させるだろう。保険業界において、クラス認可段階における価格影響性のイベント・スタディの費用を付保範囲とすべきかについて議論がされるだろう。

4　日本法への示唆

信頼の要件、損害因果関係の要件　⊂　相当因果関係

明文で信頼の要件を課す条文はなく、証券クラス・アクション制度もない。

因果関係を取引因果関係と損害因果関係を分けて分析することは有用。

信頼、損害因果関係、重要性の概念の相互の関係について、一定の示唆を与えてくれる。

Fischel 教授

市場に対する詐欺理論の論理を受け入れれば、公開市場での証券詐欺事件において、重要性、信頼、因果関係、および損害賠償額を別々に審査する必要はなくなり、不実表示が市場価格に人為的な影響を与えたかどうかのみが問題になる[13]。

この議論は市場の効率性を前提としたもの

→ 信頼の推定を行うには、市場が効率性である必要はなく、不実表示の価格影響性があれば足りるとなると、上記議論はどのような影響を受けるか？
価格影響性があれば、不実表示は重要で、不実表示と損害との間に因果関係が認められ、損害賠償額は価格に対する影響の幅によって決定されるか。

cf. Bebchuk & Ferrell

（私見）価格影響性があれば、不実表示の重要性、信頼の要件、損害因果関係を認めてよいが、市場が効率的でない限り、価格に対する影響の幅が直ちに損害賠償額になるとはいえない。

[13] Daniel R. Fischel, Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. Law. 1, 13 (1982).

配布資料

資料１　*Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) .　(Halliburton Ⅰ)

資料２　*Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013).（Amgen）

資料３　*Halliburton Co.* v. *Erica P. John Fund, Inc.*, 133 S. Ct. 1184 (2014).　(Halliburton Ⅱ)

資料１

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC. *v.* HALLIBURTON CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09–1403. Argued April 25, 2011—Decided June 6, 2011

Petitioner Erica P. John Fund, Inc. (EPJ Fund), is the lead plaintiff in a putative securities fraud class action filed against Halliburton Co. and one of its executives (collectively Halliburton). EPJ Fund alleges that Halliburton made various misrepresentations designed to inflate the company's stock price, in violation of §10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5. EPJ Fund also contends that Halliburton later made a number of corrective disclosures that caused the stock price to drop and, consequently, investors to lose money. EPJ Fund sought to have its proposed class certified pursuant to Federal Rule of Civil Procedure 23. The District Court found that the suit could proceed as a class action under Rule 23(b)(3), but for one problem: Fifth Circuit precedent required securities fraud plaintiffs to prove "loss causation"—*i.e.*, that the defendant's deceptive conduct caused the investors' claimed economic loss—in order to obtain class certification. The District Court concluded that EPJ Fund had failed to satisfy that requirement. The Court of Appeals agreed and affirmed the denial of class certification.

Held: Securities fraud plaintiffs need not prove loss causation in order to obtain class certification. Pp. 3–10.

(a) In order to certify a class under Rule 23(b)(3), a court must find "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." Considering whether "ques-

Syllabus

tions of law or fact common to class members predominate" begins, of course, with the elements of the underlying cause of action. The elements of a private securities fraud claim based on violations of §10(b) and Rule 10b–5 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." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. ___, ___.

Whether common questions of law or fact predominate in such an action often turns on the element of reliance. The traditional way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation. The Court recognized in *Basic Inc.* v. *Levinson*, 485 U. S. 224, however, that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[ ] the common ones." *Id.*, at 242. The Court in *Basic* sought to alleviate that concern by permitting plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the "fraud-on-the-market" theory. According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. Under that doctrine, the Court explained, one can assume an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.*, at 247. The Court also made clear that the presumption could be rebutted by appropriate evidence. Pp. 3–5.

(b) It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. According to the Court of Appeals, EPJ Fund had to prove the separate element of loss causation in order to trigger the presumption. That requirement is not justified by *Basic* or its logic. This Court has never mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption. Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.

The Court has referred to the element of reliance in a private Rule 10b–5 action as "transaction causation," not loss causation. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342. Consistent with that description, when considering whether a plaintiff has relied on a misrepresentation, the Court has typically focused on facts surrounding the investor's decision to engage in the transaction. Loss

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causation, by contrast, requires a plaintiff to show that the misrepresentation caused a subsequent economic loss. That has nothing to do with whether an investor relied on that misrepresentation in the first place, either directly or through the fraud-on-the-market theory. The Court of Appeals' rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. Pp. 5–8.

(c) Halliburton concedes that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presumption of reliance. Halliburton nonetheless defends the judgment below on the ground that the Court of Appeals did not actually require EPJ Fund to prove "loss causation" as the Court has used that term. According to Halliburton, "loss causation" was shorthand for a different analysis. The lower court's actual inquiry, Halliburton insists, was whether EPJ Fund had demonstrated "price impact"—that is, whether the alleged misrepresentations affected the market price in the first place.

The Court does not accept Halliburton's interpretation of the Court of Appeals' opinion. Loss causation is a familiar and distinct concept in securities law; it is not price impact. Whatever Halliburton thinks the Court of Appeals meant to say, what it said was loss causation. The Court takes the Court of Appeals at its word. Based on those words, the decision below cannot stand. Pp. 8–9.

597 F. 3d 330, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 09–1403

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., PETITIONER *v.* HALLIBURTON CO. ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 6, 2011]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

To prevail on the merits in a private securities fraud action, investors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss. This requirement is commonly referred to as "loss causation." The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.

I

Petitioner Erica P. John Fund, Inc. (EPJ Fund), is the lead plaintiff in a putative securities fraud class action filed against Halliburton Co. and one of its executives (collectively Halliburton). The suit was brought on behalf of all investors who purchased Halliburton common stock between June 3, 1999, and December 7, 2001.

EPJ Fund alleges that Halliburton made various misrepresentations designed to inflate its stock price, in violation of §10(b) of the Securities Exchange Act of 1934 and

Securities and Exchange Commission Rule 10b–5. See 48 Stat. 891, 15 U. S. C. §78j(b); 17 CFR §240.10b–5 (2010). The complaint asserts that Halliburton deliberately made false statements about (1) the scope of its potential liability in asbestos litigation, (2) its expected revenue from certain construction contracts, and (3) the benefits of its merger with another company. EPJ Fund contends that Halliburton later made a number of corrective disclosures that caused its stock price to drop and, consequently, investors to lose money.

After defeating a motion to dismiss, EPJ Fund sought to have its proposed class certified pursuant to Federal Rule of Civil Procedure 23. The parties agreed, and the District Court held, that EPJ Fund satisfied the general requirements for class actions set out in Rule 23(a): The class was sufficiently numerous, there were common questions of law or fact, the claims of the representative parties were typical, and the representative parties would fairly and adequately protect the interests of the class. See App. to Pet. for Cert. 3a.

The District Court also found that the action could proceed as a class action under Rule 23(b)(3), but for one problem: Circuit precedent required securities fraud plaintiffs to prove "loss causation" in order to obtain class certification. *Id.*, at 4a, and n. 2 (citing *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F. 3d 261, 269 (CA5 2007)). As the District Court explained, loss causation is the "'causal connection between the material misrepresentation and the [economic] loss'" suffered by investors. App. to Pet. for Cert. 5a, and n. 3 (quoting *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 342 (2005)). After reviewing the alleged misrepresentations and corrective disclosures, the District Court concluded that it could not certify the class in this case because EPJ Fund had "failed to establish loss causation with respect to any" of its claims. App. to Pet. for Cert. 54a. The court made clear,

however, that absent "this stringent loss causation requirement," it would have granted the Fund's certification request. *Ibid.*

The Court of Appeals affirmed the denial of class certification. See 597 F. 3d 330 (CA5 2010). It confirmed that, "[i]n order to obtain class certification on its claims, [EPJ Fund] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." *Id.*, at 334. Like the District Court, the Court of Appeals concluded that EPJ Fund had failed to meet the "requirements for proving loss causation at the class certification stage." *Id.*, at 344.

We granted the Fund's petition for certiorari, 562 U. S. ___ (2011), to resolve a conflict among the Circuits as to whether securities fraud plaintiffs must prove loss causation in order to obtain class certification. Compare 597 F. 3d, at 334 (case below), with *In re Salomon Analyst Metromedia Litigation*, 544 F. 3d 474, 483 (CA2 2008) (not requiring investors to prove loss causation at class certification stage); *Schleicher* v. *Wendt*, 618 F. 3d 679, 687 (CA7 2010) (same); *In re DVI, Inc. Securities Litigation*, No. 08–8033 etc., 2011 WL 1125926, *7 (CA3, Mar. 29, 2011) (same; decided after certiorari was granted).

II

EPJ Fund contends that the Court of Appeals erred by requiring proof of loss causation for class certification. We agree.

A

As noted, the sole dispute here is whether EPJ Fund satisfied the prerequisites of Rule 23(b)(3). In order to certify a class under that Rule, a court must find "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." Fed. Rule Civ. Proc. 23(b)(3). Considering whether "questions of law or fact common to class members predominate" begins, of course, with the elements of the underlying cause of action. The elements of a private securities fraud claim based on violations of §10(b) and Rule 10b–5 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.'" *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. ___, ___ (2011) (slip op., at 9) (quoting *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008)).

Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance. The courts below determined that EPJ Fund had to prove the separate element of loss causation in order to establish that reliance was capable of resolution on a common, classwide basis.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the §10(b) private cause of action." *Stoneridge*, *supra*, at 159. This is because proof of reliance ensures that there is a proper "connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc.* v. *Levinson*, 485 U. S. 224, 243 (1988). The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation. In that situation, the plaintiff plainly would have relied on the company's deceptive conduct. A plaintiff unaware of the relevant statement, on the other hand, could not establish reliance on

that basis.

We recognized in *Basic*, however, that limiting proof of reliance in such a way "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Id.*, at 245. We also observed that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[ ] the common ones." *Id.*, at 242.

The Court in *Basic* sought to alleviate those related concerns by permitting plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the "fraud-on-the-market" theory. According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. Because the market "transmits information to the investor in the processed form of a market price," we can assume, the Court explained, that an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.*, at 244, 247 (internal quotation marks omitted); see also *Stoneridge*, *supra*, at 159; *Dura Pharmaceuticals*, 544 U. S., at 341–342. The Court also made clear that the presumption was just that, and could be rebutted by appropriate evidence. See *Basic*, *supra*, at 248.

B

It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that the relevant transaction

took place "between the time the misrepresentations were made and the time the truth was revealed." *Basic*, 485 U. S., at 248, n. 27; *id.*, at 241–247; see also *Stoneridge*, *supra*, at 159.

According to the Court of Appeals, EPJ Fund also had to establish loss causation at the certification stage to "trigger the fraud-on-the-market presumption." 597 F. 3d, at 335 (internal quotation marks omitted); see *ibid.* (EPJ Fund must "establish a causal link between the alleged falsehoods and its losses in order to invoke the fraud-on-the-market presumption"). The court determined that, in order to invoke a rebuttable presumption of reliance, EPJ Fund needed to prove that the decline in Halliburton's stock was "because of the correction to a prior misleading statement" and "that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market." *Id.*, at 336 (emphasis deleted). This is the loss causation requirement as we have described it. See *Dura Pharmaceuticals*, *supra*, at 342; see also 15 U. S. C. §78u–4(b)(4).

The Court of Appeals' requirement is not justified by *Basic* or its logic. To begin, we have never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance. The term "loss causation" does not even appear in our *Basic* opinion. And for good reason: Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.

We have referred to the element of reliance in a private Rule 10b–5 action as "transaction causation," not loss causation. *Dura Pharmaceuticals, supra*, at 341–342 (citing *Basic*, *supra*, at 248–249). Consistent with that description, when considering whether a plaintiff has relied on a misrepresentation, we have typically focused on facts surrounding the investor's decision to engage in

the transaction. See *Dura Pharmaceuticals*, *supra*, at 342. Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that "information is reflected in [the] market price" of the stock at the time of the relevant transaction. See *Basic*, 485 U. S., at 247.

Loss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss. As we made clear in *Dura Pharmaceuticals*, the fact that a stock's "price on the date of purchase was inflated because of [a] misrepresentation" does not necessarily mean that the misstatement is the cause of a later decline in value. 544 U. S., at 342 (emphasis deleted; internal quotation marks omitted). We observed that the drop could instead be the result of other intervening causes, such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Id.*, at 342–343. If one of those factors were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent. This is true even if the investor purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price.

According to the Court of Appeals, however, an inability to prove loss causation would prevent a plaintiff from invoking the rebuttable presumption of reliance. Such a rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the

facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.

The Court of Appeals erred by requiring EPJ Fund to show loss causation as a condition of obtaining class certification.

C

Halliburton concedes that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presumption of reliance or otherwise achieve class certification. See Tr. of Oral Arg. 26–29. Halliburton nonetheless defends the judgment below on the ground that the Court of Appeals did not actually require plaintiffs to prove "loss causation" as we have used that term. See *id.*, at 27 ("it's not loss causation as this Court knows it in *Dura*"). According to Halliburton, "loss causation" was merely "shorthand" for a different analysis. Brief for Respondents 18. The lower court's actual inquiry, Halliburton insists, was whether EPJ Fund had demonstrated "price impact"—that is, whether the alleged misrepresentations affected the market price in the first place. See, *e.g.*, *id.*, at 16–19, 24–27, 50–51; see also Tr. of Oral Arg. 27 (stating that the Court of Appeals' "test is simply price impact" and that EPJ Fund's "only burden under the Fifth Circuit case law was to show price impact").*

"Price impact" simply refers to the effect of a misrepresentation on a stock price. Halliburton's theory is that if a

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*Halliburton further concedes that, even if its conception of what the Court of Appeals meant by "loss causation" is correct, the Court of Appeals erred by placing the initial burden on EPJ Fund. See Tr. of Oral Arg. 29 ("We agree . . . that the Fifth Circuit put the initial burden of production on the plaintiff, and that's contrary to *Basic*"). According to Halliburton, a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendant. Tr. of Oral Arg. 28, 38–40. We express no views on the merits of such a framework.

misrepresentation does not affect market price, an investor cannot be said to have relied on the misrepresentation merely because he purchased stock at that price. If the price is unaffected by the fraud, the price does not reflect the fraud.

We do not accept Halliburton's wishful interpretation of the Court of Appeals' opinion. As we have explained, loss causation is a familiar and distinct concept in securities law; it is not price impact. While the opinion below may include some language consistent with a "price impact" approach, see, *e.g.*, 597 F. 3d, at 336, we simply cannot ignore the Court of Appeals' repeated and explicit references to "loss causation," see *id.*, at 334 (three times), 334 n. 2, 335, 335 n. 10 (twice), 335 n. 11, 336, 336 n. 19, 336 n. 20, 337, 338, 341 (twice), 341 n. 46, 342 n. 47, 343, 344 (three times).

Whatever Halliburton thinks the Court of Appeals meant to say, what it said was loss causation: "[EPJ Fund] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." 597 F. 3d, at 334; see *id.*, at 335 ("we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption" (internal quotation marks omitted)). We take the Court of Appeals at its word. Based on those words, the decision below cannot stand.

* * *

Because we conclude the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage, we need not, and do not, address any other question about *Basic*, its presumption, or how and when it may be rebutted. To the extent Halliburton has preserved any further arguments against class certification, they may be addressed in the first instance by the Court of Appeals on remand.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

資料２

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMGEN INC. ET AL. *v.* CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11–1085. Argued November 5, 2012—Decided February 27, 2013

To recover damages in a private securities-fraud action under §10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5, a plaintiff must prove, among other things, reliance on a material misrepresentation or omission made by the defendant. *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. ___, ___. Requiring proof of direct reliance "would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff who has traded on an impersonal market." *Basic Inc.* v. *Levinson*, 485 U. S. 224, 245. Thus, this Court has endorsed a "fraud-on-the-market" theory, which permits securities-fraud plaintiffs to invoke a rebuttable presumption of reliance on public, material misrepresentations regarding securities traded in an efficient market. *Id.*, at 241–249. The fraud-on-the-market theory facilitates the certification of securities-fraud class actions by permitting reliance to be proved on a classwide basis.

Invoking the fraud-on-the-market theory, respondent Connecticut Retirement Plans and Trust Funds (Connecticut Retirement) sought certification of a securities-fraud class action under Federal Rule of Civil Procedure 23(b)(3) against biotechnology company Amgen Inc. and several of its officers (collectively, Amgen). The District Court certified the class, and the Ninth Circuit affirmed. The Ninth Circuit rejected Amgen's argument that Connecticut Retirement was required to prove the materiality of Amgen's alleged misrepresentations and omissions before class certification in order to satisfy Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." The Ninth Circuit also held that the District Court did not err in refusing to consider rebuttal evidence that Amgen had pre-

sented on the issue of materiality at the class-certification stage.

Held: Proof of materiality is not a prerequisite to certification of a securities-fraud class action seeking money damages for alleged violations of §10(b) and Rule 10b–5. Pp. 9–26.

(a) The pivotal inquiry in this case is whether proof of materiality is needed to ensure that the questions of law or fact common to the class will "predominate over any questions affecting only individual members" as the litigation progresses. For two reasons, the answer to this question is "no." First, because materiality is judged according to an objective standard, it can be proved through evidence common to the class. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 445. Thus, it is a common question for Rule 23(b)(3) purposes. Second, a failure of proof on the common question of materiality would not result in individual questions predominating. Instead, it would end the case, for materiality is an essential element of a securities-fraud claim. Pp. 9–14.

(b) Amgen's arguments to the contrary are unpersuasive. Pp. 14–24.

(1) Amgen points to the Court's statement in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. ___, ___, that "securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance," including "that the alleged misrepresentations were publicly known . . . , that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'" If these fraud-on-the-market predicates must be proved before class certification, Amgen contends, materiality—another fraud-on-the-market predicate—should be treated no differently. The Court disagrees. The requirement that a putative class representative establish that it executed trades "between the time the misrepresentations were made and the time the truth was revealed" relates primarily to the Rule 23(a)(3) and (a)(4) inquiries into typicality and adequacy of representation, not to the Rule 23(b)(3) predominance inquiry. And unlike materiality, market efficiency and the public nature of the alleged misrepresentations are not indispensable elements of a Rule 10–5 claim. While the failure of common, classwide proof of market efficiency or publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for all class members. Pp. 15–18.

(2) Amgen also contends that "policy considerations" militate in favor of requiring precertification proof of materiality. Because class certification can exert substantial pressure on the defendant to settle rather than risk ruinous liability, Amgen asserts, materiality may

Syllabus

never be addressed by a court if it is not required to be evaluated at the class-certification stage. In this regard, however, materiality does not differ from other essential elements of a Rule 10b–5 claim, notably, the requirements that the statements or omissions on which the plaintiff 's claims are based were false or misleading and that the alleged statements or omissions caused the plaintiff to suffer economic loss. Significantly, while addressing the settlement pressures associated with securities-fraud class actions, Congress has rejected calls to undo the fraud-on-the-market theory. And contrary to Amgen's argument that requiring proof of materiality before class certification would conserve judicial resources, Amgen's position would necessitate time and resource intensive mini-trials on materiality at the class-certification stage. Pp. 18–22.

(c) Also unavailing is Amgen's claim that the District Court erred by refusing to consider the rebuttal evidence Amgen proffered in opposing Connecticut Retirement's class-certification motion. The Ninth Circuit concluded, and Amgen does not contest, that Amgen's rebuttal evidence aimed to prove that the misrepresentations and omissions alleged in Connecticut Retirement's complaint were immaterial. The potential immateriality of Amgen's alleged misrepresentations and omissions, however, is no barrier to finding that common questions predominate. Just as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class. Pp. 24–26.

660 F. 3d 1170, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. SCALIA, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which KENNEDY, J., joined, and in which SCALIA, J., joined except for Part I–B.

SUPREME COURT OF THE UNITED STATES

No. 11–1085

AMGEN INC., ET AL., PETITIONERS *v.* CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 27, 2013]

JUSTICE GINSBURG delivered the opinion of the Court.

This case involves a securities-fraud complaint filed by Connecticut Retirement Plans and Trust Funds (Connecticut Retirement) against biotechnology company Amgen Inc. and several of its officers (collectively, Amgen). Seeking class-action certification under Federal Rule of Civil Procedure 23, Connecticut Retirement invoked the "fraud-on-the-market" presumption endorsed by this Court in *Basic Inc.* v. *Levinson*, 485 U. S. 224 (1988), and recognized most recently in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. ___ (2011). The fraud-on-the-market premise is that the price of a security traded in an efficient market will reflect all publicly available information about a company; accordingly, a buyer of the security may be presumed to have relied on that information in purchasing the security.

Amgen has conceded the efficiency of the market for the securities at issue and has not contested the public character of the allegedly fraudulent statements on which Connecticut Retirement's complaint is based. Nor does Amgen here dispute that Connecticut Retirement meets

all of the class-action prerequisites stated in Rule 23(a): (1) the alleged class "is so numerous that joinder of all members is impracticable"; (2) "there are questions of law or fact common to the class"; (3) Connecticut Retirement's claims are "typical of the claims . . . of the class"; and (4) Connecticut Retirement will "fairly and adequately protect the interests of the class."

The issue presented concerns the requirement stated in Rule 23(b)(3) that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Amgen contends that to meet the predominance requirement, Connecticut Retirement must do more than plausibly *plead* that Amgen's alleged misrepresentations and misleading omissions materially affected Amgen's stock price. 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.

While Connecticut Retirement certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification. Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. Because materiality is judged according to an objective standard, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class Connecticut Retirement would represent. The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class. As vital, the plaintiff class's inability to prove materiality would not result in individual questions predominating. Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-

fraud claims. 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.

Essentially, Amgen, also the dissenters from today's decision, would have us put the cart before the horse. To gain certification under Rule 23(b)(3), Amgen and the dissenters urge, Connecticut Retirement must first establish that it will win the fray. But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the "metho[d]" best suited to adjudication of the controversy "fairly and efficiently."

I

A

This case involves the interaction between federal securities-fraud laws and Rule 23's requirements for class certification. To obtain certification of a class action for money damages under Rule 23(b)(3), a plaintiff must satisfy Rule 23(a)'s above-mentioned prerequisites of numerosity, commonality, typicality, and adequacy of representation, see *supra*, at 1–2, and must also establish 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." To recover damages in a private securities-fraud action under §10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. §78j(b) (2006 ed., Supp. V), and Securities and Exchange Commission Rule 10b–5, 17 CFR §240.10b–5 (2011), a plaintiff must prove "(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." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. ___, ___ (2011) (slip op., at 9) (internal quotation marks omitted).

"Reliance," we have explained, "is an essential element of the §10(b) private cause of action" because "proof of reliance ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Halliburton*, 563 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). "The traditional (and most direct) way" for a plaintiff to demonstrate reliance "is by showing that he was aware of a company's statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Ibid.* We have recognized, however, that requiring proof of direct reliance "would place an unnecessarily unrealistic evidentiary burden on [a] plaintiff who has traded on an impersonal market." *Basic*, 485 U. S., at 245. Accordingly, in *Basic* the Court endorsed the "fraud-on-the-market" theory, which permits certain Rule 10b–5 plaintiffs to invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public. *Id.*, at 241–249.[1]

The fraud-on-the-market theory rests on the premise that certain well developed markets are efficient processors of public information. In such markets, the "market price of shares" will "reflec[t] all publicly available information." *Id.*, at 246. Few investors in such markets, if any, can consistently achieve above-market returns by trading based on publicly available information alone, for if such above-market returns were readily attainable, it

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[1] Part IV of Justice Blackmun's opinion in *Basic*—the part endorsing the fraud-on-the-market theory—was joined by Justices Brennan, Marshall, and Stevens. Together, these Justices composed a majority of the quorum of six Justices who participated in the case. See 28 U. S. C. §1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").

would mean that market prices were not efficiently incorporating the full supply of public information. See R. Brealey, S. Myers, & F. Allen, Principles of Corporate Finance 330 (10th ed. 2011) ("[I]n an efficient market, there is no way for most investors to achieve consistently superior rates of return.").

In *Basic*, we held that if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities. See 485 U. S., at 245–247. This presumption springs from the very concept of market efficiency. If a market is generally efficient in incorporating publicly available information into a security's market price, it is reasonable to presume that a particular public, material misrepresentation will be reflected in the security's price. Furthermore, it is reasonable to presume that most investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information. Thus, courts may presume that investors trading in efficient markets indirectly rely on public, material misrepresentations through their "reliance on the integrity of the price set by the market." *Id.*, at 245. "[T]he presumption," however, is "just that, and [can] be rebutted by appropriate evidence." *Halliburton*, 563 U. S., at ___ (slip op., at 5). See also *Basic*, 485 U. S., at 248–249 (providing examples of showings that would rebut the fraud-on-the-market presumption).

Although fraud on the market is a substantive doctrine of federal securities-fraud law that can be invoked by any Rule 10b–5 plaintiff, see, *e.g.*, *Black* v. *Finantra Capital, Inc.*, 418 F. 3d 203, 209 (CA2 2005); *Blackie* v. *Barrack*, 524 F. 2d 891, 908 (CA9 1975), the doctrine has particular significance in securities-fraud class actions. Absent the

fraud-on-the-market theory, the requirement that Rule 10b–5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class. See *Basic*, 485 U. S., at 242. The fraud-on-the-market theory, however, facilitates class certification by recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations when shares are traded in an efficient market. *Ibid.*[2]

B

In its complaint, Connecticut Retirement alleges that Amgen violated §10(b) and Rule 10b–5 through certain misrepresentations and misleading omissions regarding the safety, efficacy, and marketing of two of its flagship drugs.[3] According to Connecticut Retirement, these misrepresentations and omissions artificially inflated the price of Amgen's stock at the time Connecticut Retirement and numerous other securities buyers purchased the stock. When the truth came to light, Connecticut Retirement asserts, Amgen's stock price declined, resulting in financial losses to those who purchased the stock at the inflated price. In its answer to Connecticut Retirement's complaint, Amgen conceded that "[a]t all relevant times, the market for [its] securities," which are traded on the NASDAQ stock exchange, "was an efficient market"; thus, "the market for Amgen's securities promptly digested current information regarding Amgen from all publicly

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[2]Although describing *Basic*'s adoption of the fraud-on-the-market presumption of reliance as "questionable," JUSTICE THOMAS' dissent acknowledges that "the Court has not been asked to revisit" that issue. *Post*, at 4–5, n. 4. See also *post*, p. 1 (ALITO, J., concurring).

[3]Amgen's allegedly improper marketing practices have sparked federal and state investigations and several whistleblower lawsuits. See Dye, Amgen to pay $762 million in drug-marketing case, Washington Post, Dec. 19, 2012, p. A17.

available sources and reflected such information in Amgen's stock price." Consolidated Amended Class Action Complaint ¶¶199–200 in No. CV–07–2536 (CD Cal.); Answer ¶¶199–200.

The District Court granted Connecticut Retirement's motion to certify a class action under Rule 23(b)(3) on behalf of all investors who purchased Amgen stock between the date of the first alleged misrepresentation and the date of the last alleged corrective disclosure. After granting Amgen's request to take an interlocutory appeal from the District Court's class-certification order, see Fed. Rule Civ. Proc. 23(f), the Court of Appeals affirmed. See 660 F. 3d 1170 (CA9 2011).

Amgen raised two arguments on appeal. First, Amgen contended that the District Court erred by certifying the proposed class without first requiring Connecticut Retirement to prove that Amgen's alleged misrepresentations and omissions were material. Second, Amgen argued that the District Court erred by refusing to consider certain rebuttal evidence that Amgen had proffered in opposition to Connecticut Retirement's class-certification motion. This evidence, in Amgen's view, demonstrated that the market was well aware of the truth regarding its alleged misrepresentations and omissions at the time the class members purchased their shares.

The Court of Appeals rejected both contentions. Amgen's first argument, the Court of Appeals noted, made the uncontroversial point that immaterial misrepresentations and omissions "by definition [do] not affect . . . stock price[s] in an efficient market." *Id.*, at 1175. Thus, where misrepresentations and omissions are not material, there is no basis for presuming classwide reliance on those misrepresentations and omissions through the information-processing mechanism of the market price. "The problem with that argument," the Court of Appeals observed, is evident: "[B]ecause materiality is an element of

the *merits* of their securities fraud claim, the plaintiffs cannot both fail to prove materiality yet still have a viable claim for which they would need to prove reliance individually." *Ibid.* The Court of Appeals thus concluded that "proof of materiality is not necessary" to ensure compliance with Rule 23(b)(3)'s requirement that common questions predominate. *Id.*, at 1177.

With respect to Amgen's second argument, the Court of Appeals determined that Amgen's proffered rebuttal evidence was merely "a method of refuting [the] *materiality*" of the misrepresentations and omissions alleged in Connecticut Retirement's complaint. *Ibid.* Having already concluded that a securities-fraud plaintiff does not need to prove materiality before class certification, the court similarly held that "the district court correctly refused to consider" Amgen's rebuttal evidence "at the class certification stage." *Ibid.*

We granted Amgen's petition for certiorari, 567 U. S. ___ (2012), to resolve a conflict among the Courts of Appeals over whether district courts must require plaintiffs to prove, and must allow defendants to present evidence rebutting, the element of materiality before certifying a class action under §10(b) and Rule 10b–5. Compare 660 F. 3d 1170 (case below); and *Schleicher* v. *Wendt*, 618 F. 3d 679, 687 (CA7 2010) (materiality need not be proved at the class-certification stage), with *In re Salomon Analyst Metromedia Litigation*, 544 F. 3d 474, 484–485, 486, n. 9 (CA2 2008) (plaintiff must prove, and defendant may present evidence rebutting, materiality before class certification). See also *In re DVI, Inc. Securities Litigation*, 639 F. 3d 623, 631–632, 637–638 (CA3 2011) (plaintiff need not prove materiality before class certification, but defendant may present rebuttal evidence on the issue).

II

A

The only issue before us in this case is whether Connecticut Retirement has satisfied Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___, ___ (2011) (slip op., at 10) (internal quotation marks omitted), Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. See *id.*, at ___, n. 6 (slip op., at 10, n. 6) (a district court has no "'authority to conduct a preliminary inquiry into the merits of a suit'" at class certification unless it is necessary "to determine the propriety of certification" (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974))); Advisory Committee's 2003 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 144 ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

Bearing firmly in mind that the focus of Rule 23(b)(3) is on the predominance of common *questions*, we turn to Amgen's contention that the courts below erred by failing to require Connecticut Retirement to prove the materiality of Amgen's alleged misrepresentations and omissions before certifying Connecticut Retirement's proposed class. As Amgen notes, materiality is not only an element of the Rule 10b–5 cause of action; it is also an essential predicate of the fraud-on-the-market theory. See *Basic*, 485 U. S., at 247 ("[W]here *materially* misleading statements have been disseminated into an impersonal, well-developed market

for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed." (emphasis added)). That theory, Amgen correctly observes, is premised on the understanding that in an efficient market, all publicly available information is rapidly incorporated into, and thus transmitted to investors through, the market price. See *id.*, at 246–247. Because immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity. Therefore, the fraud-on-the-market theory cannot apply absent a *material* misrepresentation or omission. And without the fraud-on-the-market theory, the element of reliance cannot be proved on a classwide basis through evidence common to the class. See *id.*, at 242. It thus follows, Amgen contends, that materiality must be proved before a securities-fraud class action can be certified.

Contrary to Amgen's argument, the key question in this case is not whether materiality is an essential predicate of the fraud-on-the-market theory; indisputably it is.[4] Instead, the pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class will "predominate over any questions affecting only individual members" as the litigation progresses. Fed. Rule Civ. Proc. 23(b)(3). For two reasons, the answer to this question is clearly "no."

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[4] We agree with JUSTICE THOMAS that "[m]ateriality was central to the development, analysis, and adoption of the fraud-on-the-market theory both before *Basic* and in *Basic* itself." *Post*, at 18. We disagree, however, that the history of the fraud-on-the-market theory's development "confirms that materiality must be proved at the time that the theory is invoked—*i.e.*, at certification." *Ibid.* As explained below, see *infra* this page and 11–13, proof of materiality is not required prior to class certification because such proof is not necessary to ensure satisfaction of Rule 23(b)(3)'s predominance requirement.

First, because "[t]he question of materiality . . . is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor," materiality can be proved through evidence common to the class. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 445 (1976). Consequently, materiality is a "common questio[n]" for purposes of Rule 23(b)(3). *Basic*, 485 U. S., at 242 (listing "materiality" as one of the questions common to the *Basic* class members).

Second, there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating. Because materiality is an essential element of a Rule 10b–5 claim, see *Matrixx Initiatives*, 563 U. S., at ___ (slip op., at 9), Connecticut Retirement's failure to present sufficient evidence of materiality to defeat a summary-judgment motion or to prevail at trial would not cause individual reliance questions to overwhelm the questions common to the class. Instead, the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate.

Totally misapprehending our essential point, JUSTICE THOMAS' dissent asserts that our "entire argument is based on the assumption that the fraud-on-the-market presumption need not be shown at certification because it will be proved later on the merits." *Post*, at 11, n. 9. Our position is not so based. We rest, instead, entirely on the text of Rule 23(b)(3), which provides for class certification if "the questions of law or fact common to class members predominate over any questions affecting only individual members." A failure of proof on the *common* question of materiality ends the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class. Therefore, under the plain language of Rule 23(b)(3), plaintiffs are not

required to prove materiality at the class-certification stage. In other words, they need not, at that threshold, prove that the predominating question will be answered in their favor.

JUSTICE THOMAS urges that a plaintiff seeking class certification "must show that the elements of [her] claim are susceptible to classwide proof." *Post*, at 7. See also *post*, at 11 (criticizing the Court for failing to focus its analysis on "whether the element of *reliance* is susceptible to classwide proof"). From this premise, JUSTICE THOMAS concludes that Rule 10b–5 plaintiffs must prove materiality before class certification because (1) "materiality is a necessary component of fraud on the market," and (2) without fraud on the market, the Rule 10b–5 element of reliance is not "susceptible of a classwide answer." *Post*, at 6, 10–11. See also *post*, at 12 ("[I]f a plaintiff wishes to use *Basic*'s presumption to prove that reliance is a common question, he must establish the entire presumption, including materiality, at the class certification stage.").

Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each "elemen[t] of [her] claim [is] susceptible to classwide proof." *Post*, at 7. What the rule does require is that common questions "*predominate* over any questions affecting only individual [class] members." Fed. Rule Civ. Proc. 23(b)(3) (emphasis added). Nowhere does JUSTICE THOMAS explain how, in an action invoking the *Basic* presumption, a plaintiff class's failure to prove an essential element of its claim for relief will result in individual questions predominating over common ones. Absent proof of materiality, the claim of the Rule 10b–5 class will fail in its entirety; there will be no remaining individual questions to adjudicate.

Consequently, proof of materiality is not required to establish that a proposed class is "sufficiently cohesive to warrant adjudication by representation"—the focus of the predominance inquiry under Rule 23(b)(3). *Amchem*

Products, Inc. v. *Windsor*, 521 U. S. 591, 623 (1997). No doubt a clever mind could conjure up fantastic scenarios in which an individual investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning). But such objectively unreasonable reliance does not give rise to a Rule 10b–5 claim. See *TSC Industries*, 426 U. S., at 445 (materiality is judged by an objective standard). Thus, "the individualized questions of reliance," *post*, at 9, n. 8, that hypothetically might arise when a failure of proof on the issue of materiality dooms the fraud-on-the-market class are far more imaginative than real. Such "individualized questions" do not undermine class cohesion and thus cannot be said to "predominate" for purposes of Rule 23(b)(3).[5]

Because the question of materiality is common to the class, and because a failure of proof on that issue would not result in questions "affecting only individual members" predominating, Fed. Rule Civ. Proc. 23(b)(3), Connecticut Retirement was not required to prove the materiality of Amgen's alleged misrepresentations and omissions at the class-certification stage. This is not a case in which the asserted problem—*i.e.*, that the plaintiff class cannot prove materiality—"exhibits some fatal dissimilarity" among class members that would make use of the class-action device inefficient or unfair. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 107 (2009). Instead, what Amgen alleges is "a fatal similarity—[an alleged] failure of proof as to an element of

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[5] JUSTICE THOMAS is also wrong in arguing that a failure of proof on the issue of materiality would demonstrate that a Rule 10b–5 class action "should not have been certified in the first place." *Post*, at 2. Quite the contrary. The fact that such a failure of proof resolves all class members' claims once and for all, leaving no individual issues to be adjudicated, confirms that the original certification decision was proper.

the plaintiffs' cause of action." *Ibid.* Such a contention is properly addressed at trial or in a ruling on a summary-judgment motion. The allegation should not be resolved in deciding whether to certify a proposed class. *Ibid.* See also *Schleicher*, 618 F. 3d, at 687 ("[W]hether a statement is materially false is a question common to all class members and therefore may be resolved on a class-wide basis after certification.").

B

Insisting that materiality must be proved at the class-certification stage, Amgen relies chiefly on two arguments, neither of which we find persuasive.[6]

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[6]Amgen advances a third argument founded on modern economic research tending to show that market efficiency is not "'a binary, yes or no question.'" Brief for Petitioners 32 (quoting Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 167). Instead, this research suggests, differences in efficiency can exist within a single market. For example, a market may more readily process certain forms of widely disseminated and easily digestible information, such as public merger announcements, than information more difficult to acquire and understand, such as obscure technical data buried in a filing with the Securities and Exchange Commission. See, *e.g.*, Macey & Miller, Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory, 42 Stan. L. Rev. 1059, 1083–1087 (1990); Stout, The Mechanisms of Market Inefficiency: An Introduction to the New Finance, 28 J. Corp. L. 635, 653–656 (2003). Amgen, however, never clearly explains how this research on *market efficiency* bolsters its argument that courts should require precertification proof of *materiality*. In any event, this case is a poor vehicle for exploring whatever implications the research Amgen cites may have for the fraud-on-the-market presumption recognized in *Basic*. As noted above, see *supra*, at 6–7, Amgen conceded in its answer that the market for its securities is "efficient" and thus "promptly digest[s] current information regarding Amgen from all publicly available sources and reflect[s] such information in Amgen's stock price." Consolidated Amended Class Action Complaint ¶¶199–200; Answer ¶¶199–200. See also App. to Pet. for Cert. 40a (relying on the admission in Amgen's answer and an unchallenged expert report submitted by Connecticut Retirement, the District Court expressly found that the market for Amgen's stock was

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Amgen points first to our statement in *Halliburton* that "securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance," including "that the alleged misrepresentations were publicly known . . . , that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'" 563 U. S., at ___ (slip op., at 5–6) (quoting *Basic*, 485 U. S., at 248, n. 27). See also *Dukes*, 564 U. S., at ___, n. 6 (slip op., at 11, n. 6) ("[P]laintiffs seeking 23(b)(3) certification [of a securities-fraud class action] must prove that their shares were traded on an efficient market."). If these fraud-on-the-market predicates must be proved before class certification, Amgen contends, materiality—another fraud-on-the-market predicate—should be treated no differently.

We disagree. As an initial matter, the requirement that a putative class representative establish that it executed trades "between the time the misrepresentations were made and the time the truth was revealed" relates primarily to the Rule 23(a)(3) and (a)(4) inquiries into typicality and adequacy of representation, not to the Rule 23(b)(3) predominance inquiry. *Basic*, 485 U. S., at 248, n. 27.[7] A

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efficient). Amgen remains bound by that concession. See *American Title Ins. Co.* v. *Lacelaw Corp.*, 861 F. 2d 224, 226 (CA9 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."); cf. *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 561 U. S. ___, ___ (2010) (slip op., at 10) ("This Court has . . . refused to consider a party's argument that contradicted a joint 'stipulation [entered] at the outset of th[e] litigation.'" (quoting *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 226 (2000))). We thus find nothing in the cited research that would support requiring precertification proof of materiality in this case.

[7]As earlier noted, see *supra,* at 1–2, Amgen does not here contest

security's market price cannot be affected by a misrepresentation not yet made, and in an efficient market, a misrepresentation's impact on market price is quickly nullified once the truth comes to light. Thus, a plaintiff whose relevant transactions were not executed between the time the misrepresentation was made and the time the truth was revealed cannot be said to have indirectly relied on the misrepresentation through its reliance on the integrity of the market price.[8] Such a plaintiff's claims, therefore, would not be "typical" of the claims of investors who did trade during the window between misrepresentation and truth revelation. Fed. Rule Civ. Proc. 23(a)(3). Nor could a court confidently conclude that such a plaintiff would "fairly and adequately protect the interests" of investors who traded during the relevant window. Rule 23(a)(4). The requirement that the fraud-on-the-market theory's trade-timing predicate be established before class certification thus sheds little light on the question whether materiality must also be proved at the class-certification stage.

Amgen is not aided by *Halliburton*'s statement that market efficiency and the public nature of the alleged misrepresentations must be proved before a securities-fraud class action can be certified. As Amgen notes, market efficiency, publicity, and materiality can all be proved on a classwide basis. Furthermore, they are all essential predicates of the fraud-on-the-market theory. Unless

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Connecticut Retirement's satisfaction of Rule 23(a)'s requirements.

[8] Accordingly, "the timing of the relevant stock trades" is indeed an "element" of the fraud-on-the-market theory. *Post*, at 6, n. 6 (opinion of THOMAS, J.). Unlike JUSTICE THOMAS, however, see *ibid.*, we do not understand the United States as *amicus curiae* to take a different view. See Brief for United States 15, n. 2 ("Precise identification of the times when the alleged misrepresentation was made and the truth was subsequently revealed is . . . important to ensure that the named plaintiff has traded stock during the time the stock price allegedly was distorted by the defendant's misrepresentations.").

those predicates are established, there is no basis for presuming that the defendant's alleged misrepresentations were reflected in the security's market price, and hence no grounding for any contention that investors indirectly relied on those misrepresentations through their reliance on the integrity of the market price. But unlike materiality, market efficiency and publicity are not indispensable elements of a Rule 10b–5 claim. See *Matrixx Initiatives*, 563 U. S., at ___ (slip op., at 9) (listing elements of a Rule 10b–5 claim). Thus, where the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption. She can, however, attempt to establish reliance through the "traditional" mode of demonstrating that she was personally "aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Halliburton*, 563 U. S., at ___ (slip op., at 4). Individualized reliance issues would predominate in such a lawsuit. See *Basic*, 485 U. S., at 242. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action, but the initiating plaintiff's claim would remain live; it would not be "dead on arrival." 660 F. 3d, at 1175.

A failure of proof on the issue of materiality, in contrast, not only precludes a plaintiff from invoking the fraud-on-the-market presumption of classwide reliance; it also establishes as a matter of law that the plaintiff cannot prevail on the merits of her Rule 10b–5 claim. Materiality thus differs from the market-efficiency and publicity predicates in this critical respect: While the failure of common, classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class. See Brief for United

States as *Amicus Curiae* 20 ("Unless the failure of *common* proof gives rise to a need for *individualized* proof, it does not cast doubt on the propriety of class certification."). In short, there can be no actionable reliance, individually or collectively, on immaterial information. Because a failure of proof on the issue of materiality, unlike the issues of market efficiency and publicity, does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification.

2

Amgen also contends that certain "policy considerations" militate in favor of requiring precertification proof of materiality. Brief for Petitioners 28. An order granting class certification, Amgen observes, can exert substantial pressure on a defendant "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Advisory Committee's 1998 Note on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 143. See also *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. ___, ___ (2011) (slip op., at 16) (class actions can entail a "risk of 'in terrorem' settlements"). Absent a requirement to evaluate materiality at the class-certification stage, Amgen contends, the issue may never be addressed by a court, for the defendant will surrender and settle soon after a class is certified. Insistence on proof of materiality before certifying a securities-fraud class action, Amgen thus urges, ensures that the issue will be adjudicated and not forgone. See also *post*, at 4 (SCALIA, J., dissenting) (expressing the same concerns).

In this regard, however, materiality does not differ from other essential elements of a Rule 10b–5 claim, notably, the requirements that the statements or omissions on which the plaintiff's claims are based were false or misleading and that the alleged statements or omissions

caused the plaintiff to suffer economic loss. See *Matrixx Initiatives*, 563 U. S., at ___ (slip op., at 9). Settlement pressure exerted by class certification may prevent judicial resolution of these issues. Yet this Court has held that loss causation and the falsity or misleading nature of the defendant's alleged statements or omissions are common questions that need not be adjudicated before a class is certified. See *Halliburton*, 563 U. S., at ___ (slip op., at 3) (loss causation need not be proved at the class-certification stage); *Basic*, 485 U. S., at 242 ("the falsity or misleading nature of the . . . public statements" allegedly made by the defendant is a "common questio[n]"). See also *Schleicher*, 618 F. 3d, at 685 (falsity of alleged misstatements need not be proved before certification of a securities-fraud class action).

Congress, we count it significant, has addressed the settlement pressures associated with securities-fraud class actions through means other than requiring proof of materiality at the class-certification stage. In enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, Congress recognized that although private securities-fraud litigation furthers important public-policy interests, prime among them, deterring wrongdoing and providing restitution to defrauded investors, such lawsuits have also been subject to abuse, including the "extract[ion]" of "extortionate 'settlements'" of frivolous claims. H. R. Conf. Rep. No. 104–369, pp. 31–32 (1995). The PSLRA's response to the perceived abuses was, *inter alia*, to "impos[e] heightened pleading requirements" for securities-fraud actions, "limit recoverable damages and attorney's fees, provide a 'safe harbor' for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v.

Dabit, 547 U. S. 71, 81–82 (2006). See also 15 U. S. C. §78u–4 (2006 ed. and Supp. V). Congress later fortified the PSLRA by enacting the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, which curtailed plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law. See 15 U. S. C. §78bb(f)(1) (2006 ed.).

While taking these steps to curb abusive securities-fraud lawsuits, Congress rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*. See Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 153, and n. 8 (noting that the initial version of H. R. 10, 104th Cong., 1st Sess. (1995), an unenacted bill that, like the PSLRA, was designed to curtail abuses in private securities litigation, "would have undone *Basic*"). See also Common Sense Legal Reform Act: Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Commerce, 104th Cong., 1st Sess., 92, 236–237, 251–252, 272 (1995) (witnesses criticized the fraud-on-the-market presumption and expressed support for H. R. 10's requirement that securities-fraud plaintiffs prove direct reliance). Nor did Congress decree that securities-fraud plaintiffs prove each element of their claim before obtaining class certification. Because Congress has homed in on the precise policy concerns raised in Amgen's brief, "[w]e do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits." *Schleicher*, 618 F. 3d, at 686; cf. *Smith* v. *Bayer Corp.*, 564 U. S. ___, ___ (2011) (slip op., at 17–18) ("Congress's decision to address the relitigation concerns associated with class actions through the mechanism of removal provides yet another reason for federal courts to adhere in this context to longstanding

principles of preclusion.").

In addition to seeking our aid in warding off "in terrorem" settlements, Amgen also argues that requiring proof of materiality before class certification would conserve judicial resources by sparing judges the task of overseeing large class proceedings in which the essential element of reliance cannot be proved on a classwide basis. In reality, however, it is Amgen's position, not the judgments of the lower courts in this case, that would waste judicial resources. Amgen's argument, if embraced, would necessitate a mini-trial on the issue of materiality at the class-certification stage. Such preliminary adjudications would entail considerable expenditures of judicial time and resources, costs scarcely anticipated by Federal Rule of Civil Procedure 23(c)(1)(A), which instructs that the decision whether to certify a class action be made "[a]t an early practicable time." If the class is certified, materiality might have to be shown all over again at trial. And if certification is denied for failure to prove materiality, nonnamed class members would not be bound by that determination. See *Smith*, 564 U. S., at ___ (slip op., at 12–18). They would be free to renew the fray, perhaps in another forum, perhaps with a stronger showing of materiality.

Given the tenuousness of Amgen's judicial-economy argument, Amgen's policy arguments ultimately return to the contention that private securities-fraud actions should be hemmed in to mitigate their potentially "vexatiou[s]" character. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 739 (1975). We have already noted what Congress has done to control exorbitant securities-fraud actions. See *supra*, at 19–20. Congress, the Executive Branch, and this Court, moreover, have "recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, re-

spectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U. S. 308, 313 (2007); see H. R. Conf. Rep. No. 104–369, at 31; Brief for United States as *Amicus Curiae* 1. See also *Amchem*, 521 U. S., at 617 ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F. 3d 338, 344 (CA7 1997))). We have no warrant to encumber securities-fraud litigation by adopting an atextual requirement of precertification proof of materiality that Congress, despite its extensive involvement in the securities field, has not sanctioned.

C

JUSTICE SCALIA acknowledges that proof of materiality is not required to satisfy Rule 23(b)(3)'s predominance requirement. See *post*, at 1. Nevertheless, he maintains that full satisfaction of Rule 23's requirements is insufficient to obtain class certification under *Basic*. In JUSTICE SCALIA's view, the Court's decision in *Basic* established a special rule: A securities-fraud class action cannot be certified unless all of the prerequisites of the fraud-on-the-market presumption of reliance, including materiality, have first been established. *Post*, at 2.

The purported rule is JUSTICE SCALIA's invention. It cannot be attributed to anything the Court said in *Basic*. That decision is best known for its endorsement of the fraud-on-the-market theory. But the opinion also established something more. It stated the proper standard for judging the materiality of misleading statements regarding the existence and status of preliminary merger discussions. See 485 U. S., at 230–241, 250 ("Materiality in the merger context depends on the probability that the transaction will be consummated, and its significance to the

issuer of the securities."). The District Court in *Basic* certified a class of investors whose share prices were allegedly depressed by misleading statements that disguised ongoing merger negotiations. *Id.*, at 228. Postcertification, the court granted summary judgment to the defendants on the ground that the alleged misstatements were immaterial as a matter of law. *Id.*, at 228–229. The Court of Appeals affirmed the class certification but reversed the grant of summary judgment. *Id.*, at 229. This Court, in turn, vacated the Court of Appeals' judgment and remanded for further proceedings on the defendants' summary-judgment motion in light of the materiality standard set forth in the Court's opinion. *Id.,* at 240–241, 250. Notably, however, we did not disturb the District Court's class-certification order, which we stated "was appropriate when made." *Id.*, at 250.[9]

If JUSTICE SCALIA were correct that our decision in *Basic* demands proof of materiality before class certification, the Court in *Basic* should have ordered the lower courts to reconsider on remand both the defendants' entitlement to summary judgment and the propriety of class certification. Instead, the Court expressly endorsed the District Court's class-certification order while at the same time recognizing that further proceedings were necessary to determine whether the plaintiffs had mustered sufficient evidence to satisfy the relatively lenient standard for

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[9] Scouring the Court's decision in *Basic* for some semblance of support for his position, JUSTICE SCALIA attaches portentous significance to *Basic*'s statement that the District Court's class-certification order, although "'appropriate when made,'" was "'subject on remand to such adjustment, if any, as developing circumstances demand[ed].'" *Post*, at 2 (quoting *Basic*, 485 U. S., at 250). This statement, however, merely reminds that certifications are not frozen once made. Rule 23 empowers district courts to "alte[r] or amen[d]" class-certification orders based on circumstances developing as the case unfolds. Fed. Rule Civ. Proc. 23(c)(1) (1988). See also Rule 23(c)(1)(C) (2013).

avoiding summary judgment. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986) ("[S]ummary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). Unlike JUSTICE SCALIA, we are unwilling to presume that *Basic* announced a rule requiring precertification proof of materiality when *Basic* failed to apply any such rule to the very case before it.[10]

III

Amgen also argues that the District Court erred by refusing to consider the rebuttal evidence Amgen proffered in opposing Connecticut Retirement's class-certification motion. This evidence, Amgen contends, showed that "in light of all the information available to the market," its alleged misrepresentations and misleading omissions "could not be presumed to have altered the market price because they would not have 'significantly altered the total mix of information made available.'" Brief for Petitioners 40–41 (quoting *Basic*, 485 U. S., at 232). For example, Connecticut Retirement's complaint alleges that an Amgen executive misleadingly downplayed the significance of an upcoming Food and Drug Administration advisory committee meeting by incorrectly stating that the meeting would not focus on one of Amgen's leading drugs. See App. to Pet. for Cert. 17a. Amgen responded to this allegation by presenting public documents—including the committee's meeting agenda, which was published in the

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[10] JUSTICE SCALIA suggests that the Court's approach in *Basic* might have been influenced by the obsolete view that "'Rule 23 . . . set[s] forth a mere pleading standard.'" *Post*, at 3 (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___, ___ (2011) (slip op., at 10)). The opinion in *Basic*, however, provides no indication that the Court perceived any issue before it to turn on the question whether a plaintiff must merely plead, rather than "affirmatively demonstrate," her satisfaction of Rule 23's certification requirements. *Dukes*, 564 U. S., at ___ (slip op., at 10).

Federal Register more than a month before the meeting—stating that safety concerns associated with Amgen's drug would be discussed at the meeting. See *id.*, at 41a–42a. See also 69 Fed. Reg. 16582 (2004).

The District Court did not err, we agree with the Court of Appeals, by disregarding Amgen's rebuttal evidence in deciding whether Connecticut Retirement's proposed class satisfied Rule 23(b)(3)'s predominance requirement. The Court of Appeals concluded, and Amgen does not contest, that Amgen's rebuttal evidence aimed to prove that the misrepresentations and omissions alleged in Connecticut Retirement's complaint were immaterial. 660 F. 3d, at 1177 (characterizing Amgen's rebuttal evidence as an attempt to present a "'truth-on-the-market' defense," which the Court of Appeals explained "is a method of refuting an alleged misrepresentation's *materiality*"). See also Reply Brief 17 (Amgen's evidence was offered to rebut the "materiality predicate" of the fraud-on-the-market theory). As explained above, however, the potential immateriality of Amgen's alleged misrepresentations and omissions is no barrier to finding that common questions predominate. See Part II, *supra*. If the alleged misrepresentations and omissions are ultimately found immaterial, the fraud-on-the-market presumption of classwide reliance will collapse. But again, as earlier explained, see *supra,* at 10–13, individual reliance questions will not overwhelm questions common to the class, for the class members' claims will have failed on their merits, thus bringing the litigation to a close. Therefore, just as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class.

We recognized as much in *Basic* itself. A defendant could "rebut the [fraud-on-the-market] presumption of reliance," we observed in *Basic*, by demonstrating that "news of the [truth] credibly entered the market and dissi-

pated the effects of [prior] misstatements." 485 U. S., at 248–249. We emphasized, however, that "[p]roof of that sort is a matter for trial" (and presumably also for a summary-judgment motion under Federal Rule of Civil Procedure 56). *Id.*, at 249, n. 29.[11] The District Court thus correctly reserved consideration of Amgen's rebuttal evidence for summary judgment or trial. It was not required to consider the evidence in determining whether common questions predominated under Rule 23(b)(3).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

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[11] Amgen attempts to minimize the import of this statement by noting that it was made prior to a 2003 amendment to Rule 23 that eliminated district courts' authority to conditionally certify class actions. See Advisory Committee's 2003 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 144. Nothing in our opinion in *Basic*, however, suggests that the statement relied in any way on district courts' conditional-certification authority. To the contrary, the Court in *Basic* stated: "Proof of that sort [*i.e.*, that news of the truth had entered the market and dissipated the effects of prior misstatements] is a matter for trial, throughout which the District Court retains the authority to *amend the certification order as may be appropriate*." 485 U. S., at 249, n. 29 (emphasis added). Rule 23(c)(1)(C) continues to provide that a class-certification order "may be altered or amended before final judgment."

SUPREME COURT OF THE UNITED STATES

No. 11–1085

AMGEN INC., ET AL., PETITIONERS *v.* CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 27, 2013]

JUSTICE ALITO, concurring.

I join the opinion of the Court with the understanding that the petitioners did not ask us to revisit *Basic*'s fraud-on-the-market presumption. See *Basic Inc.* v. *Levinson*, 485 U. S. 224 (1988). As the dissent observes, more recent evidence suggests that the presumption may rest on a faulty economic premise. *Post,* at 4, n. 4 (opinion of THOMAS, J.); see Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 175–176. In light of this development, reconsideration of the *Basic* presumption may be appropriate.

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[February 27, 2013]

JUSTICE SCALIA, dissenting.

I join the principal dissent, that of JUSTICE THOMAS, except for Part I–B.

The fraud-on-the-market rule says that purchase or sale of a security in a well functioning market establishes reliance on a material misrepresentation known to the market. This rule is to be found nowhere in the United States Code or in the common law of fraud or deception; it was invented by the Court in *Basic Inc.* v. *Levinson*, 485 U. S. 224 (1988). Today's Court applies to that rule the principles of Federal Rule of Civil Procedure 23(b)(3), and thereby concludes (logically enough) that commonality is established at the certification stage even when materiality has not been shown. That would be a correct procedure if *Basic* meant the rule it announced to govern only the question of substantive liability—what must be shown in order to prevail. If that were so, the new substantive rule, like the more general substantive rule that reliance must be proved, would be subject, at the certification stage, to the commonality analysis of Rule 23(b)(3). In my view, however, the *Basic* rule of fraud-on-the-market—a well functioning market plus purchase or sale in the market plus material misrepresentation known to the market establishes a necessary showing of reliance—governs not only the question of substantive liability, but also the

question whether certification is proper. All of the elements of that rule, including materiality, must be established if and when it is relied upon to justify certification. The answer to the question before us today is to be found not in Rule 23(b)(3), but in the opinion of *Basic*.

Basic established a presumption *that the misrepresentation was relied upon*, not a mere presumption that the plaintiffs relied on the market price. And it established that presumption not just for the question of substantive liability but also for the question of certification. "We granted certiorari . . . to determine whether the courts below properly applied a *presumption of reliance in certifying the class*, rather than requiring each class member to show direct reliance on Basic's statements." 485 U. S., at 230 (emphasis added). Of course it makes no sense to "presume reliance" on the misrepresentation merely because the plaintiff relied on the market price, *unless* the alleged misrepresentation would likely have affected the market price—that is, unless it was material. Thus, as JUSTICE THOMAS' dissent shows, the *Basic* opinion is shot through with references to the necessary materiality. The presumption of reliance does not apply, and hence neither substantive liability will attach nor will certification be proper, unless materiality is shown. The necessity of materiality for certification is demonstrated by the last sentence of the *Basic* opinion, which comes after the Court has decided to remand the case for reconsideration of materiality under the appropriate legal standard: "The District Court's certification of the class here was appropriate when made but is subject on remand to such adjustment, if any, as developing circumstances demand." *Id.*, at 250. Those circumstances are the establishment of facts that rebut the presumption, including of facts that show the misrepresentation was not material, or was not known to the market.

The Court argues that if materiality were a predicate to

certification on a fraud-on-the-market theory, the *Basic* Court would not have approved the class certification order while remanding for reconsideration of "whether the plaintiffs had mustered sufficient evidence to satisfy the relatively lenient standard for avoiding summary judgment." See *ante,* at 23–24. The Court manufactures an inconsistency on the basis of doctrine that did not govern class certification at the time of *Basic*. We recently clarified that "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___, ___ (2011) (slip op., at 10). But review of the *Basic* certification order shows that the District Court's fraud-on-the-market analysis was based exclusively on the pleadings: "[T]he *allegations of plaintiffs' complaint* are sufficient to bring this section 10(b) and Rule 10(b)(5) claim within the so-called 'fraud on the market' theory." App. to Pet. for Cert. in *Basic Inc.* v. *Levinson*, O. T. 1987, No. 86–279, p. 115a (emphasis added); see also *ibid.* (citing complaint paragraphs as establishing fraud on the market). Under a pleadings standard, the District Court found that the plaintiffs had satisfied Rule 23(b)(3) with regard to fraud on the market, including its materiality predicate. See *id.,* at 133a (denial of reconsideration) ("This court ruled on December 10 that transaction causation [*i.e.*, reliance] could be established by the following: *proof of a material misrepresentation* which affected the market price of the stocks with a resulting injury to the plaintiffs" (emphasis added)). Thus, even if the plaintiffs sufficiently pleaded materiality that the certification order "was appropriate when made," *Basic*, *supra*, at 250, the defendants retained an opportunity on remand to rebut the pleading in order to defeat certification.*

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*As for the Court's contention that I have "[s]cour[ed] the Court's decision in *Basic*" to find "some semblance of support" for my reading of the case, *ante*, at 23, n. 9: It does not take much scouring to come across

Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high. It does an injustice to the *Basic* Court to presume without clear evidence—and indeed in the face of language to the contrary—that it was establishing a regime in which not only those market class-action suits that have earned the presumption of reliance pass beyond the crucial certification stage, but *all* market-purchase and market-sale class-action suits do so, no matter what the alleged misrepresentation. The opinion need not be read this way, and it should not.

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.

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the Court's opening statement that "[w]e granted certiorari . . . to determine whether the courts below properly applied a *presumption of reliance in certifying the class*." 485 U. S., at 230 (emphasis added).

SUPREME COURT OF THE UNITED STATES

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[February 27, 2013]

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, and with whom JUSTICE SCALIA joins except for Part I–B, dissenting.

I

The Court today allows plaintiffs to obtain certification of securities-fraud class actions without proof that common questions predominate over individualized questions of reliance, in contravention of Federal Rule of Civil Procedure 23(b)(3). The Court does so by all but eliminating materiality as one of the predicates of the fraud-on-the-market theory, which serves as an alternative mode of establishing reliance. See *Basic Inc.* v. *Levinson*, 485 U. S. 224, 241–250 (1988). Without demonstrating materiality at certification, plaintiffs cannot establish *Basic*'s fraud-on-the-market presumption. Without proof of fraud on the market, plaintiffs cannot show that otherwise individualized questions of reliance will predominate, as required by Rule 23(b)(3). And without satisfying Rule 23(b)(3), class certification is improper. Fraud on the market is thus a condition precedent to class certification, without which individualized questions of reliance will defeat certification.

The Court's opinion depends on the following assumption: Plaintiffs will either (1) establish materiality at the merits stage, in which case class certification was proper

because reliance turned out to be a common question, or (2) fail to establish materiality, in which case the claim would fail on the merits, notwithstanding the fact that the class should not have been certified in the first place, because reliance was never a common question. The failure to establish materiality retrospectively confirms that fraud on the market was never established, that questions regarding the element of reliance were not common under Rule 23(b)(3), and, by extension, that certification was never proper. Plaintiffs cannot be excused of their Rule 23 burden to show at certification that questions of reliance are common merely because they might lose later on the merits element of materiality. Because a securities-fraud plaintiff invoking *Basic*'s fraud-on-the-market presumption to satisfy Rule 23(b)(3) should be required to prove each of the predicates of that theory at certification in order to demonstrate that questions of reliance are common to the class, I respectfully dissent.

A

We begin with §10 of the Securities Exchange Act of 1934, 15 U. S. C. §78j (2006 ed. and Supp. V).[1] We "have implied a private cause of action from the text and purposes of §10(b)" and Securities and Exchange Commission Rule 10b–5, 17 CFR §240.10b–5 (2011).[2] *Matrixx Initia-*

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[1] Section 10 states, in relevant part:

"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—

. . . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . ."

[2] Rule 10b–5 states:

"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

tives, Inc. v. *Siracusano*, 563 U. S. ___, ___ (2011) (slip op., at 9). See also *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971) ("It is now established that a private right of action is implied under §10(b)"). The elements of an implied §10(b) cause of action for securities fraud 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.'" *Matrixx*, *supra,* at ___ (slip op., at 9) (quoting *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008)). This case concerns the reliance element of the §10(b) claim and its interaction with Rule 23(b)(3).

To prove reliance, a plaintiff, whether proceeding individually or as a class member, must show that his stock transaction was caused by the specific alleged misstatement. "[P]roof of reliance ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'" *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. ___, ___ (2011) (slip op., at 4) (quoting *Basic*, *supra*, at 243).[3] To satisfy this element, a

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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, 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."

[3] Courts have also "referred to the element of reliance as 'transaction causation.'" *Erica P. John Fund*, 563 U. S., at ___ (slip op., at 6) (quoting *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342 (2005), in turn citing *Basic Inc.* v. *Levinson*, 485 U. S. 224, 248–249 (1988)). This alternative phrasing recognizes that the reliance inquiry

plaintiff traditionally was required to "sho[w] that he was aware of a company's statement and engaged in a relevant transaction . . . *based on that specific misrepresentation*." *Erica P. John Fund*, *supra,* at ___ (slip op., at 4) (emphasis added). In the face-to-face fraud cases from which securities claims historically arose, see, *e.g., Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 343–344 (2005) (discussing common-law roots of securities-fraud actions), this requirement was easily met by showing that the seller made statements directly to the purchaser and that the purchaser bought stock in reliance on those statements. However, in a modern securities market many, if not most, individuals who purchase stock from third parties on an impersonal exchange will be unaware of statements made by the issuer of those securities. As a result, such purchaser-plaintiffs are unable to meet the traditional reliance requirement because they cannot establish that they "engaged in a relevant transaction . . . based on [a] specific misrepresentation." *Erica P. John Fund*, *supra*, at ___ (slip op., at 4).

This concern was the driving force behind the development of the fraud-on-the-market theory adopted in *Basic*. Because individuals trading stock on an impersonal market often cannot show reliance even for purposes of an individual securities-fraud action, *Basic* permitted "plaintiffs to invoke a rebuttable presumption of reliance." *Erica P. John Fund*, *supra,* at ___ (slip op., at 5).[4] *Basic* pre-

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is directed at determining whether a particular piece of information caused an individual to enter into a given transaction.

[4]The *Basic* decision itself is questionable. Only four Justices joined the portion of the opinion adopting the fraud-on-the-market theory. Justice White, joined by Justice O'Connor, dissented from that section, emphasizing that "[c]onfusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts" and that the Court is "not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory." 485 U. S., at 252–253 (concurring in

sumes that "'in an open and developed securities market, the price of a company's stock is determined by the available *material* information regarding the company and its business.'" 485 U. S., at 241 (quoting *Peil* v. *Speiser*, 806 F. 2d 1154, 1160–1161 (CA3 1986); emphasis added).[5] "'Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.'" 485 U. S., at 241–242. As a result, "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," and "an investor's reliance *on any public material misrepresentations*" may therefore "be presumed for purposes of a Rule 10b–5 action." *Id.*, at 247 (emphasis added).

If a plaintiff opts to show reliance through fraud on the market, *Basic* is clear that the plaintiff must show the following predicates in order to prevail: (1) an efficient market, (2) a public statement, (3) that the stock was traded after the statement was made but before the truth

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part and dissenting in part). Justice White's concerns remain valid today, but the Court has not been asked to revisit *Basic*'s fraud-on-the-market presumption. I thus limit my dissent to demonstrating that the Court is not following *Basic*'s dictates.

Moreover, the Court acknowledges there is disagreement as to whether market efficiency is "'"a binary, yes or no question,"'" or instead operates differently depending on the information at issue, see *ante*, at 14, n. 6 (quoting Brief for Petitioners 32, in turn quoting Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 167).

[5] *Basic* "adopt[ed] the *TSC Industries* standard of materiality for the §10(b) and Rule 10b–5 context." 485 U. S., at 232. That standard indicates that "'[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.'" *Id.,* at 231 (quoting *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449 (1976); alteration in original). "[T]o fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" 485 U. S., at 231–232 (quoting *TSC Industries*, *supra*, at 449).

was revealed, and (4) the materiality of the statement. *Id.*, at 248, n. 27.[6] Both the Court and respondent agree that materiality is a necessary component of fraud on the market. See, *e.g.*, *ante,* at 9 (materiality is "indisputably" "an essential predicate of the fraud-on-the-market theory"); Brief for Respondent 29 ("If the statement is not materially false, then no one in the class can establish reliance via the integrity of the market"). The materiality of a specific statement is, therefore, essential to the fraud-on-the-market presumption, which in turn enables a plaintiff to prove reliance.

B

Basic's fraud-on-the-market presumption is highly sig-

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[6]The United States as *amicus curiae* invokes Rule 23(a)(3) to suggest that the third element, the timing of the relevant stock trades, is a "limit on the definition of the class." Brief for United States 15, n. 2. But it is also necessary to establish the timing of the allegedly material, public misstatement made into an allegedly efficient market (as well as when the fraud ended due to entry of truth on the market) before the fraud-on-the-market theory can be evaluated under Rule 23(b)(3). Thus, the lower court opinion in *Basic* expressly identified "the time the misrepresentations were made and the time the truth was revealed" as part of fraud on the market. *Levinson* v. *Basic Inc.*, 786 F. 2d 741, 750 (CA6 1986). The *Basic* Court cited the formulation approvingly, 485 U. S., at 248, n. 27, and recently in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. ___ (2011), the Court cited the same language as part of the "undisputed" elements a securities-fraud plaintiff must prove to invoke *Basic*. 563 U. S., at ___ (slip op., at 5–6) (quoting *Basic*, *supra*, at 248, n. 27). Unless the timing of the misrepresentation and truth is established at certification, there is no framework within which to determine whether fraud on the market renders reliance a common question. Thus, insofar as the majority recognizes that timing is a factor of the fraud-on-the-market theory, *ante*, at 16, n. 8, I agree. It would be incorrect to suggest that timing *solely* relates to Rules 23(a)(3) and (4). It is equally important to establish the timing range at certification for Rule 23(b)(3) reliance purposes. This fact undercuts the majority's attempt to isolate materiality as the only factor of fraud on the market that need not be shown at certification to demonstrate that reliance is a common question.

nificant because it makes securities-fraud class actions possible by converting the inherently individual reliance inquiry into a question common to the class, which is necessary to satisfy the dictates of Rule 23(b)(3).[7] Rule 23(b)(3) requires the party seeking certification to prove that "questions of law or fact common to class members predominate over any questions affecting only individual members." A plaintiff seeking class certification is not required to prove the elements of his claim at the certification stage, but he must show that the elements of the claim are susceptible to classwide proof. See, *e.g., Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___, ___, n. 6 (2011) (slip op., at 11, n. 6) ("[P]laintiffs seeking 23(b)(3) certification must *prove* that their shares were traded on an efficient market," an element of the fraud-on-the-market theory (emphasis added)). Without that proof, there is no justification for certifying a class because there is no "'capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.,* at ___ (slip op., at 9–10) (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009)).

If plaintiffs fail to show that *reliance* is a common question at the time of certification, certification is improper. For if reliance is not a common question, each plaintiff would be required to prove that he in fact relied on a misstatement, a showing which is simply not susceptible to classwide proof. Individuals make stock transactions for divergent, even idiosyncratic, reasons. As the leading pre-*Basic* fraud-on-the-market case recognized, "[a] purchaser on the stock exchanges may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price

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[7] There is no dispute that respondent meets the prerequisites of Fed. Rule Civ. Proc. 23(a).

earnings ratio, or some other factor." *Blackie* v. *Barrack*, 524 F. 2d 891, 907 (CA9 1975). The inquiry's inherently individualized nature renders it impossible to generate the common answers necessary for certification under Rule 23(b)(3). See *Basic*, 485 U. S., at 242 ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones").

The Court's solution in *Basic* was to allow putative class members to prove reliance through the fraud-on-the-market presumption. *Id.*, at 241–250. As the Court today recognizes, failure to establish fraud on the market "leaves open the prospect of individualized proof of reliance." *Ante*, at 17. Notably, the Court and the Ninth Circuit both acknowledge that in order to obtain the benefit of the presumption, plaintiffs must establish two of the fraud-on-the-market predicates *at class certification*: (1) that the market was generally efficient, and (2) that the alleged misstatement was public. See *ante,* at 16 (acknowledging "that market efficiency and the public nature of the alleged misrepresentations must be proved before a securities-fraud class action can be certified"); 660 F. 3d 1170, 1175 (CA9 2011) (same). See also *Erica P. John Fund*, 563 U. S., at ___ (slip op., at 5) ("It is undisputed that securities fraud plaintiffs must prove," at certification *inter alia*, "that the alleged misrepresentations were publicly known . . . [and] that the stock traded in an efficient market"). The Court is correct insofar as its statements recognize that fraud on the market is a condition precedent to showing that there are common questions of reliance at the time of class certification.

Nevertheless, the Court asserts that materiality—by its own admission an essential predicate to invoking fraud on the market—need not be established at certification because it will ultimately be proved at the merits stage.

Ante, at 16–18. This assertion is an express admission that parties *will not know* at certification whether reliance is an individual or common question.

To support its position, the Court transforms the predicate certification inquiry into a novel either-or inquiry occurring much later on the merits. According to the Court, either (1) plaintiffs will prove materiality on the merits, thus demonstrating *ex post* that common questions predominated at certification, or (2) they will fail to prove materiality, at which point we learn *ex post* that certification was inappropriate because reliance was not, in fact, a common question. In the Court's second scenario, fraud on the market was never established, reliance for each class member was inherently individualized, and Rule 23(b)(3) in fact should have barred certification long ago.[8] The Court suggests that the problem created by the second scenario is excusable because the plaintiffs will lose anyway on alternative merits grounds, and the case will be

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[8]The majority ignores this explanation of the fundamental flaw in its position, asserting that I never "explain how . . . a plaintiff class's failure to prove an essential element of its claim for relief will result in individual questions predominating over common ones." *Ante*, at 12. But a plaintiff, who is excused from his burden of showing, at certification that reliance is a common question, fails to demonstrate that common questions predominate over the individualized questions of reliance that are inherent in a securities fraud claim. A plaintiff must carry this burden at certification for certification to be proper. The majority does not respond to the inherent timing problem in its position. It does not explain how *ignoring* questions of reliance—that undeniably will be individualized in some cases—*at certification* is justified by the fact that those questions will be resolved months or years later on the merits in a way that indicates reliance was indeed an individualized question all along. Far from obeying the dictates of Rule 23(b)(3) as it claims, *ante*, at 12–13, the majority unjustifiably puts off a critical part of the Rule 23(b)(3) inquiry until the merits. The only way the majority can purport to follow Rule 23(b)(3) is by ignoring the fact that, under its own analysis, reliance may be an individualized question that predominates over common questions at certification.

over. See *ante,* at 17 ("[F]ailure of proof on the issue of materiality [at the merits stage] . . . not only precludes a plaintiff from invoking the fraud-on-the-market presumption of classwide reliance; it also establishes as a matter of law that the plaintiff cannot prevail on the merits of her Rule 10b–5 claim"). But nothing in logic or precedent justifies ignoring at certification whether reliance is susceptible to Rule 23(b)(3) classwide proof simply because one predicate of reliance—materiality—will be resolved, if at all, much later in the litigation on an independent merits element.

It is the Court, not Amgen, that "would have us put the cart before the horse," *ante*, at 3, by jumping chronologically to the §10(b) merits element of materiality. But Rule 23, as well as common sense, requires class certification issues to be addressed first. See Rule 23(c)(1)(A) ("At an early practicable time after a person sues or is sued . . . the court must determine by order whether to certify the action as a class action"). A plaintiff who cannot prove materiality does not simply have a claim that is "'dead on arrival'" at the merits, *ante*, at 17 (quoting 660 F. 3d, at 1175); he has a class that should never have arrived at the merits at all because it failed Rule 23(b)(3) certification from the outset. Without materiality, there is no fraud-on-the-market presumption, questions of reliance remain individualized, and Rule 23(b)(3) certification is impossible. And the fact that evidence of materiality goes to both fraud on the market at certification and an independent merits element is no issue; *Wal-Mart* expressly held that a court at certification may inquire into questions that also have later relevance on the merits. See 564 U. S., at ___ (slip op., at 10–11). The Court reverses that inquiry, effectively saying that certification may be put off until later because an adverse merits determination will retroactively wipe out the entire class. However, a plaintiff who cannot prove materiality cannot prove fraud on the

market and, thus, cannot demonstrate that the question of reliance is susceptible of a classwide answer.

The fact that a statement may prove to be material at the merits stage does not justify conflating the doctrinally independent (and distinct) elements of materiality and reliance.[9] The Court's error occurs when, instead of asking whether the element of *reliance* is susceptible to classwide proof, the Court focuses on whether *materiality* is susceptible to classwide proof. *Ante,* at 10 ("[T]he pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class will 'predominate'"). The result is that the Court effectively equates §10(b) materiality with fraud-on-the-market materiality and elides reliance as a §10(b) element. But a plaintiff seeking certification under Rule 23 bears the burden of proof with regard to all the elements of a §10(b) claim, which includes materiality *and* reliance. As *Wal-Mart* explained, "[a] party seeking class certification must affirmatively demonstrate his compliance with

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[9] Of course, the Court's assertion that materiality will be resolved on the merits presumes that certification will not bring *in terrorem* settlement pressures to bear, foreclosing any materiality inquiry at all. The Court dismisses this concern, *ante*, at 18–20, attempting to give fraud-on-the-market analysis the imprimatur of congressional enactment instead of recognizing it as a judicially created doctrine grafted onto an implied cause of action. But the fact that Congress has enacted legislation to curb excesses in securities litigation while leaving *Basic* intact, see *ante,* at 19–20, says nothing about the proper interpretation of *Basic* at issue here. The Court retains discretion over the contours of *Basic* unless and until Congress sees fit to alter them—a fact Congress must also have realized when it passed the Private Securities Litigation Reform Act of 1995, 109 Stat. 737, and other legislation. The Court's entire argument is based on the assumption that the fraud-on-the-market presumption need not be shown at certification because it will be proved later on the merits; insofar as certification makes that later determination unlikely to occur, it at least counsels against the certitude with which the Court assures us that its gloss on *Basic* is correct.

the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 564 U. S., at ___ (slip op., at 10). If the elements of fraud on the market are not proved at certification, a plaintiff has failed to carry his burden of establishing that questions of individualized reliance will not predominate, without which the plaintiff class cannot obtain certification. Cf. *id.*, at ___ (slip op., at 12) (holding in Rule 23(a)(2) context that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer"). It is only by establishing all of the elements of the fraud-on-the-market presumption that reliance can be proved on a classwide basis. Therefore, if a plaintiff wishes to use *Basic*'s presumption to prove that reliance is a common question, he must establish the entire presumption, including materiality, at the class certification stage.

Nor is it relevant, as respondent argues, that requiring plaintiffs to establish all predicates of fraud on the market at certification will make it more difficult to obtain certification. See Brief for Respondent 35–38. In *Basic*, four Justices of a six-Justice Court created the fraud-on-the-market presumption from a combination of newly minted economic theories, 485 U. S., at 250–251, n. 1 (White, J., concurring in part and dissenting in part), and "considerations of fairness, public policy, and probability," *id.*, at 245 (majority opinion), to allow claims that otherwise would have been barred due to the plaintiffs' inability to show reliance, *id.*, at 242. *Basic* is a judicially invented doctrine based on an economic theory adopted to ease the burden on plaintiffs bringing claims under an implied cause of action. There is nothing untoward about requiring plaintiffs to take the steps that the *Basic* Court created in an effort to save otherwise inadequate claims.

II

The majority's approach is, thus, doctrinally incorrect under *Basic*. Its shortcomings are further highlighted by the role that materiality played in the pre-*Basic* development of the fraud-on-the-market theory as a condition precedent to showing that there are common questions of reliance in the class-action context. Materiality, at the time of certification, has been a driving force behind the theory from the outset. This fact further supports the need to prove materiality at the time the fraud-on-the-market theory is invoked to show that questions of reliance can be answered on a classwide basis.

A

Before *Basic*, two signposts marked the way for courts applying the fraud-on-the-market theory. Both demonstrate that the materiality of an alleged falsehood was not a mere afterthought but rather one of the primary reasons for allowing traditional proof of reliance to be brushed aside at certification. This fact weighs strongly in favor of the conclusion that materiality must be resolved at certification when the fraud-on-the-market presumption is invoked to show that reliance can be proved on a classwide basis.

The first signpost was the Ninth Circuit's 1975 opinion in *Blackie*, termed by one pre-*Basic* court the "seminal fraud on the market case." *Peil*, 806 F. 2d, at 1163, n. 16. See also *Basic*, *supra*, at 251, n. 1 (White, J., dissenting) ("The earliest Court of Appeals case adopting this theory cited by the Court is *Blackie* v. *Barrack*, 524 F. 2d 891 (CA9 1975), cert. denied, 429 U. S. 816 (1976)").

Blackie arose from a $90 million loss reported by audio equipment manufacturer Ampex Corp. in its 1972 annual report. 524 F. 2d, at 894.[10] Ampex's independent auditors

[10] Ampex's sales for 1971 were just under $284 million. See Reckert,

not only refused to certify the 1972 annual report but also withdrew certification of all 1971 financial statements "because of doubts that the loss reported for 1972 was in fact suffered in that year." *Ibid.* In resultant class actions, the defendants argued that reliance stood in the way of class certification under Rule 23(b)(3) because it was not a common question.

The Ninth Circuit disagreed. Instead, it relieved plaintiffs from providing traditional proof of reliance, explaining that "causation is adequately established in the impersonal stock exchange context *by proof of purchase and of the materiality of misrepresentations*, without direct proof of reliance." *Id.,* at 906 (emphasis added). The court left no doubt that the materiality of the $90 million shortfall in Ampex's financial statements was central to its determination that reliance could be presumed. It asserted that "[m]ateriality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price—when the purchase is made[,] the causational chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a prima facie case." *Ibid.* Materiality was not merely an important factor that allowed reliance to be presumed at certification; materiality was *the* factor. It demonstrated that the defendants had committed a fraud on the market, that all putative class plaintiffs had relied on it in purchasing stock, and, therefore, that questions of reliance would be susceptible to common answers.[11]

A. & P. Registers Deficit for First Fiscal Quarter, N. Y. Times, July 1, 1972, p. 30 (discussing Ampex's revenue and net loss in its 1972 Annual Report).

[11] *Blackie*'s use of materiality to satisfy reliance for purposes of Rule 23(b)(3) predominance continued to form the foundation for the fraud-on-the-market concept in subsequent pre-*Basic* appellate cases. See, *e.g.*, *Peil* v. *Speiser*, 806 F. 2d 1154, 1161 (CA3 1986) ("[W]e hold that plaintiffs who purchase in an open and developed market need not

The second fraud-on-the-market signpost prior to *Basic* was a note in the Harvard Law Review, which described the nascent theory. See Note, The Fraud-on-the-Market Theory, 95 Harv. L. Rev. 1143 (1982) (hereinafter Harv. L. Rev. Note). The Sixth Circuit opinion reviewed in *Basic* termed the Note "[t]he clearest statement of the theory of presumption of reliance." *Levinson* v. *Basic Inc.*, 786 F. 2d 741, 750 (1986). Indeed, in the briefing for *Basic* itself, the plaintiffs, the United States, and plaintiffs' *amicus* cited the article repeatedly as an authoritative statement on the subject. See Brief for Respondent 43, n. 18, 46, n. 20 (cited in *Peil*, *supra*, at 1160), Brief for Securities and Exchange Commission as *Amicus Curiae* 22, n. 25, 24, n. 30, 26, n. 32, and Brief for Joseph Harris et al. as *Amicus Curiae* 4, n. 2, in *Basic Inc.* v. *Levinson*, O. T. 1987, No. 86–279.

Like *Blackie*, the Note also hinged the fraud-on-the-market presumption of reliance on proof of materiality. Harv. L. Rev. Note 1161 ("In developed markets, which are apparently efficient, reliance should be presumed *from the materiality of the deception*" (emphasis added)). Ultimately, in language that will be familiar to anyone who has read *Basic*, the Note formulated a "pivotal assumption" underlying the fraud-on-the-market theory as the belief that:

> "market prices respond to information disseminated (or *not* disseminated) concerning the companies whose securities are traded. In such a setting—often described as an 'efficient market'—the reliance of some traders upon a material deception influences market

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prove direct reliance on defendants' misrepresentations, but can satisfy their burden of proof on the element of causation by showing that the defendants made material misrepresentations" (footnote omitted)); *Panzirer* v. *Wolf*, 663 F. 2d 365, 368 (CA2 1981) ("*Blackie* held that the materiality of a fraud creates a presumption of reliance through its presumed effect on the market. . . . Our holding is no more than an extension of *Blackie*").

> prices and thereby affects even traders who never read or hear of the deception." Harv. L. Rev. Note 1154 (footnote omitted).

Again, the materiality of the alleged misstatement was a key component, without which the market could not be presumed to move. As a result, without materiality it is impossible to say that there has been a fraud on the market at all, and if that is not the case there is no reason to believe that the market price at which stock transactions occurred was affected by an alleged misstatement or, by extension, that any market participants relied on it. Materiality should thus be proved when the fraud-on-the-market presumption is invoked, or there is no commonality with respect to questions of reliance.

B

Nor did the importance of materiality diminish in the Sixth Circuit opinion reviewed in *Basic*. Rather, the court followed the path marked by the signposts discussed above. It excused plaintiffs from offering traditional evidence of reliance, so long as "a defendant is shown to have made a *material* public misrepresentation that, if relied on directly, would fraudulently induce an individual to misjudge the value of the stock." *Levinson*, 786 F. 2d, at 750 (emphasis added). The court's analysis made clear that materiality should be demonstrated *at the time the presumption was invoked*: "In order to invoke the presumption of reliance based upon the fraud on the market theory, a plaintiff must allege and prove . . . that the misrepresentations were material . . . ." *Ibid.* (citing *Blackie*, 524 F. 2d, at 906).

C

Finally, the briefing before this Court in *Basic* itself built upon this framework and the foundational principle that materiality is an integral part of the theory. Criti-

cally, the *Basic* defendants argued that the plaintiffs could not establish fraud on the market at certification even if the theory were valid because the alleged misstatement was immaterial. They "contrast[ed] the likely market impact of disclosure of the [$90 million *Blackie* loss] . . . with the disclosure of the information which respondents contend[ed] rendered Basic's statements materially misleading." See Brief for Petitioners in O. T. 1987, No. 86–279, p. 42. The *Basic* defendants concluded that "the differences between a company's $90 million loss and a company's sporadic contacts with a friendly suitor are substantial. . . . [T]he fraud on the market theory, if it has vitality, should not be applied in a case such as this." *Id.,* at 43.

In response, the plaintiffs in *Basic* did not argue that the defendants misunderstood the role of materiality in the fraud-on-the-market theory. They instead advanced a now-foreclosed interpretation of dicta from *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974):

> "Petitioners' final argument—that respondents will be unable to establish that Basic's repeated false and misleading statements impacted the price of Basic stock over a fourteen month period—represents an effort to litigate the merits of this case on the motion for class certification. . . . As this Court held in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974): 'We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" Brief for Respondents in O. T. 1987, No. 86–279, p. 54.

The Court rejected this reading of *Eisen* two Terms ago, explaining that the very language the *Basic* plaintiffs quoted was "sometimes mistakenly cited" as prohibiting

inquiry into "the propriety of certification under Rules 23(a) and (b)." *Wal-Mart Stores, Inc.*, 564 U. S., at ___, n. 6 (slip op., at 10, n. 6). That reading, the Court explained, "is the purest dictum and is contradicted by our other cases." *Ibid.* The *Basic* defendants' reply is consistent with *Wal-Mart*:

> "Putative class representatives, such as respondents, should not be permitted to invoke the fraud on the market theory while, at the same time, arguing that courts may not make any preliminary inquiry into the claimed impact on the market. *See*, *e.g.*, Resp. Br., p. 54. By seeking the benefit of the presumption, respondents necessarily invite judicial scrutiny of the circumstances in which it is invoked." Reply Brief for Petitioners in O. T. 1987, No. 86–279, p. 18.

Well said. The history of *Basic* is worth the volume of argument offered by the majority. Cf. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921) (majority opinion of Holmes, J.). Materiality was central to the development, analysis, and adoption of the fraud-on-the-market theory both before *Basic* and in *Basic* itself. Materiality, therefore, must be demonstrated to prove fraud on the market, and until materiality of an alleged misstatement is shown there is no reason to believe that all market participants have relied equally on it. Otherwise individualized questions of reliance remain. This history confirms that materiality must be proved at the time that the theory is invoked—*i.e.,* at certification.

III

I, thus, would reverse the judgment of the Ninth Circuit and hold that a plaintiff invoking the fraud-on-the-market presumption bears the burden to establish all the elements of fraud on the market at certification, including the materiality of the alleged misstatement.

資料３

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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HALLIBURTON CO. ET AL. *v.* ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–317. Argued March 5, 2014—Decided June 23, 2014

Investors can recover damages in a private securities fraud action only if they prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. In *Basic Inc.* v. *Levinson*, 485 U. S. 224, this Court held that investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misrepresentations. The Court also held, however, that a defendant could rebut this presumption by showing that the alleged misrepresentation did not actually affect the stock price—that is, that it had no "price impact."

Respondent Erica P. John Fund, Inc. (EPJ Fund), filed a putative class action against Halliburton and one of its executives (collectively Halliburton), alleging that they made misrepresentations designed to inflate Halliburton's stock price, in violation of section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5. The District Court initially denied EPJ Fund's class certification motion, and the Fifth Circuit affirmed. But this Court vacated that judgment, concluding that securities fraud plaintiffs need not prove loss causation—a causal connection between the defendants' alleged misrepresentations and the plaintiffs' economic losses—at the class certification stage in order to invoke *Basic*'s presumption of reliance. On remand, Halliburton argued that class certification was nonetheless inappropriate because the evidence it had earlier introduced to disprove loss causation also showed that its alleged misrepresentations had not affected its stock price. By demonstrating the absence of any "price impact," Halliburton contended, it

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had rebutted the *Basic* presumption. And without the benefit of that presumption, investors would have to prove reliance on an individual basis, meaning that individual issues would predominate over common ones and class certification would be inappropriate under Federal Rule of Civil Procedure 23(b)(3). The District Court rejected Halliburton's argument and certified the class. The Fifth Circuit affirmed, concluding that Halliburton could use its price impact evidence to rebut the *Basic* presumption only at trial, not at the class certification stage.

Held:

1. Halliburton has not shown a "special justification," *Dickerson* v. *United States*, 530 U. S. 428, 443, for overruling *Basic*'s presumption of reliance. Pp. 4–16.

(a) To recover damages under section 10(b) and Rule 10b–5, a plaintiff must prove, as relevant here, "'reliance upon the misrepresentation or omission.'" *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, ___. The Court recognized in *Basic,* however, that requiring direct proof of reliance from every individual plaintiff "would place an unnecessarily unrealistic evidentiary burden on the . . . plaintiff who has traded on an impersonal market," 485 U. S., at 245, and "effectively would" prevent plaintiffs "from proceeding with a class action" in Rule 10b–5 suits, *id.,* at 242. To address these concerns, the Court held that plaintiffs could satisfy the reliance element of a Rule 10b–5 action by invoking a rebuttable presumption of reliance. The Court based that presumption on what is known as the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.,* at 246. The Court also noted that the typical "investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.,* at 247. As a result, whenever an investor buys or sells stock at the market price, his "reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b–5 action." *Id.* at 247. *Basic* also emphasized that the presumption of reliance was rebuttable rather than conclusive. Pp. 5–7.

(b) None of Halliburton's arguments for overruling *Basic* so discredit the decision as to constitute a "special justification." Pp. 7–12.

(1) Halliburton first argues that the *Basic* presumption is inconsistent with Congress's intent in passing the 1934 Exchange Act—the same argument made by the dissenting Justices in *Basic.* The *Basic* majority did not find that argument persuasive then, and Halliburton has given no new reason to endorse it now. Pp. 7–8.

(2) Halliburton also contends that *Basic* rested on two premis-

es that have been undermined by developments in economic theory. First, it argues that the *Basic* Court espoused "a robust view of market efficiency" that is no longer tenable in light of empirical evidence ostensibly showing that material, public information often is not quickly incorporated into stock prices. The Court in *Basic* acknowledged, however, the debate among economists about the efficiency of capital markets and refused to endorse "any particular theory of how quickly and completely publicly available information is reflected in market price." 485 U. S., at 248, n. 28. The Court instead based the presumption of reliance on the fairly modest premise that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.,* at 247, n. 24. Moreover, in making the presumption rebuttable, *Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof. Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities.

Halliburton also contests the premise that investors "invest 'in reliance on the integrity of [the market] price,'" *id.,* at 247, identifying a number of classes of investors for whom "price integrity" is supposedly "marginal or irrelevant." But *Basic* never denied the existence of such investors, who in any event rely at least on the facts that market prices will incorporate public information within a reasonable period and that market prices, however inaccurate, are not distorted by fraud. Pp. 8–12.

(c) The principle of *stare decisis* has " 'special force' " "in respect to statutory interpretation" because "'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139. So too with *Basic*'s presumption of reliance. The presumption is not inconsistent with this Court's more recent decisions construing the Rule 10b–5 cause of action. In *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, and *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, the Court declined to effectively eliminate the reliance element by extending liability to entirely new categories of defendants who themselves had not made any material, public misrepresentation. The *Basic* presumption, by contrast, merely provides an alternative means of satisfying the reliance element. Nor is the *Basic* presumption inconsistent with the Court's recent decisions governing class action certification, which require plaintiffs to *prove*—not simply plead—that their proposed class satisfies each requirement of Federal Rule of Civil Procedure 23, including, if applicable, the predominance requirement of Rule 23(b)(3). See, *e.g., Wal-*

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Mart Stores, Inc. v. *Dukes*, 564 U. S. ___, ___. The *Basic* presumption does not relieve plaintiffs of that burden but rather sets forth what plaintiffs must prove to demonstrate predominance. Finally, Halliburton emphasizes the possible harmful consequences of the securities class actions facilitated by the *Basic* presumption, but such concerns are more appropriately addressed to Congress, which has in fact responded, to some extent, to many of them. Pp. 12–16.

2. For the same reasons the Court declines to overrule *Basic*'s presumption of reliance, it also declines to modify the prerequisites for invoking the presumption by requiring plaintiffs to prove "price impact" directly at the class certification stage. The *Basic* presumption incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation. Requiring plaintiffs to prove price impact directly would take away the first constituent presumption. Halliburton's argument for doing so is the same as its argument for overruling the *Basic* presumption altogether, and it meets the same fate. Pp. 16–18.

3. The Court agrees with Halliburton, however, that defendants must be afforded an opportunity to rebut the presumption of reliance before class certification with evidence of a *lack* of price impact. Defendants may already introduce such evidence at the merits stage to rebut the *Basic* presumption, as well as at the class certification stage to counter a plaintiff's showing of market efficiency. Forbidding defendants to rely on the same evidence prior to class certification for the particular purpose of rebutting the presumption altogether makes no sense, and can readily lead to results that are inconsistent with *Basic*'s own logic. *Basic* allows plaintiffs to establish price impact indirectly, by showing that a stock traded in an efficient market and that a defendant's misrepresentations were public and material. But an indirect proxy should not preclude consideration of a defendant's direct, more salient evidence showing that an alleged misrepresentation did not actually affect the stock's price and, consequently, that the *Basic* presumption does not apply. *Amgen* does not require a different result. There, the Court held that materiality, though a prerequisite for invoking the *Basic* presumption, should be left to the merits stage because it does not bear on the predominance requirement of Rule 23(b)(3). In contrast, the fact that a misrepresentation has price impact is "*Basic*'s fundamental premise."

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Erica P. John Fund, Inc. v. *Halliburton Co.*, 563 U. S. ___, ___. It thus has everything to do with the issue of predominance at the class certification stage. That is why, if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification. Given that such indirect evidence of price impact will be before the court at the class certification stage in any event, there is no reason to artificially limit the inquiry at that stage by excluding direct evidence of price impact. Pp. 18–23.

718 F. 3d 423, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion, in which BREYER and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA and ALITO, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 13–317

HALLIBURTON CO., ET AL., PETITIONERS *v.* ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2014]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Investors can recover damages in a private securities fraud action only if they prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. In *Basic Inc.* v. *Levinson*, 485 U. S. 224 (1988), we held that investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements. In such a case, we concluded, anyone who buys or sells the stock at the market price may be considered to have relied on those misstatements.

We also held, however, that a defendant could rebut this presumption in a number of ways, including by showing that the alleged misrepresentation did not actually affect the stock's price—that is, that the misrepresentation had no "price impact." The questions presented are whether we should overrule or modify *Basic*'s presumption of reliance and, if not, whether defendants should nonetheless

be afforded an opportunity in securities class action cases to rebut the presumption at the class certification stage, by showing a lack of price impact.

I

Respondent Erica P. John Fund, Inc. (EPJ Fund), is the lead plaintiff in a putative class action against Halliburton and one of its executives (collectively Halliburton) alleging violations of section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. §78j(b), and Securities and Exchange Commission Rule 10b–5, 17 CFR §240.10b–5 (2013). According to EPJ Fund, between June 3, 1999, and December 7, 2001, Halliburton made a series of misrepresentations regarding its potential liability in asbestos litigation, its expected revenue from certain construction contracts, and the anticipated benefits of its merger with another company—all in an attempt to inflate the price of its stock. Halliburton subsequently made a number of corrective disclosures, which, EPJ Fund contends, caused the company's stock price to drop and investors to lose money.

EPJ Fund moved to certify a class comprising all investors who purchased Halliburton common stock during the class period. The District Court found that the proposed class satisfied all the threshold requirements of Federal Rule of Civil Procedure 23(a): It was sufficiently numerous, there were common questions of law or fact, the representative parties' claims were typical of the class claims, and the representatives could fairly and adequately protect the interests of the class. App. to Pet. for Cert. 54a. And except for one difficulty, the court would have also concluded that the class satisfied the requirement of Rule 23(b)(3) that "the questions of law or fact common to class members predominate over any questions affecting only individual members." See *id.,* at 55a, 98a. The difficulty was that Circuit precedent required securities fraud plain-

tiffs to prove "loss causation"—a causal connection between the defendants' alleged misrepresentations and the plaintiffs' economic losses—in order to invoke *Basic*'s presumption of reliance and obtain class certification. App. to Pet. for Cert. 55a, and n. 2. Because EPJ Fund had not demonstrated such a connection for any of Halliburton's alleged misrepresentations, the District Court refused to certify the proposed class. *Id.,* at 55a, 98a. The United States Court of Appeals for the Fifth Circuit affirmed the denial of class certification on the same ground. *Archdiocese of Milwaukee Supporting Fund, Inc.* v. *Halliburton Co.*, 597 F. 3d 330 (2010).

We granted certiorari and vacated the judgment, finding nothing in "*Basic* or its logic" to justify the Fifth Circuit's requirement that securities fraud plaintiffs prove loss causation at the class certification stage in order to invoke *Basic*'s presumption of reliance. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. ___, ___ (2011) (*Halliburton I*) (slip op., at 6). "Loss causation," we explained, "addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Ibid.* We remanded the case for the lower courts to consider "any further arguments against class certification" that Halliburton had preserved. *Id.,* at ___ (slip op., at 9).

On remand, Halliburton argued that class certification was inappropriate because the evidence it had earlier introduced to disprove loss causation also showed that none of its alleged misrepresentations had actually affected its stock price. By demonstrating the absence of any "price impact," Halliburton contended, it had rebutted *Basic*'s presumption that the members of the proposed class had relied on its alleged misrepresentations simply by buying or selling its stock at the market price. And without the benefit of the *Basic* presumption, investors would have to prove reliance on an individual basis, mean-

ing that individual issues would predominate over common ones. The District Court declined to consider Halliburton's argument, holding that the *Basic* presumption applied and certifying the class under Rule 23(b)(3). App. to Pet. for Cert. 30a.

The Fifth Circuit affirmed. 718 F. 3d 423 (2013). The court found that Halliburton had preserved its price impact argument, but to no avail. *Id.,* at 435–436. While acknowledging that "Halliburton's price impact evidence could be used at the trial on the merits to refute the presumption of reliance," *id.,* at 433, the court held that Halliburton could not use such evidence for that purpose at the class certification stage, *id.,* at 435. "[P]rice impact evidence," the court explained, "does not bear on the question of common question predominance [under Rule 23(b)(3)], and is thus appropriately considered only on the merits after the class has been certified." *Ibid.*

We once again granted certiorari, 571 U. S. ___ (2013), this time to resolve a conflict among the Circuits over whether securities fraud defendants may attempt to rebut the *Basic* presumption at the class certification stage with evidence of a lack of price impact. We also accepted Halliburton's invitation to reconsider the presumption of reliance for securities fraud claims that we adopted in *Basic*.

II

Halliburton urges us to overrule *Basic*'s presumption of reliance and to instead require every securities fraud plaintiff to prove that he actually relied on the defendant's misrepresentation in deciding to buy or sell a company's stock. Before overturning a long-settled precedent, however, we require "special justification," not just an argument that the precedent was wrongly decided. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (internal quotation marks omitted). Halliburton has failed to make that showing.

A

Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b–5 prohibit making any material misstatement or omission in connection with the purchase or sale of any security. Although section 10(b) does not create an express private cause of action, we have long recognized an implied private cause of action to enforce the provision and its implementing regulation. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975). To recover damages for violations of section 10(b) and Rule 10b–5, a plaintiff must prove "'(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.'" *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, ___ (2013) (slip op., at 3–4) (quoting *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. ___, ___ (2011) (slip op., at 9)).

The reliance element "'ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury.'" 568 U. S., at ___ (slip op., at 4) (quoting *Halliburton I*, 563 U. S., at ___ (slip op., at 4)). "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.,* purchasing common stock—based on that specific misrepresentation." *Id.,* at ___ (slip op., at 4).

In *Basic*, however, we recognized that requiring such direct proof of reliance "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." 485 U. S., at 245. That is because, even assuming an investor could prove that he was aware of the misrepresentation, he would still have to "show a speculative state of facts, *i.e.*,

how he would have acted . . . if the misrepresentation had not been made." *Ibid.*

We also noted that "[r]equiring proof of individualized reliance" from every securities fraud plaintiff "effectively would . . . prevent[ ] [plaintiffs] from proceeding with a class action" in Rule 10b–5 suits. *Id.,* at 242. If every plaintiff had to prove direct reliance on the defendant's misrepresentation, "individual issues then would . . . overwhelm[ ] the common ones," making certification under Rule 23(b)(3) inappropriate. *Ibid.*

To address these concerns, *Basic* held that securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b–5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation. The Court based that presumption on what is known as the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.,* at 246. The Court also noted that, rather than scrutinize every piece of public information about a company for himself, the typical "investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price"—the belief that it reflects all public, material information. *Id.,* at 247. As a result, whenever the investor buys or sells stock at the market price, his "reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b–5 action." *Ibid.*

Based on this theory, a plaintiff must make the following showings to demonstrate that the presumption of reliance applies in a given case: (1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the

truth was revealed. See *id.,* at 248, n. 27; *Halliburton I*, *supra*, at ___ (slip op., at 5–6).

At the same time, *Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive. Specifically, "[a]ny showing that 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, will be sufficient to rebut the presumption of reliance." 485 U. S., at 248. So for example, if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price, or that a plaintiff would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud, then the presumption of reliance would not apply. *Id.,* at 248–249. In either of those cases, a plaintiff would have to prove that he directly relied on the defendant's misrepresentation in buying or selling the stock.

B

Halliburton contends that securities fraud plaintiffs should *always* have to prove direct reliance and that the *Basic* Court erred in allowing them to invoke a presumption of reliance instead. According to Halliburton, the *Basic* presumption contravenes congressional intent and has been undermined by subsequent developments in economic theory. Neither argument, however, so discredits *Basic* as to constitute "special justification" for overruling the decision.

1

Halliburton first argues that the *Basic* presumption is inconsistent with Congress's intent in passing the 1934 Exchange Act. Because "[t]he Section 10(b) action is a 'judicial construct that Congress did not enact,'" this Court, Halliburton insists, "must identify—and borrow

from—the express provision that is 'most analogous to the private 10b–5 right of action.'" Brief for Petitioners 12 (quoting *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164 (2008); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 294 (1993)). According to Halliburton, the closest analogue to section 10(b) is section 18(a) of the Act, which creates an express private cause of action allowing investors to recover damages based on misrepresentations made in certain regulatory filings. 15 U. S. C. §78r(a). That provision requires an investor to prove that he bought or sold stock "in reliance upon" the defendant's misrepresentation. *Ibid.* In ignoring this direct reliance requirement, the argument goes, the *Basic* Court relieved Rule 10b–5 plaintiffs of a burden that Congress would have imposed had it created the cause of action.

EPJ Fund contests both premises of Halliburton's argument, arguing that Congress has affirmed *Basic*'s construction of section 10(b) and that, in any event, the closest analogue to section 10(b) is not section 18(a) but section 9, 15 U. S. C. §78i—a provision that does not require actual reliance.

We need not settle this dispute. In *Basic*, the dissenting Justices made the same argument based on section 18(a) that Halliburton presses here. See 485 U. S., at 257–258 (White, J., concurring in part and dissenting in part). The *Basic* majority did not find that argument persuasive then, and Halliburton has given us no new reason to endorse it now.

2

Halliburton's primary argument for overruling *Basic* is that the decision rested on two premises that can no longer withstand scrutiny. The first premise concerns what is known as the "efficient capital markets hypothesis." *Basic* stated that "the market price of shares traded on well-

developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.,* at 246. From that statement, Halliburton concludes that the *Basic* Court espoused "a robust view of market efficiency" that is no longer tenable, for "'overwhelming empirical evidence' now 'suggests that capital markets are not fundamentally efficient.'" Brief for Petitioners 14–16 (quoting Lev & de Villiers, Stock Price Crashes and 10b–5 Damages: A Legal, Economic, and Policy Analysis, 47 Stan. L. Rev 7, 20 (1994)). To support this contention, Halliburton cites studies purporting to show that "public information is often not incorporated immediately (much less rationally) into market prices." Brief for Petitioners 17; see *id.,* at 16–20. See also Brief for Law Professors as *Amici Curiae* 15–18.

Halliburton does not, of course, maintain that capital markets are *always* inefficient. Rather, in its view, *Basic*'s fundamental error was to ignore the fact that "'efficiency is not a binary, yes or no question.'" Brief for Petitioners 20 (quoting Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 167)). The markets for some securities are more efficient than the markets for others, and even a single market can process different kinds of information more or less efficiently, depending on how widely the information is disseminated and how easily it is understood. Brief for Petitioners at 20–21. Yet *Basic*, Halliburton asserts, glossed over these nuances, assuming a false dichotomy that renders the presumption of reliance both underinclusive and overinclusive: A misrepresentation can distort a stock's market price even in a generally inefficient market, and a misrepresentation can leave a stock's market price unaffected even in a generally efficient one. Brief for Petitioners at 21.

Halliburton's criticisms fail to take *Basic* on its own terms. Halliburton focuses on the debate among econo-

mists about the degree to which the market price of a company's stock reflects public information about the company—and thus the degree to which an investor can earn an abnormal, above-market return by trading on such information. See Brief for Financial Economists as *Amici Curiae* 4–10 (describing the debate). That debate is not new. Indeed, the *Basic* Court acknowledged it and declined to enter the fray, declaring that "[w]e need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory." 485 U. S., at 246–247, n. 24. To recognize the presumption of reliance, the Court explained, was not "conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.,* at 248, n. 28. The Court instead based the presumption on the fairly modest premise that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.,* at 247, n. 24. *Basic*'s presumption of reliance thus does not rest on a "binary" view of market efficiency. Indeed, in making the presumption rebuttable, *Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof.

The academic debates discussed by Halliburton have not refuted the modest premise underlying the presumption of reliance. Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices. See, *e.g.,* Shiller, We'll Share the Honors, and Agree to Disagree, N. Y. Times, Oct. 27, 2013, p. BU6 ("Of course, prices reflect available information"). Halliburton also conceded as much in its reply brief and at oral argument. See Reply Brief 13 ("market prices generally respond to new, material information"); Tr. of Oral Arg. 7. Debates about the precise

degree to which stock prices accurately reflect public information are thus largely beside the point. "That the . . . price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss," which is "all that *Basic* requires." *Schleicher* v. *Wendt*, 618 F. 3d 679, 685 (CA7 2010) (Easterbrook, C. J.). Even though the efficient capital markets hypothesis may have "garnered substantial criticism since *Basic*," *post*, at 6 (THOMAS, J., concurring in judgment), Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities. Contrast *State Oil Co.* v. *Khan*, 522 U. S. 3 (1997), unanimously overruling *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968).

Halliburton also contests a second premise underlying the *Basic* presumption: the notion that investors "invest 'in reliance on the integrity of [the market] price.'" Reply Brief 14 (quoting 485 U. S., at 247; alteration in original). Halliburton identifies a number of classes of investors for whom "price integrity" is supposedly "marginal or irrelevant." Reply Brief 14. The primary example is the value investor, who believes that certain stocks are undervalued or overvalued and attempts to "beat the market" by buying the undervalued stocks and selling the overvalued ones. Brief for Petitioners 15–16 (internal quotation marks omitted). See also Brief for Vivendi S. A. as *Amicus Curiae* 3–10 (describing the investment strategies of day traders, volatility arbitragers, and value investors). If many investors "are indifferent to prices," Halliburton contends, then courts should not presume that investors rely on the integrity of those prices and any misrepresentations incorporated into them. Reply Brief 14.

But *Basic* never denied the existence of such investors. As we recently explained, *Basic* concluded only that "it is reasonable to presume that *most* investors—knowing that

they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen*, 568 U. S., at ___ (slip op., at 5) (emphasis added).

In any event, there is no reason to suppose that even Halliburton's main counterexample—the value investor—is as indifferent to the integrity of market prices as Halliburton suggests. Such an investor implicitly relies on the fact that a stock's market price will eventually reflect material information—how else could the market correction on which his profit depends occur? To be sure, the value investor "does not believe that the market price accurately reflects public information *at the time he transacts*." *Post*, at 11. But to indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable period. The value investor also presumably tries to estimate *how* undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price tainted by fraud.

C

The principle of *stare decisis* has "'special force'" "in respect to statutory interpretation" because "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989)). So too with *Basic*'s presumption of reliance. Although the presumption is a judicially created doctrine designed to implement a judicially created cause of action, we have described the presumption as "a substantive doctrine of federal securities-fraud law." *Amgen*, *supra*, at ___ (slip op., at 5). That is because it provides a

way of satisfying the reliance element of the Rule 10b–5 cause of action. See, *e.g., Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342 (2005). As with any other element of that cause of action, Congress may overturn or modify any aspect of our interpretations of the reliance requirement, including the *Basic* presumption itself. Given that possibility, we see no reason to exempt the *Basic* presumption from ordinary principles of *stare decisis*.

To buttress its case for overruling *Basic*, Halliburton contends that, in addition to being wrongly decided, the decision is inconsistent with our more recent decisions construing the Rule 10b–5 cause of action. As Halliburton notes, we have held that "we must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U. S. ___, ___ (2011) (slip op., at 6) (quoting *Stoneridge*, 552 U. S., at 167); see, *e.g., Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994) (refusing to recognize aiding-and-abetting liability under the Rule 10b–5 cause of action); *Stoneridge*, *supra* (refusing to extend Rule 10b–5 liability to certain secondary actors who did not themselves make material misstatements). Yet the *Basic* presumption, Halliburton asserts, does just the opposite, *expanding* the Rule 10b–5 cause of action. Brief for Petitioners 27–29.

Not so. In *Central Bank* and *Stoneridge*, we declined to extend Rule 10b–5 liability to entirely new categories of defendants who themselves had not made any material, public misrepresentation. Such an extension, we explained, would have eviscerated the requirement that a plaintiff prove that he relied on a misrepresentation made *by the defendant*. See *Central Bank*, *supra*, at 180; *Stoneridge*, *supra*, at 157, 159. The *Basic* presumption does

not eliminate that requirement but rather provides an alternative means of satisfying it. While the presumption makes it easier for plaintiffs to prove reliance, it does not alter the elements of the Rule 10b–5 cause of action and thus maintains the action's original legal scope.

Halliburton also argues that the *Basic* presumption cannot be reconciled with our recent decisions governing class action certification under Federal Rule of Civil Procedure 23. Those decisions have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3). See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___, ___ (2011) (slip op., at 10); *Comcast Corp.* v. *Behrend*, 569 U. S. ___, ___ (2013) (slip op., at 5–6). According to Halliburton, *Basic* relieves Rule 10b–5 plaintiffs of that burden, allowing courts to presume that common issues of reliance predominate over individual ones.

That is not the effect of the *Basic* presumption. In securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3). The *Basic* presumption does not relieve plaintiffs of the burden of proving—before class certification—that this requirement is met. *Basic* instead establishes that a plaintiff satisfies that burden by proving the prerequisites for invoking the presumption—namely, publicity, materiality, market efficiency, and market timing. The burden of proving those prerequisites still rests with plaintiffs and (with the exception of materiality) must be satisfied before class certification. *Basic* does not, in other words, allow plaintiffs simply to plead that common questions of reliance predominate over individual ones, but rather sets forth what they must prove to demonstrate such predominance.

Basic does afford defendants an opportunity to rebut the

presumption of reliance with respect to an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock. While this has the effect of "leav[ing] individualized questions of reliance in the case," *post*, at 12, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.

Finally, Halliburton and its *amici* contend that, by facilitating securities class actions, the *Basic* presumption produces a number of serious and harmful consequences. Such class actions, they say, allow plaintiffs to extort large settlements from defendants for meritless claims; punish innocent shareholders, who end up having to pay settlements and judgments; impose excessive costs on businesses; and consume a disproportionately large share of judicial resources. Brief for Petitioners 39–45.

These concerns are more appropriately addressed to Congress, which has in fact responded, to some extent, to many of the issues raised by Halliburton and its *amici*. Congress has, for example, enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, which sought to combat perceived abuses in securities litigation with heightened pleading requirements, limits on damages and attorney's fees, a "safe harbor" for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss. See *Amgen*, 568 U. S., at ___ (slip op., at 19–20). And to prevent plaintiffs from circumventing these restrictions by bringing securities class actions under state law in state court, Congress also enacted the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, which precludes many state law class actions alleging

securities fraud. See *Amgen*, *supra*, at ___ (slip op., at 20). Such legislation demonstrates Congress's willingness to consider policy concerns of the sort that Halliburton says should lead us to overrule *Basic*.

III

Halliburton proposes two alternatives to overruling *Basic* that would alleviate what it regards as the decision's most serious flaws. The first alternative would require plaintiffs to prove that a defendant's misrepresentation actually affected the stock price—so-called "price impact"—in order to invoke the *Basic* presumption. It should not be enough, Halliburton contends, for plaintiffs to demonstrate the general efficiency of the market in which the stock traded. Halliburton's second proposed alternative would allow defendants to rebut the presumption of reliance with evidence of a *lack* of price impact, not only at the merits stage—which all agree defendants may already do—but also before class certification.

A

As noted, to invoke the *Basic* presumption, a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed. See *Basic*, 485 U. S., at 248, n. 27; *Amgen*, *supra*, at ___ (slip op., at 15). Each of these requirements follows from the fraud-on-the-market theory underlying the presumption. If the misrepresentation was not publicly known, then it could not have distorted the stock's market price. So too if the misrepresentation was immaterial—that is, if it would not have "'been viewed by the reasonable investor as having significantly altered the "total mix" of information made available,'" *Basic*, *supra*, at 231–232 (quoting *TSC Industries, Inc.* v.

Northway, Inc., 426 U. S. 438, 449 (1976))—or if the market in which the stock traded was inefficient. And if the plaintiff did not buy or sell the stock after the misrepresentation was made but before the truth was revealed, then he could not be said to have acted in reliance on a fraud-tainted price.

The first three prerequisites are directed at price impact—"whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 563 U. S., at ___ (slip op., at 8). In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse. The "fundamental premise" underlying the presumption is "that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." 563 U. S., at ___ (slip op., at 7). If it was not, then there is "no grounding for any contention that [the] investor[ ] indirectly relied on th[at] misrepresentation[ ] through [his] reliance on the integrity of the market price." *Amgen*, *supra*, at ___ (slip op., at 17).

Halliburton argues that since the *Basic* presumption hinges on price impact, plaintiffs should be required to prove it directly in order to invoke the presumption. Proving the presumption's prerequisites, which are at best an imperfect proxy for price impact, should not suffice.

Far from a modest refinement of the *Basic* presumption, this proposal would radically alter the required showing for the reliance element of the Rule 10b–5 cause of action. What is called the *Basic* presumption actually incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a

further presumption that he purchased the stock in reliance on the defendant's misrepresentation.

By requiring plaintiffs to prove price impact directly, Halliburton's proposal would take away the first constituent presumption. Halliburton's argument for doing so is the same as its primary argument for overruling the *Basic* presumption altogether: Because market efficiency is not a yes-or-no proposition, a public, material misrepresentation might not affect a stock's price even in a generally efficient market. But as explained, *Basic* never suggested otherwise; that is why it affords defendants an opportunity to rebut the presumption by showing, among other things, that the particular misrepresentation at issue did not affect the stock's market price. For the same reasons we declined to completely jettison the *Basic* presumption, we decline to effectively jettison half of it by revising the prerequisites for invoking it.

B

Even if plaintiffs need not directly prove price impact to invoke the *Basic* presumption, Halliburton contends that defendants should at least be allowed to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price. We agree.

1

There is no dispute that defendants may introduce such evidence at the merits stage to rebut the *Basic* presumption. *Basic* itself "made clear that the presumption was just that, and could be rebutted by appropriate evidence," including evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock. *Halliburton I*, *supra*, at ___ (slip op., at 5); see *Basic*, *supra*, at 248.

Nor is there any dispute that defendants may introduce

price impact evidence at the class certification stage, so long as it is for the purpose of countering a plaintiff's showing of market efficiency, rather than directly rebutting the presumption. As EPJ Fund acknowledges, "[o]f course . . . defendants can introduce evidence at class certification of lack of price impact as some evidence that the market is not efficient." Brief for Respondent 53. See also Brief for United States as *Amicus Curiae* 26.

After all, plaintiffs themselves can and do introduce evidence of the *existence* of price impact in connection with "event studies"—regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events. See Brief for Law Professors as *Amici Curiae* 25–28. In this case, for example, EPJ Fund submitted an event study of various episodes that might have been expected to affect the price of Halliburton's stock, in order to demonstrate that the market for that stock takes account of material, public information about the company. See App. 217–230 (describing the results of the study). The episodes examined by EPJ Fund's event study included one of the alleged misrepresentations that form the basis of the Fund's suit. See *id.,* at 230, 343–344. See also *In re Xcelera.com Securities Litigation*, 430 F. 3d 503, 513 (CA1 2005) (event study included effect of misrepresentation challenged in the case).

Defendants—like plaintiffs—may accordingly submit price impact evidence prior to class certification. What defendants may not do, EPJ Fund insists and the Court of Appeals held, is rely on that same evidence prior to class certification for the particular purpose of rebutting the presumption altogether.

This restriction makes no sense, and can readily lead to bizarre results. Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to

refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed.

Such a result is inconsistent with *Basic*'s own logic. Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact. As explained, it is appropriate to allow plaintiffs to rely on this indirect proxy for price impact, rather than requiring them to prove price impact directly, given *Basic*'s rationales for recognizing a presumption of reliance in the first place. See *supra,* at 6–7, 16–17.

But an indirect proxy should not preclude direct evidence when such evidence is available. As we explained in *Basic*, "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance" because "the basis for finding that the fraud had been transmitted through market price would be gone." 485 U. S., at 248. And without the presumption of reliance, a Rule 10b–5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not "predominate" over individual ones, as required by Rule 23(b)(3). *Id.,* at

242. Price impact is thus an essential precondition for any Rule 10b–5 class action. While *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 actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply.

2

The Court of Appeals relied on our decision in *Amgen* in holding that Halliburton could not introduce evidence of lack of price impact at the class certification stage. The question in *Amgen* was whether plaintiffs could be required to prove (or defendants be permitted to disprove) materiality before class certification. Even though materiality is a prerequisite for invoking the *Basic* presumption, we held that it should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3). We reasoned that materiality is an objective issue susceptible to common, classwide proof. 568 U. S., at ___ (slip op., at 11). We also noted that a failure to prove materiality would necessarily defeat every plaintiff's claim on the merits; it would not simply preclude invocation of the presumption and thereby cause individual questions of reliance to predominate over common ones. *Ibid.* See also *id.,* at ___ (slip op., at 17–18). In this latter respect, we explained, materiality differs from the publicity and market efficiency prerequisites, neither of which is necessary to prove a Rule 10b–5 claim on the merits. *Id.,* at ___–___ (slip op., at 16–18).

EPJ Fund argues that much of the foregoing could be said of price impact as well. Fair enough. But price impact differs from materiality in a crucial respect. Given that the other *Basic* prerequisites must still be proved at the class certification stage, the common issue of materiality can be left to the merits stage without risking the

certification of classes in which individual issues will end up overwhelming common ones. And because materiality is a discrete issue that can be resolved in isolation from the other prerequisites, it can be wholly confined to the merits stage.

Price impact is different. The fact that a misrepresentation "was reflected in the market price at the time of [the] transaction"—that it had price impact—is "*Basic*'s fundamental premise." *Halliburton I*, 563 U. S., at ___ (slip op., at 7). It thus has everything to do with the issue of predominance at the class certification stage. That is why, if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification. Without proof of those prerequisites, the fraud-on-the-market theory underlying the presumption completely collapses, rendering class certification inappropriate.

But as explained, publicity and market efficiency are nothing more than prerequisites for an indirect showing of price impact. There is no dispute that at least such indirect proof of price impact "is needed to ensure that the questions of law or fact common to the class will 'predominate.'" *Amgen*, 568 U. S., at ___ (slip op., at 10) (emphasis deleted); see *id.,* at ___ (slip op., at 16–17). That is so even though such proof is also highly relevant at the merits stage.

Our choice in this case, then, is not between allowing price impact evidence at the class certification stage or relegating it to the merits. Evidence of price impact will be before the court at the certification stage in any event. The choice, rather, is between limiting the price impact inquiry before class certification to indirect evidence, or allowing consideration of direct evidence as well. As explained, we see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact. Defendants may seek to defeat the *Basic* pre-

sumption at that stage through direct as well as indirect price impact evidence.

* * *

More than 25 years ago, we held that plaintiffs could satisfy the reliance element of the Rule 10b–5 cause of action by invoking a presumption that a public, material misrepresentation will distort the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation. We adhere to that decision and decline to modify the prerequisites for invoking the presumption of reliance. But to maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23, defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.

Because the courts below denied Halliburton that opportunity, we vacate the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–317

HALLIBURTON CO., ET AL., PETITIONERS *v.* ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2014]

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, concurring.

Advancing price impact consideration from the merits stage to the certification stage may broaden the scope of discovery available at certification. See Tr. of Oral Arg. 36–37. But the Court recognizes that it is incumbent upon the defendant to show the absence of price impact. See *ante,* at 17–18. The Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims. On that understanding, I join the Court's opinion.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2014]

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE ALITO join, concurring in the judgment.

The implied Rule 10b–5 private cause of action is "a relic of the heady days in which this Court assumed common-law powers to create causes of action," *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (SCALIA, J., concurring); see, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). We have since ended that practice because the authority to fashion private remedies to enforce federal law belongs to Congress alone. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164 (2008). Absent statutory authorization for a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter." *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001).

Basic Inc. v. *Levinson*, 485 U. S. 224 (1988), demonstrates the wisdom of this rule. *Basic* presented the question how investors must prove the reliance element of the implied Rule 10b–5 cause of action—the requirement that the plaintiff buy or sell stock in reliance on the defendant's misstatement—when they transact on modern, impersonal securities exchanges. Were the Rule 10b–5 action statutory, the Court could have resolved this question by interpreting the statutory language. Without a statute to

interpret for guidance, however, the Court began instead with a particular policy "problem": for investors in impersonal markets, the traditional reliance requirement was hard to prove and impossible to prove as common among plaintiffs bringing 10b–5 class-action suits. *Id.,* at 242, 245. With the task thus framed as "resol[ving]" that "'problem'" rather than interpreting statutory text, *id.,* at 242, the Court turned to nascent economic theory and naked intuitions about investment behavior in its efforts to fashion a new, easier way to meet the reliance requirement. The result was an evidentiary presumption, based on a "fraud on the market" theory, that paved the way for class actions under Rule 10b–5.

Today we are asked to determine whether *Basic* was correctly decided. The Court suggests that it was, and that *stare decisis* demands that we preserve it. I disagree. Logic, economic realities, and our subsequent jurisprudence have undermined the foundations of the *Basic* presumption, and *stare decisis* cannot prop up the façade that remains. *Basic* should be overruled.

I

Understanding where *Basic* went wrong requires an explanation of the "reliance" requirement as traditionally understood.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element" of the implied 10b–5 private cause of action.[1] *Stoneridge*, *supra*, at 159. To prove

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[1] 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: "'(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.'" *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, ___–___ (2013) (slip op., at 3–4).

reliance, the plaintiff must show "'transaction causation,'" *i.e.,* that the specific misstatement induced "the investor's decision to engage in the transaction." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. ___, ___–___ (2011) (slip op., at 6–7). Such proof "ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury'"—namely, that the plaintiff has not just lost money as a result of the misstatement, but that he was actually *defrauded* by it. *Id.,* at ___ (slip op., at 4); see also *Dirks* v. *SEC*, 463 U. S. 646, 666–667, n. 27 (1983) ("[T]o constitute a violation of Rule 10b–5, there must be fraud. . . . [T]here always are winners and losers; but those who have 'lost' have not necessarily been defrauded"). Without that connection, Rule 10b–5 is reduced to a "'scheme of investor's insurance,'" because a plaintiff could recover whenever the defendant's misstatement distorted the stock price—regardless of whether the misstatement had actually tricked the plaintiff into buying (or selling) the stock in the first place. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 345 (2005) (quoting *Basic*, *supra*, at 252 (White, J., concurring in part and dissenting in part)).

The "traditional" reliance element requires a plaintiff to "sho[w] that he was aware of a company's statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Erica P. John Fund*, *supra,* at ___ (slip op., at 4). But investors who purchase stock from third parties on impersonal exchanges (*e.g.,* the New York Stock Exchange) often will not be aware of any particular statement made by the issuer of the security, and therefore cannot establish that they transacted based on a specific misrepresentation. Nor is the traditional reliance requirement amenable to class treatment; the inherently individualized nature of the reliance inquiry renders it impossible for a 10b–5 plaintiff to prove that common questions predominate over individual ones, making class

certification improper. See *Basic*, *supra,* at 242; Fed. Rule Civ. Proc. 23(b)(3).

Citing these difficulties of proof and class certification, 485 U. S., at 242, 245, the *Basic* Court dispensed with the traditional reliance requirement in favor of a new one based on the fraud-on-the-market theory.[2] The new version of reliance had two related parts.

First, *Basic* suggested that plaintiffs could meet the reliance requirement "'indirectly,'" *id.,* at 245. The Court reasoned that "'ideally, [the market] transmits information to the investor in the processed form of a market price.'" *Id.,* at 244. An investor could thus be said to have "relied" on a specific misstatement if (1) the market had incorporated that statement into the market price of the security, and (2) the investor then bought or sold that security "in reliance on the integrity of the [market] price," *id.,* at 247, *i.e.,* based on his belief that the market price "'reflect[ed]'" the stock's underlying "'value,'" *id.,* at 244.

Second, *Basic* created a presumption that this "indirect" form of "reliance" had been proved. Based primarily on certain assumptions about economic theory and investor behavior, *Basic* afforded plaintiffs who traded in efficient markets an evidentiary presumption that both steps of the novel reliance requirement had been satisfied—that (1) the market *had* incorporated the specific misstatement into the market price of the security, and (2) the plaintiff

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[2] In the years preceding *Basic*, lower courts and commentators experimented with various ways to facilitate 10b–5 class actions by relaxing or eliminating the reliance element of the implied 10b–5 action. See, *e.g.*, *Blackie* v. *Barrack*, 524 F. 2d 891 (CA9 1975); Note, The Fraud-on-the-Market Theory, 95 Harv. L. Rev. 1143 (1982); Note, The Reliance Requirement in Private Actions under SEC Rule 10b–5, 88 Harv. L. Rev. 584, 592–606 (1975). The "fraud-on-the-market theory" is an umbrella term for those varied efforts. Black, Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions, 62 N. C. L. Rev. 435, 439–457 (1984).

did transact in reliance on the integrity of that price.[3] *Id.,* at 247. A defendant was ostensibly entitled to rebut the presumption by putting forth evidence that either of those steps was absent. *Id.,* at 248.

II

Basic's reimagined reliance requirement was a mistake, and the passage of time has compounded its failings. First, the Court based both parts of the presumption of reliance on a questionable understanding of disputed economic theory and flawed intuitions about investor behavior. Second, *Basic*'s rebuttable presumption is at odds with our subsequent Rule 23 cases, which require plaintiffs seeking class certification to "'affirmatively demonstrate'" certification requirements like the predominance of common questions. *Comcast Corp.* v. *Behrend*, 569 U. S. ___, ___ (2013) (slip op., at 5) (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___, ___ (2011) (slip op., at 10)). Finally, *Basic*'s presumption that investors rely on the integrity of the market price is virtually irrebuttable in practice, which means that the "essential" reliance element effectively exists in name only.

A

Basic based the presumption of reliance on two factual assumptions. The first assumption was that, in a "well-developed market," public statements are generally "reflected" in the market price of securities. 485 U. S., at 247. The second was that investors in such markets transact "in reliance on the integrity of that price." *Ibid.*

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[3] An investor could invoke this presumption by demonstrating certain predicates: (1) a public statement; (2) an efficient market; (3) that the shares were traded after the statement was made but before the truth was revealed; and (4) that the statement was material. *Basic,* 485 U. S., at 248, n. 27.

In other words, the Court created a presumption that a plaintiff had met the two-part, fraud-on-the-market version of the reliance requirement because, in the Court's view, "common sense and probability" suggested that each of those parts *would* be met. *Id.*, at 246.

In reality, both of the Court's key assumptions are highly contestable and do not provide the necessary support for *Basic*'s presumption of reliance. The first assumption—that public statements are "reflected" in the market price—was grounded in an economic theory that has garnered substantial criticism since *Basic*. The second assumption—that investors categorically rely on the integrity of the market price—is simply wrong.

1

The Court's first assumption was that "most publicly available information"—including public misstatements—"is reflected in [the] market price" of a security. *Id.,* at 247. The Court grounded that assumption in "empirical studies" testing a then-nascent economic theory known as the efficient capital markets hypothesis. *Id.*, at 246–247. Specifically, the Court relied upon the "semi-strong" version of that theory, which posits that the average investor cannot earn above-market returns (*i.e.,* "beat the market") in an efficient market by trading on the basis of publicly available information. See, *e.g.,* Stout, The Mechanisms of Market Inefficiency: An Introduction to the New Finance, 28 J. Corp. L. 635, 640, and n. 24 (2003) (citing Fama, Efficient Capital Markets: A Review of Theory and Empirical Work, 25 J. Finance 383, 388 (1970)).[4] The upshot of

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[4]The "weak form" of the hypothesis provides that an investor cannot earn an above-market return by trading on historical price data. See Dunbar & Heller, Fraud on the Market Meets Behavioral Finance, 31 Del. J. Corporate L. 455, 463–464 (2006) (hereinafter Dunbar & Heller). The "strong form" provides that investors cannot achieve above-market returns even by trading on nonpublic information. See *ibid.* The weak

the hypothesis is that "the market price of shares traded on well-developed markets [will] reflec[t] all publicly available information, and, hence, any material misrepresentations." *Basic, supra,* at 246. At the time of *Basic*, this version of the efficient capital markets hypothesis was "widely accepted." See Dunbar & Heller 463–464.

This view of market efficiency has since lost its luster. See, *e.g.,* Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 175 ("Doubts about the strength and pervasiveness of market efficiency are much greater today than they were in the mid-1980s"). As it turns out, even "well-developed" markets (like the New York Stock Exchange) do not uniformly incorporate information into market prices with high speed. "[F]riction in accessing public information" and the presence of "processing costs" means that "not all public information will be impounded in a security's price with the same alacrity, or perhaps with any quickness at all." Cox, Understanding Causation in Private Securities Lawsuits: Building on *Amgen*, 66 Vand. L. Rev. 1719, 1732 (2013) (hereinafter Cox). For example, information that is easily digestible (merger announcements or stock splits) or especially prominent (Wall Street Journal articles) may be incorporated quickly, while information that is broadly applicable or technical (Securities and Exchange Commission filings) may be incorporated slowly or even ignored. See Stout, *supra,* at 653–656; see *e.g., In re Merck & Co. Securities Litigation*, 432 F. 3d 261, 263–265 (CA3 2005) (a Wall Street Journal article caused a steep decline in the company's stock price even though the same information was contained in an earlier SEC disclosure).

Further, and more importantly, "overwhelming empirical evidence" now suggests that even when markets do incorporate public information, they often fail to do so

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form is generally accepted; the strong form is not. See *ibid.*

accurately. Lev and de Villiers, Stock Price Crashes and 10b–5 Damages: A Legal, Economic and Policy Analysis, 47 Stan. L. Rev. 7, 20–21 (1994); see also *id.,* at 21 ("That many share price movements seem unrelated to specific information strongly suggests that capital markets are not fundamentally efficient, and that wide deviations from fundamentals . . . can occur"(footnote omitted)). "Scores" of "efficiency-defying anomalies"—such as market swings in the absence of new information and prolonged deviations from underlying asset values—make market efficiency "more contestable than ever." Langevoort, Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation, 97 Nw. U. L. Rev. 135, 141 (2002); Dunbar & Heller 476–483. Such anomalies make it difficult to tell whether, at any given moment, a stock's price accurately reflects its value as indicated by all publicly available information. In sum, economists now understand that the price impact *Basic* assumed would happen reflexively is actually far from certain even in "well-developed" markets. Thus, *Basic*'s claim that "common sense and probability" support a presumption of reliance rests on shaky footing.

2

The *Basic* Court also grounded the presumption of reliance in a second assumption: that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." 485 U. S., at 247. In other words, the Court assumed that investors transact based on the belief that the market price accurately reflects the underlying "'value'" of the security. See *id.,* at 244 ("'[P]urchasers generally rely on the price of the stock as a reflection of its value'"). The *Basic* Court appears to have adopted this assumption about investment behavior based only on what it believed to be "common sense." *Id.,* at 246. The Court found it "'hard to imagine that there

ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?'" *Id.*, at 246–247.

The Court's rather superficial analysis does not withstand scrutiny. It cannot be seriously disputed that a great many investors do *not* buy or sell stock based on a belief that the stock's price accurately reflects its value. Many investors in fact trade for the opposite reason—that is, because they think the market has under- or overvalued the stock, and they believe they can profit from that mispricing. *Id.,* at 256 (opinion of White, J.); see, *e.g.,* Macey, The Fraud on the Market Theory: Some Preliminary Issues, 74 Cornell L. Rev. 923, 925 (1989) (The "opposite" of *Basic*'s assumption appears to be true; some investors "attempt to locate undervalued stocks in an effort to 'beat the market' . . . in essence betting that the market . . . is in fact inefficient"). Indeed, securities transactions often take place because the transacting parties disagree on the security's value. See, *e.g.,* Stout, Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation, 81 Va. L. Rev. 611, 619 (1995) ("[A]vailable evidence suggests that . . . investor disagreement inspires the lion's share of equities transactions").

Other investors trade for reasons entirely unrelated to price—for instance, to address changing liquidity needs, tax concerns, or portfolio balancing requirements. See *id.*, at 657–658; see also Cox 1739 (investors may purchase "due to portfolio rebalancing arising from its obeisance to an indexing strategy"). These investment decisions—made with indifference to price and thus without regard for price "integrity"—are at odds with *Basic*'s understanding of what motivates investment decisions. In short, *Basic*'s assumption that all investors rely in common on

"price integrity" is simply wrong.[5]

The majority tries (but fails) to reconcile *Basic*'s assumption about investor behavior with the reality that many investors do not behave in the way *Basic* assumed. It first asserts that *Basic* rested only on the more modest view that "'*most* investors'" rely on the integrity of a security's market price. *Ante*, at 12 (quoting not *Basic*, but *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U. S. ___, ___ (2013) (slip op., at 5) (emphasis added)). That gloss is difficult to square with *Basic*'s plain language: "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 458 U. S., at 247; see also *id.*, at 246–247 ("'[I]t is hard to imagine that there ever is a buyer or seller who does not rely on market integrity'"). In any event, neither *Basic* nor the majority offers anything more than a judicial hunch as evidence that even "most" investors rely on price integrity.

The majority also suggests that "there is no reason to suppose" that investors who buy stock they believe to be undervalued are "indifferent to the integrity of market prices." *Ante*, at 12. Such "value investor[s]," according to the majority, "implicitly rel[y] on the fact that a stock's market price will eventually reflect material information"

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[5]The *Basic* Court's mistaken intuition about investor behavior appears to involve a category mistake: the Court invoked a hypothesis meant to describe markets, but then used it "in the one way it is not meant to be used: as a predictor of the behavior of individual investors." Langevoort, Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited, 140 U. Pa. L. Rev. 851, 895 (1992). The efficient capital markets hypothesis does not describe "how investors behave; [it] only suggests the consequences of their collective behavior." Cox 1736. "Nothing in the hypothesis denies what most popular accounts assume: that much information searching and trading by investors, from institutions on down, is done in the (perhaps erroneous) belief that undervalued or overvalued stocks exist and can systematically be discovered." Langevoort, Theories, *supra,* at 895.

and "presumably tr[y] to estimate *how* undervalued or overvalued a particular stock is" by reference to the market price. *Ibid*. Whether the majority's unsupported claims about the thought processes of hypothetical investors are accurate or not, they are surely beside the point. Whatever else an investor believes about the market, he simply does not "rely on the integrity of the market price" if he does not believe that the market price accurately reflects public information *at the time he transacts*. That is, an investor cannot claim that a public misstatement induced his transaction by distorting the market price if he did not buy at that price while believing that it accurately incorporated that public information. For that sort of investor, *Basic*'s critical fiction falls apart.

B

Basic's presumption of reliance also conflicts with our more recent cases clarifying Rule 23's class-certification requirements. Those cases instruct that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 569 U. S., at ___ (slip op., at 5) (quoting *Wal-Mart,* 564 U. S., at ___ (slip op., at 10). To prevail on a motion for class certification, a party must demonstrate through "evidentiary proof" that "'questions of law or fact common to class members predominate over any questions affecting only individual members.'" 569 U. S., at ___ (slip op., at 5–6) (quoting Fed. Rule Civ. Proc. 23(b)(3)).

Basic permits plaintiffs to bypass that requirement of evidentiary proof. Under *Basic*, plaintiffs who invoke the presumption of reliance (by proving its predicates) are deemed to have met the predominance requirement of Rule 23(b)(3). See *ante,* at 14; *Amgen*, *supra,* at ___ (slip op., at 6) (*Basic* "facilitates class certification by recognizing a rebuttable presumption of classwide reliance"); *Basic*, 485 U. S., at 242, 250 (holding that the District

Court appropriately certified the class based on the presumption of reliance). But, invoking the *Basic* presumption does not actually prove that individual questions of reliance will not overwhelm the common questions in the case. *Basic* still requires a showing that the *individual investor* bought or sold in reliance on the integrity of the market price and, crucially, permits defendants to rebut the presumption by producing evidence that individual plaintiffs do not meet that description. See *id.,* at 249 ("Petitioners . . . could rebut the presumption of reliance as to plaintiffs who would have divested themselves of their Basic shares without relying on the integrity of the market"). Thus, by its own terms, *Basic* entitles defendants to ask each class member whether he traded in reliance on the integrity of the market price. That inquiry, like the traditional reliance inquiry, is inherently individualized; questions about the trading strategies of individual investors will not generate "'common answers apt to drive the resolution of the litigation,'" *Wal-Mart Stores*, *supra,* at ___ (slip op., at 10). See *supra,* at 8–9; see also Cox 1736, n. 55 (*Basic*'s recognition that defendants could rebut the presumption "by proof the investor would have traded anyway appears to require individual inquiries into reliance").

Basic thus exempts Rule 10b–5 plaintiffs from Rule 23's proof requirement. Plaintiffs who invoke the presumption of reliance are deemed to have shown predominance as a matter of law, even though the resulting rebuttable presumption leaves individualized questions of reliance in the case and predominance still unproved. Needless to say, that exemption was beyond the *Basic* Court's power to grant.[6]

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[6]The majority suggests that *Basic* squares with *Comcast Corp.* v. *Behrend*, 569 U. S. ___ (2013), and *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___ (2011), because it does not "relieve plaintiffs of the burden of

C

It would be bad enough if *Basic* merely provided an end-run around Rule 23. But in practice, the so-called "rebuttable presumption" is largely irrebuttable.

The *Basic* Court ostensibly afforded defendants an opportunity to rebut the presumption by providing evidence that either aspect of a plaintiff's fraud-on-the-market reliance—price impact, or reliance on the integrity of the market price—is missing. 485 U. S., at 248–249. As it turns out, however, the realities of class-action procedure make rebuttal based on an individual plaintiff's lack of reliance virtually impossible. At the class-certification stage, rebuttal is only directed at the class representatives, which means that counsel only needs to find one class member who can withstand the challenge. See Grundfest, Damages and Reliance Under Section 10(b) of the Exchange Act, 69 Bus. Lawyer 307, 362 (2014). After class certification, courts have refused to allow defendants to challenge any plaintiff's reliance on the integrity of the market price prior to a determination on classwide liability. See Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 13–14 (collecting cases rejecting postcertification attempts to rebut individual class members' reliance on price integrity as not pertinent to classwide liability). One search for rebuttals on individual-reliance grounds turned up only six cases out of the thousands of Rule 10b–5 actions brought since *Basic*. Grundfest, *supra,* at 360.[7]

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proving . . . predominance" but "rather sets forth what they must prove to demonstrate such predominance." *Ante,* at 14–15. This argument misses the point. Because *Basic* offers defendants a chance to rebut the presumption on individualized grounds, the predicates that *Basic* sets forth as sufficient to invoke the presumption do not necessarily prove predominance.

[7]The absence of postcertification rebuttal is likely attributable in part to the substantial *in terrorem* settlement pressures brought to bear

The apparent unavailability of this form of rebuttal has troubling implications. Because the presumption is conclusive in practice with respect to investors' reliance on price integrity, even *Basic*'s watered-down reliance requirement has been effectively eliminated. Once the presumption attaches, the reliance element is no longer an obstacle to prevailing on the claim, even though many class members will not have transacted in reliance on price integrity, see *supra*, at 8–9. And without a functional reliance requirement, the "essential element" that ensures the plaintiff has actually been defrauded, see *Stoneridge*, 552 U. S., at 159, Rule 10b–5 becomes the very "'scheme of investor's insurance'" the *rebuttable* presumption was supposed to prevent. See *Basic*, *supra,* at 252 (opinion of White, J.).[8]

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For these reasons, *Basic* should be overruled in favor of the straightforward rule that "[r]eliance by the plaintiff upon the defendant's deceptive acts"—actual reliance, not the fictional "fraud-on-the-market" version—"is an essential element of the §10(b) private cause of action." *Stoneridge*, 552 U. S., at 159.

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by certification. See, *e.g.,* 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 Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 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").

[8] Of course, today's decision makes clear that a defendant may rebut the presumption by producing evidence that the misstatement at issue failed to affect the market price of the security, see *ante,* at 17–22. But both parts of *Basic*'s version of reliance are key to its fiction that an investor has "indirectly" relied on the misstatement; the unavailability of rebuttal with respect to one of those parts still functionally removes reliance as an element of proof.

III

Principles of *stare decisis* do not compel us to save *Basic*'s muddled logic and armchair economics. We have not hesitated to overrule decisions when they are "unworkable or are badly reasoned," *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); when "the theoretical underpinnings of those decisions are called into serious question," *State Oil Co.* v. *Khan*, 522 U. S. 3, 21 (1997); when the decisions have become "irreconcilable" with intervening developments in "competing legal doctrines or policies," *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); or when they are otherwise "a positive detriment to coherence and consistency in the law," *ibid.* Just one of these circumstances can justify our correction of bad precedent; *Basic* checks all the boxes.

In support of its decision to preserve *Basic*, the majority contends that *stare decisis* "has 'special force' 'in respect to statutory interpretation' because 'Congress remains free to alter what we have done.'" *Ante,* at 12 (quoting *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008); some internal quotation marks omitted). But *Basic*, of course, has nothing to do with statutory interpretation. The case concerned a judge-made evidentiary presumption for a judge-made element of the implied 10b–5 private cause of action, itself "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge*, *supra*, at 164. We have not afforded *stare decisis* "special force" outside the context of statutory interpretation, see *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___, n. 6 (2014) (THOMAS, J. dissenting) (slip op., at 15, n. 6 and for good reason. In statutory cases, it is perhaps plausible that Congress watches over its enactments and will step in to fix our mistakes, so we may leave to Congress the judgment whether the interpretive question is better left "'settled'" or "'settled right,'" *Square D Co.* v. *Niagara Frontier*

Tariff Bureau, Inc., 476 U. S. 409, 424 (1986). But this rationale is untenable when it comes to judge-made law like "implied" private causes of action, which we retain a duty to superintend. See, *e.g., Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 507 (2008) ("[T]he judiciary [cannot] wash its hands of a problem it created . . . simply by calling [the judicial doctrine] legislative"). Thus, when we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around. That duty is especially clear in the Rule 10b–5 context, where we have said that "[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b–5 right and the definition of the duties it imposes." *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 292 (1993).

Basic's presumption of reliance remains our mistake to correct. Since *Basic*, Congress has enacted two major securities laws: the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 112 Stat. 3227. The PSLRA "sought to combat perceived abuses in securities litigation," *ante,* at 15, and SLUSA prevented plaintiffs from avoiding the PSLRA's restrictions by bringing class actions in state court, *ibid.* Neither of these Acts touched the reliance element of the implied Rule 10b–5 private cause of action or the *Basic* presumption.

Contrary to respondent's argument (the majority wisely skips this next line of defense), we cannot draw from Congress' silence on this matter an inference that Congress approved of *Basic*. To begin with, it is inappropriate to give weight to "Congress' unenacted opinion" when construing judge-made doctrines, because doing so allows the Court to create law and then "effectively codif[y]" it "based only on Congress' failure to address it." *Bay Mills*,

supra, at ___ (THOMAS, J., dissenting) (slip op., at 14). Our Constitution, however, demands that laws be passed by Congress and signed by the President. U. S. Const., Art. I, §7. Adherence to *Basic* based on congressional inaction would invert that requirement by insulating error from correction merely because Congress *failed* to pass a law on the subject. Cf. *Patterson*, *supra*, at 175, n. 1 ("Congressional inaction cannot amend a duly enacted statute").

At any rate, arguments from legislative inaction are speculative at best. "[I]t is '"impossible to assert with any degree of assurance that congressional failure to act represents" affirmative congressional approval of' one of this Court's decisions." *Bay Mills*, *supra,* at ___ (THOMAS, J., dissenting) (slip op., at 13) (quoting *Patterson*, *supra,* at 175, n. 1). "'Congressional inaction lacks persuasive significance'" because it is indeterminate; "'several equally tenable inferences may be drawn from such inaction.'" *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990)). Therefore, "[i]t does not follow . . . that Congress' failure to overturn a . . . precedent is reason for this Court to adhere to it." *Patterson*, *supra,* at 175, n. 1.

That is especially true here, because Congress passed a law to tell us *not* to draw any inference from its inaction. The PSLRA expressly states that "[n]othing in this Act . . . shall be deemed to create or ratify any implied private right of action." Notes following 15 U. S. C. §78j–1, p. 430. If the Act did not ratify even the Rule 10b–5 private cause of action, it cannot be read to ratify *sub silentio* the presumption of reliance this Court affixed to that action. Further, the PSLRA and SLUSA operate to curtail abuses of various private causes of action under our securities laws—hardly an indication that Congress approved of *Basic*'s *expansion* of the 10b–5 private cause of action.

Congress' failure to overturn *Basic* does not permit us to "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 70 (1946).

* * *

Basic took an implied cause of action and grafted on a policy-driven presumption of reliance based on nascent economic theory and personal intuitions about investment behavior. The result was an unrecognizably broad cause of action ready made for class certification. Time and experience have pointed up the error of that decision, making it all too clear that the Court's attempt to revise securities law to fit the alleged "new realities of financial markets" should have been left to Congress. 485 U. S., at 255 (opinion of White, J.).

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