IN RE FIRSTENERGY CORP. SECURITIES LITIGATION: WHERE *MACQUARIE* MEETS *AFFILIATED UTE*

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INTRODUCTION

"Half the truth is often a great lie." Found in the 1914 volume of Poor Richard's Almanack, this quote is attributed to Benjamin Franklin, who published a collection of his sayings under the pseudonym Richard

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Saunders.[1] That quote leads to the question: what precisely is a "half-truth?" According to the Merriam-Webster Dictionary, a half-truth is "a statement that is only partially true."[2] The Cambridge Dictionary defines a half-truth as "a statement that is intended to deceive by being only partly true."[3] Courts have weighed in, describing half-truths as statements that "paint[] a materially false picture in what they say because of what they omit."[4]

Exploring the meaning of "half-truths" through the prism of the following Cold War-era joke about the Soviet propaganda machine helps to elucidate the deceptive nature of half-truths. According to this joke, the Russians wanted to showcase the superiority of the Russian auto manufacturing industry by racing the Lada (a car manufactured by a Russian state-owned company) against the Ford.[5] No other cars participated in the race.[6] The American press was not invited to cover the race.[7] After 100 laps around the track, the Ford won the race.[8] The following day, the headline in Pravda, the official newspaper of the Communist Party of the Soviet Union, read: "International Race Yesterday – The Lada was second, the American entry was second to last."[9]

Because of the omitted information, one might infer that the Russian-made Lada was superior to the American-made Ford. After all, the Lada finished second in an "international race," and the Ford finished a dismal second to last. However, the headline is purposefully deceiving. There were only two cars in the race, and the Ford won the race. While the race was technically international because it involved two countries, it was hardly a Formula One international event.

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1. *See* BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 24 (U.S.C. Publishing Co. 1914) (1758).

2. *See Half-Truth*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/half-truth [https://perma.cc/LZV9-5BXF].

3. *See Half-Truth*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/half-truth [https://perma.cc/2BE7-J75J].

4. *See* SEC v. Johnston, 986 F.3d 63, 72 (1st Cir. 2021).

5. *See* Dean J. Murphy, *The Best Lie is a Half Truth*, MEDIUM (Sept. 17, 2021), https://medium.com/an-idea/the-best-lie-is-a-half-truth-1140a217175b [].

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

The Lada/Ford joke is a perfect preamble to the real facts underlying the *FirstEnergy Corp.* ("FirstEnergy") securities class action.[10] For both the Lada/Ford joke and the FirstEnergy story, the deceit lies in what is not said. As background, FirstEnergy was embroiled in a nearly three-and-a-half year bribery and corruption scheme with an Ohio local government in an effort to save its nuclear power plants.[11] With nuclear energy becoming less cost-efficient, the company began funneling approximately $60 million to Ohio elected officials through a web of covert vehicles in exchange for a bailout of its failing nuclear power plants (known as the "HB6 scandal").[12] In its public disclosures, FirstEnergy represented that it "complie[d] with all federal and state lobbying registration and disclosure requirements" and "ha[d] decision-making and oversight processes in place for political contributions and expenditures to ensure such contributions or expenditures [were] legally permissible and in the best interests of FirstEnergy."[13] Furthermore, the company stated that it was pursuing "[l]egislative or regulatory solutions" for its nuclear liabilities.[14] In all of its public disclosures, FirstEnergy failed to disclose exactly how the company was pursuing those legislative or regulatory solutions (which included illegal political contributions) as well as the legal, financial, and reputational risks to the company resulting from its conduct relating to its political contributions and lobbying activities.[15] *In re FirstEnergy Corporation Securities Litigation*, the class action that followed public revelations of the HB6 scandal, courts grappled with whether half-truths (which FirstEnergy itself acknowledged as misleading, incomplete statements that omitted the full truth) should be treated under the securities under the securities laws as affirmative misrepresentations or as omissions.[16]

In the context of securities fraud class actions, claims have historically been premised on three types of disclosures: (1) those based on pure omissions, (2) those based on affirmative misstatements, and (3)

10. *See In re* FirstEnergy Corp. Sec. Litig., No. 20-CV-3785, 2023 WL 2709373 (S.D. Ohio Mar. 30, 2023).

11. *See id.* at *2-3.

12. *See id.* at *1-2.

13. *Id.* at *3.

14. *Id.*

15. *See id.*

16. *See id.* at *19 (considering that "half-truths, which, although analytically closer to lies than to nondisclosure, are obviously closer to omissions than are pure misrepresentations").

those based on half-truths.[17] Through a series of landmark decisions, the Supreme Court has issued guidance on how the first two types of claims are to be treated for purposes of establishing a Section 10(b) and Rule 10b-5 claim under the Securities Exchange Act of 1934.[18] The Supreme Court has long been silent as to the third type, which has often left securities plaintiffs and defendants to duke out whether half-truths should be treated as pure omissions or as affirmative misstatements for purposes of the various rules and presumptions governing Rule 10b-5 claims. This issue most frequently comes into focus when plaintiffs must establish reliance at the class certification stage.[19]

Historically, there have been two separate and distinct paths for plaintiffs to prove reliance at class certification depending on whether plaintiffs' claims are based on omissions or on affirmative misstatements. If plaintiffs' claims are based on omissions, they follow the path set forth by the Supreme Court in its 1972 decision in *Affiliated Ute Citizens of Utah v. United States*.[20] There, the Supreme Court ruled that if a duty to disclose exists and the defendant fails to disclose material information, the plaintiff is presumed to have relied on the omission.[21] In other words, the Supreme Court created a presumption of reliance in cases involving a Section 10(b) and Rule 10b-5 claims based primarily on a defendant's pure omissions.[22] The *Affiliated Ute* presumption of reliance is rooted in the Supreme Court's recognition of the impossibility of proving reliance—a critical element of a Section 10(b) and Rule 10b-5 claim—in cases based primarily on pure omissions.[23]

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17. *See* John H. Matheson, *Corporate Disclosure Obligations and the Parameters of Rule 10b-5:* Basic Inc. v. Levinson *and Beyond*, 14 J. CORP. L. 1, 14 (1988) (discussing types of disclosure liabilities).

18. *See infra* Part IV.

19. *See In re* Interbank Funding Corp. Sec. Litig., 629 F.3d 213, 219-20 (D.C. Cir. 2010) (collecting cases deciding whether to apply the *Affiliated Ute* presumption of reliance to half-truths at the class certification stage).

20. 406 U.S. 128,152-53 (1972) [hereinafter *Affiliated Ute*].

21. *See id.* at 153-54.

22. *Id.*

23. *See* Adam C. Pritchard, *Halliburton II: A Loser's History*, 10 DUKE J. CONST. L. & PUB. POL'Y 32 (2015) ("The gravamen of the fraud in *Affiliated Ute* was deceptive non-disclosure in breach of a fiduciary duty. . . . In the case of non-disclosure, it was impossible for the plaintiffs to plead actual reliance because the violation was a failure to speak, rather than a misstatement. . . . The holding was unsurprising in that context—how can you rely on something left unsaid?").

On the other hand, if plaintiffs' claims are based on affirmative misstatements, they follow the path set forth in the Supreme Court's 1988 decision, *Basic Inc. v. Levinson*.[24] In that case, the Supreme Court held that an investor's reliance on material misrepresentations may be presumed if the misrepresentations were disclosed to the public and the company's stock was traded in an efficient market.[25] The presumption is premised on the view that stock prices reflect all publicly-available material information and that investors who trade stock at the market price rely on the integrity of that price. In *Basic*, the Supreme Court chose not to require proof of each individual investor's direct reliance on affirmative misstatements in cases where there was a so-called "fraud on the market."[26] The "fraud on the market" theory posits 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."[27] Misleading statements "will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements."[28] As a result of the *Basic* (or the "fraud on the market") presumption, an investor's reliance on public material misrepresentations may be presumed.

Those two paths to class certification for securities cases under Section 10(b) and Rule 10b-5 have existed for decades. Recently, the Supreme Court threw the securities bar a curveball in 2024 when it issued its groundbreaking decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*[29] In that case, the Supreme Court distinguished half-truths from pure omissions and held that pure omissions cannot support private claims under Section 10(b) and Rule 10b-5(b).[30] Although the decision did not address *Affiliated Ute*, or even mention presumptions of reliance more generally, it seemingly had one major consequence: closing the pathway to the *Affiliated Ute* presumption for claims based on half-truths under Rule 10b-5(b), even when the half-truths primarily sound in omissions.

24. *See* 485 U.S. 224 (1988).
25. *Id.* at 247.
26. *Id.* at 230.
27. *Id.* at 241 (citing Peil v. Speiser, 806 F.2d 1154, 1160–61 (3d Cir. 1986)).
28. *Id*. at 241–42 (citation omitted).
29. 601 U.S. 257 (2024).
30. *Id.* at 259.

This leads to the central question this Article seeks to address: is there any world in which the *Affiliated Ute* presumption can still apply to cases under Rule 10b-5(b) after the Supreme Court's decision in *Macquarie*? Put differently, if only half-truths (like the Lada/Ford and FirstEnergy situations) and affirmative misrepresentations remain actionable under Rule 10b-5(b), is the *Basic* presumption the only pathway left for securities plaintiffs?

The U.S. Court of Appeals for the Sixth Circuit will likely be the first court to address this issue in *In re FirstEnergy Corp. Securities Litigation*.[31] The case will test the availability of the *Affiliated Ute* presumption post-*Macquarie* in cases based on half-truths under Rule 10b-5(b). If the Sixth Circuit affirms the decision of the lower court, it will drive a further wedge between it and other federal appellate courts—the majority of which have determined that only the *Basic* presumption can apply to cases based on half-truths.[32] Those circuit courts have reasoned that the problems of proof that plagued plaintiffs in omissions cases do not apply in instances where the defendant has spoken, even if the statements are incomplete.[33] The circuit split could prompt Supreme Court intervention to resolve the question of whether the *Affiliated Ute* presumption can apply to half-truth cases. Significantly, the answer to this question could signal a paradigmatic shift in the securities fraud class action landscape.

Part I of this Article provides background on the securities fraud regime in the United States, including an overview of Section 10(b) and the elements of a Rule 10b-5 claim. Given that class action lawsuits are the primary vehicle for plaintiffs bringing securities fraud claims under Section 10(b) and Rule 10b-5, Part II sets forth the requirements for class certification contained in Federal Rule of Civil Procedure 23 ("Rule 23").[34] Part II discusses the nexus between the Rule 10b-5 elements (in particular, the reliance element) and Rule 23's class certification requirements.[35] Following the discussion of Rule 23 and the genesis of

31. No. 24-03654 (6th Cir. July 29, 2024).

32. *See infra* note 248.

33. *See, e.g.*, *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 2 F.4th 1199, 1206 (9th Cir. 2021) (relying on the Supreme Court's justification underlying *Affiliated Ute*: "reliance is impossible or impractical to prove when no positive statements were made").

34. FED. R. CIV. P. 23.

35. As set forth in more detail below, *see infra* Section II, Rule 23 the certification of class actions.

rebuttable presumptions of reliance, Part III examines the evolution of the securities fraud class certification regime over the last decade. Against the backdrop of Supreme Court jurisprudence establishing the rebuttable presumptions of reliance in *Affiliated Ute* and *Basic*, Part III analyzes four recent Supreme Court cases that address what securities fraud class action plaintiffs must prove to invoke the *Basic* presumption of reliance and how defendants can rebut it. Part IV of the Article discusses the Supreme Court's recent ruling in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*[36] While *Macquarie* does not address the *Affiliated Ute* or *Basic* presumptions, the decision significantly impacts their application going forward. Part V of the Article provides an in-depth analysis of the district court's decision in *In re FirstEnergy Corp. Securities Litigation* and sets the stage for the impending Sixth Circuit ruling. The Sixth Circuit's decision will address the limits of the *Affiliated Ute* and *Basic* presumptions following the Supreme Court's ruling in Macquarie. Part VI proposes that post-Macquarie courts should reject plaintiffs' attempts to apply the *Affiliated Ute* presumption to half-truths. Instead, the *Basic* presumption should be the only path available for establishing a class-wide presumption of reliance at the class certification stage, regardless of whether a plaintiff alleges half-truths, affirmative misrepresentations, or some combination of the two.

I. BACKGROUND ON SECTION 10(B) AND RULE 10B-5

Congress constructed the securities fraud regime of the United States in response to the stock market crash of 1929 and the Great Depression.[37] The crash stemmed from many factors, including manipulative stock trading (or "pump and dump" schemes), insider trading, and the sale of shares in fictional companies.[38] In that aftermath, Congress sought to restore public confidence in the financial markets,

36. 601 U.S. 257 (2024).

37. *See* Ronald J. Colombo, *Cooperation with Securities Fraud*, 61 ALA. L. REV. 61, 64 (2009) (noting that as part of the New Deal, "Congress largely federalized the regulation of securities with the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934.").

38. *See The 1933 Securities Act*, CORP. FIN. INST, https://corporatefinanceinstitute.com/resources/equities/1933-securities-act-truth-securities/ (last edited on Jan. 18, 2024) ("President Roosevelt stated that the [1933 Act] was aimed at correcting some of the wrongdoings that led to the exploitation of the public.").

deter fraud, and compensate victims for fraudulent sales of securities.[39] As a result, two landmark pieces of legislation – the Securities Act of 1933 (the "1933 Act")[40] and the Securities Exchange Act of 1934 (the "1934 Act")[41] were enacted.[42] Broadly speaking, the 1933 Act and the 1934 Act mandate transparency in financial statements and establish prohibitions against fraud in the financial markets.[43] Together, the 1933 Act and 1934 Acts included a number of antifraud measures.[44] Of those antifraud measures, the single most powerful weapon in the arsenal of securities fraud class action plaintiffs is Section 10(b) of the 1934 Act.[45] Section 10(b) states:

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39. *See* Elizabeth Keller & Gregory A. Gehlmann, *A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO L.J. 329, 330 (1988) ("The general purpose of the [1933] Act is to regulate the initial distribution of securities by issuers to public investors. The [1933] Act compels the filing of a registration statement for securities sold through the instrumentalities of interstate commerce or the mails. The goal of registration is the full disclosure of truthful information regarding the character of the securities offered to the public."); *see also id.* ("The Exchange Act provides for the regulation of the securities exchange markets and the operations of the corporations listed on the various national securities exchanges (such as the New York and American stock exchanges). The Exchange Act also created the federal agency in charge of securities regulation, the Securities and Exchange Commission.").

40. 15 U.S.C. §§ 77a-77bbbb.

41. *Id*. §§ 78a-78rr.

42. *See* W. Taylor Marshall, *The Securities Exchange Act of 1934—'Round and 'Round We Go: The Supreme Court Again Limits the Circumstances in which Federal Courts May Hold Secondary Actors Liable Under Section 10(B) and SEC Rule 10B-5.*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008)*, 31 U. ARK. LITTLE ROCK L. REV. 197, 200 (2008) ("Congress was motivated, in part, to pass the Exchange Act due to the Great Depression's devastating economic and sociological effects and because it believed the Great Depression was the product of abuse in the securities markets.").

43. *See Slack Techs., LLC v. Pirani, 598 U.S. 759, 762 (2023)* **("**Together, the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78a *et seq.*, form the backbone of American securities law 15 U.S.C. § 78j(b).").

44. *See* Colombo, supra note 37, at 65("[I]n order to bolster the credibility of such disclosure and further protect investors, Congress included in the new legislation a variety of antifraud measures.").

45. Recent publicly available data shows that Rule 10b-5 is also the most commonly-used weapon in that arsenal.

> It shall be unlawful for any person, directly or indirectly . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe as necessary or appropriate in the public interest or for the protection of investors.[46]

Pursuant to the authority granted to it under Section 10(b), the SEC promulgated Rule 10b-5.[47] Rule 10b-5 thereunder provides the following:

> 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,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (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.[48]

While the SEC has the authority to bring enforcement actions under Section 10(b) and Rule 10b-5, private plaintiffs have an implied right to bring suit under these provisions for losses suffered in connection with the sale or purchase of securities.[49] As the Supreme Court has articulated, a private plaintiff must establish the following five elements to successfully prove a Section 10(b) or Rule 10b-5 violation: (1) a material

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46. 15 U.S.C. §78j(b).

47. *See* Frank F. Coulom Jr., *Rule 10b-5 and the Duty to Disclose Market Information: It Takes a Thief*, 55 ST. JOHN'S L. REV. 93, 102 n.52 (1980) ("Rule 10b-5 was promulgated in 1942 to close a 'loophole' in the antifraud provisions of the federal securities laws by prohibiting fraud in the purchase as well as sale of securities."); SEC Exch. Act. Rel. No. 3230 (May 21, 1942).

48. 17 C.F.R. § 240.10b-5(b) (2024).

49. *See* Todd G. Cosenza, *Applying* Stoneridge *to Restrict Secondary Actor Liability Under 10b-5*, 64 BUS. LAW. 59, 59 (2008) ("As is well-known, the implied private right of action under Rule 10b-5 was recognized in the lower courts as early as 1946 and acknowledged by the Supreme Court in 1971."); Blue Chip Stamps v. Manor Drugs Stores, 421 U.S. 723, 730 (1975).

misrepresentation or omission, (2) scienter, (3) reliance, (4) economic loss, and (5) loss causation.[50]

In the many decades since the enactment of the 1933 and 1934 Acts, the securities fraud regime has developed through the evolution of Supreme Court jurisprudence, interpreting the application of each of the five elements of a Section 10(b) claim. First, misrepresentations or omissions are legally actionable only if they are material.[51] In *TSC Industries v. Northway*, the Supreme Court stated that a fact is "material" if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or "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."[52] Over a decade later in *Basic v. Levinson*, the Supreme Court applied this materiality definition for the first time in the context of Rule 10b-5.[53] There, the Supreme Court stated that "[m]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information."[54] Moreover, the Court noted that materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event."[55]

More recently, in *Matrixx Initiatives, Inc. v. Siracusano*, the Supreme Court reiterated a materiality standard that contemplates whether there is "a substantial likelihood that the [false statement or omission] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[56] The Supreme Court has consistently maintained that the materiality inquiry is

50. *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

51. *See* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011). In *Matrixx*, the Supreme Court held that a drug company had an obligation to reveal details of the observed side effects of a drug to investors even though the information did not rise to the level of statistically significant data. *Id.* at 35. *Matrixx* reiterates that there is no bright line test for materiality and that materiality "is a 'fact-specific' inquiry that requires consideration of the source, content, and context of" any alleged misstatement or omission. *Id.* at 43 (citation omitted).

52. 426 U.S. 438, 449 (1975).

53. *See* 485 U.S. 224, 240 (1988).

54. *Id.*

55. *Id.* at 238 (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).

56. *Matrixx*, 563 U.S. at 38.

to be performed on a case-by-case basis with due consideration to the totality of the facts and with no one fact being outcome dispositive of the materiality of the alleged misstatement or omission.[57] As a result, false statements or omissions that are trivial or do not impact a company's stock price cannot be the predicate for a Section 10(b) claim.[58]

The second element of a Rule 10b-5 claim (*i.e.*, scienter) requires proof that the defendant acted with "a mental state embracing [the] intent to deceive, manipulate, or defraud."[59] In 1995, Congress enacted the Private Securities Litigation Reform Act (the "PSLRA").[60] The PSLRA included, among other things, detailed pleading requirements for allegations of scienter for Rule 10b-5 claims. For instance, under Section 21D(b)(2) of the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[61] Further, plaintiffs must state with particularity the facts constituting the alleged violation of Rule 10b-5, including each statement alleged to have been misleading and the reason or reasons why the statement is misleading.[62] In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Supreme Court provided further guidance on what a plaintiff must plead to meet the standard of a "strong inference" of scienter under the PSLRA.[63] The Supreme Court stated that "[a] complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[64]

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57. *See, e.g.*, *TSC Indus. Inc.*, 426 U.S. at 449; *Basic*, 485 U.S. at 240; *Matrixx*, 563 U.S. at 38.

58. *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346 (2005) (stating that "the misrepresented or concealed information must have negatively affected the stock price").

59. *See* 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(2), 78u-4(b)(3)(B) (2006); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

60. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

61. 15 U.S.C. § 78u-4(b)(2)(A).

62. 15 U.S.C. § 78u-4(b)(1). The PSLRA provides that "the court shall, on the motion of any defendant, dismiss the complaint" if plaintiffs do not meet these pleading standards. 15 U.S.C. § 78u-4(b)(3)(A).

63. 551 U.S. 308, 314–24 (2007). After accepting all the allegations in the complaint as true, a court must assess if all of the alleged facts give rise to a strong inference of scienter. *See id.* The Court then must evaluate whether—after considering all plausible competing inferences—the complaint gives rise to a strong inference of scienter. *See id.*

64. *Id.* at 324.

The third element of a Rule 10b-5 claim (*i.e.*, reliance) is currently at the center of a firestorm between plaintiffs and defendants, particularly at the class certification stage of securities fraud class action lawsuits.[65] In its simplest terms, plaintiffs must prove that they relied on a defendant's misstatements or omissions when making the transactional decision at issue.[66] In *Basic v. Levinson*, the Supreme Court explained that "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[67] For securities fraud class action litigation, a class cannot be certified unless there is proof of class-wide reliance.[68] To facilitate the certification of classes, the Supreme Court has afforded plaintiffs with two rebuttable presumptions of reliance: (1) the *Affiliated Ute* presumption, which gives investors a presumption of reliance if their claims are based on material omissions in situations where the defendant had a duty to disclose; or (2) the *Basic* presumption, whereby reliance is presumed for the entire class if the material misstatement was disclosed to the public in an efficient market and plaintiffs bought or sold the security between the time when the misrepresentation was made and the truth was revealed to the market.[69]

The fourth and fifth elements of a Rule 10b-5 claim (*i.e.*, economic loss and loss causation, respectively) require that plaintiffs prove that they suffered damages and that there is a causal connection between the economic loss and the alleged fraud.[70] In *Dura Pharmaceuticals v.*

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65. *See, e.g.*, Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011); Amgen Inc. v. Conn. Ret. Plans and Tr. Funds, 568 U.S. 455 (2013); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014); Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 124 (2021).

66. *See* Basic v. Levinson, 485 U.S. 224,243 (1988).

67. *Id.* The Supreme Court held in *Stoneridge* that in the absence of a false statement or deceptive act attributable to the secondary actors' reliance typically cannot be established under Rule 10b-5 as to the secondary actor. *See* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 159 (2008).

68. *See Basic*, 485 U.S. at 243.

69. *See Stoneridge*, 552 U.S. at 159 (indicating that the Supreme Court has "found a rebuttable presumption of *reliance in two different circumstances*": (1) "if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance" , and (2) "under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public" (emphasis added) (internal citations omitted))).

70. *See* Dura Pharms. v. Broudo, 544 U.S. 336, 345-46 (2005); *see also* Jacob M. Kantrow, Dura Pharmaceuticals, Inc. v. Broudo: *Not Really a Loss Causation Case*, 67

Broudo, the seminal case on loss causation, the Supreme Court explicitly rejected the argument that "an inflated purchase price" can "constitute or proximately cause the relevant economic loss."[71] The Supreme Court also made clear that the loss causation element does not "provide investors with broad insurance against market losses, but . . . protect[s] [the investors] against those economic losses that misrepresentations actually cause."[72] In the years since *Dura*, plaintiffs have been required to show that their pecuniary losses were caused by the alleged fraud and not by market fluctuations or industry or company-related developments.[73]

LA. L. REV. 257, 258 (2006) ("[T]he Court concluded that a purchaser of stock at an artificially inflated price, meaning a price that has been elevated on account of a fraudulent misrepresentation by the issuing corporation, has not suffered a loss at that time. A loss is only suffered if the corporation or someone else discloses the misrepresentation, which then causes the value of the stock to decline.").

71. *Dura Pharms.*, at 345–46 ("An inflated purchase price due to a misrepresentation does not, in and of itself, proximately cause economic loss."). In Erica P. John Fund, Inc. v. Halliburton Co., the Supreme Court stated that "loss causation . . . 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." 563 U.S. 804, 812 (quoting *Dura Pharms.*, 544 U.S. at 342–43). The Court noted 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 812–813. Further, the Court detailed that "[i]f 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." *Id.* at 813.

72. *See Dura Pharms*., 544 U.S. at 345 (emphasis added).

73. *See, e.g.*, *In re* Omnicom Grp., Inc. Sec Litig., 597 F.3d 501, 511 (2d Cir. 2010) (affirming dismissal on loss causation grounds). The Second Circuit found that the information disclosed to the market at the end of the alleged class period (which plaintiffs claimed caused the stock price decline) was nothing new and was only a negative portrayal of previously known information. *See id.* As a result, the Second Circuit concluded that the alleged corrective disclosure was not new information and failed to satisfy *Dura*. *See id.*

II. BACKGROUND ON RULE 23'S REQUIREMENTS

Typically, securities fraud plaintiffs bring their claims as a putative class action pursuant to Rule 23.[74] Given the predominance of the class action as the vehicle for bringing Rule 10b-5 claims, it is important to understand the requirements of Rule 23, which governs the certification of class actions. Rule 23 provides (in relevant part):

> 1. Prerequisites: One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
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> 2. Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
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> * * *
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[75]

As set forth above, certification of a class under Rule 23 requires plaintiffs to satisfy requirements of numerosity, commonality, typicality, and adequacy of representation.[76] Courts have stated that numerosity is a fact-specific inquiry.[77] In analyzing numerosity, courts consider whether the issuer's securities are listed and traded on a national securities exchange, the average weekly trading volume of those securities, the value of the company's securities, and the number of investors reporting to own the securities during the class period.[78]

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74. *See* Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 REV. LITIG. 405, 406 (2003).

75. *See* FED. R. CIV. P. 23(a), (b)(3).

76. These requirements correspond to subsection (a) of Rule 23. *See* FED. R. CIV. P. 23(a).

77. *See* Willis v. Big Lots, Inc., 242 F. Supp. 3d 634, 644 (S.D. Ohio 2017).

78. *See In re* FirstEnergy Corp. Sec. Litig., No. 20-CV-3785, 2023 WL 2709373, at *8 (S.D. Ohio Mar. 30, 2023).

Commonality is frequently litigated: the class members' claims must share a common question of law or fact such "that it is capable of classwide resolution—which means that [its] determination . . . will resolve an issue that is central to the validity of each one of the claims in one stroke."[79] In most securities fraud class action lawsuits, plaintiffs allege that defendants made materially false or misleading statements or omissions that caused the putative class members to sustain financial losses in violation of the federal securities laws.[80] These allegations typically involve the resolution of questions that are "common to the class which must be resolved to give rise to liability, including whether [d]efendants indeed made material statements and omissions . . . whether [d]efendants violated federal securities laws, and whether [p]laintiffs were injured because of the alleged misconduct."[81] The resolution of any of these questions that "affect[s] all or a substantial swath of the putative class" is sufficient to establish commonality.[82]

Next, courts have found a claim to be typical if "'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and the claims are based on the same legal theory.'"[83] As long as the putative class's claims derive from the same underlying alleged wrongful conduct and assert the same theory of liability, the typicality requirement is satisfied.[84]

The adequacy requirement "calls for a two-pronged inquiry: (1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel."[85] If plaintiffs can satisfy the commonality and typicality requirements by alleging they have suffered losses and seek remuneration for the injuries caused by the same underlying wrongful conduct as the putative class members, they will have met the first prong of the adequacy inquiry.[86]

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79. S*ee* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011); FED. R. CIV. P. 23(a)(2)

80. *See In re FirstEnergy*, 2023 WL 2709373, at *9.

81. *Id.*

82. *Id.* at *8.

83. *Id.* at *10 (citing Myers v. Marietta Mem'l Hosp., No. 15-CV-2956, 2017 WL 3977956, at *7 (S.D. Ohio Sept. 11, 2017); *see also* FED. R. CIV. P. 23(a)(3).

84. *See In re FirstEnergy*, 2023 WL 2709373, at *10.

85. *Id.* at *11 (citing Swigart v. Fifth Third Bank, 288 F.R.D. 177, 185–86 (S.D. Ohio 2012)); *see also* FED. R. CIV. P. 23(a)(2).

86. *See In re FirstEnergy*, 2023 WL 2709373, at *11.

That is, "the class members have interests that are not antagonistic to one another" and there are no indications "that the class representative[s] would not vigorously prosecute the interests of the class."[87] With respect to the second prong, the lead plaintiffs must show that they can "vigorously" represent the interests of the class and that class counsel is "qualified and able to conduct the litigation."[88] In light of all of these considerations, "[t]o satisfy the adequacy test, the named representative of a class need only be adequate and need not be the best of all possible plaintiffs."[89]

Finally, plaintiffs seeking damages must establish that common questions predominate over questions affecting individual class members.[90] The "hallmark" of the predominance analysis "is whether a common form of liability exists among the proposed class members."[91] The predominance requirement is "demanding" because it obligates courts to examine all aspects of the class's claims, even damages.[92]

IV. THE EVOLUTION OF THE SECURITIES FRAUD CLASS CERTIFICATION REGIME

This section provides an overview of the Supreme Court's carefully constructed securities fraud class certification regime, particularly with respect to the genesis of the rebuttable presumptions of reliance.

A. AFFILIATED UTE CITIZENS OF UTAH V. UNITED STATES

In *Affiliated Ute*, certain members of the Ute Indian Tribe brought suit against a bank and two of the bank's managers under Section 10(b)

87. *Id.* (citation omitted).

88. *Id.* at *12 (holding in class certification decision that reviewing case documents, communicating and coordinating with class counsel, participating in depositions, and generally remaining consistently and actively involved in the case are sufficient to demonstrate the class plaintiffs' ability to "vigorously" represent the class).

89. *Id.* (citing Ballan v. Upjohn, Co., 159 F.R.D. 473, 482 (E.D. Mich. 1994)).

90. *See* FED. R. CIV. P. 23(b)(3); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359–65 (2011); Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

91. See David I. Berman, *Class Problem!: Why the Inconsistent Application of Rule 23's Class Certification Requirements During Overbreadth Analysis Is A Threat to Litigant Certainty*, 87 FORDHAM L. REV. 253, 263 (2018).

92. *See Comcast Corp.*, 569 U.S. at 34–38 (holding common questions do not predominate where "[q]uestions of individual damages calculations will inevitably overwhelm questions common to the class.")

and Rule 10b-5.[93] The plaintiffs had acquired stock in a corporation that was formed to manage assets derived from tribal holdings.[94] The complaint arose out of the bank managers' actions in assisting the plaintiffs with disposing of their stock. At the time of the stock sales, the managers knew that the stock was traded in two separate markets—a primary market of Ute Indians selling to non-Ute Indians through the bank and a resale market consisting entirely of non-Ute Indians.[95] The managers devised a scheme to directly purchase stock from the Ute Indians—both on their own behalf and on the behalf of others—and then market those shares to non-Ute Indian buyers at higher prices.[96] The managers, however, never told plaintiffs about the non-Ute Indian market for their stock, the considerably higher prices available in that market, or their financial interest in the transactions.[97]

The district court entered judgment for the plaintiffs.[98] The Court of Appeals reversed, holding that there could be no recovery under Section 10(b) and Rule 10b-5 without positive proof of reliance by the plaintiffs upon some representation by the defendants.[99] The Supreme Court, however, reversed the Court of Appeals. First, the Supreme Court found that the managers, as market makers for the stock, possessed an affirmative duty under Rule 10b-5 to disclose the fact that they were "in a position to gain financially from their sales and that their shares were selling for a higher price in that [secondary] market."[100] Second, the Supreme Court held:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.[101]

93. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972).
94. *See id.* at 136.
95. *See id.* at 152.
96. *See id.*
97. *See id.* at 152–53.
98. *See id.* at 148.
99. *See id.* at 152.
100. *Id.* at 152–53.
101. *Id.* at 153 (citations omitted).

After the Supreme Court's decision in *Affiliated Ute*, the lower courts generally found that plaintiffs were entitled to a rebuttable presumption of reliance in cases alleging a failure to disclose in the face of a duty to disclose (*i.e.*, a pure omission).[102] In cases based on affirmative misstatements, courts continued to require proof of actual reliance, regardless of whether the claims were asserted by a single plaintiff or on behalf of a class.[103] As explained next, that changed sixteen years later in the landmark Supreme Court case *Basic Inc. v. Levinson*.

B. BASIC INC. V. LEVINSON

In *Basic Inc. v. Levinson*,[104] shareholders of Basic Inc. ("*Basic*"), a producer of chemical refractories for the steel industry, brought a class action lawsuit against the company and its directors, alleging that they made false and misleading statements concerning merger negotiations and thereby violated Section 10(b) and Rule 10b-5.[105] Specifically, Basic became engaged in merger discussions with another company in 1976.[106] However, in the two years that followed, Basic made three public

102. Although the decision itself did not expressly refer to it as a presumption, "it has been widely interpreted as eliminating plaintiff's need to establish reliance in nondisclosure cases involving open market transactions." *See* Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. REV. 435, 445 (1984); *see also* Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584, 591 (1975) (noting that lower court decisions post-*Affiliated Ute* "support[] the proposition that proof of reliance is unnecessary when the deception involves nondisclosure rather than misrepresentation").

103. *See, e.g.*, Reeder v. Mastercraft Electronics Corp., 363 F. Supp. 574 (S.D.N.Y. 1973) (stating that "reliance is still generally required in misrepresentation cases" post-*Affiliated Ute*); *see also* Holdsworth v. Strong, 545 F.2d 687, 695 (10th Cir. 1976) ("Where, as here, there are affirmative misrepresentations, the problem of proving reliance is not the same and reliance is the appropriate and decisive way to prove the chain of causation. Unquestionably the proof of reliance or materiality is essential to the case where it is a positive misrepresentation type of action and justifiable reliance is the required element.").

104. For a more detailed summary of the decision, see Yolanda Eleni Stefanou, Basic Inc. v. Levinson: *The Disclosure of Preliminary Merger Discussions Within the Context of Rule 10b-5*, 3 ADMIN. L.J. 465 (1989).

105. *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988).

106. *See id.* at 226.

statements denying that it was engaged in any merger negotiations.[107] Then, at the end of 1978, Basic surprised the market when it suddenly announced its approval of a tender offer for all of the outstanding shares of the company.[108] The plaintiffs alleged that they sustained substantial losses by relying on Basic's statements denying the existence of merger negotiations and selling their shares at an artificially depressed price between 1976 and 1978.[109]

After reviewing the allegations, the district court certified the class, applying a rebuttable presumption of reliance based on the so-called "fraud-on-the-market theory."[110] In the Supreme Court's own telling, the fraud-on-the-market theory holds that:

> [I]n 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. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations. In both cases, defendants' fraudulent statements or omissions cause plaintiffs to purchase stock they would not have purchased absent defendants' misstatements and/or omissions.[111]

That presumption allowed the plaintiffs to satisfy Rule 23's class certification requirements by making reliance a question common to the class rather than an individual question for each plaintiff. Basic appealed the district court's order certifying the class, arguing that use of the presumption was improper.[112] The Sixth Circuit disagreed and affirmed

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107. *See id.* at 227. The three affirmative statements at issue were: (1) "the company knew no reason for the stock's activity and that no negotiations were under way with any company for a merger"; (2) "management is unaware of any present or pending company development that would result in the abnormally heavy trading activity and price fluctuation in company shares"; and (3) the company is "unaware of any present or pending developments which would account for the high volume of trading and price fluctuations." *Id.* at 243 n.4.

108. *See id.* at 228.

109. *See id.* at 242.

110. *See* Levinson v. Basic Inc., 786 F.2d 741, 750 (6th Cir. 1986), *vacated*, 485 U.S. 224 (1988).

111. Peil v. Speiser, 806 F.2d 1154, 1160–61 (3d Cir. 1986).

112. See *Levinson*, 786 F.2d at 750.

the class certification order.[113] The Sixth Circuit stated that there are two distinct situations where proof of actual reliance would be impractical or impossible such that courts have applied a presumption of reliance: (1) in cases like *Affiliated Ute*, where there has been "non-disclosure of material facts in face-to-face transactions," and (2) where there has been "material public misrepresentations that distort the price of stock on the impersonal market, in other words, a fraud on the market."[114] The Court explained that the latter situation is present here given Basic's public, material misrepresentations and the fact that the plaintiffs sold their stock in an impersonal, efficient market.[115] The Sixth Circuit thus found that the district court correctly applied the presumption of reliance.[116]

Following the Sixth Circuit's ruling, Basic filed a writ of certiorari, which the Supreme Court granted.[117] One of the issues before the Supreme Court was whether the Court below properly applied a rebuttable presumption of reliance—based on the fraud-on-the-market theory—in certifying the class, rather than requiring each class member to show direct reliance on Basic's alleged misstatements.[118] Endorsing the fraud-on-the-market theory, [119] the Supreme Court held that it did, stating:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in a stock's market price, an

113. *See id.*
114. *Id.*
115. *See id.* at 751.
116. *See id.*
117. *See* Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988).
118. *See id.*
119. In the years since *Basic*, the fraud-on-the-market theory has been heavily criticized by both scholars and courts alike. *See* Mark Klock, *The Enduring Legacy of Modern Efficient Market Theory After* Halliburton v. John, 50 GA. L. REV. 769, 770 (2016) ("For more than a quarter of a century since, the [fraud-on-the-market] theory has sustained a barrage of attacks from legal scholars with varying degrees of hostility towards application of economic theory in securities and corporate jurisprudence."); Jill E. Fisch, *The Trouble with* Basic*: Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895, 933 (2013) (noting that some commentators have advocated for overruling *Basic* in order to eliminate the fraud-on-the-market presumption). *See also id.* at 925 (suggesting that "*Basic* was decided in the context of a broadening acceptance of the class action and, in particular, the widespread view that the application of the class action to securities fraud litigation was particularly appropriate. Since *Basic* was decided, many courts and commentators have become more critical of class actions in general and securities fraud class actions in particular.").

> investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.[120]

Thus the *Basic* presumption, which is premised on an economic theory, became settled law in securities class actions. In crafting the *Basic* presumption, the Supreme Court recognized that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented [plaintiffs] from proceeding with a class action, since individual issues then would have overwhelmed the common ones."[121] Without the presumption, plaintiffs would face the "unnecessarily unrealistic evidentiary burden" of "show[ing] a speculative state of facts, *i.e.*, how he would have acted if . . . the misrepresentation had not been made."[122] Such a burden "effectively would . . . prevent [plaintiffs] from proceeding with a class action" in securities fraud cases.[123]

After *Basic*, the filing of securities fraud class action lawsuits following stock price declines skyrocketed.[124] Although questions remained as to what must be pled to invoke the *Basic* presumption, plaintiffs were no longer faced with the nearly impossible task of proving reliance on a class-wide basis with respect to an alleged misstatement. Defendants, on the other hand, were left with the difficult task of figuring out how to successfully defend these claims and devise strategies to rebut

120. *Basic*, 485 U.S. 224 at 247.

121. *Id.* at 242.

122. *Id.* at 245.

123. *Id.* at 242. *See also* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 HARV. L. REV. 1067, 1069 (2019) (explaining that "[b]efore *Basic*, securities-fraud plaintiffs suing as a class could usually establish the 'reliance' element only by showing that each class member was aware of and traded a security based on a specific falsehood" and that the presumption "upended the existing individual-reliance regime and modified the private 10b-5 action to allow securities-fraud class actions to proceed").

124. *See* Pritchard, *supra* note 23, at 27 ("The number of securities fraud class actions increased dramatically after *Basic Inc. v. Levinson* validated the FOTM presumption."); *Congress, the Supreme Court, and the Rise of the Securities-Fraud Class Actions*, 132 HARV. L. REV. 1067, 1067 (2019) (noting that securities fraud class actions "have become much more frequent over the last three decades, spurred on by the Supreme Court's decision in Basic Inc. v. Levinson"); *see also* Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 663 (1992) ("[T]he rate at which securities fraud class action suits were filed nearly tripled between April 1988, just after *Basic* was decided, and June 1991.").

that presumption.[125] In the years that followed *Basic*, the Supreme Court, in several seminal decisions for securities class action practitioners, clarified four particularly important points with respect to both invoking and rebutting the *Basic* presumption.

C. ERICA P. JOHN FUND, INC. V. HALLIBURTON CO. ("HALLIBURTON I")

In 2011, the Supreme Court held in *Erica P. John Fund, Inc. v. Halliburton Co.* ("*Halliburton I*") that plaintiffs do not have to prove loss causation at the class certification stage to invoke the *Basic* presumption.[126] In that case, the plaintiff filed a securities fraud class action against Halliburton Company, one of the world's largest providers of products and services to the energy industry, for violating Section 10(b) and Rule 10b-5. Plaintiff alleged that Halliburton made false and misleading statements regarding its potential liability in asbestos litigation, its expected revenue from certain construction contracts, and the anticipated benefits of its merger with another company, which were allegedly designed to inflate the price of the company's stock.[127] When Halliburton made a number of subsequent corrective disclosures, the company's stock price dropped, thereby causing the plaintiff and class to suffer losses.[128]

At class certification, the parties agreed that the proposed class satisfied Rule 23 with respect to the numerosity, commonality, typicality, and adequacy requirements.[129] The sole issue was whether loss

125. *See* Joel W. Sternman & Jessica M. Garret, *The Inappropriateness of Applying Presumptions of Reliance to Facilitate Class Certification of Consumer Facilitate Class Certification of Consumer Fraud Actions*, 31 NO. 3 CLASS ACTION REPORTS art. 2 n.1 (2010) ("Although the majority opinion in *Basic* emphasizes that this presumption is rebuttable and, in fact, provides examples of how defendants might rebut it, Justice White, in dissent, questioned the majority's optimism about the ability to rebut, noting that rebuttal was likely to be 'virtually impossible in all but the most extraordinary case.' Justice White's expectation that the fraud on the market theory, as conceived in *Basic*, would actually create 'nonrebuttable' presumptions of reliance for certain securities fraud cases appears to have been borne out by the absence of significant decisions decertifying classes because of defendants' success in rebutting the presumption.").

126. 563 U.S. 804 (2011).

127. *See id.* at 807-08.

128. *Id.* at 808.

129. *See* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 02-CV-1152, 2008 WL 4791492, at *1 (N.D. Tex. Nov. 4, 2008), *aff'd*, 597 F.3d 330

causation—that is, the causal connection between the misrepresentation and the economic loss suffered by investors—must be proven at the class certification stage to invoke the *Basic* presumption.[130] Based on Fifth Circuit precedent, the district court answered that question in the affirmative and found that the plaintiff could not establish loss causation with respect to any of its claims.[131] The Fifth Circuit affirmed.[132]

Recognizing a conflict among the circuit courts as to whether securities fraud plaintiffs must prove loss causation to obtain class certification,[133] the Supreme Court granted plaintiff's writ of certiorari to resolve it. In a unanimous decision, the Supreme Court reversed and remanded, ruling for the first time that plaintiffs in a securities fraud class action need not affirmatively prove loss causation at the class certification stage to invoke the *Basic* presumption.[134] The Court stated that it has "never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance."[135] In fact, that term does not even appear in *Basic*.[136] The Court explained that loss causation "requires a plaintiff to show that a misrepresentation that affected the integrity of the market price also cause[d] a subsequent economic loss" and therefore has "no logical connection" to establishing the applicability of the *Basic* presumption.[137]

Halliburton I was a win-win for securities plaintiffs and defendants. While the Court held that loss causation is not a prerequisite for class certification, it did make clear that securities fraud plaintiffs "must prove certain things in order to invoke" the *Basic* presumption.[138] To that end, the Court provided a non-exhaustive list of elements plaintiffs must prove to invoke the *Basic* presumption, including that the alleged

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(5th Cir. 2010), *vacated and remanded sub nom.*, Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011), *rev'd and remanded*, 647 F.3d 533 (5th Cir. 2011).

130. *See id.* at *1.

131. *See id.*

132. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 334 (5th Cir. 2010), *vacated and remanded sub nom.*, Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011).

133. Lapin v. Goldman Sachs & Co., 254 F.R.D. 168, 184–85 (S.D.N.Y. 2008) (noting that the Fifth Circuit requires proof of loss causation to invoke the *Basic* presumption but the Second Circuit does not).

134. See *Halliburton I*, 563 U.S. at 815.

135. *Id.* at 812.

136. *Id.* at 812.

137. *Id.* at 812–13.

138. *Id.* at 811.

misrepresentations were publicly known and that the stock traded in an efficient market.[139] By virtue of this list, the Court provided defendants with clearer lines of attack for rebutting the *Basic* presumption. In the two cases that follow, however, the Supreme Court changed the playing field by lessening plaintiffs' burden at the class certification stage.

D. AMGEN INC. V. CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS

In 2013, just two years after *Halliburton I*, the Supreme Court held in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* that the materiality of an alleged misstatement need not be proven to invoke the *Basic* presumption at class certification.[140] In *Amgen*, the plaintiff filed a securities fraud class action against Amgen Inc., a biotechnology company, alleging that Amgen violated Section 10(b) and Rule 10b-5 by making a series of false and misleading statements and omissions concerning the safety, marketing, and market demand of two of its flagship drugs, which artificially inflated the price of Amgen's stock.[141] The plaintiff claimed that when the truth later came to light through various "partial corrective disclosures," Amgen's stock price dropped, causing injury to those who purchased Amgen's stock at the inflated price.[142]

At class certification, the plaintiff argued that they met all of Rule 23's requirements for class certification.[143] Amgen made two arguments in response. First, Amgen asserted that the plaintiff failed to meet Rule 23(b)'s predominance requirement because each individual failed to prove that they relied on the misrepresentations and omissions at issue.[144] Amgen further argued that the plaintiff was not entitled to the *Basic* presumption of reliance because they failed to establish that the misrepresentations or omissions were material.[145] Second, Amgen contended that if the *Basic* presumption applies, they adequately rebutted it by showing that the truth was known to the market (also known as the

139. *See id.*
140. *See* 568 U.S. 455, 459 (2013).
141. *See id.* at 463.
142. *Id.*
143. *See* Conn. Ret. Plans & Tr. Funds v. Amgen Inc., No. 07-CV-2536, 2009 WL 2633743, at *4 (C.D. Cal. Aug. 12, 2009).
144. *See id.* at *8.
145. *See id.*

"truth-on-the-market" doctrine).[146] The district court rejected Amgen's arguments and certified the class, finding that the plaintiff successfully invoked the *Basic* presumption and that proving materiality is not a precondition to invoking the *Basic* presumption at class certification.[147] On appeal, the Ninth Circuit affirmed the district court's class certification order, though it recognized that the circuit courts were split on the issue of whether materiality must be proven by plaintiffs and rebutted by defendants at class certification.[148]

The Supreme Court granted Amgen's petition for a writ of certiorari and resolved the circuit split by ruling—for the first time—that proof of materiality is not a prerequisite to class certification.[149] The Court reasoned that Rule 23's predominance requirement only "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."[150] As "materiality is judged according to an objective standard," the materiality of an alleged misrepresentation or omission "is a question common to all members of the class."[151] The Court further held that the district court properly refused to consider Amgen's rebuttal evidence.[152] The Court explained that, "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."[153]

The Supreme Court's decision in *Amgen* was clearly a win for plaintiffs who bring securities fraud class actions under Section 10(b) and Rule 10b-5. *Amgen* made it easier for plaintiffs to obtain class

146. *See id.* at *12. *See also* Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474, 485 (2d Cir. 2018) (explaining that the "'truth on the market' defense attacks the timing of the plaintiffs' purchase of shares, not price impact. The theory is, essentially, that the market was already aware of the truth regarding defendants' misrepresentations at the time the class members purchased their shares, meaning the market price had already adjusted to the revelation of defendants' misstatements, and class members could not have relied on those misstatements in choosing to buy stock.").

147. *See Conn. Ret. Plans & Tr. Funds*, 2009 WL 2633743, at *11, *14.

148. *See* Conn. Ret. Plans & Tr. Funds v. Amgen Inc., 660 F.3d 1170, 1175–77 (9th Cir. 2011), *aff'd*, 568 U.S. 455 (2013).

149. *See* Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013).

150. *Id.*

151. *Id.*

152. *Id.* at 480.

153. *Id.* at 481.

certification, especially in circuits that previously required plaintiffs to prove materiality (and loss causation) at class certification.[154]

E. HALLIBURTON CO. V. ERICA P. JOHN FUND, INC. ("HALLIBURTON II")

In 2014, just one year after *Amgen*, the Supreme Court handed down an important win for defendants in *Halliburton Co. v. Erica P. John Fund*, Inc. ("*Halliburton II*") by ruling that they must be afforded an opportunity to rebut the *Basic* presumption by showing that the alleged misrepresentations did not affect the market price of the stock (*i.e.*, it had no "price impact").[155] After the initial trip to the Supreme Court in *Halliburton I*,[156] the case went back before the district court. At the second class certification round, Halliburton argued that the class should not be certified because the alleged misrepresentations had no impact on Halliburton's stock price.[157] By showing a lack of price impact, Halliburton maintained that it had successfully rebutted the *Basic* presumption. The district court declined to consider Halliburton's evidence on the issue and certified the class, holding that common issues predominated, and the other Rule 23 requirements were met.[158] Halliburton appealed that ruling.

On appeal, the Fifth Circuit affirmed the district court's class certification order.[159] As the Fifth Circuit explained, the "pivotal

154. *See* Harold S. Bloomenthal, *Materiality, Fraud-on-the-Market, and Class Certification:* Amgen v. Connecticut Retirement Plans, 35 NO. 3 SEC. & FED. CORP. L. REP. I (2013) ("*Amgen* and [*Halliburton I*] are significant blows to parties attempting to ward off securities class actions. There had been a split in the Circuits, and the matter has now been resolved. Plaintiffs do not have to prove materiality or loss causation at the certification stage of the proceeding. Nor may defendants rebut the fraud-on-the-market presumption at the certification stage by arguing the alleged misrepresentations were not material.").

155. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014). *See also* Noah Weingarten, Halliburton II *at Four: Has it Changed the Outcome of Class Certification Decisions?*, 25 FORDHAM J. CORP. & FIN. L. 459, 470 (2020) (explaining that "[p]rice impact is a shorthand reference to 'whether the alleged misrepresentations affected the market price.'").

156. 563 U.S. 804 (2011).

157. *See* Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 428 (5th Cir. 2013), *vacated and remanded*, 573 U.S. 258 (2014).

158. *See* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 02-CV-1152, 2012 WL 565997 (N.D. Tex. Jan. 27, 2012).

159. *Erica P. John Fund, Inc.*, 718 F.3d at 423 (5th Cir. 2013).

question" was "whether a defendant should be permitted to show the absence of price impact at the class certification stage of the proceedings to establish that common issues among class members do not predominate and that class certification is inappropriate."[160] The court held that "price impact fraud-on-the-market rebuttal evidence should not be considered at class certification," explaining that price impact evidence bears on materiality, which (per the Supreme Court's decision in *Amgen*) should not be considered at the class certification stage.[161]

The case then went back before the Supreme Court for a second time.[162] This time, however, the Supreme Court aimed to resolve the circuit split 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."[163] Specifically, the question before the Court was twofold: should *Basic*'s presumption of reliance be overruled or modified,[164] and, if not, should defendants have the opportunity to rebut the presumption at the class certification stage by showing a lack of price impact?[165] The Supreme Court ultimately decided to reaffirm the viability of the *Basic* presumption and held that plaintiffs in securities class actions need not prove price impact to first invoke the *Basic* presumption, but "defendants must be afforded the opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock"—regardless of whether that same evidence bears on materiality.[166] Event studies—*i.e.*, "regression analyses that seek to show that the market price of [a] stock tends to respond to pertinent publicly reported events"—are one form of evidence defendants may use.[167]

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160. *Id.* at 428.

161. *Id.* at 432–35.

162. *Halliburton II*, 573 U.S. 258 (2014).

163. *Id.* at 266.

164. Pritchard, *supra* note 23, at 27 (discussing how *Halliburton II* was the first time the Supreme Court squarely faced the issue of whether to overrule *Basic*).

165. *See Halliburton II*, 573 U.S. at 264.

166. *See id.* at 278–82.

167. *Id.* at 280–81. *See also* Jill E. Fisch & Jonah B. Gelbach, *Power and Statistical Significance in Securities Fraud Litigation*, 11 HARV. BUS. L. REV. 55, 56–57 (2021) ("The purpose of an event study is to measure the extent to which stock prices react to the release of new information into the market. In securities fraud cases, event studies are used in several ways, including analyzing the efficiency of the market in which the securities trade, measuring the price impact of the fraudulent disclosures, determining whether there is a causal relationship between the fraud and the plaintiffs' economic

Halliburton II was a significant development in the Supreme Court's Rule 23 jurisprudence: courts may consider evidence of a lack of price impact at the class certification stage even if that evidence is also relevant to issues reserved for the merits stage. The decision reflected the Supreme Court's intent to reject a formalistic distinction between merits and non-merits issues and embrace greater judicial scrutiny of all evidence relevant to class certification.[168] In doing so, the Court armed defendants with a tool for rebutting the *Basic* presumption at class certification.[169] However, the strength and usefulness of that tool has been heavily debated in the years since.[170]

losses, and computing the amount of damages. Although courts vary in the extent to which they require the use of an event study and the degree to which they accept other evidence with respect to these issues, a properly conducted event study is often a critical factor.").

168. *See Halliburton II*, 573 U.S. at 283 ("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 . . . [W]e see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact.").

169. See Weingarten, *supra* note 155, at 461 ("Before *Halliburton II*, commentators believed that if a complaint survived a motion to dismiss, class certification was essentially *fait accompli*.").

170. *See* Allen Ferrell & Andrew Roper, *Price Impact, Materiality, and Halliburton II*, 93 WASH. U. L. REV. 553, 560 (2015) (stating that the decision left unanswered the question of "what type of 'direct' economic evidence suffices to successfully rebut the Basic Inc. presumption" because "[b]eyond its mention of event studies, the Court did not define or circumscribe the type of economic evidence that defendants can proffer as 'direct evidence' of a lack of price impact"); Pritchard, *supra* note 23, at 46 (taking the view that the decision did little more than "add[] a new battle of the experts" and "encourage defendants to put on economists to testify that the alleged misstatements did not affect the market price"); Weingarten, *supra* note 155, at 461 ("*Although Halliburton II* may have given defendants the ability to make a new argument that they were previously not able to make, it is an argument that counterintuitively works against defendants and leads to the grant of class certification in most cases."); *id.* at 459 ("[B]ased on an empirical study of pre-versus post-*Halliburton II* class certification decisions, it appears that the outcomes of class certification decisions have become even more hostile to defendants, as class certification is now being granted with greater frequency post-*Halliburton II*."); Ferrell & Roper, *supra* note 170, at 560–61 (examining cases where defendants have attempted to rebut the *Basic* presumption by showing a lack of price impact and finding that defendants have failed to do so in seven out of the eight cases).

F. GOLDMAN SACHS GROUP, INC. V. ARKANSAS TEACHER RETIREMENT SYSTEM

Nine years later, in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, the Supreme Court issued another decision that provides defendants with a crucial path forward for rebutting the *Basic* presumption.[171] In 2010, a putative class of shareholders sued Goldman Sachs Group, Inc. alleging (among other things) violations of Section 10(b) and Rule 10b-5.[172] The plaintiffs alleged that Goldman Sachs made material misrepresentations with respect to two categories of statements. The first category of statements related to Goldman Sachs' aspirational goals—for example, "Our clients' interests always come first."[173] The second category of statements related to warnings about the risks of conflicts of interest—for example, "We have extensive procedures and controls that are designed to . . . address conflicts of interest."[174] The plaintiffs alleged that the challenged statements were fraudulent because Goldman Sachs had undisclosed client conflicts with respect to some of their financial instruments, and subsequent news reports of government enforcement activity relating to alleged conflicts of interest demonstrated the falsity of the challenged statements to the market.[175]

The case eventually made its way to the class certification stage, with plaintiffs invoking the *Basic* presumption and relying on the inflation maintenance theory. Pursuant to this theory, certain statements are actionable merely because they maintained an already inflated stock price.[176] To rebut the *Basic* presumption at the class certification stage, Goldman Sachs presented evidence showing that the alleged misstatements had no price impact.[177] Goldman Sachs argued that the generic, aspirational nature of the alleged misstatements could not have affected the stock price and that Goldman Sachs' stock price had not declined in response to news reports on 36 separate dates before the purported "corrective disclosures," despite the fact that those reports

171. *See* 594 U.S. 113 (2021).

172. *See In re* Goldman Sachs Grp., Inc. Sec. Litig., No. 10-CV-3461, 2015 WL 5613150, at *1 (S.D.N.Y. Sept. 24, 2015), *vacated and remanded sub nom.*, Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474 (2d Cir. 2018).

173. *Id.*

174. *Id.*

175. *See id.*

176. *See id.*

177. *See id.* at *4–6.

included allegations about Goldman Sachs' conflicts of interest.[178] The district court found that Goldman Sachs failed to rebut the *Basic* presumption and granted the plaintiffs' motion for class certification, which Goldman Sachs appealed.[179]

On appeal, the Second Circuit vacated the district court's class certification order, holding that the district court failed to apply the preponderance of the evidence standard for determining whether Goldman Sachs rebutted the *Basic* presumption and erred by refusing to consider the petitioners' evidence that Goldman Sachs' generic statements had no price impact.[180] The case went back down to the district court. After reviewing Goldman Sachs' evidence showing that the challenged statements had no price impact and the stock price drop following the corrective disclosures was not attributable to the alleged misstatements, the court found that Goldman Sachs failed to rebut the *Basic* presumption and again certified the class.[181] Goldman Sachs appealed.

On appeal to the Second Circuit for the second time, the court affirmed the district court's class certification order.[182] The court held that the *Basic* presumption could be rebutted only by showing that the entire price decline on the corrective disclosure dates was due to something other than the alleged misstatements and that the generic nature of an alleged misrepresentation is irrelevant to the price impact question given Amgen's holding that materiality may not be considered at the class certification stage.[183] Thereafter, Goldman Sachs filed a petition for a writ of certiorari.

In 2021, the Supreme Court issued a monumental decision vacating the Second Circuit's holding and remanding under an instruction that "the Second Circuit must take into account all record evidence relevant to price impact, regardless of whether that evidence overlaps with materiality or

178. *See id.*

179. *See id.* at *6–7.

180. *See* Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474 (2d Cir. 2018).

181. *See In re* Goldman Sachs Grp. Inc. Sec. Litig. v. Ark. Tchrs. Ret. Sys., No. 10-CV-3461, 2018 WL 3854757 (S.D.N.Y. Aug. 14, 2018).

182. *See* Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc., 955 F.3d 254 (2nd Cir. 2020); *see also* Matthew C. Turk, *The Securities Fraud Class Action After* Goldman Sachs, 59 AM. BUS. L.J. 281, 281–82 (2022) (describing the decision as "one of the most significant securities law decisions in years").

183. Turk, *supra* note 182, at 271–72.

any other merits issue."[184] In doing so, the Court established a so-called "mismatch" standard. The Court explained that the generic nature of a misrepresentation often will be important evidence of a lack of price impact in cases proceeding under the inflation maintenance theory.[185] This is because plaintiffs typically point to a negative disclosure about a company and a stock price drop and then claim that the drop is equal to the amount of inflation maintained by the earlier misrepresentation.[186] However, that inference breaks down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure, which can happen when the earlier misrepresentation is generic and the corrective disclosure is specific.[187] The Supreme Court's decision requires courts to assess the "mismatch" between the generality of the alleged misrepresentation and the specificity of the corrective disclosure to properly make a price impact determination.

V. INTERRUPTING THE FRAMEWORK: THE SUPREME COURT'S DECISION IN *MACQUARIE*

Under the Supreme Court's framework, there are two ways reliance may be presumed at the class certification stage: the *Affiliated Ute* presumption and the *Basic* presumption. The Supreme Court has made clear that these two presumptions are distinct from one another, with the *Affiliated Ute* presumption applying to cases based on pure omissions and the *Basic* presumption applying to cases based on affirmative misstatements.[188] Although this dichotomy is clear when it comes to cases based on pure omissions or affirmative misstatements, the Supreme Court has never resolved the issue of which side of the line half-truths fall on—that is, whether they should be characterized as omissions or affirmative misstatements. In an apparent effort to avoid the more onerous *Basic* presumption, plaintiffs have seized upon this ambiguity, arguing that the *Affiliated Ute* presumption is applicable to half-truths because half-truths are similar to pure omissions in that they are misleading by virtue of what

184. Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 124(2021).

185. *Id.* at 119. Notably, the Supreme Court reserved on the validity or contours of the inflation maintenance theory. *Id.* at 120 n.1.

186. *See id.* at 122–23.

187. *See id.*

188. *See* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 159 (2008).

they omit.[189] Defendants, on the other hand, argue the contrary. That is, *Affiliated Ute* is inapplicable to half-truths because half-truths are a form of a misrepresentation rather than an omission since they involve affirmative statements rather than silence in the face of a duty to disclose.[190] In 2024, the Supreme Court seemingly threw a wrench in that debate when it issued its ruling in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*[191]

Macquarie Infrastructure was an owner and operator of various infrastructure-related businesses, including a subsidiary that provided bulk liquid storage for number 6 fuel oil.[192] In 2016, the United Nations adopted an environmental regulation that would effectively eliminate the use of number 6 fuel oil, but Macquarie never discussed that regulation in its offering documents.[193] Unsurprisingly, investors were caught off guard when, in February 2018, Macquarie announced that its subsidiary had been affected by the decline in the number 6 fuel oil market.[194] Macquarie's stock price subsequently plummeted by approximately 41%.[195] Two months later, in April 2018, Moab Partners, L.P. filed a class action lawsuit against Macquarie, alleging that it made material misrepresentations and omissions regarding the regulation's likely impact on Macquarie's business in violation of Section 10(b) and Rule 10b-5(b).[196] The crux of Moab's complaint was that Macquarie's statements were false and misleading because it failed to disclose the fact that its subsidiary's business was heavily dependent on storing number 6 fuel oil.[197] Moab argued that Macquarie had a duty to disclose the extent to which its subsidiary's storage capacity was devoted to number 6 fuel oil under Item 303 of Regulation S-K, which requires companies to disclose information concerning "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or

189. *See, e.g., In re* FirstEnergy Corp. Sec. Litig., 2021 WL 2007418 (S.D. Ohio Feb. 26, 2021).
190. *See id.*
191. 601 U.S. 257 (2024).
192. *See* id. at 261.
193. *See id.*
194. *See id.*
195. *See id.*
196. *See id.*
197. *See id.*

unfavorable impact on net sales or revenues or income from continuing operations."[198]

The case eventually made its way to the Supreme Court, with the issue before the Court being "whether the failure to disclose information required by Item 303 can support a private action under Rule 10b-5(b), even if the failure does not render any 'statements made' misleading."[199] In a unanimous opinion, the Court held that it cannot, stating that "[p]ure omissions are not actionable under Rule 10b-5(b)."[200] To make that determination, the Court focused on Rule 10b-5(b)'s language, which expressly prohibits two things: (1) an untrue statement of a material fact (*i.e.*, false statements or lies) and (2) the omission of a material fact necessary to make the "statements made" not misleading.[201] The Court then zeroed in on that second prohibition, stating that the "case turns on whether [it] bars only half-truths or instead extends to pure omissions."[202] The Court went on to distinguish half-truths from pure omissions, explaining that "a pure omission occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence."[203] The Court reasoned that Rule 10b-5(b) covers half-truths, not pure omissions, because—by its plain text—"it requires disclosure of information necessary to ensure that statements already made are clear and complete (*i.e.*, that the dessert was, in fact, a whole cake)."[204] To hold otherwise would be to "read the words 'statements made' out of Rule 10b-5(b) and shift[] the focus of that Rule and § 10(b) from fraud to disclosure."[205]

The Supreme Court's decision in *Macquarie* thus makes clear that half-truths are distinct from pure omissions, and pure omissions are not actionable under Rule 10b-5(b). Put differently, Rule 10b-5(b) creates liability only for half-truths and affirmative misstatements. The Court's decision in *Macquarie* did not discuss the *Affiliated Ute* presumption in reaching that holding. However, *Macquarie* calls into question the vitality of that presumption at the class certification stage, at least with

198. *See id.*; *see also* 17 C.F.R. § 229.303(a)(3)(ii) (2018).
199. 601 U.S. at 259–60.
200. *Id.* at 260.
201. *Id.* at 263.
202. *Id.*
203. *Id.*
204. *See id.*
205. *See id.* at 265.

respect to Rule 10b-5(b) claims.[206] More specifically, it raises the question of whether plaintiffs are foreclosed from arguing that half-truths, which are distinct from pure omissions, should nonetheless be treated as such for purposes of the *Affiliated Ute* presumption, despite the fact that claims based on pure omissions are not actionable under Rule 10b-5(b).

VI. *IN RE FIRST ENERGY CORP. SECURITIES LITIGATION*: THE TEST CASE

In re FirstEnergy Corporation Securities Litigation will be the first case to address the issue of whether the *Affiliated Ute* presumption can apply to Rule 10b-5(b) claims based on half-truths following the Supreme Court's decision in *Macquarie*. As discussed above, the case arose out of the HB6 scandal in 2019.[207] The gist of the scandal is that FirstEnergy was facing financial issues related to two of its failing nuclear plants.[208] To "fix" those problems, FirstEnergy and its top executives secretly and illegally funneled $60 million dollars into the hands of Larry Householder, the Speaker of the Ohio House of Representatives, and his associates in order to secure the passage of HB6,[209] which was purported

206. In *Macquarie*, the Supreme Court made clear that it was no resolving the issue of whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions. 601 U.S. at 266 n.2.

207. *See supra* note 12. For a timeline of the HB6 scandal, see *Selling Out in the Statehouse*, THE CINCINNATI ENQUIRER (June 3, 2021), https://www.cincinnati.com/in-depth/news/politics/2021/06/03/ohio-corruption-house-bill-6-bribery-timeline-larry-householder/5248218001/ [https://perma.cc/UX9M-UTNR].

208. *See* John Seewer, *Nuclear Bailout Tied to Bribery Scandal Was Years in Making*, ASSOCIATED PRESS (Aug. 3, 2020), https://apnews.com/article/business-ohio-toledo-91ba582c11e9c773b18ffaf30bba63b1 [https://perma.cc/UE77-9LXC] (describing the financial issues related to the nuclear plants); Jackie Borchardt, *Nuclear Power Companies Have Spent Millions Lobbying for Subsidies. Should Ohio, Other States Bail Them Out?*, THE CINCINNATI ENQUIRER (Apr. 29, 2019), https://www.cincinnati.com/story/news/2019/04/29/ohio-nuclear-plant-bailout/3519840002/ [https://perma.cc/U5YV-RFHV] (same).

209. *See id. See also* Marty Schladen, *Attorneys Dig Up Thousands of New Documents in Case Against FirstEnergy*, THE OHIO CAP. J., https://ohiocapitaljournal.com/2023/09/22/attorneys-dig-up-thousands-of-new-documents-in-case-against-firstenergy/ [https://perma.cc/4UHQ-N5XE] (discussing how the money was passed from FirstEnergy to Householder and later used to "pass and protect a $1.3 billion ratepayer bailout that was mostly intended to prop up two Northern Ohio nuclear reactors FirstEnergy was spinning off").

to be a "clean energy" bill that would save jobs at nuclear power plants.[210] In reality, the bill was primarily designed to provide $2 billion dollars in benefits to FirstEnergy, including a $1.3 billion bailout of FirstEnergy's failing plants.[211]

In July 2020, the U.S. Attorney for the Southern District of Ohio announced that it filed a criminal complaint against Larry Householder and others for their role in the HB6 scandal.[212] The criminal complaint stated that from March 2017 to March 2020 Householder "received approximately $60 million from Company A entities" in exchange for assisting with the passage of HB6, which the complaint described "as a billion-dollar 'bailout' that saved from closure two failing nuclear power plants in Ohio affiliated with Company A."[213] Although "Company A" was not specifically defined as FirstEnergy, the complaint provided so many details about the company's business that it was generally understood that Company A referred to FirstEnergy.

On February 26, 2021, a consolidated class action complaint was filed in the Southern District of Ohio, with the plaintiffs seeking billions of dollars in damages from FirstEnergy under Sections 11, 12(a), and 15 of the 1933 Act and Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5.[214] The thrust of the complaint was that FirstEnergy made numerous statements about its legislative and regulatory pursuits, legal compliance,

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210. *See* Daniel Carson, *New Bill Could Be A Lifeline For Davis-Besse*, THE NEWS-MESSENGER (Apr. 12, 2019), https://www.thenews-messenger.com/story/news/local/2019/04/12/new-bill-could-help-davis-besse-continues-bankruptcy-proceedings/3425678002/ [https://perma.cc/HB6H-SDA7] (discussing the introduction of HB6); Stephen Abbott and Rushad Nanavatty, *HB6 Is a Terrible Deal for Ohio*, RMI (Dec. 22, 2020), https://rmi.org/hb6-is-a-terrible-deal-for-ohio/ [https://perma.cc/587A-EZ5Z].

211. *See supra* notes 147–49.

212. Press Release, U.S. Att'ys Off., S. Dist. of Ohio, Ohio House Speaker, Former Chair of Ohio Republican Party, 3 Other Individuals & 501(c)(4) Entity Charged in Federal Public Corruption Racketeering Conspiracy Involving $60 Million (July 21, 2020), https://www.justice.gov/usao-sdoh/pr/ohio-house-speaker-former-chair-ohio-republican-party-3-other-individuals-501c4-entity [https://perma.cc/FEQ9-G2J4].

213. Criminal Complaint at ¶ 9, *U.S. v. Matthew Borges*, No. 20-MJ-00526 (S.D. Ohio July 16, 2020).

214. Complaint, *In re* FirstEnergy Corp. Securities Litigation, No. 20-CV-03785, 2021 WL 2007418 (S.D. Ohio Feb. 26, 2021), ECF No. 72, ¶¶ 1, 13. The case was led by Lead Plaintiff Los Angeles County Employees Retirement Association. Lead Plaintiff was joined by Plaintiffs Amalgamated Bank, City of Irving Supplemental Benefit Plan, and Wisconsin Laborers' Pension Funds. *Id.* at 1.

internal controls, and corporate governance that were materially false and misleading when made because they failed to disclose the involvement of the company and its executives in the HB6 scandal.[215] In other words, the plaintiffs primarily alleged that FirstEnergy told half-truths to the market. The complaint asserted that the plaintiffs purchased FirstEnergy's securities at artificially inflated prices as a result.[216] The complaint further alleged that the truth came to light in July 2020 when the criminal complaint against Larry Householder was made public.[217] That same day, FirstEnergy's stock price dropped almost 35%, which represented a loss of over $7.68 billion in market value.[218] FirstEnergy's stock price continued to drop thereafter as more information related to the scandal came to light.[219]

At class certification, the parties went to battle over the applicability of the *Affiliated Ute* presumption to FirstEnergy's alleged half-truths. The plaintiffs took the position that they were entitled to the *Affiliated Ute* presumption because they "predominantly pled claims based on material omissions, and *Affiliated Ute* applies to claims 'involving primarily a failure to disclose.'"[220] This argument was premised on the plaintiffs' view that half-truths should be treated as omissions rather than affirmative misrepresentations. In fact, in their brief, the plaintiffs argued that "the alleged misstatements that were made in the form of affirmative misrepresentations can be properly characterized as primarily based on a failure to disclose since, at bottom, their falsity was due to the concealed scheme."[221] The plaintiffs further argued that under *Affiliated Ute*, once it is shown that the case is primarily based on omissions, all that is necessary to invoke that presumption is that the facts withheld be material, but materiality need not be proven at the class certification stage given the Supreme Court's ruling in Amgen.[222] Additionally, the plaintiffs argued that, in the alternative, they are entitled to the *Basic* presumption or both presumptions (with the *Affiliated Ute* presumption applying to the

215. *See id.* at ¶¶ 95–135.

216. *See id.* at ¶¶ 257–67.

217. *See Id.* at ¶ 143. *See also* Press Release, U.S. Att'ys Off., *supra* note 212.

218. *See id.* ¶ 258.

219. *See id.* ¶¶ 261, 264.

220. Plaintiffs' Motion for Class Certification at 17, *In re* FirstEnergy Corp. Securities Litigation, No. 20-CV-03785 (S.D. Ohio June 6, 2022), ECF No. 293 (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972)).

221. *Id.* at 18.

222. *Id.* at 17.

omissions and the *Basic* presumption applying to the affirmative misstatements).[223]

The defendants, on the other hand, took the opposite view, arguing that the plaintiffs were not entitled to the *Affiliated Ute* presumption because their claims were grounded in affirmative misrepresentations, not omissions.[224] The defendants' characterized plaintiffs' argument as superimposing a single omission—specifically, the company's role in the HB6 scandal and the risks related to it—to over "dozens and dozens" of affirmative misstatements.[225] The defendants argued that the presence of affirmative misstatements renders the case "a far cry" from the type of case *Affiliated Ute* was meant to address (*i.e.*, where it is impossible for plaintiffs to point to an affirmative misstatement).[226] The defendants further argued that the plaintiffs should not be entitled to both the *Affiliated Ute* and *Basic* presumptions simultaneously, pointing to a majority of the court's sister circuits holding that plaintiffs may invoke either, but not both presumptions.[227]

In March 2023, the district court entered an order certifying the plaintiffs' proposed class.[228] The court held that Rule 23's predominance requirement was met with respect to the plaintiffs' 1934 Act claims because the plaintiffs had established their entitlement to the *Affiliated Ute* presumption.[229] The court determined that the *Affiliated Ute* presumption is not limited to cases where the plaintiff's "allegations hinge mostly or exclusively on omissions."[230] The court then stated that even if it were, the *Affiliated Ute* presumption would still apply.[231] The court found that, "[i]n [its] view, the 'communications' and 'statements' here were 'primarily omissions-based' because they 'painted an incomplete

223. *Id.* at 19 n.7.

224. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification at 1, *In re* FirstEnergy Corp. Sec. Litig., No. 20-CV-3785 (S.D. Ohio Aug. 17, 2022), ECF No. 327.

225. *Id.* at 20, 22.

226. *Id.* at 22.

227. *Id.* at 17–18 (citing cases).

228. *In re* FirstEnergy Corp. Sec. Litig., No. 20-CV-3785, 2023 WL 2709373 (S.D. Ohio Mar. 30, 2023), *opinion clarified*, No. 20-CV-03785, 2023 WL 8105252 (S.D. Ohio Apr. 18, 2023) [hereinafter FirstEnergy Class Certification Order].

229. *See* FirstEnergy Class Certification Order at *19–20, *23.

230. *See id.* at *19.

231. *Id.* at *19–20.

picture of the alleged truth.'"[232] In other words, the court treated the defendants' alleged half-truths as pure omissions rather than affirmative misstatements, thus rendering the *Affiliated Ute* presumption appropriate. The court went a step further and stated that even if the case primarily involved affirmative misstatements, the plaintiffs would still be entitled to the *Affiliated Ute* presumption, at least with respect to the alleged omissions, while the *Basic* presumption would apply to the alleged misstatements.[233] Additionally, the court seemingly accepted the plaintiffs' argument—without citing to Amgen—that the materiality requirement was satisfied at the class certification stage so long as it was pled.[234] The court found that the materiality requirement was met based on its prior finding that the plaintiffs pleaded materiality at the motion to dismiss stage.[235]

In April 2023, FirstEnergy filed a Rule 23(f)[236] petition seeking the Sixth Circuit's review of the district court's class certification order with respect to the 1934 Act claims.[237] One of the questions presented on appeal is "[w]hether the district court erred in extending the *Affiliated Ute* presumption of reliance to cover claims based on half-truths."[238] While the case was pending on appeal, the Supreme Court issued its ruling in *Macquarie*.[239] Accordingly, the parties filed letters addressing *Macquarie*'s applicability to the case. The defendants argued that *Macquarie* clearly distinguished half-truths from pure omissions, thereby confirming that half-truths are not omissions for purposes of the *Affiliated Ute* presumption. Conversely, the plaintiffs argued that the *Affiliated Ute* presumption could still apply to half-truths because *Macquarie* did not expressly preclude it.

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232. *Id.* at *20.

233. *See id.*

234. *See id.*

235. *See id.*

236. Rule 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification." FED. R. CIV. P. 23. *See also* Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROCESS 283, 284–86, 295 (2022) (discussing the creation of Rule 23(f) and the procedure for invoking it).

237. Defendants' Petition for Permission to Appeal, *In re* FirstEnergy Corp. Sec. Litig., No. 03-0303 (6th Cir. Apr. 13, 2023), ECF No 1.

238. *Id.* at 5.

239. Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257 (2024).

VII. THE *AFFILIATED UTE* PRESUMPTION SHOULD NOT APPLY TO RULE 10B-5(B) CLAIMS BASED ON HALF-TRUTHS POST-*MACQUARIE*

With its decision in *Macquarie*, the Supreme Court made clear that pure omissions are not actionable under Rule 10b-5(b). Lower federal courts should therefore consider adopting the following proposal for securities fraud class actions: regardless of whether the plaintiff alleges half-truths, affirmative misrepresentations, or some combination of the two, the *Basic* presumption is the only path available for establishing a classwide presumption of reliance at the class certification stage. In other words, plaintiffs are foreclosed from arguing that half-truths, which are distinct from pure omissions, should nonetheless be treated as such for purposes of the *Affiliated Ute* presumption, despite the fact that claims based on pure omissions are not actionable under Rule 10b-5(b). There are a number of reasons why this should be the case.

As an initial matter, this proposal is entirely consistent with both the plain language of the Supreme Court's decision in *Affiliated Ute* and the reasoning that underlies it—both of which make clear that the *Affiliated Ute* presumption was never meant to apply in situations where the defendants have made positive statements. In *Affiliated Ute*, the Supreme Court found that the defendants had a duty to disclose the higher prices available in the non-Ute Indian market and their financial interest in the transactions.[240] The Court explained:

> It is no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation or recommendation. The defendants may not stand mute while they facilitate the mixed-bloods' sales to those seeking to profit in the non-Indian market the defendants had developed and encouraged and with which they were fully familiar. The sellers had the right to know that the defendants were in a position to gain financially from their sales and that their shares were selling for a higher price in that market.[241]

The Court went on to hold that "[u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery."[242] *Affiliated Ute* itself therefore involved pure omissions, and the plaintiffs received the benefit of a presumption of

240. 406 U.S. 128, 153 (1972).
241. *Id.*
242. *Id.* (emphasis added).

reliance only because the Court recognized the impossibility of proving reliance on statements that were never made. That evidentiary impossibility does not exist where defendants have told half-truths. In that situation, plaintiffs are capable of pointing to the statements they claim to be misleading by virtue of what they omit.

This proposal also avoids a situation where the exception (*i.e.*, the *Affiliated Ute* presumption) entirely swallows the rule (*i.e.*, the reliance requirement).[243] The reliance element is a critical element of Rule 10b-5(b).[244] However, a plaintiff need not provide specific proof of reliance when the *Affiliated Ute* presumption applies.[245] And if the *Affiliated Ute* presumption is expanded to half-truths, it could apply in nearly every securities fraud class action because affirmative misstatements and pure omissions can be easily reframed as half-truths. The reliance element would therefore be effectively eliminated in its entirety in securities fraud class actions. The same would be true with respect to the entire class certification regime that the Supreme Court has spent decades crafting. Monumental decisions—like *Amgen*, *Halliburton I*, *Halliburton II*, and *Goldman Sachs*—would likely have little relevance in a world dominated by the *Affiliated Ute* presumption.

Additionally, this proposal is entirely consistent with the majority of federal appellate courts that have already addressed the issue. Indeed, even before the Supreme Court decided *Macquarie*, at least eight other federal courts of appeals have held that the *Basic* presumption, not the *Affiliated Ute* presumption, applies to claims based on half-truths.[246] For

243. Numerous courts have expressed this precise concern. *See, e.g.*, Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000), *abrogated by* California Pub. Emps. Ret. Sys. v. ANZ Sec., Inc., 582 U.S. 497 (2017); Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 193 (3d Cir. 2001).

244. *See* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 159 (2008) (stating that reliance is an "essential element" of a Section 10(b) claim because "[i]t ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability" (citation omitted)).

245. *See Stoneridge*, 552 U.S. at 159.

246. *See, e.g.*, Waggoner v. Barclays PLC, 875 F.3d 79, 96 (2d Cir. 2017); Johnston., 265 F.3d at 193; Abell v. Potomac Ins. Co., 858 F.2d 1104, 1119 (5th Cir. 1988); Rowe v. Maremont Corp., 850 F.2d 1226, 1233 n.4 (7th Cir. 1988); Vervaecke v. Chiles, Heider & Co., Inc., 578 F.2d 713, 717–18 n.2 (8th Cir. 1978); *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig., 2 F.4th 1199, 1208–09 (9th Cir. 2021); *Joseph*, 223 F.3d at 1162–63; *In re* Interbank Funding Corp. Sec. Litig., 629 F.3d 213, 220 (D.C. Cir. 2010).

example, in *Waggoner v. Barclays*, the Second Circuit held that "the *Affiliated Ute* presumption does not apply to earlier misrepresentations made more misleading by subsequent omissions, or to what has been described as 'half–truths,' nor does it apply to misstatements whose only omission is the truth that the statement misrepresents."[247]

If federal courts reject this proposal and instead allow the *Affiliated Ute* presumption to apply to half-truths notwithstanding the Supreme Court's decision in Macquarie, it could have potentially far-reaching implications for securities fraud class actions. Most importantly, it will render class certification all but a formality. In nearly every securities fraud class action, plaintiffs will be incentivized to artfully recast their claims—whether based on pure omissions or affirmative misstatements—as claims based on half-truths in order to take advantage of the *Affiliated Ute* presumption. There are at least two reasons for this. First, it will enable plaintiffs to circumvent the Supreme Court's ruling in Macquarie (at least with respect to Rule 10b-5(b) claims that are properly characterized as pure omissions). Second, as compared to the *Basic* presumption, the *Affiliated Ute* presumption is far easier (and cheaper) for plaintiffs to establish and harder for defendants to rebut. Unlike the *Basic* presumption, plaintiffs invoking the *Affiliated Ute* presumption need not show market efficiency, which can be both costly and time consuming because it usually requires the retention of an expert. Instead, they often need only show that they pled (not proved) the omission of material facts to invoke the presumption.[248] For defendants, it is not clear what, if anything, they can do to rebut the *Affiliated Ute* presumption. While the Supreme Court has clearly established the ways in which defendants can rebut the *Basic* presumption, it has not done the same with respect to the *Affiliated Ute* presumption. This means defendants will have to somehow prove that the plaintiffs did not rely on the half-truth at issue in making their investment decision.

How to apply a presumption of reliance to a half-truth case has been the subject of confusion, if not outright controversy, in recent years. This proposal closes the pathway to the *Affiliated Ute* presumption of reliance for claims based on half-truths in securities fraud class actions, and in doing so, strikes an appropriate balance between affording plaintiffs the

247. *See* 875 F.3d at 96.

248. *See, e.g.*, Burges v. Bancorpsouth, Inc. No. 14-CV-1564, 2017 WL 2772122, at *10 (M.D. Tenn. June 26, 2017) (applying the *Affiliated Ute* presumption at the class certification stage because plaintiffs had pled materiality).

right to invoke a presumption of reliance and instituting necessary guardrails for the protection of defendants.