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Eighth Circuit Holds Presumption of Reliance Rebutted Under *Halliburton II* and Reverses Class Certification in Securities Action

On April 12, 2016, in *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. 14-3178, slip. op. (8th Cir. Apr. 12, 2016), the United States Court of Appeals for the Eighth Circuit became the first Court of Appeals to hold that a defendant had rebutted *Basic*'s presumption of reliance by showing lack of price impact pursuant to the U.S. Supreme Court's decision in *Halliburton II*.¹ More specifically, the *Best Buy* court rejected Plaintiffs' contention that alleged misrepresentations had artificially maintained stock prices, even though Plaintiffs alleged a subsequent corrective disclosure had led to a significant stock-price decline. The decision makes clear that lack of price impact remains a significant avenue of attack in the class certification context—at least in the Eighth Circuit, and with the right set of facts.

The *Best Buy* action involves three alleged misrepresentations—all of which related to one another and occurred within a few hours. The first alleged misrepresentation, which adjusted earnings guidance upward, was contained in an 8:00 a.m. press release and appeared to have a significant positive impact on Best Buy's stock price. The latter two alleged misrepresentations were made during a subsequent 10:00 a.m. conference call, also related to the company's progress in meeting its earnings guidance, and had no discernible effect on stock price. The Eighth Circuit affirmed that the earnings guidance in the press release was a protected forward-looking statement and, therefore, was not actionable. The court further held that, because there was no discernible price impact from the latter two statements, they could not provide a basis for the fraud-on-the-market presumption and, therefore, the class could not be certified.

Background

In *Halliburton II*, the Supreme Court reaffirmed the fraud-on-the-market presumption of reliance, set forth in *Basic*, that investors seeking to certify securities class actions under Securities Exchange Act Rule 10b-5 may satisfy Federal Rule of Civil Procedure 23's predominance requirement if the alleged material misrepresentations were

¹ *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014); see also *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

reflected in the price of the securities at the time of purchase.² The Court also held that defendants have the right to rebut the presumption of reliance by, among other things, providing evidence that shows that alleged misrepresentations did not actually affect the stock price when made (i.e., that the misrepresentations had no “price impact”).³ At the time *Halliburton II* was issued, commentators noted that the price impact issue might be a difficult one in so-called “price maintenance” cases, in which plaintiffs allege that misrepresentations that do not increase a stock’s price nevertheless prevent stock prices from falling.

Best Buy involves such a scenario. On September 14, 2010, Best Buy and its representatives (1) released an announcement at 8:00 a.m. that it was increasing its full year earnings-per-share guidance; (2) made a statement during a 10:00 a.m. conference call that “we are pleased that our earnings are essentially in line with our original expectations for the year”; and (3) made an additional statement during that call that “we are on track to deliver and exceed our annual EPS guidance.”⁴ On December 14, 2010, Best Buy announced lower than expected third quarter sales and reduced its fiscal year earnings-per-share guidance, allegedly causing its stock price to fall.⁵

Plaintiffs then brought a class action against Best Buy and certain executives under Securities Exchange Act Rule 10b-5.⁶ Although the district court dismissed Plaintiffs’ claims relating to the statement in the press release on the basis that it was forward looking and accompanied by meaningful cautionary language,⁷ it held the conference-call statements constituted actionable statements regarding existing conditions.

In support of class certification, Plaintiffs’ expert testified that Best Buy’s stock price increased in reaction to all three statements.⁸ Defendants’ expert, however, established that the stock price had increased only after the 8:00 a.m. press release, and that the stock price before the call began was essentially the same as that day’s closing price. Importantly, Plaintiffs’ expert argued that this was because “the economic substance” of the

² See *Halliburton II*, 134 S. Ct. at 2410. For additional analysis of *Halliburton II*, see *Supreme Court Preserves “Fraud-on-the-Market” and Validates Use of “Price Impact” Defense Against Class Certification in Securities Class Actions*, SHEARMAN & STERLING LLP (June 26, 2014), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/06/Supreme-Court-Preserves-FraudontheMarket-and-Validates-Use-of-Price-Impact-Defense-LT-062614.pdf>; N.Y.C. BAR ASS’N COMM. ON SEC. LITIG., REPORT ON THE POSSIBLE IMPACT OF HALLIBURTON II ON SECURITIES CLASS ACTION LITIGATION (May 28, 2014), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/06/LT-060414-NYCBA-SLC-Halliburton.pdf>.

³ *Halliburton II*, 134 S. Ct. at 2414.

⁴ *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. 14-3178, slip. op. at 3 (8th Cir. Apr. 12, 2016).

⁵ *Id.* at 3.

⁶ *Id.* at 3–4.

⁷ *IBEW Local 98 Pension Fund v. Best Buy Co.*, 958 F. Supp. 2d 1065, 1075 (D. Minn. 2013); see also 15 U.S.C. § 78u-5(c)(1), (2) (safe harbor provision).

⁸ *Best Buy Co.*, No. 14-3178, slip. op. at 6.

Defendants' disclosure occurred in the press release and was "virtually the same" as the statements made in the conference call.⁹

The district court certified the class, concluding that "price impact can be shown by a decrease in price following a revelation of the fraud" (what many would call "loss causation") and that Defendants had "not offered evidence to show that Best Buy's stock price did not decrease when the truth [regarding its performance] was revealed."¹⁰ Defendants then sought and obtained interlocutory review under Federal Rule of Civil Procedure 23(f).

The Eighth Circuit's Decision

The Eighth Circuit reversed in a 2 – 1 decision and held that the lack of price movement following the conference call established that the statements made during that call did not result in additional price impact, particularly in light of the conclusions by the Plaintiffs' expert that "the economic substance" of the press release and the conference call statements "was 'virtually the same,'"¹¹ and that investors gave the non-actionable press release statement "great weight."¹² The majority flatly rejected Plaintiffs' additional contention that "the conference call statements effected a gradual increase in stock price between September and December" 2010 as "contrary to the efficient market hypothesis."¹³

In dissent, Judge Murphy wrote that Plaintiffs contended that Best Buy's statements during its press conference "fraudulently maintained its stock at a constant price and counteracted expected price declines."¹⁴ Therefore, Judge Murphy stated, "Best Buy could have rebutted the presumption of reliance by producing evidence showing that the alleged misrepresentations had not counteracted a price decline that would otherwise have occurred" but Best Buy failed to do so.¹⁵ Judge Murphy noted that other courts had upheld such claims, and expressed the view that, in rejecting the class in this case, the Eighth Circuit had "not joined the circuit courts that have recognized price maintenance theories to be cognizable under the Securities Exchange Act."¹⁶ Judge Murphy also wrote that she would have affirmed the district court's conclusion that "the statements in the conference call were not identical to those in the press release because the conference call also contained statements of current facts reflecting upon Best Buy's current position and historical performance up until that point in the fiscal year."¹⁷

⁹ *Id.* at 7.

¹⁰ *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. CIV. 11-429 DWF/FLN, 2014 WL 4746195, at *6 (D. Minn. Aug. 6, 2014).

¹¹ *Best Buy Co.*, No. 14-3178, slip. op. at 11.

¹² *Id.*

¹³ *Id.* at 12.

¹⁴ *Id.* at 14 (Murphy, J., dissenting).

¹⁵ *Id.*

¹⁶ *Id.* at 15.

¹⁷ *Id.*

Significance of the Eighth Circuit's Decision

Although the timing and relationship of the alleged misrepresentations provides a particular set of circumstances, the Eighth Circuit's decision is notable in that it gives short shrift to the Plaintiffs' price maintenance theory and shows that *Halliburton II*'s rebuttal standard has real teeth. Other courts have held that it is sufficient to allege that there was an actionable misrepresentation followed by a price decline upon an alleged corrective disclosure. Indeed, the *Halliburton* action itself is currently before the Fifth Circuit for a third time on a Rule 23(f) appeal of class certification, where one of the questions to be addressed includes whether the district court may examine the relationship between an alleged corrective disclosure and an alleged misrepresentation at all once an actionable price drop is established.¹⁸

Thus, this decision arguably creates a split in authority. The Seventh Circuit¹⁹ and Eleventh Circuit²⁰ have upheld theories of securities fraud based on the allegation that false statements prevented artificially inflated stock prices from dropping. Other lower courts have also certified classes where plaintiffs have alleged a price maintenance theory.²¹ The Eighth Circuit's decision at least casts doubt on when such reasoning may be applied and the extent to which the impact of allegedly false statements may be examined on class certification.²² *Halliburton III* remains a possibility.

¹⁸ See *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260 (N.D. Tex. 2015).

¹⁹ See *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 419 (7th Cir. 2015); *Schleicher v. Wendt*, 618 F.3d 679, 683–84 (7th Cir. 2010).

²⁰ *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1314 (11th Cir. 2011).

²¹ E.g., *Strougo v. Barclays PLC*, 312 F.R.D. 307, 325 (S.D.N.Y. 2016).

²² See *Best Buy Co.*, No. 14-3178, slip. op. at 14 (Murphy, J., dissenting) ("The majority ignores IBEW's theory that the conference call statements prevented the stock price from declining . . .").

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