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Challenging the Presumption of Reliance on Class Certification after *Halliburton* and *Wal-Mart*

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The U.S. Supreme Court's recently completed Term included three private securities-fraud cases, including one—*Erica P. John Fund v. Halliburton*[1]—that focused specifically on the class-certification stage of such actions.[2] The same Term brought three class-action decisions, including one—*Wal-Mart Stores v. Dukes*[3]—that addresses some of the same issues as *Halliburton*.[4]

Together, the *Halliburton* and *Wal-Mart* decisions point the way for defendants in securities cases to challenge the "fraud-on-the-market" presumption of reliance, as articulated in *Basic Inc. v. Levinson*,[5] that private plaintiffs almost invariably invoke in order to secure class certification.

This proposition might not be self-evident, since the investor-plaintiffs prevailed in *Halliburton*, while *Wal-Mart* was an employment discrimination case rather than a securities-fraud suit. But a close examination of what the Court did *not* decide in *Halliburton* (the plaintiffs' entreaties notwithstanding), coupled with what the *Wal-Mart* Court *did*, should be of great interest, and import, to securities defendants faced with class-certification motions in cases involving the presumption of reliance.

Background

"Under Rule 10b-5," adopted by the Securities and Exchange Commission pursuant to § 10(b) of the Securities Exchange Act of 1934, "it is unlawful for 'any person, directly or indirectly, ...[t]o make any untrue statement of a material fact' in connection with the purchase or sale of securities."[6] The Supreme Court has implied a private right of action to enforce Rule 10b-5, although it has also recognized that "we must give 'narrow dimensions... to a right

of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'"[7]

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The elements of the implied private right to enforce Rule 10b-5 are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[8]

The Supreme Court has repeatedly emphasized that reliance is an essential element of the private right of action: Without adequately pleading (and, ultimately, proving) reliance, an investor cannot prevail on a claim of securities fraud.[9] Most securities plaintiffs, however, do not even attempt to prove that they—or the unnamed class members they seek to represent—*actually* relied on the alleged misstatements or omissions that they accuse the defendant of making. That is because actual reliance is an individualized inquiry that, in a class action, would "predominate" over any common issues and therefore preclude class certification.[10]

The Supreme Court has recognized two *presumptions* of reliance that may be invoked by securities plaintiffs who wish to proceed via class action. The most common is the "fraud-on-the-market" presumption described in *Basic*. It posits that the market price of shares traded on developed and efficient markets reflects all publicly available information, warranting the "assum[ption]... that an investor relies on public misstatements whenever he 'buys or sells stock at the price set by the market.'"[11] The other presumption, announced in *Affiliated Ute Citizens of Utah v. U.S.*,[12] presumes that investors rely on *omissions* made by one who owes a duty to the purchaser or seller to disclose the omitted information.

Both of these presumptions were created before Congress codified the implied private right in the Private Securities Litigation Reform Act of 1995 (PSLRA).[13] That legislation, the Court has held, "froze" the contours of the private right as it then existed and precluded further judicial innovation.[14] In particular, the PSLRA prevents courts from inventing any new presumptions of reliance.[15] An investor-plaintiff seeking to certify a class action, therefore, must fit its case within either *Basic* or *Affiliated Ute*.

The Fifth Circuit, in *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*,[16] a case that preceded *Halliburton*, had held that class plaintiffs must prove the separate element of loss causation in order to invoke the *Basic* presumption of reliance. In *Halliburton*, the district court declined to certify the class because the named plaintiff had failed to establish loss causation, and the Fifth Circuit affirmed based on this "fail[ure] to meet the 'requirements for proving loss causation at the class certification stage.'"[17]

The Supreme Court granted *certiorari* to resolve a conflict between the Fifth Circuit's rule and what was being applied in other circuits, and rather summarily rejected the Fifth Circuit approach. In a unanimous opinion authored by Chief Justice John G. Roberts, the Court noted that "we have never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance. And for good reason: Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock."[18]

The Supreme Court granted certiorari [in Halliburton] to resolve a conflict between the Fifth Circuit's rule and what was being applied in other circuits, and rather summarily rejected the Fifth Circuit approach.

Because "[l]oss causation has no logical connection to the facts necessary to establish the efficient

market predicate to the fraud-on-the-market theory," the Supreme Court concluded that the Fifth Circuit was wrong to require securities plaintiffs "to show loss causation as a condition of obtaining class certification."[19]

Discussion

The *holding* of *Halliburton* is straightforward and requires little in terms of explication: Loss causation and reliance are separate elements of the Rule 10b-5 private right, and thus proof of loss causation is not a necessary precondition to invoking the *Basic* presumption of reliance. Indeed, in the Supreme Court, counsel for "Halliburton concede[d] that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presumption of reliance or otherwise achieve class certification."[20]

The tantalizing part of *Halliburton* for future litigants lies in the decision's rather laconic penultimate paragraph:

> **Because we conclude the Court of Appeals erred by requiring [the named plaintiff] to prove loss causation at the certification stage, *we need not, and do not, address any other question about Basic, its presumption, or how and when it may be rebutted.*[21]**

It is important to remember that the petition for a writ of certiorari in *Halliburton* presented *two* questions for the Court's decision: The first, which the Court answered in the affirmative, was whether the Fifth Circuit had erred in concluding that loss causation is a predicate to the *Basic* presumption of reliance; the second, which the Court reserved, was whether the Fifth Circuit had "improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23."[22]

Two weeks later, the Supreme Court in *Wal-Mart* decided the question that it had reserved in *Halliburton*—and it squarely rejected the position advanced expressly by the *Halliburton* plaintiff and implicitly by the *Wal-Mart* plaintiffs. *Wal-Mart* was a sex-discrimination case that the lower courts had said could proceed as a class action. En route to reversing that determination, the Court emphasized that "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule... ."[23]

In *General Telephone Co. of the Southwest v. Falcon*,[24] the Court had previously recognized that the "rigorous analysis" required under Rule 23 may require courts "to probe behind the pleadings before coming to rest on the certification question," which "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[25] In *Wal-Mart*, the Court confirmed that this "[f]requently... will entail some overlap with the merits of the plaintiff's claim. That cannot be helped."[26]

> ***[T]he Supreme Court in Wal-Mart decided the question that it had reserved in Halliburton—and it squarely rejected the position advanced expressly by the Halliburton plaintiff and implicitly by the Wal-Mart plaintiffs.***

The *Wal-Mart* Court noted that a passage in *Eisen* "is sometimes mistakenly cited to the contrary."[27] (In fact, the *Halliburton* plaintiffs had cited it for exactly that purpose.) The Court held that *Eisen* is limited to the question of who bears the cost of notice, and that "[t]o the extent [it] goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases."[28]

Wal-Mart thus accepted the consensus view of the courts of appeals, which recognize that courts must resolve factual issues that pertain to Rule 23's prerequisites before certifying a class, even if those issues overlap with the merits.[29]

Intriguingly, the *Wal-Mart* Court then used the presumption of reliance in securities cases to illustrate the operation of this rule:

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. *To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, an issue they will surely have to prove again at trial in order to make out their case on the merits.*[30]

So the conjunction of *Wal-Mart* and *Halliburton* establishes that securities plaintiffs must prove, *before* a class can be certified, that the essential predicates to the *Basic* presumption are met. *Halliburton* holds that loss causation is not such a prerequisite, but it also recognizes that "securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance."[31] "[F]or example," the Court continued, such things include "that the alleged misrepresentations were publicly known... , that the stock traded in an efficient market, and that the relevant transaction took place between the time the misrepresentations were made and the time the truth was revealed."[32] As the Court's use of "for example" signifies, this list is not exhaustive.

One immediate consequence of this conjunction will be to require a securities plaintiff to introduce *evidence*–by means of expert reports or otherwise–on *Basic*'s predicates together with a motion for class certification. They cannot merely rest, as they often do now, on allegations in the complaint to the effect that, because the stock in issue trades on a major market, the *Basic* presumption applies. Rather, they will have to demonstrate not just market efficiency (which is hardly a foregone conclusion for all securities), but also the public's knowledge of the misstatements, when those misstatements were made, and when any corrective disclosures were issued. Requiring such proof, in itself, should help courts define more precisely the parameters of investor classes that may sue to enforce Rule 10b-5.

The courts of appeals recognize, correctly, that where the plaintiff bears the burden of proving an issue that is a prerequisite to class certification, it must carry that burden by a preponderance of the evidence.[33] Thus, the evidence with respect to *Basic* (and all other Rule 23 issues) must be more than just "plausible"–the standard that all federal pleadings must meet;[34] rather it must be sufficient to allow the district court to find in the proponents' favor at the class-certification stage.

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If expert evidence is submitted at class certification–for example, an event study analyzing stock price movements–that evidence must meet the standards for admissibility of expert testimony set forth in Federal Rule of Evidence 702, which implements the Court's *Daubert* decision.[35] The *Wal-Mart* Court hinted as much,[36] and the courts of appeals that have addressed the point hold that *Daubert* scrutiny is appropriate at the class-certification stage.[37]

And in addition to being *admissible*, that evidence must also be sufficiently *convincing* to meet the plaintiff's burden of satisfying Rule 23. The plaintiffs in *Wal-Mart* submitted expert testimony supporting certification, but the Court analyzed the expert's conclusions and rejected them.[38] Certifying a class without exercising such scrutiny would "amount[] to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert."[39]

In many cases, the plaintiffs' proof as to these prerequisites will not stand unchallenged. If the defendant

has evidence that the securities do not trade on an efficient market (because they are restricted, thinly traded, or for any other reason), then it may introduce that evidence—through a competing expert report or otherwise—to challenge the plaintiffs' proffer. Likewise, if the defendant wishes to challenge the plaintiffs' assertions regarding whether and when a misstatement was made (and subsequently corrected) to the public, it must be given that opportunity.[40] District courts must engage in this "battle of the experts," because "[w]eighing conflicting expert testimony at the class certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[41]

At class certification, "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives."[42] District courts have not just the authority but the obligation to resolve disputes that go to the Rule 23 requirements, even if they overlap with the "merits" of the dispute.[43] Where necessary to fully analyze the Rule 23 requirements, district courts must weigh the evidence presented by the parties and make factual findings regarding the evidence that is "enmeshed" with the class-certification analysis.[44] In short: "Class certification requires a *finding* that each of the requirements of Rule 23 has been met."[45]

Moreover, the *Halliburton* Court stressed that the fraud-on-the-market presumption of reliance is *rebuttable*.[46] *Basic* itself recognized that the presumption can be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[47]

Thus, where the plaintiff invokes the *Basic* presumption, and offers proof that its predicates are met in a particular case, the necessary corollary is that the defendant may try to rebut the plaintiff's showing *at the class certification stage*. Indeed, at oral argument Justice Samuel Alito asked counsel for the *Halliburton* plaintiffs: "Can the *Basic* presumption be rebutted at the certification stage?" And plaintiffs' counsel responded: "The *Basic* presumption of reliance, yes, Your Honor."[48]

To be sure, there is a footnote in *Basic* which says that rebutting the presumption "is a matter for trial."[49] Securities plaintiffs in future cases will undoubtedly point to this in support of their argument that rebuttal evidence should *not* be considered at class certification. Any such argument, however, would be irreconcilable with *Wal-Mart*.

The courts of appeals correctly recognized, even before *Halliburton*, that evidence offered to rebut the *Basic* presumption must be considered, and resolved, at the class-certification stage. As the Second Circuit put it, the requisite "definitive assessment that the Rule 23(b)(3) predominance requirement has been met... cannot be made without determining whether defendants can successfully rebut the fraud-on-the-market presumption."[50]

The *Wal-Mart* Court specifically recognized that the *Basic* presumption must be proved *both* on class certification *and* at trial.[51] And what must be proved may be disproved (or rebutted), again both on class certification and at trial. Any other approach would revive the "class/merits" distinction that the Court buried in *Wal-Mart*.

The Wal-Mart Court specifically recognized that the Basic presumption must be proved both on class certification and at trial.

In future cases, some plaintiffs might argue that evidence that tends to prove or disprove loss causation (such as the statistical significance of stock price movements following statements or other events) should not be considered at class certification under *Halliburton*. Any such argument would be misplaced: *Halliburton* holds only that proof of loss causation *itself* is not required to certify a class, not that *evidence* related to loss causation is irrelevant at class certification. Nor could it have so held, since the Court has repeatedly recognized the interrelationships between the elements of the private Rule 10b-5 cause of action, including particularly causation and reliance.[52] An event study or other evidence that is relevant to reliance, and specifically the fraud-on-the-market presumption, must be considered if offered at class certification even if that same evidence would also be relevant at summary judgment or trial on the question of loss causation.[53]

The *Basic* presumption can be rebutted not just by disproving one of its predicates, but also by "*[a]ny*" evidence that tends to break the "causal connection"

between the alleged misstatement and the market price of a security.[54] As one knowledgeable observer has remarked:

> **The [*Halliburton*] Court specifically held open the possibility that class certification should be denied when the plaintiffs cannot establish, at the certification stage, that the misrepresentations had an impact on market price. Indeed, the Court acknowledged Halliburton's argument that if a misrepresentation does not affect market price, an investor could not have relied on the misrepresentation simply by purchasing stock at that price.[55]**

The Court's *Janus* decision points to other avenues of potential rebuttal evidence: For example, whether (and, if so, when and how) the defendant made a "public misstatement."[56] The PSLRA already requires securities plaintiffs to plead each and every misstatement on which they base their claim;[57] *Halliburton* reconfirmed that such misstatements must have been communicated to the public, "else how would the market take them into account?"[58] In many cases, however, it is far from clear if, or when, the challenged statements made their way into the public domain, and in such cases this could become a focus of contention at the class-certification stage.

A defendant may also defeat certification under *Janus* by showing that the market could not have relied on a defendant's statement because the defendant was not the "maker" of the statement.[59] *Stoneridge* and *Janus* both hold that the market is not entitled to rely on parties who simply participate in the creation of another's statement that is alleged to be fraudulent.[60] Accordingly, in an appropriate case, a defendant could defeat the *Basic* presumption by showing that it was not within the class of defendants on whom the market is entitled to rely.

The certification-stage challenges to the *Basic* presumption contemplated by *Halliburton* and authorized by *Wal-Mart* should have two significant benefits for litigants and courts confronting private securities class actions. First, a judicial ruling on whether or not the *Basic* presumption applies will, as a practical matter, often determine whether or not the case can proceed as a class action.[61] Second, even where the *Basic* presumption is applicable, judicial rulings on such matters as the timing and content of the misstatements and corrective disclosures at issue, and their effect (if any) on the market price–that is, the predicates to *Basic* and any rebuttal evidence–should help clarify the claim and ensure that the class definition is narrowly tailored to include only those persons who can satisfy the requirements of Rule 23 and thus be bound by a classwide judgment.[62]

Conclusion

Reliance is an essential element of a claim for securities fraud. Such a claim usually cannot proceed as a class action without the "fraud on the market" presumption of reliance, because in the absence of that presumption individuated issues of reliance will "predominate" over the common issues in the case.

The recent decisions in *Halliburton* and *Wal-Mart* confirm the plaintiff in such a case must prove its entitlement to the *Basic* presumption at the class-certification stage, and the district court must also resolve at that stage any challenges to the applicability of the presumption put forward by the defendant, including any rebuttal evidence offered to break the "causal connection" between the challenged statements and the market price of the securities in issue.

NOTES

1. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, Fed. Sec. L. Rep. (CCH) P 96323 (2011).
2. The other two were *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 179 L. Ed. 2d 398, Fed. Sec. L. Rep. (CCH) P 96249 (2011), and *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, Fed. Sec. L. Rep. (CCH) P 96327 (2011).
3. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193 (2011).
4. The other two were *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011), and *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).
5. *Basic Inc. v. Levinson*, 485 U.S. 224, 242, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).
6. *Janus*, slip op. 5 (quoting 17 C.F.R. § 240.10b-5(b)).

7. *Janus*, slip op. 6 (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165, 128 S. Ct. 761, 169 L. Ed. 2d 627, Fed. Sec. L. Rep. (CCH) P 94556 (2008)); see generally Mark A. Perry, Stoneridge *and the Continued Reconceptualization of Implied Private Rights of Action*, Wall St. Lawyer, Feb. 2008.
8. *Matrixx*, slip op. 9 (quoting *Stoneridge* at 157).
9. *Stoneridge*, 552 U.S. at 159; see also, e.g., *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180, 114 S. Ct. 1439, 128 L. Ed. 2d 119, Fed. Sec. L. Rep. (CCH) P 98178 (1994).
10. Fed. R. Civ. P. 23(b)(3); *see Basic*, 485 U.S. at 242 ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones").
11. *Halliburton*, slip op. 6 (quoting *Basic*, 485 U.S. at 244, 247).
12. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 152-53, 92 S. Ct. 1456, 31 L. Ed. 2d 741, Fed. Sec. L. Rep. (CCH) P 93443 (1972).
13. Private Securities Litigation Reform Act of 1995; 15 U.S.C.A § 78j.
14. *Stoneridge*, 552 U.S. at 165; Perry, *supra* note 7, at 3.
15. *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 754, Fed. Sec. L. Rep. (CCH) P 95931 (3d Cir. 2010) (courts must "reject[t]... new presumptions of reliance" after the PSLRA).
16. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007).
17. *Halliburton*, slip op. 3 (quoting decision below).
18. *Halliburton*, slip op. 6.
19. *Halliburton*, slip op. 8.
20. *Halliburton*, slip op. 8.
21. *Halliburton*, slip op. 9 (emphasis added).
22. Petition for a Writ of Certiorari at i, *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403 (U.S. June 6, 2011).
23. *Wal-Mart*, slip op. 10.
24. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740, 28 Fair Empl. Prac. Cas. (BNA) 1745, 29 Empl. Prac. Dec. (CCH) P 32781, 34 Fed. R. Serv. 2d 371 (1982)
25. *Gen. Tel. Co.*, 457 U.S. at 147, 160-61.
26. *Wal-Mart*, slip op. 10.
27. *Wal-Mart*, slip op. 10 n.6.
28. *Wal-Mart*, slip op. 10 n.6.
29. *Wal-Mart*, slip op. 11 (citing *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 676-77, 49 Fed. R. Serv. 3d 716 (7th Cir. 2001)). The leading court of appeals cases in this area are *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), and *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009).
30. *Wal-Mart*, slip op. 11 n.6 (citing *Halliburton*, slip op. 5) (emphasis added).
31. *Halliburton*, slip op. 5.
32. *Halliburton*, slip op. 5-6.
33. *Hydrogen Peroxide*, 552 F.3d at 320; *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); see also *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009) (per curiam).
34. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007).
35. The *Daubert* standard concerns the admissibility of expert witness testimony and was articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
36. *Wal-Mart*, slip op. 14 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so ....") (internal citation omitted).
37. *See Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (per curiam); *Hydrogen Peroxide*, 552 F.3d at 315 n.13; *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005).
38. *Wal-Mart*, slip op. 13-14.
39. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *see also Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 822-23 (7th Cir. 2011); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008); *IPO*, 471 F.3d at 42; *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 366-67 (4th Cir. 2004).
40. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 & n.4 (2d Cir. 2008).
41. *Hydrogen Peroxide*, 552 F.3d at 320.
42. *West*, 282 F.3d at 938.
43. *See, e.g., IPO Sec. Litig.*, 471 F.3d at 41 ("the obligation" to determine if Rule 23 is satisfied "is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement").
44. *Falcon*, 457 U.S. at 160 (internal quotation marks omitted).
45. *Hydrogen Peroxide*, 552 F.3d at 320 (emphasis added); *see also, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005).
46. *Halliburton*, slip op. 5-6.
47. *Basic*, 485 U.S. at 248.

48. Transcript of Oral Argument (Apr. 25, 2011), at 5.
49. *Basic*, 485 U.S. at 249 n.29.
50. *Salomon*, 544 F.3d at 485; *see also In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011) ("rebuttal of the presumption of reliance falls within the ambit of issues that, if relevant, should be addressed by district courts at the class certification stage").
51. *Wal-Mart*, slip op. 11 n.6.
52. *Stoneridge*, 552 U.S. at 160; *Basic* at 248.
53. *Wal-Mart*, slip op. 10 & n.6.
54. *Basic*, 485 U.S. at 248-49 (emphasis added).
55. MoloLamken, *Supreme Court Business Briefing* 6 (July 2011), available at: http://www.mololamken.com/media/site_files/2_ml_scbb_whitepaper_070111_FINAL.pdf.
56. *Janus*, slip op. 10 n.9.
57. PSLRA, 15 U.S.C.A § 78u-4(b)(1).
58. *Halliburton*, slip op. 5.
59. *Janus*, slip op. 6.
60. *Janus*, slip op. 6-7; *Stoneridge*, 552 U.S. at 166-67.
61. *Basic*, 485 U.S. at 242.
62. *See Bayer*, slip op. 14-15; *Taylor v. Sturgell*, 553 U. S. 880, 901 (2008).