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Supreme Court to Hear *Goldman* Securities Suit and Revisit Critical Class Certification Issues

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On Friday night, December 11, 2020, tucked below its order denying Texas's bid to overturn the results of the Presidential election, the U.S. Supreme Court agreed to review what petitioners Goldman Sachs Group, Inc. and its former top executives ("Goldman") billed as "the most important securities case to come before the Court since *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*)." That the Supreme Court granted Goldman's petition in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System* without a well-developed circuit split suggests that some members of the Court are troubled by the pro-plaintiff, lower-court decisions in this case and how class certification issues are handled in securities actions.

Goldman's petition raises two questions.

The first asks the Supreme Court to find that a court evaluating the propriety of class certification may consider the materiality of the alleged misstatements in deciding whether they had a "price impact," as required for certification under the fraud-on-the-market theory of class-wide reliance. Because class certification is often a critical inflection point in securities cases, an opinion permitting "materiality-like" arguments in opposing certification will provide defendants a vital tool in defeating certification of class actions premised on "aspirational and generic statements of the sort that virtually every public company makes," such as those that are at issue in the *Goldman* case.

Goldman's second question addresses the vexing issue of shifting burdens of persuasion between plaintiff and defendant on the critical "price impact" issue on class certification. Hopefully the Supreme Court will clarify that, once the defense presents evidence of no price impact, then *plaintiffs* must shoulder the burden of showing that there was in fact price impact by a preponderance of the evidence. Goldman argues that this approach is consistent with Federal Rule of Evidence 301, which provides that the burden "remains on the party who had it originally" "unless a federal statute provide[s] otherwise," and no statute so specifies here.

Background of the Case

The *Goldman* case has already resulted in two trips to the Second Circuit and arises out of the subprime crisis and an SEC action against Goldman in connection with Goldman's issuance of certain collateralized debt obligations. After the SEC commenced its enforcement action, Goldman's stock dropped

13% and the inevitable private plaintiff securities class action followed. Plaintiffs alleged that Goldman violated the federal securities laws by making generic statements in SEC filings such as, "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest" and "[o]ur clients' interests always come first," among others, which supposedly artificially inflated Goldman's stock price and caused investors losses when Goldman's stock price fell following the SEC's revelation of the "truth" about Goldman's alleged client conflicts. Plaintiffs allege $13 billion in damages.

In opposing class certification, Goldman argued that, before the SEC filed its enforcement action, no fewer than 36 news articles had revealed Goldman's alleged conflicts without any statistically significant accompanying decline in the company's stock price, which severed the link between the alleged misstatements and their impact on price. But the district court disagreed and found that the SEC complaint divulged "hard evidence of Goldman's client conflicts" for the first time. A majority of the Second Circuit panel deferred to the district court's evaluation of the evidence and refused to entertain Goldman's argument that its general statements about conflicts were immaterial and therefore incapable of having price impact given that *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013), held that investors need not prove materiality to obtain class certification.

Judge Sullivan dissented. He believed that "the nature of the alleged misstatements" should be fair game because it provides "the obvious explanation for why the share price didn't move" after the 36 news reports. He proposed that, "[o]nce a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price." He added that "[t]he mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper." Goldman embraced Judge Sullivan's framework in its petition.

The Supreme Court will now hear Goldman's arguments that a securities class action cannot be certified where the alleged misstatements were not material and therefore had no price impact. For the fourth time in the last decade, the Supreme Court will once again try to clarify what arguments defendants may raise in opposing class certification in securities suits specifically and who holds the burden of persuasion on these critical class and securities law issues.

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