MATERIALITY IMMATERIAL? REVISITING STANDARDS FOR SECURITIES FRAUD CLASS CERTIFICATION IN *AMGEN V. CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS*

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I. INTRODUCTION

In the world of private securities fraud litigation, class certification is the million-dollar question. Nearly twenty-five years ago in the landmark decision *Basic, Inc. v. Levinson*,[1] the Supreme Court revolutionized the landscape for securities litigation. By endorsing a fraud-on-the-market presumption of reliance, the Court armed securities fraud plaintiffs with a vital tool critical to bypassing the previously insurmountable hurdle of establishing class-wide reliance—a necessary element of securities fraud class actions.[2] In recent years, private securities fraud claims have experienced increasing judicial scrutiny; the Roberts Court alone has generated more securities fraud precedent in two years than the Supreme Court has generated in the previous two decades.[3]

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1. 485 U.S. 224 (1988).

2. *See id.* 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."); *see also* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 179 ("Basic was a boon to plaintiffs, leading to a rapid increase in the number of fraud-on-the-market suits after 1988—the number of filings had already tripled by 1991, and continued to rise dramatically over the next fifteen years.").

3. Robert F. Carangelo, et al., *The 10b-5 Guide: A Survey of 2010-2011 Securities Fraud*

Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds[4] offers the Roberts Court yet another opportunity to shape securities fraud jurisprudence by further defining class certification standards. *Amgen* will require the Court to consider whether plaintiffs must prove materiality before invoking *Basic*'s fraud-on-the-market presumption of reliance at the class certification stage.[5] Because of *Amgen*'s far-reaching implications on the future of shareholder class actions, it has the potential to set one of the most critical securities precedents since *Basic*.

II. LEGAL BACKGROUND

A. Basic *and The Fraud-on-the-Market Presumption of Reliance*

Amgen's case before the Supreme Court concerns the materiality and reliance elements of SEC Rule 10b-5[6] securities fraud claims. A plaintiff must show that a defendant's misrepresentation concerned a material fact, and that a plaintiff relied on the misrepresented material fact in deciding whether to buy or sell the company's stock.[7] To prove a fact's materiality, a plaintiff must establish that "there is a substantial likelihood that a reasonable shareholder would consider [the misrepresented fact] important" before deciding to trade.[8] The plaintiff must then prove the element of reliance: he must show that he actually relied upon the material fact before deciding to engage in the transaction that would ultimately lead to his injury.[9]

Before *Basic*, putative plaintiff classes alleging securities fraud faced a roadblock under the requirement of Federal Rule of Civil Procedure 23(b)(3) that they establish reliance on a class-wide basis.[10]

Litigation, WEIL, GOTSHAL & MANGES LLP (September 17, 2012), http://www.weil.com/files/upload/10b-5_Guide.pdf (comparing the six securities fraud cases decided between 2010 and 2011 with the five cases decided between 1994 and 2008).

4. Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds, No. 11-1085 (U.S. argued Nov. 5, 2012).

5. Petition for Writ of Certiorari at *i*, *Amgen*, No. 11-1085 (U.S. Mar. 1, 2012).

6. Rule 10b-5 is promulgated by the Securities and Exchange Commission under the rulemaking authority granted to it by Congress in the Securities Exchange Act of 1934. Securities Exchange Act of 1934 § 10(b) (codified as amended at 17 C.F.R. § 240.10b–5 (2012)).

7. Dura Pharm., Inc. v. Broudo, 554 U.S. 336, 341 (2005).

8. Basic, Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (adopting, for the context of Rule 10b-5 claims, the framework for determining materiality provided by TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

9. *See id.* at 243 ("Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury.").

10. *See supra* text accompanying note 2.

To prevail on a securities fraud claim, a plaintiff must show a causal connection between a company's alleged misrepresentation and his injury.[11] In face-to-face transactions, this is accomplished through a showing that an investor-plaintiff's subjective pricing of a company's stock, based on information the investor had from the company, affected his decision to buy or sell the company's stock.[12] But to proceed as a class, plaintiffs need to show that common questions of law or fact predominate over questions particular to individual plaintiffs.[13] The certification problem is thus particularly acute for plaintiffs trading in an open market because individual investors may not be aware of statements or misstatements a company made.[14] Instead, investors rely on the market to perform the valuation process of securities based on all available information, disrupting the direct link between the company and the investor.[15] Thus, a showing of common individualized reliance on a company's alleged misrepresentations would be an unrealistic evidentiary burden for plaintiffs trading in an open and impersonal securities market.[16]

Confronted with the rigorous requirements of class certification and the need for judicial efficiency, *Basic* adopted a pragmatic solution to solve the reliance problem for plaintiffs seeking class treatment. Out of "considerations of fairness, public policy, . . . probability, [and] judicial economy," and in the interest of facilitating Rule 10b-5 litigation, the *Basic* Court relied in part on a new hypothesis of "efficient capital markets" to advance its innovative fraud-on-the-market presumption of reliance.[17] The theory posits that in an efficient market, the price of a security reflects all material public information about that security.[18] This assumption gives rise to the rebuttable presumption that investors, relying on the integrity of the market-set price, indirectly rely on any material misrepresentations absorbed into the market price at the time they

11. *Basic*, 485 U.S. at 243.

12. *Id.*

13. *See* FED. R. CIV. P. 23(b)(3) (stating that a class action may be maintained if the "court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members").

14. Merritt B. Fox, *After* Dura*: Causation in Fraud-on-the-Market Actions*, 31 J. CORP. L. 829, 840 (2006).

15. *Basic*, 485 U.S. at 244.

16. Fox, *supra* note 14, at 839–40.

17. *See Basic*, 485 U.S. at 245–46 (explaining the efficient capital markets hypothesis).

18. *See id.* at 244 ("[The market is] the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.").

decide to buy or sell a stock.[19] Because this holds true for any purchaser or seller of company stock during the putative class period, plaintiffs may establish reliance on a class-wide basis, with the class encapsulating all persons who traded after the alleged misrepresentations were made.

Although the Court intended to aid putative plaintiff classes by adopting the fraud-on-the-market presumption, it did not leave future defendants helpless. The *Basic* Court cautioned that this presumption of reliance is just that—a presumption.[20] The Court acknowledged that "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[21] In sum, *Basic* established that plaintiffs may invoke the fraud-on-the-market presumption to secure class certification, but defendants must be afforded the opportunity to rebut this presumption.

B. Basic*'s Aftermath and Rule 10b-5 Class Certification*

Lower courts wrestling with *Basic*'s class certification framework have relied on two Supreme Court cases that address presumptive reliance and Rule 23 certification standards. In June of 2011, a unanimous Court held in *Erica P. John Fund, Inc. v. Halliburton*[22] that plaintiffs do not need to prove loss causation to trigger the fraud-on-the-market presumption for the purposes of class certification.[23] The Court reasoned that loss causation has no bearing on whether an investor directly or presumptively relied on a misrepresentation.[24] *Basic* requires proof that the misrepresentations were reflected in the market price at the time of transaction.[25] Thus, investors are presumed to rely on the misrepresentations by simply deciding to transact—what the Court refers to as "transaction causation."[26] By contrast, loss causation requires proof that the misrepresentations reflected in the

19. *Id.* at 247.
20. *See id.* at 248 (enumerating several ways in which defendants can rebut the presumption of reliance).
21. *Id.*
22. 131 S. Ct. 2179 (2011).
23. *Id.* at 2186.
24. *Id.*
25. *Id.*
26. *Id.*

market price also caused subsequent economic loss.[27] Notably, the Court avoided considering the respondent's argument that *Halliburton* was about price impact; that is, the effect of a misrepresentation on market price.[28] The Court kept its decision narrow, holding that loss causation is not required to invoke *Basic*'s presumption of reliance because the two involve different sets of evidentiary facts.[29] The Court left open the question of whether the fraud-on-the-market presumption requires a showing of price impact.[30]

Just two weeks after *Halliburton*, the Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*.[31] While *Dukes* arose from an employment discrimination claim, courts and litigants in securities fraud class actions have relied on *Dukes*'s explanation of what Rule 23 requires from courts and putative classes before certification.[32] The *Dukes* Court held that the class certification inquiry requires district courts to apply a "rigorous analysis" to determine whether the prerequisites of Rule 23 are satisfied—even if such analysis requires the court to trudge into the merits of the action.[33] *Dukes* identifies securities fraud class actions as an example where courts must consider a merits question during certification proceedings.[34] The Court noted that investors must provide evidence of market efficiency before invoking *Basic*'s presumption that all investors relied on the accuracy of a company's public statements.[35]

Shadowing this string of Supreme Court precedent, circuit courts have seen an increase in litigation over class certification standards. These cases have highlighted the significant uncertainty related to the predicates necessary to trigger *Basic*'s fraud-on-the-market presumption for class certification.[36]

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27. *Id.*

28. *See id.* at 2187 (disagreeing with the respondent's interpretation of the issues in the court below and expressly declining to reach the respondent's theory that "if a misrepresentation does not affect market price, an investor cannot be said to have relied on the misrepresentation merely because he purchased stock at that price").

29. *Id.* at 2186–87.

30. *Id.* at 2187.

31. 131 S. Ct. 2541 (2011).

32. *See, e.g.*, In re Am. Int'l Group, Inc. Sec. Litig., 689 F.3d 229, 237–38 (2d Cir. 2012) (relying on the *Dukes* standard to review a class certification denial in a securities fraud action).

33. *See Dukes*, 131 S. Ct. at 2551 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.").

34. *Id.* at 2552 n.6.

35. *Id.*

36. *Compare* In re Salomon Analyst Metromedia Litig., 544 F.3d 474, 482 (2d Cir. 2008)

III. FACTUAL AND PROCEDURAL HISTORY

Defendants-Petitioners are Amgen, Inc. and its principal officers. Amgen is a publicly traded company and one of the largest biotechnology companies in the world. Amgen is particularly well known for commercializing two major pharmaceutical products: "Epogen" and "Aranesp."[37] Both Epogen and Aranesp are drugs that stimulate the formation of red blood cells in order to treat various types of anemia.[38]

Plaintiff-Respondent Connecticut Retirement Plans and Trust Funds represents a class of purchasers who bought Amgen's publicly traded securities between April 22, 2004, and May 10, 2007.[39] On October 1, 2007, Connecticut Retirement brought a securities fraud action against Amgen in the Central District of California, alleging that Amgen made a series of materially false and misleading statements and omissions regarding Epogen and Aranesp in violation of Rule 10b-5.[40]

Connecticut Retirement alleges that Amgen made four types of actionable misstatements in its earnings calls and conferences starting on April 22, 2004.[41] Connecticut Retirement claims that these misstatements and omissions artificially inflated Amgen's stock price until May 10, 2007, when corrective disclosures allegedly caused the stock price to plummet.[42] Connecticut Retirement moved to certify its class action on behalf of all purchasers of Amgen stock between the date of the first actionable misstatement and the date of the corrective disclosures.[43]

(holding that plaintiffs must prove materiality for the presumption of reliance to apply), *and* In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 8 n.11 (1st Cir. 2005) (stating in dictum that plaintiffs must prove materiality at class certification), *with* In re DVI, Inc. Sec. Litig., 639 F.3d 623, 631 (3d Cir. 2011) (not requiring plaintiffs to prove materiality to invoke *Basic*'s presumption), *and* Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010) (holding that materiality is not one of "those aspects of the merits that affect the decisisons essential under Rule 23").

37. Petition for Writ of Certiorari, *supra* note 5, at 4.

38. *Id.*

39. *Id.*

40. Conn. Ret. Plans and Trust Funds v. Amgen, Inc., 660 F.3d 1170, 1172 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 2742 (U.S. June 11, 2012) (No. 11-1085).

41. Connecticut Retirement alleges that Amgen made material misrepresentations regarding (1) FDA safety concerns; (2) clinical trials involving Aranesp; (3) the safety of the drugs' on-label usages; and (4) Amgen's marketing practices. *Id.* at 1172–73.

42. *Id.* at 1173.

43. *Id.*

Federal Rule of Civil Procedure 23(b)(3) provides the process for class certification.[44] The Rule requires a certifying court to find that questions of law or fact common to all class members predominate over individual questions.[45] The District Court for the Central District of California ruled that the requirements of Rule 23(b)(3) were satisfied because Connecticut Retirement successfully invoked the fraud-on-the-market presumption, thus establishing common reliance.[46] To avail itself of the presumption, Connecticut Retirement tendered evidence showing that Amgen's stock traded in an efficient market and that Amgen's alleged misstatements were public.[47] Connecticut Retirement argues that because the misrepresentations were reflected in the market price, common reliance should be presumed for any investors who sold or purchased Amgen stock during the class period.[48]

Amgen attempted to defeat class certification on two grounds. First, Amgen claimed that the fraud-on-the-market presumption also requires a showing that the misrepresentations were *material*, because immaterial statements, by definition, do not affect stock price in an efficient market.[49] Second, Amgen, arguing the "truth-on-the-market" defense to *Basic*'s presumption of reliance, demanded the opportunity to rebut the presumption by showing that the truth behind each of Amgen's alleged misstatements had already entered the market and, consequently, could not have affected the stock price.[50]

The district court rejected both of Amgen's arguments and granted certification because both the materiality of the alleged misrepresentations and the opportunity to rebut the presumption of

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44. FED. R. CIV. P. 23(a), 23(b)(3).

45. *Id*.

46. *Conn. Ret.*, 660 F.3d at 1173.

47. *Id.* The court characterizes the efficient market hypothesis as a theory asserting that "[t]he price of a stock traded in an *efficient market* fully reflects all *publicly available information* about the company and its business." *Id.* (emphasis added). Therefore, *Basic*'s presumption only requires evidence of market efficiency and the public availability of information. *Id.*

48. *Id.* at 1174.

49. *Id.* at 1175 (noting Amgen's argument that if the stock price is not affected, "no buyer could claim to have been misled by an artificially inflated stock price," thus defeating the fraud-on-the-market presumption of reliance).

50. *Id.* at 1174; *see* Basic, Inc. v. Levinson, 485 U.S. 224, 248–49 (1988) (describing one example of how defendants can break the causal connection between the misrepresentations and the price received or paid by the plaintiff (thus rebutting the presumption of reliance) by showing that the truth behind the misrepresentations had "credibly entered the market and dissipated the effects of the misstatements [on the market price]").

reliance were issues on the merits and inappropriate to consider at the certification stage.[51] Amgen appealed the certification order to the Ninth Circuit. The court granted Amgen's appeal, acknowledging that the question of whether a putative securities fraud plaintiff class must prove materiality to avail itself of the fraud-on-the-market presumption remains unsettled.[52]

IV. NINTH CIRCUIT HOLDING

The Ninth Circuit reviewed the district court's class certification order for abuse of discretion—any error of law is considered a *per se* abuse of discretion.[53] The court joined the Third and Seventh Circuits, holding that to procure certification, a putative plaintiff class must prove (1) market efficiency, and (2) the public nature of the misrepresentations.[54] The court decided that materiality, however, only needs to be alleged.[55] According to the court, materiality is purely a merits-based issue that cannot be considered during class certification.[56]

The Ninth Circuit refused to consider materiality during class certification because merits-based issues can be considered, at earliest, during summary judgment.[57] If Amgen's misrepresentations were immaterial, then the plaintiff class will be unable to prove a violation of Rule 10b-5 regardless of whether the plaintiff class could make use of the fraud-on-the-market presumption.[58] If, on the other hand, the plaintiff class were required to prove materiality at the certification stage and failed to do so, then each plaintiff would be forced to prove reliance individually.[59] However, the same immateriality that defeated class certification would deal a fatal blow

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51. *Conn. Ret.*, 660 F.3d at 1174.

52. *See id.* (rejecting Plaintiffs' argument that the issue had already been decided in the Ninth Circuit, because the cases Plaintiffs cite were not Section 10(b) securities fraud actions).

53. *Id.* at 1174–75.

54. *Id.* at 1172 (declaring the court's conformity to the Third and Seventh Circuits' reading of *Basic*); In re DVI, Inc. Sec. Litig., 639 F.3d 623, 631 (3d Cir. 2011) ("To invoke the fraud-on-the-market presumption of reliance, plaintiffs must show they traded shares in an efficient market and the misrepresentation at issue became public." (internal citations omitted)); Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010).

55. *Conn. Ret.*, 660 F.3d at 1172.

56. *See id.* at 1175 (distinguishing materiality as an element on the merits of a securities fraud claim, whereas the fraud-on-the-market elements of market efficiency and public availability are not part of the core elements of a securities fraud claim).

57. *Id.*

58. *Id.* (noting that a successful Rule 10b-5 claim requires proof of materiality).

59. *Id.*

to the individual claims on the merits because materiality is a "standalone merits element" in *all* Rule 10b-5 claims.[60] All the individual claims would essentially be "dead on arrival." This common mortality among *individual* plaintiffs' claims is exactly what makes class treatment appropriate; the critical question in the Rule 23 inquiry is whether the plaintiffs' claims will stand or fall together.[61] By contrast, the two enumerated predicates required to invoke the fraud-on-the-market presumption (market efficiency and the misrepresentation's public availability) do not yield this common mortality among plaintiffs' claims because they are not elements of the substantive securities fraud claim; if the class fails to show market efficiency, an individual securities fraud claim can still succeed on the merits.[62]

The Ninth Circuit sided with the Third and Seventh Circuits,[63] declining to follow opposing holdings from three other circuits.[64] The Ninth Circuit credited the opposing circuits' rationales to a misreading of the following footnote in *Basic*: "The Court of Appeals held that in order to invoke the presumption, a plaintiff must allege and prove . . . that the misrepresentations were material."[65] While the three other circuits interpreted this footnote to mean that plaintiffs must allege and prove the materiality of misrepresentations in order to successfully plead the fraud-on-the-market presumption, the Ninth Circuit interpreted the footnote to reflect only an objective interpretation of the lower court's opinion, not the Supreme Court's adoption of it.[66]

The Ninth Circuit affirmed the district court's certification order, holding that Connecticut Retirement did not need to prove

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60. *Id.* ("[T]he plaintiffs cannot both fail to prove materiality [at the certification stage] yet still have a viable claim for which they would need to prove reliance individually.").

61. *See id.* ("[W]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011))).

62. *See id.* (pointing out that if plaintiffs failed to prove that the securities market was efficient and the misstatements were public, the effect would only bar the plaintiffs' use of the fraud-on-the-market presumption of reliance; however, plaintiffs can still prove reliance individually, and their claims are not automatically "dead on arrival").

63. *Id.* at 1176 (citing In re DVI, Inc. Sec. Litig., 639 F.3d 623, 631 (3d Cir. 2011); Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010)).

64. *Id.* (citing In re Salomon Analyst Metromedia Litig., 544 F.3d 474, 481 (2d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 264 (5th Cir. 2007); In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 8 n.11 (1st Cir. 2005)).

65. *Id.* (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988)).

66. *See id.* (siding with the Seventh Circuit's interpretation of *Basic*'s footnote 27).

materiality to avail itself of the fraud-on-the-market presumption and that Amgen could not rebut the presumption by attacking materiality during the certification proceedings.[67] After the court denied a re-hearing en banc,[68] Amgen petitioned for a writ of certiorari to the Supreme Court and on June 11, 2012, the Court granted certiorari.[69] The questions presented were: (1) whether the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory; and (2) whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.[70]

V. ARGUMENTS

A. Petitioners' Argument

Amgen claims that the Ninth Circuit disobeyed *Basic*'s core principles. First, materiality is an essential element to *Basic*'s fraud-on-the-market presumption.[71] Therefore, Rule 23 requires materiality to be established at class certification for plaintiffs to use the presumption to satisfy common reliance.[72] Second, because *Basic* dealt with class certification, the opportunity it bestowed upon defendants to rebut the presumption must be granted at certification—including the opportunity to refute materiality.[73] Third, preserving the issue of materiality until adjudication on a claim's merits encumbers judicial economy because all claims will inevitably fail without materiality, rendering any proceedings after certification futile.[74] Furthermore, leaving materiality out of the certification stage imposes unfair pressure upon defendants because once a class has been certified, defendants rarely have any choice but to settle.[75] Certifying a class without proof of materiality will force defendants to settle even

67. *Id.* at 1177.
68. Petition for Writ of Certiorari, *supra* note 5, at 2.
69. Amgen, Inc. v. Conn. Ret. Plans and Trust Funds, 132 S. Ct. 2742 (U.S. June 11, 2012) (No. 11-1085).
70. Brief for Petitioners at *i*, Amgen, Inc. v. Conn. Ret. Plans and Trust Funds, No. 11-1085 (U.S. Aug. 8, 2012).
71. *Id.* at 8.
72. *Id.* at 9.
73. *Id.* at 12.
74. *Id.*
75. *Id.*

frivolous claims.[76]

Amgen argues that materiality is necessary to trigger the fraud-on-the-market presumption. Reviewing *Basic*'s holding, Amgen contends that the rebuttable presumption of reliance could not survive without establishing that the misrepresentations were material.[77] Only material representations can move the price of a stock up or down; by contrast, immaterial representations by definition do not affect the stock price.[78] "Absent materiality," Amgen asserts, "the fundamental premise of *Basic* is not established, because an essential link between the misstatement and the plaintiff is entirely missing."[79] Amgen interprets the Court's consistent inclusion of the concept of materiality in its subsequent explications of the *Basic* holding to indicate that materiality must be considered *before* triggering the presumption of reliance.[80] Amgen contends that *Halliburton*'s recognition that the presumption of reliance is partly based on price impact directly supports its claim that materiality cannot be separated from the fraud-on-the-market presumption.[81]

Since materiality is vital to *Basic*'s presumption of reliance, Amgen argues that it must be proved at class certification like all other fraud-on-the-market predicates.[82] In Amgen's view, it does not matter that materiality is also a merits-based element, a fact that the Ninth Circuit strongly emphasizes.[83] In a claim alleging fraud-on-the-market, *Basic*'s presumption is essential to both class certification—to

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76. *Id.*

77. *See id.* at 17 ("Without materiality . . . there is no basis to presume an effect on the market price—and therefore presume class-wide reliance on a distorted price—even if the other fraud-on-the-market predicates are met.")

78. *See id.* ("[I]n an efficient market the concept of *materiality* translates into information that *alters the price* of the firm's stock." (emphasis added) (quoting Oran v. Stafford, 2 F.3d 275, 282 (3d Cir. 2000))).

79. Petition for Writ of Certiorari, *supra* note 5, at 20.

80. Brief for Petitioners, *supra* note 70, at 18–19; *see, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005) (unanimously citing Basic as having approved a "presum[ption] that the price of a publicly traded share reflects a *material* misrepresentation and that plaintiffs have relied upon that [material] misrepresentation" (emphasis added)).

81. *See* Brief for Petitioners, *supra* note 70, at 19 (noting that in *Halliburton*, the Court unanimously described *Basic*'s fundamental premise as an investor's reliance on a misrepresentation "*so long as it was reflected in the market price*" when the investor trades (emphasis added)).

82. *Id.*

83. *See id.* at 36 (differentiating the certification inquiry for materiality from the merits inquiry, and arguing that materiality's status as a distinct element of a Rule 10b-5 claim is irrelevant to its requirement under Rule 23's analysis of whether common issues predominate on the element of reliance).

prove common reliance—and to the actual merits of the claim—to satisfy actual reliance.[84] Thus, plaintiffs must prove all elements of the fraud-on-the-market presumption, including materiality, during certification proceedings.[85] That plaintiffs will inevitably be required to prove the fraud-on-the-market predicates again during trial does not relieve them of their certification burden.[86]

Amgen contends that requiring proof of materiality before certification is consistent with the Court's decision in *Dukes*.[87] According to Amgen, *Dukes*'s edict, that plaintiffs bear the burden of proving all elements under Rule 23 and that courts have the duty to rigorously ensure the rule has been satisfied, mandates a full examination into the *Basic* presumption.[88] Amgen argues that the Ninth Circuit defies the *Dukes* holding by extricating materiality from the certification inquiry simply because materiality is a merits element.[89] Materiality is necessary to the fraud-on-the-market presumption, which is necessary to show common reliance.[90] Therefore, materiality must be determined at certification.[91]

Furthermore, because the elements underlying the presumption of reliance must be satisfied before the plaintiffs can proceed as a class, Amgen argues that courts must afford defendants the opportunity to rebut the presumption at the certification stage.[92] The *Basic* Court added a "powerful weapon to plaintiffs' arsenal in securities fraud litigation," but only on the condition that defendants also had the

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84. *Id.* at 37; *see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.6 (2011) (noting that in securities fraud claims, plaintiffs seeking class certification must prove the predicates to the fraud-on-the-market presumption, and "they will surely have to prove [the predicates] again at trial in order to make out their case on the merits").

85. Brief for Petitioners, *supra* note 70, at 36.

86. *See id.* (asserting that a Rule 23 determination is made "before, and independently of, any merits determination" and that it "provides no exception" for subjects merely because their litigation at certification could affect the claim's merits).

87. *Id.* at 19.

88. *See id.* (citing *Dukes*, 131 S. Ct. at 2551) (relying on *Dukes*'s principles that the "party seeking class certification must prove that the requirements of Rule 23 are *in fact* satisfied" and that district courts may certify a class "only if it concludes, after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied." (internal quotation marks omitted)).

89. *See id.* at 35–36 (reiterating the *Dukes* Court's findings that class certification may involve "considerations that are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action" (quoting *Dukes*, 131 S. Ct. at 2551)).

90. *Id.* at 36.

91. *Id.*

92. *See id.* at 40 (arguing that it makes no sense to force defendants to wait until summary judgment adjudication or trial to show that a plaintiff class should not have been certified in the first place).

"meaningful opportunity to rebut the presumption."[93] Amgen argues that the opportunity to rebut the presumption would have no force if rebuttal were postponed until after class certification.[94] According to Amgen, the Ninth Circuit's proposal of delayed rebuttal requires courts "to initially hear evidence regarding class certification from only one side . . . inevitably lead[ing] to certification in some cases in which it is improper."[95]

Amgen makes various policy arguments supporting its position, urging the Court to consider the unfair leverage that class certification grants to plaintiffs in settlement negotiations and the potential for waste of judicial resources. First, because materiality also needs to be litigated to prove class-wide reliance, refusing to consider it before class certification will waste judicial resources and accrue unnecessary costs.[96] Second, Amgen warns of the risk of "in terrorem settlements" because the massive costs associated with discovery in securities class actions induce defendants to settle.[97] Failing to evaluate materiality before granting certification will often mean that "defendants are forced to settle without any testing of the materiality of the alleged misstatements . . . without any showing that class certification was warranted in the first place."[98] Finally, every case in which the alleged misrepresentations are not material inevitably fails on the merits. Therefore, the increased costs of proceeding on a class-wide basis after certification are wasted where materiality cannot be proven.[99]

B. Respondent's Argument

Connecticut Retirement replies on two fronts: first, countering arguments based on the "common question" requirement of Rule 23, and second, noting judicial interests and policy concerns underlying the class action tool. Connecticut Retirement's brief closely tracks the reasoning of the Ninth and Seventh Circuits.[100] First, materiality is a

93. *Id.* at 41.
94. *Id.*
95. *Id.* at 41–42.
96. *See id.* at 27 (referring to a study demonstrating that judges spent over five times as many hours on certified class actions as on putative class actions that were never certified).
97. *Id.* at 24–25; *cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 554, 558 (2007) (adopting the higher "plausibility" pleading and noting that frivolous suits present an "in terrorem" threat that may increase settlement values).
98. Brief for Petitioners, *supra* note 70, at 26.
99. *Id.*
100. Brief for Respondent at 18–21, Amgen, Inc. v. Conn. Ret. Plans and Trust Funds, No.

non-issue for certification because whether or not a misrepresentation is material, it will still impart the same effect on all class members' claims; thus, the common issue of reliance is present as required by Rule 23.[101] Second, the *Dukes* holding does not apply to the present case because materiality is not an element of certification.[102] Third, requiring proof of materiality at the certification stage, before formal discovery, would impose too great of a burden upon securities fraud plaintiffs.[103] Finally, allowing defendants to present a truth-on-the-market defense to defeat certification would be an issue on the merits and inappropriate at certification.[104]

Connecticut Retirement opens with the assertion that because Amgen did not challenge that Rule 23(a)'s prerequisites were met, the only Rule 23 requirement at issue is whether "questions of law or fact common to class members predominate over any questions affecting only individual members."[105] The crucial question for class certification, therefore, turns on whether plaintiffs have established similarity in their claims.[106] Thus, Connecticut Retirement argues that proof of materiality at class certification is only required if absent such proof, individual questions would predominate over common questions.[107] Because determining materiality is an objective standard and "does not relate to the characteristics of any particular investor's subjective views about the importance of the information," a misrepresentation's materiality or immateriality will affect all investors in a similar fashion.[108] Echoing the Ninth Circuit, Connecticut Retirement asserts that since materiality or immateriality will categorically affect all plaintiffs in the same way, the plaintiffs' claims stand and fall together, exhibiting a resultant *similarity*.[109] Because the misrepresentations' alleged immateriality will still

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11-1085 (U.S. Sept. 20, 2012); Conn. Ret. Plans and Trust Funds v. Amgen, Inc., 660 F.3d 1170, 1175–76 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 2742 (U.S. June 11, 2012) (No. 11-1085); Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010).

101. Brief for Respondent, *supra* note 100, at 18.

102. *See id.* at 19 ("[R]equiring proof of materiality for class certification goes beyond what is required by Rule 23 and this Court's Rule 23 precedents.").

103. *Id.* at 20.

104. *See id.* at 21 (claiming that evidence rebutting materiality cannot be considered at the certification stage because it defeats the claim on its merits, not on the issue of predominance of common questions).

105. FED. R. CIV. P. 23(b)(3); Brief for Respondent, *supra* note 100, at 26.

106. Brief for Respondent, *supra* note 100, at 26.

107. *Id.* at 22.

108. *Id.* at 24 (referring to the "reasonable investor" standard).

109. *Id.* at 25.

maintain the "common questions" status of the class, a showing that a misrepresentation was definitively material is not required at certification under Rule 23.[110]

Connecticut Retirement relies on the same logic to counter Amgen's claim that proof of a misrepresentation's materiality is a prerequisite for triggering the fraud-on-the-market presumption for the purposes of certification. The fraud-on-the-market presumption assumes that the efficient market price will reflect any material misrepresentations. Consequently, reliance on those material misrepresentations may be presumed by the buyer's reliance on the integrity of the market price.[111] Evidence that the misrepresentation was immaterial and consequently *not* reflected in the market price will disable any individual investor in the class from proving reliance.[112] Thus, reliance via the fraud-on-the-market presumption is a question common to the class because the same set of evidentiary facts causes the plaintiffs' claims to stand and fall together.[113] Unlike Amgen, which reads *Basic* to establish materiality as a predicate to the fraud-on-the-market presumption, Connecticut Retirement interprets *Basic* only as listing materiality as an element on the merits for the court below to consider.[114]

Responding to Amgen's argument in the alternative, that *Dukes* allows—in fact commands—judges to consider issues of merit within courts' "rigorous analyses," Connecticut Retirement reads *Dukes* in a much narrower fashion, arguing that the *Dukes* holding was merely an attempt to stabilize courts overreaching and under-reaching Rule 23 standards.[115] *Dukes* only directs judges to ensure that the elements required by Rule 23 must be considered during class certification, even if it means crossing into issues overlapping with the merits.[116] According to Connecticut Retirement, *Dukes* does not permit the

110. *Id.*; *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131 (2009) ("[T]he question of whether the class exhibits some fatal similarity—a failure of proof as to all class members on an element of their cause of action—is properly engaged as a matter of summary judgment.").

111. *See* Brief for Respondent, *supra* note 100, at 27 (explaining the fraud-on-the-market theory).

112. *Id.* at 29.

113. *Id.*

114. *Id.* at 42–43.

115. *See id.* at 29–30 (citing *Dukes* as an example of the Court preventing courts from under-reaching into merits issues required by Rule 23, while also noting that other courts overreach into merits issues that are unnecessary under Rule 23).

116. *Id.* at 23.

reverse: courts may not consider questions of merit during class certification proceedings that are outside the bounds of Rule 23's requirements.[117] Connecticut Retirement thus points to the current case as an example of overreaching that contravenes *Dukes*'s holding.[118] A determination of materiality for the purposes of the fraud-on-the-market presumption is not required by Rule 23, and instead is an issue for summary judgment at the earliest.[119]

As a matter of policy, Connecticut Retirement urges the Court not to request proof of materiality at certification proceedings because such a rule would require courts "to consider a particularly fact-intensive issue at an early stage of the case, before full discovery."[120] Because the burden of proof at the certification stage is the same for the plaintiffs as it is during trial, plaintiffs run the risk of having certification denied even though the discovery process after certification would reveal evidence of materiality.[121] Responding to Amgen's argument that certification without requiring proof of *material* misrepresentations would lead to "in terrorem" settlements, Connecticut Retirement claims the Private Securities Litigation Reform Act of 1995[122] (PSLRA) has already addressed this danger by enacting procedural safeguards for defendants to protect against frivolous claims.[123] Connecticut Retirement further lists studies conducted after the PSLRA that indicate settlement amounts are not exorbitant.[124]

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117. *See id.* at 30 (citing Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. 149, 168 (2010)) (asserting that when courts consider issues during class certification that are more appropriate for summary judgment, they commit the flipside of the error the Supreme Court corrected in *Dukes*).

118. *Id.*

119. *Id.*

120. *Id.* at 20.

121. *See id.* at 36 ("Amgen's position thus creates a significant risk that courts will fail to certify federal securities fraud class actions even in cases where the evidence after full discovery would show that the misstatements were material.").

122. Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, 109 Stat. 737 (codified at 15 U.S.C. § 78u-4(b)(1)–(2) (2006)).

123. *See* Brief for Respondent, *supra* note 100, at 39–40 (claiming that the PSLRA was enacted specifically to address "extortionate settlements" being "extracted" from companies by raising the pleading standard for scienter and imposing various other procedural requirements on securities fraud plaintiffs).

124. *See id.* at 45 (citing ELLEN M. RYAN & LAURA E. SIMMONS, CLEARINGHOUSE & CORNERSTONE RESEARCH, SECURITIES CLASS ACTIONS SETTLEMENTS: 2011 REVIEW AND ANALYSIS 2 (2012), *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2011/Settlements_Through_12_2011.pdf) (relying on empirical data that demonstrate the median settlement amount in 2011 was $5.8 million, and that more than half of post-PSLRA securities fraud cases have settled for less than $10 million, while eighty percent of post-PSLRA

Challenging Amgen's request that the Court allow defendants to rebut materiality and the fraud-on-the-market presumption through a truth-on-the-market defense, Connecticut Retirement reiterates the class-wide effect argument. Connecticut Retirement argues that if the truth were publicly available and misrepresentations could not have been said to alter the stock price, the immateriality would still apply to all putative class members' claims.[125] A truth-on-the-market defense would cause the plaintiffs' claims to stand or fall as one.[126] Moreover, Connecticut Retirement contends that a truth-on-the-market defense goes straight to merits-based issues because it proves no one was defrauded, and is therefore inappropriate for consideration during class certification proceedings.[127] Finally, Connecticut Retirement points out that there are alternative ways to defeat the presumption at class certification, either by rebutting the predicates of market efficiency or the misrepresentations' public availability.[128]

VI. ANALYSIS AND LIKELY DISPOSITION

The Supreme Court's answer to whether materiality is an essential element of class certification has great implications for the future of securities fraud class actions. Because securities fraud class actions rarely proceed to trial on the merits, the Supreme Court's decision will likely have a significant effect on settlement negotiations. A decision for Connecticut Retirement will allow investors to effectively guarantee substantial settlement amounts after certification; a decision for Amgen will hinder shareholders from using the class action tool to keep fraudulent business practices at bay. If materiality is required for *Basic*'s presumption, courts will be faced with the same daunting task at certification that they struggle with during merits proceedings: unraveling whether the price change was caused by fraudulent *or* legitimate statements. The Court's decision likely will echo the same practical and policy-oriented considerations espoused by *Basic* and lead to the adoption of a moderate approach in order to maintain a balance between business and shareholder interests.

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cases have settled for less than $25 million).

125. *See id.* at 51–52 ("[D]isproving materiality would not demonstrate the existence of individual questions; it would negate the elements of materiality and reliance for all class members alike.").

126. *Id.*

127. *Id.* at 52–53.

128. *Id.* at 53.

A. Future Implications for Publicly Held Companies and Their Shareholders

If the Supreme Court affirms the Ninth Circuit's decision, businesses will continue to face considerable financial obligations to certified investor classes who may or may not have legally meritorious claims. Aggregating shareholders' claims can lead to threats of staggering potential losses if the class prevails on the merits.[129] Rather than risk the prospect of financial ruin, defendants are quick to settle for amounts disproportionate to the merits of the shareholders' claims. This only invites more frivolous lawsuits.[130] Defendants are frequently at the plaintiffs' mercy after class certification. Without a requirement of materiality at the certification stage, defendants' only options are to settle and avoid additional costs, or wait until adjudication on summary judgment to test the claim's legitimacy.

If the Court sides with Amgen, plaintiffs will be forced to assemble a case proving materiality prior to actual discovery. Plaintiffs are already encumbered by the requirement to plead facts supporting loss causation[131] and *Basic*'s certification requirement of expert evidence proving market efficiency.[132] An additional requirement of proof of materiality before certification may add considerably to plaintiffs' burden. If this were not already a significant burden to class action litigation, plaintiffs would have to prove materiality by a preponderance of the evidence, a burden of proof that is higher than the standard by which plaintiffs need to prove a genuine issue of material fact to defeat a motion for summary judgment.[133] This would act as an additional barrier to class action litigation.[134] Front-loading

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129. *See, e.g.*, Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007) (reviewing a district court's certification order in which plaintiffs alleged damages totaling $40 billion).

130. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1302 (2002) ("[L]ack of attention to the merits make[s] the class action an attractive vehicle for frivolous suits.").

131. *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346 (2005) (holding that plaintiffs must present facts in order to adequately allege that the fraud proximately caused actual economic loss, not just that the misrepresentations inflated the stock price).

132. *See* In re DVI, Inc. Sec. Litig., 639 F.3d 623, 633 (3d Cir. 2011) (noting that because market efficiency is the cornerstone behind *Basic*'s presumption, Rule 23 requires judges to weigh, if necessary, the conflicting expert testimony on market efficiency before certification).

133. *See* Brief for Respondent, *supra* note 100, at 32 (noting that some courts believe the Rule 23 requirements are subject to a preponderance-of-the-evidence standard).

134. *See* Brief for Public Citizen, Inc., as Amicus Curiae Supporting Respondent at 13, Amgen, Inc. v. Conn. Ret. Plans and Trust Funds, No. 11-1085 (U.S. Sept. 27, 2012) (noting the advisory committee notes to Federal Rule of Civil Procedure 23, which state that allowing

the lengthy, fact-based inquiries surrounding materiality before certification can hinder or even discourage investors from pursuing legitimate securities fraud claims, undercutting *Basic*'s intended purpose. Such obstacles would prevent plaintiffs from keeping businesses in check, thereby undermining the deterrent effect of private securities fraud claims.

B. Challenges for Trial Courts Assessing Materiality Under Basic*'s Presumption*

A discussion of whether materiality is a predicate to triggering *Basic*'s presumption could force the Court to plunge into deeply tangled issues, such as the reliability of the market efficiency hypothesis and *Basic*'s fraud-on-the-market presumption. Under *Basic*'s presumption, courts need to determine whether fraudulent statements cause a plaintiff's injury based on the impact that such statements had on stock price.[135] However, an impersonal market continually absorbs large amounts of public information. Thus, proving the actual impact of a particular statement is very difficult, and sometimes impossible. In *Dura Pharmaceuticals, Inc. v. Broudo*,[136] the Court addressed requirements for proving loss causation in the context of fraud-on-the-market claims, holding that evidence of price inflation resulting from misstatements was insufficient.[137] Instead, plaintiffs needed to have shown that corrective disclosures *also* caused a price drop to connect the defendant's fraud to the plaintiff's economic loss.[138] *Dura*'s narrow holding that price inflation alone is insufficient has left lower courts struggling to find loss causation when a price drop may not be the direct result of a corrective disclosure.[139]

Dura and its progeny demonstrate the difficulty of disaggregating causes of price impact in an open market. If materiality is held to be

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controlled discovery to determine certification would cause significant expansion to merits-based discovery during preliminary certification proceedings).

135. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 247 (1988) (justifying a presumption of reliance because the misstatements have been disseminated into the market and are reflected in the market price).

136. 544 U.S. 336 (2005).

137. *Id.* at 342.

138. *Id.* at 347.

139. *See, e.g.*, Phillips v. Scientific-Atlanta, Inc., No. 10-15910, 2012 WL 3854795, at *3 (11th Cir. Sept. 6, 2012) (per curiam) (affirming the district court's grant of summary judgment for defendants because plaintiffs could not establish that it was the corrective disclosures that caused the price drop, when the disclosures were bundled with multiple pieces of non-fraudulent information that also could have caused the identified price drop).

essential to *Basic*'s presumption, then courts and litigants will face the challenge of unraveling misleading information from the bundle of all information that may have contributed to a price change.[140] Fraudulent statements and corrective disclosures are frequently released as part of larger packages of information, increasing the difficulty of proving a specific statement's materiality. If the misrepresentation precedes a stock price increase, courts would need to determine whether it was the misrepresentation—rather than any legitimate good news that was released with it—that inflated the stock price. By contrast, if plaintiffs attempt to show the materiality of the misrepresentation by pointing to a price drop following corrective disclosures, the price drop could be the result of other bad news bundled with the corrective disclosure.

C. An Adaptable Line of Precedent

The relevant issues under *Basic*'s fraud-on-the-market presumption are deeply connected to the economic and policy interests of both public companies and investors. As this is a relatively new area of legal doctrine saturated with ambiguities, the Supreme Court will likely be sharply divided on the issue. The best precedential indicators of the how the Supreme Court will rule come from its 2011 decisions in *Halliburton* and *Dukes*.

Halliburton's precedent can substantiate a decision for either party. For Connecticut Retirement, direct language from the *Halliburton* decision suggests that the Court may preclude determination of materiality at the class certification stage. Like loss causation, materiality is "distinct" from actual reliance, and is a distinct element of a Rule 10b-5 claim.[141] The Court may find that materiality remains distinct from the presumed reliance required by *Basic*'s presumption, and is unnecessary for plaintiffs to establish in order to invoke the presumption.

A strong argument for Amgen is the Court's distinction in *Halliburton* between reliance—or transaction causation—and loss causation. Logic does not support making loss causation a precondition to the presumption of reliance because reliance is

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140. *See* Langevoort, *supra* note 2, at 184 (identifying problems with showing that the misrepresentation caused the price change when other information, such as good news or bad news, accompanies misrepresentations or corrective disclosures).

141. Erica P. John Fund, Inc. v. Halliburton, 131 S. Ct. 2179, 2184 (2011).

preliminary to any economic loss.[142] However, materiality, unlike loss causation, is not as easily distinguishable from reliance. The primary justification for presuming reliance is the idea that an efficient market reflects all publicly available information; investors depend on the market's efficiency to account for information the investor would otherwise rely on individually.[143] The Court's emphasis on the efficient market hypothesis in *Dukes*, *Halliburton*, and *Dura* arguably may have contained an implicit understanding that only if misrepresentations are material can they be reflected in the efficient market price.[144]

The *Dukes* decision has demonstrated the Court's willingness to entertain consideration of the merits at the certification stage. However, Amgen faces the argument that *Dukes* is distinguishable from the present case, and its holding does not apply with the same force to securities fraud claims. The Court may find that *Dukes* necessitated the merits inquiry because of the claim's nature as an employment discrimination suit.[145] A class member's personal discrimination by a company, as in *Dukes*, requires a much more individualized, fact-laden inquiry than the impersonal market *Basic* was intended to address.

D. The Opportunity for Rebuttal: An Equitable Compromise

The Court's way out may be to focus on Amgen's second argument: that defendants must have the opportunity to rebut the fraud-on-the-market presumption of reliance before certification, regardless of whether plaintiffs must prove materiality. Accounting for the considerable future impact on both parties and the Court's interest in following its own precedent, the Justices may adopt a

142. Loss causation requires proof that the misrepresentation that affected the stock price also caused *subsequent* economic loss through a later decline in value, not merely because the investor relied upon the artificially inflated price on the date of purchase. *Id.* at 2186.

143. *See id.* ("*Basic*'s fundamental premise [is that] an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction.").

144. *See, e.g.*, *id.* at 2185 ("P]laintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market *take them into account*?) . . . ." (emphasis added)); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005) ("[*Basic*] nonconclusively presume[s] that the price of a publicly traded share reflects a *material* misrepresentation and that plaintiffs have relied upon that misrepresentation as long as they would not have bought the share in its absence." (emphasis added)).

145. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011) ("In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination . . . [because] the crux of the [Title VII claim] inquiry is the reason for a particular employment decision." (internal quotation marks omitted)).

hybrid approach similar to the Third Circuit's practice of not requiring proof of materiality from plaintiffs at certification, but instead allowing defendants to affirmatively rebut the fraud-on-the-market presumption at the certification stage.[146] To remain consistent with the "rebuttable presumption" framework established by *Basic*, the Court will likely require defendants to bear both the burden of production and the burden of persuasion if defendants wish to avail themselves of the rebuttal right. This approach would allow the Court to avoid placing undue evidentiary demands upon the plaintiffs at certification, while still allowing defendants to use the defense *Basic* handed down in parcel with its fraud-on-the-market presumption.

VII. CONCLUSION

Amgen promises to clarify the uncertainty regarding *Basic*'s fraud-on-the-market presumption. Because of *Amgen*'s significant potential impact on future securities fraud litigation, the Court is likely to adopt an approach that does not require an initial showing of materiality, but would afford defendants an opportunity to rebut the fraud-on-the-market presumption of reliance before class certification. Nevertheless, there is no easy way for the Supreme Court to endorse one side of the circuit split without significantly affecting the landscape of securities class actions. Whatever the decision may be, lower courts will undoubtedly struggle to rein in any polarizing effects that the Court's decision may have on parties' advantages in securities fraud litigation.

146. *See* In re DVI, Inc. Sec. Litig., 639 F.3d 623, 648–49 (3d Cir. 2011) (holding that while plaintiffs do not need to prove materiality to trigger the fraud-on-the-market presumption, defendants have the opportunity to rebut the presumption before certification).