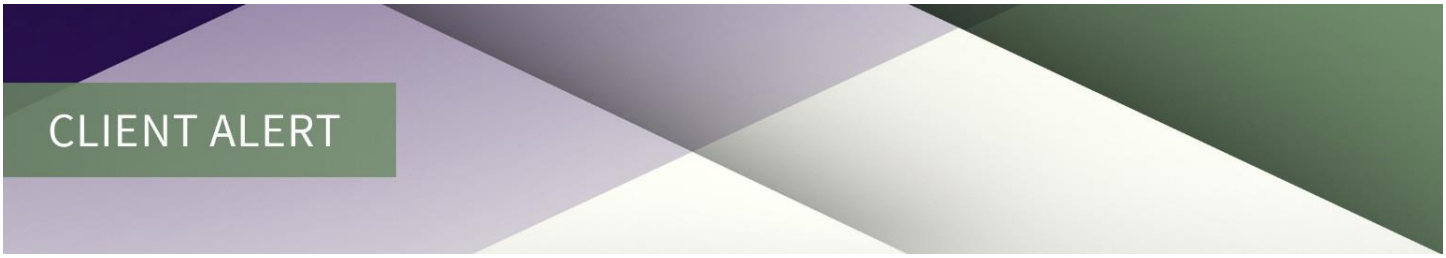

Supreme Court Rules that Price Impact Evidence (Even If It Overlaps with Merits Issues) Must Be Considered at Class Certification Stage

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Today, the Supreme Court issued its highly-anticipated decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System.*[1] Justice Barrett delivered the opinion of the Court, which vacated the Second Circuit's holding and remanded under an instruction that "the Second Circuit must take into account *all* record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue."[2]

The first issue before the Court was whether the generic nature of a misrepresentation is relevant to price impact. Observing that the dispute had narrowed on appeal and that the parties ultimately agreed that the general nature of an alleged misrepresentation is often important evidence of price impact, eight Justices (all but Justice Sotomayor) found that the Second Circuit's opinion left sufficient doubt as to whether it properly considered such evidence so as to warrant a remand.[3] Recognizing that "materiality and price impact are overlapping concepts and that the evidence relevant to one will almost always be relevant to the other,"[4] the Supreme Court explained that courts should nonetheless

1 No. 20-222, 2021 WL 2519035 (U.S. June 21, 2021). Willkie Farr & Gallagher LLP represents a group of former SEC officials and law professors who filed an amicus brief in support of Goldman Sachs in this case.

2 *Id.* at *6 (emphasis in original).

3 *Id*. at *5-6.

4 *Id*. at *5, n.2.

"be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense" when assessing price impact at class certification.[5] This is so because "a court cannot conclude that Rule 23's requirements are satisfied without considering *all* evidence relevant to price impact."[6]

Reserving on the validity or the precise contours of the inflation maintenance theory, the Court stressed that the generic nature of a misrepresentation often will be important evidence of a lack of price impact in cases proceeding under this theory.[7] In such cases, plaintiffs try to prove the amount of inflation indirectly by pointing to a negative disclosure and an associated stock price drop, and then they ask courts to infer that the price drop is equal to the amount of inflation maintained by the earlier misrepresentation.[8] Critically, the Court wrote:

But that final inference—that the back-end price drop equals front-end inflation—starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure. That may occur when the earlier misrepresentation is generic (*e.g*., "we have faith in our business model") and the later corrective disclosure is specific *(e.g*., "our fourth quarter earnings did not meet expectations"). Under those circumstances, it is less likely that the specific disclosure actually corrected the generic misrepresentation, which means that there is less reason to infer front-end price inflation—that is, price impact—from the back-end price drop.[9]

As to the second issue before the Court, the allocation of burdens under FRE 301, the Court held that the Second Circuit correctly placed the burden of proving a lack of price impact at class certification on the Defendants. The Court stated that FRE 301 does not restrain the authority of a court to change customary burdens of persuasion, and the Court has already exercised that authority in establishing the *Basic* framework in that decision and further refining it in *Halliburton II*.[10] Despite this holding, the Court noted that it "is unlikely to make much difference on the ground" because the "defendant's burden of persuasion will have bite only when the court finds that the evidence [submitted by competing experts] is in equipoise—a situation that should rarely arise."[11] That holding prompted an animated dissent from Justice Gorsuch who pointed out that the Court has never before suggested that plaintiffs are relieved from carrying the burden of persuasion on any aspect of their own causes of action.[12]

5 *Id*. at *5 (citation omitted).

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*. at *6.

10 *Id*.

11 *Id*. at *7.

12 *Id*. at *11 (Gorsuch, J., dissenting).

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