Client Alert.

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U.S. Supreme Court Invites Solicitor General's Views on *Erica P. John Fund, Inc. v. Halliburton Co.*

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On October 4, 2010, the U.S. Supreme Court signaled its interest in an appeal by shareholders trying to sue Halliburton Co. for securities fraud by seeking the U.S. Solicitor General's advice on *Erica P. John Fund, Inc. v. Halliburton Co. et al.*, No. 09-1403. Should the Court grant *certiorari* in *Erica P. John Fund*, it will consider the Fifth Circuit's class certification standard, which differs from other circuits' standards. The key issue will involve the role of proving causation as part of the class certification decision.

Plaintiff in the case below, *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010), filed a putative securities class action in 2002 against Halliburton and David Lesar (Halliburton's CEO during the alleged class period, 1999-2001), alleging defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 by deliberately falsifying financial results and misleading the public about its financial information. According to the allegations, defendants made false statements concerning (1) Halliburton's potential liability in asbestos litigation, (2) Halliburton's accounting for revenue in its engineering and construction business, and (3) the benefits to Halliburton of a merger with Dresser Industries.

Plaintiff moved for class certification, seeking to represent a class of all Halliburton investors during the class period. Plaintiff sought to show, among other factors, that common questions of law and fact—such as whether defendants' conduct caused plaintiffs' loss—predominated over questions that were individual to each member of the class. The district court denied the motion, holding that plaintiff's pleading was insufficient to warrant the application of the fraud-on-the-market presumption. Rather, the court held that for the presumption to apply, plaintiff needed to prove loss causation by a preponderance of the evidence.

Plaintiff appealed the decision to the Fifth Circuit, arguing that the district court's requirement that plaintiff prove loss causation was more than what was required by the Supreme Court's holding in the 1988 *Basic v. Levinson* decision. Noting that it was bound by the standard set forth three years earlier in *Oscar Private Equity Invests. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007), the circuit court disagreed. It found that the district court had read *Oscar* correctly to require that a plaintiff prove loss causation before it can trigger the fraud-on-the-market presumption of reliance. And to prove loss causation, the court explained, a plaintiff had to show ***both*** that the corrective disclosures caused the stock price to fall *and* that the corrective disclosure *more probably than not* showed that the original statements were designed to mislead.

On May 13, 2010, the Fund (now known as the Erica P. John Fund) filed a petition for a writ of *certiorari*, asking the Supreme Court to review and reverse what it called the Fifth Circuit's "substantial and unprecedented burden" on securities class action plaintiffs. Specifically, it asked the Court to consider two questions: first, whether the Fifth Circuit correctly held that plaintiffs in securities fraud actions must not only satisfy the requirements to trigger a rebuttable presumption of fraud on the market, but must also establish loss causation at class certification by a preponderance of

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admissible evidence without merits discovery; and second, whether the Fifth Circuit improperly considered the merits of the underlying litigation when it held that a plaintiff must establish loss causation to invoke the fraud-on-the-market presumption.

The Fund argued that the Fifth Circuit's holding is in direct conflict with principles adopted in eight other circuits, including the Second Circuit, as well as with the Supreme Court's holding in *Basic*, which adopted the fraud-on-the-market theory as a permissible method for class members to establish reliance in securities actions. "No other court has followed the rule created by the Fifth Circuit," the Fund argued, "which has established an exceedingly high standard for certifying a securities class action." According to the Fund, the Fifth Circuit's standard reflects its erroneous reading of *Basic* as permitting each of the circuits room to develop its own fraud-on-the-market rule, a reading that has been expressly criticized by several other circuits. In addition, the Fund argued, the Fifth Circuit's requirement that plaintiff prove loss causation *prior* to class certification does not make sense, since whether a particular misstatement caused the stock price to move is necessarily a question that will be common to all members of the proposed class and should therefore not be used to defeat certification. Finally, the Fund also argued that the circuit court improperly considered the merits of the case in its decision on appeal, in violation of both Federal Rule of Civil Procedure 23 and the Supreme Court's decision in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974).

When the Justices reviewed the *certiorari* petition and the other briefs, they did not issue the typical order either granting or denying review. Instead, the Court issued an "Invitation" to the SG to file a brief on whether the Court should grant review. When issued such an Invitation, also known as a "CVSG" because it Calls for the Views of the Solicitor General, the SG always files a brief in response with a recommendation as to whether the Court should grant review.

The Supreme Court issues an Invitation to the SG only a dozen or so times each year. The Court does so in cases where it wants to be informed by the expertise of the United States in a case in which the federal government is not a party. Generally, Invitations are issued in cases in which the federal government has a significant interest in the underlying federal law because of related federal programs or federal enforcement efforts. In this case, for example, as the SG formulates his position, he will likely solicit the views of the Securities and Exchange Commission, as well as those of other interested agencies in the United States government. The Court's Invitation indicates the Court's interest in hearing whether the United States thinks that *Erica P. John Fund* presents an important enough question of securities law to warrant review.

An Invitation by the Supreme Court to the SG cannot be read as a determination that the Court ultimately will grant review. More often than not, the SG recommends that the Court deny the petition, and the Court usually follows that recommendation. But an Invitation does indicate that the odds of *certiorari* being granted in the case are significantly higher than for a typical *certiorari* petition. It takes four Justices to issue an Invitation, just as it takes four Justices to grant a *certiorari* petition. The Court grants *certiorari* in only about 4% of petitions on the Court's "paid" docket, which consists of petitions where the filing fee is paid and excludes those petitions filed by a prisoner or other indigent individual. For paid petitions on which the Court issues an Invitation for the SG's views, that percentage jumps to approximately 33%.

The Supreme Court's practice does not impose a specific deadline by when an Invitation brief must be filed. The SG usually takes at least 60 to 90 days to file an Invitation brief and sometimes takes significantly longer than that. Once the SG files the Invitation brief in *Erica P. John Fund*, the parties will all then have an opportunity to file a supplemental brief before the Court decides whether to take the case. Assuming that the SG files its Invitation in 90 days, and that the Court grants *certiorari*, the briefing on the merits likely will take place next Spring, with oral argument to follow.

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