THE TWO FACES OF MATERIALITY

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Abstract

To make out a claim for securities fraud under federal law, a plaintiff must plead and prove the misrepresentation of a material fact. The Supreme Court has repeatedly defined a material fact as one that would be important to a reasonable investor in deciding how to act in that it would change the total mix of information—although it need not necessarily change the ultimate decision of the investor as to how to vote or whether to trade. The courts have also defined a material fact as one that would affect market price—which clearly implies that it must have changed the decisions of some investors. Although these two definitions of materiality appear to conflict, they can be reconciled as alternative expressions of the same standard, the former referring to individual investors and the latter referring to investors in the aggregate. Indeed, the Supreme Court has held a fact cannot be material if it cannot matter to the ultimate outcome, suggesting that a fact cannot be material if it does not affect the behavior of a number of investors sufficient to move the market. Arguably, it would be appropriate to consider price impact in connection with the decision to certify a securities fraud action as a class action under the fraud on the market (FOTM) theory since a class action involves the claims of investors in the aggregate and since price impact need not be dispositive as to the merits of the individual claim of the lead plaintiff who may be able to recover under the individual investor standard. The Supreme Court foreclosed that option in its Amgen *decision, possibly for fear that failure to determine materiality in the context of a class action might lead to a multiplicity of lawsuits. Nevertheless, the* Amgen *Court stated that determination of the question may be appropriate on summary judgment even though earlier decisions have emphasized that materiality is a matter of fact that should not be decided by any bright line test. Moreover, in focusing on materiality as a matter of merit,* Amgen *says nothing about when a court should consider other grounds for rebutting the FOTM presumption of reliance based on the likelihood that the plaintiff class includes significant*

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numbers of atypical investors who may have been indifferent to company-specific market prices and thus may not be adequately represented in a class action.

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In order to prove securities fraud under federal law, one must show that the defendant either misrepresented a material fact or failed to disclose a material fact when under an affirmative duty to do so.[1] Either way, the fact must be *material*.[2] The fact must somehow matter.[3] The courts have struggled mightily to determine when a fact is material and sometimes even to determine what constitutes a fact.[4]

The United States Supreme Court has held that a fact is material if it would be important to a reasonable investor in deciding how to act: how to vote or whether to trade.[5] The information need not be so important that it would change the outcome, but it cannot be so trivial that it would not affect the total mix of available information.[6] Moreover, it must matter in the sense that an investor can do something with the information.[7] For example, although the fact that a merger lacks a business purpose or that the board of directors thinks the price is low might be important in some sense, these facts may not be material if the investor has no vote on the matter.[8]

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[1] *See* 17 C.F.R. § 240.10b-5(b) (2012).
[2] *See id.*
[3] *See* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).
[4] *See id.*
[5] TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).
[6] *Id.*
[7] *Id.*
[8] *See, e.g.*, Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1095-96 (1991) (holding a disbelief or undisclosed motivation inadequate to establish a fact under the statute); Santa Fe Indus. v. Green, 430 U.S. 462, 474 (1977) (finding the transaction was not deceptive).

On the other hand, the Supreme Court has also equated materiality with price impact.[9] A fact is material if it affects stock price.[10] Arguably, this definition of materiality (if indeed it is a definition) is at odds with the other definition. It is quite clear under the first definition that a fact can be material and yet not be so important that it affects the actions of a reasonable investor.[11] Under the second definition, it is equally clear that to be material, a fact must affect the actions of at least some investors; otherwise there would be no price impact.[12] In other words, some number of investors who would not otherwise have traded must have been motivated to buy or sell or else stock price would not likely have changed any more than can be explained by the normal Brownian motion of the market.

So, which is it? Must a fact have price impact to be material? Or is it enough that the fact is important to investors even though it does not affect market price? Although these two definitions of materiality seem to be completely at odds with each other, they can in fact be reconciled. The apparent conflict comes from focusing on an individual, reasonable, investor in one case and the collective action of many such investors in the other case. To be material, a fact need not be so important that every investor would alter his behavior or change his mind somehow.[13] But a fact cannot be material if it has no perceptible effect on investor behavior.[14] In other words, the reasonable investor is a bit like Schrödinger's Cat—both dead and alive at the same time. There is plenty of room in the concept of a reasonable investor to include both investors who react and those who do not. Not all investors need react to the new information, but some investors must.[15] Indeed, this tracks the decisions of the Supreme Court perfectly. To be material, a fact need not be outcome determinative, but it must matter somehow.[16]

This Article proceeds as follows. Part I shows how the two notions of materiality grew out of the Court's decision in *Basic, Inc. v. Levinson*.[17] Part II recounts the history of the materiality doctrine before

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[9] *See Basic*, 485 U.S. at 247-48.
[10] *See id*. at 247.
[11] *See id.* at 238.
[12] *See id.* at 243-44.
[13] *See e.g.*, TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).
[14] *See id*.
[15] *See id.*
[16] *Basic*, 485 U.S. at 236; *TSC*, 426 U.S. at 450.
[17] *See infra* Part I; *Basic*, 485 U.S. 224.

and after the *Basic* decision.[18] Part III explains the difference between price impact as a test for materiality and the concept of loss causation.[19] Part IV describes the issue of materiality as presented in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, and analyzes the relationship to the requirements of Rule 23 of the Federal Rules of Civil Procedure governing class actions.[20] Part V focuses on the law relating to class actions as applied in connection with securities fraud litigation.[21] Part VI discusses the particular implications of the *Amgen* decision.[22]

I. BIRTH OF A NOTION

Ironically, both of the definitions of materiality can be traced to the Supreme Court's 1988 decision in *Basic, Inc. v. Levinson*.[23] The facts of *Basic* are relatively simple. Basic, the defendant company, was involved in merger negotiations that would likely result in substantial gains for Basic stockholders.[24] On three separate occasions, however, Basic denied that it was engaged in any such talks.[25] When the truth came out, stock price increased.[26] Stockholders who sold during the fraud period—while the price was depressed because of the misrepresentations about merger talks—sued to recover the their losses.[27]

Basic argued that the merger negotiations did not rise to the level of a material fact because there had been no agreement on price and structure.[28] The Court rejected this bright line standard and applied the standard of materiality that it had adopted for proxy fraud purposes in *TSC Industries v. Northway, Inc.*, that a fact is material if it would be important to a reasonable investor—if it would change the total mix of information available to investors.[29]

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[18] *See infra* Part II.
[19] *See infra* Part III.
[20] *See infra* Part IV; Amgen, Inc. v. Conn. Ret. & Trust Funds, 133 S.Ct. 1184 (2013) [hereinafter *Amgen II*].
[21] *See infra* Part V.
[22] *See infra* Part VI.
[23] *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988).
[24] *Id.* at 227-28.
[25] *Id.* at 227 n.4.
[26] *See id*. at 228.
[27] *Basic*, 485 U.S. at 228.
[28] *Id*. at 232-33.
[29] *Id*. at 232, 249; TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).

Basic is better known as the case that adopted the fraud-on-the-market (FOTM) doctrine.[30] This doctrine holds because members of the plaintiff class may be presumed to rely on market prices, which themselves can be presumed to incorporate any material information that is made public, securities fraud involving a positive misrepresentation may be litigated as a class action.[31] This includes any material misrepresentation, at least where the subject stock is traded in an efficient market.[32] Although it did not use the exact phrase price impact, it is quite clear that the Court's holding in *Basic* depends on the idea that a misrepresentation must affect market price in order to trigger the presumption of reliance and that price impact implies that the fact is material.[33] As the Court stated:

> The Court of Appeals found that petitioners "made public material misrepresentations and [respondents] sold Basic stock in an impersonal, efficient market. Thus the class, as defined by the district court, has established the threshold facts for proving their loss." The court acknowledged that petitioners may rebut proof of the elements giving rise to the presumption, or show that the misrepresentation *in fact did not lead to a distortion of price* or that an individual plaintiff traded or would have traded despite his knowing the statement was false.
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> Any 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, will be sufficient to rebut the presumption of reliance.[34]
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> The Court of Appeals held that in order to invoke the presumption, a plaintiff must allege and prove: (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations

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[30] *See Amgen II*, 133 S.Ct. 1184, 1192 (2013).

[31] *See Basic*, 485 U.S. at 245-46.

[32] *Id.* at 247.

[33] *See id*. at 255 (White, J., concurring in part and dissenting in part) (noting that "in adopting a 'presumption of reliance,' the Court *also* assumes that buyers and sellers rely—not just on the market price—but on the '*integrity*' of that price").

[34] *Id.* at 248 (majority opinion) (emphasis added) (citations omitted).

> would induce a reasonable, relying investor to misjudge the value of the shares; and (5) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed.
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> Given today's decision regarding the definition of materiality as to preliminary merger discussions, elements (2) and (4) may collapse into one.[35]

To be sure, the Court did not quite say that a fact is material *only if* it affects market price. It did say (in effect) that a fact can be *presumed* to be material—and thus to support class action certification—only if it affects market price.[36]

The Court has indicated repeatedly since *Basic* that in the context of a securities fraud class action under Rule 10b-5, the plaintiff must show price impact in order to show materiality.[37] For example, in describing the elements of an action for securities fraud, the Court stated that a plaintiff must show, *inter alia*:

> *[R]eliance*, often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation," *see Basic*, *supra* (nonconclusively presuming 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) . . . .[38]

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[35] *Basic*, 485 U.S. at 248 n.27 (emphasis added) (citations omitted).

[36] *See id.* at 256 (White, J., concurring in part and dissenting in part) (noting that "investors do not always share the Court's presumption that a stock's price is a reflection of [its] value") (internal quotations omitted).

[37] *See generally* 17 C.F.R. § 240.10b-5(b) (2012); *see also* Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2186 (2011) (discussing distinction between transaction causation or price impact and loss causation).

[38] Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 341-42 (2005). Notably, the Court did not mention price impact in its recent *Amgen* decision. *Compare Amgen II*, 133 S.Ct. 1184, 1190 (2013), ("[t]he fraud-on-the-market premise is that the price of a security traded in an efficient market will reflect all publicly available information about a company; accordingly, a buyer of the security may be *presumed* to have relied on that information in purchasing the security.") (emphasis added) *with Id.* at 1214 (Thomas, J., dissenting) (advocating a "pivotal assumption underlying the fraud-on-the-market theory [that] material deception influences market prices and thereby affects even traders who never read or hear of the deception") (internal quotations omitted).

Moreover, the Circuits appear to agree that materiality and price impact are essentially the same thing and that the presumption of reliance under the FOTM theory is based on equating the two.[39] For example, as Judge Easterbrook explained in *Schleicher v. Wendt*:

> When someone makes a false (or true) statement that adds to the supply of available information, that news passes to each investor *through the price of the stock*. And since all stock trades at the same price at any one time, every investor effectively possesses the same supply of information. The price both transmits the information and causes the loss.[40]

But as discussed further below, the Circuits did not agree about *when* price impact must be proved (or disproved).[41]

II. A BRIEF HISTORY OF MATERIALITY IN THE SUPREME COURT

To see how we ended up with two different tests for materiality, it is necessary to consider how the issue of materiality first made its way to the Supreme Court. There are two types of securities fraud under the Securities Exchange Act of 1934.[42] One is fraud in connection with the purchase or sale of securities as defined in Rule 10b-5.[43] The other is fraud in connection with the solicitation of proxies as defined in Rule 14a-9.[44] Most of the law relating to materiality was first established in

[39] *See*, *e.g.*, *In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 481 (2d Cir. 2008) (holding that stock price reflects the total mix of public information including material misrepresentations); *In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 631-32 (3d Cir. 2011) (holding that stock price stock price is affected my material facts); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 265 (5th Cir. 2007), *abrogated on other grounds by Halliburton*, 131 S.Ct. at 2185 (holding that market price transmits information including material facts); *Halliburton*, 131 S.Ct. at 2185 (holding that market price is influenced by material facts); *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 7-8 n.11 (1st Cir. 2005) (dictum).

[40] Schleicher v. Wendt, 618 F.3d 679, 682 (7th Cir. 2010); s*ee In re Salomon*, 544 F.3d at 481; *In re DVI*, 639 F.3d at 631-32; *Oscar Private Equity*, 487 F.3d at 264, *abrogated on other grounds by Halliburton*, 131 S.Ct. at 2185; *see also In re PolyMedica*, 432 F.3d at 8 n.11 (dictum).

[41] *See infra* notes 172-183 and accompanying text (discussing mixed treatment of the materiality requirement in a putative plantiff's class action).

[42] *See generally* 15 U.S.C. § 78j(b) (2010).

[43] 17 C.F.R. § 240.10b-5 (2012).

[44] 17 C.F.R. § 240.14a-9 (2012).

cases involving proxy fraud.[45] As noted above, that standard was adopted for purposes of Rule 10b-5 without much thought about the relevance of its origin.[46]

The first Supreme Court case to focus on materiality was *Mills v. Electric Auto-Lite Co*.[47] In *Mills*, the plaintiffs sought first to enjoin and then to set aside a merger between Electric Auto-Lite Co. (target) and Mergenthaler Linotype Co. (survivor) because the proxy solicitation in connection with the merger vote failed to disclose that the target corporation's board of directors was controlled by the survivor and its controlling stockholder.[48] Mergenthaler owned 54% of the shares of Electric Auto-Lite, and under Ohio law, the merger required a two-thirds vote for approval.[49] The Seventh Circuit ruled that the omission was material as a matter of law, but was flummoxed by the question whether the omission could be said to have *caused* the merger to be approved even though the price may have been unfair since it was impossible to determine how many votes would have been changed if the proxy statement had not been misleading.[50] Accordingly, the Seventh Circuit ruled that the district court should decide the matter based on whether the merger price was fair.[51]

The Supreme Court vacated the judgment of the Court of Appeals and remanded the case.[52] Although the precise issue before the Court was one of causation, the Court addressed the issue by tweaking the definition of materiality:

> Where the misstatement or omission in a proxy statement has been shown to be "material," as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it *might* have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This

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[45]*See*, *e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (holding proxy statement was sufficient to violate Securities Exchange Act).

[46]17 C.F.R. § 240.10b-5 (2012); *see generally* Basic Inc. v. Levinson, 485 U.S. 224 (1988). The same standard has been adopted by Delaware. *See* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944-45 (Del. 1985).

[47]*Mills*, 396 U.S. 375.

[48]*Id.* at 378.

[49]*Id.* at 379.

[50]*See* Mills v. Electric Autolite Co., 403 F.2d 429, 435 (7th Cir. 1963) (opinion below).

[51]*Id.* at 436.

[52]*Mills*, 396 U.S. at 397.

requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14(a).[53]

In this case, where the misleading aspect of the solicitation involved failure to reveal a serious conflict of interest on the part of the directors, the Court of Appeals concluded that the crucial question in determining materiality was "whether the minority shareholders were sufficiently alerted to the board's relationship to their adversary to be on their guard." An adequate disclosure of this relationship would have warned the stockholders to give more careful scrutiny to the terms of the merger than they might to one recommended by an entirely disinterested board. Thus, the failure to make such a disclosure was found to be a material defect "as a matter of law," thwarting the informed decision at which the statute aims, regardless of whether the terms of the merger were such that a reasonable stockholder would have approved the transaction after more careful analysis.[54]

There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an *essential link* in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the

[53] *Id.* at 384 (emphasis in original) (emphasis added) (footnote omitted).
[54] *Id.* at 384 n.6 (emphasis added) (citation omitted).

> statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.[55]
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> We need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority. Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement . . . .[56]

In short, the Court held that it is not necessary to show that the omission of a material fact actually influenced any votes.[57] Rather, it is enough to establish that the vote itself was an essential link in the transaction in question.[58] Thus, coincidentally, the *Mills* Court effectively equated materiality and transaction causation just as did the *Basic* Court.[59]

The problem with the decision in *Mills* is that it suggested (to some) that a fact is material if it *might* be of interest to a stockholder.[60] Thus, the issue of materiality was soon back before the Court in *TSC Industries, Inc. v. Northway, Inc.*[61] *TSC* was also a proxy fraud case involving a challenge to a merger.[62] And again the case came to the Court by way of the Seventh Circuit.[63]

In *TSC*, National Industries acquired 34% of the shares of TSC and as a result was able to gain control of the board of directors.[64] National and TSC then proposed to merge and issued a joint proxy statement that failed to disclose that National controlled TSC.[65] The proxy statement also failed to disclose certain information that arguably indicated that the deal was not as favorable pricewise to TSC stockholders as it may have

[55]*Id.* at 384-85 (emphasis added).
[56]*Mills*, 396 U.S. at 385 n.7.
[57]*Id.* at 384-85.
[58]*Id.* at 385.
[59]*See id.*; *see also* Basic Inc. v. Levinson, 485 U.S. 224 (1988).
[60]*Mills*, 396 U.S. at 834-85.
[61]TSC Indus. v. Northway, Inc., 426 U.S. 438 (1976).
[62]*TSC*, 426 U.S. at 441, 443.
[63]*Id.*
[64]*Id.* at 440.
[65]*Id.* at 442.

appeared to be from the proxy materials.[66] The Seventh Circuit held that the claimed omissions of fact were material as a matter of law, defining material facts as "all facts [that] a reasonable shareholder *might* consider important."[67]

The Supreme Court reversed, rejecting the standard applied by the Seventh Circuit and holding that "[a]n omitted fact is material if there is a *substantial likelihood* that a reasonable shareholder would consider it important in deciding how to vote."[68] The Court further held that:

> [this standard of materiality] does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed *actual significance* in the deliberations of the reasonable shareholder.[69]

The *TSC* court also held that in order to be material a fact must change the "total mix" of information available to stockholders.[70] Finally, the Court stated that as a mixed question of law and fact, the ultimate issue of materiality is appropriately resolved by summary judgment (here in favor of the plaintiff) only if a misstatement or omission is "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality."[71]

The problem with the *TSC* standard is that it is designed for use with proxy fraud. It works well enough in connection with voting since it is only natural that some will vote YES and some will vote NO on any constellation of facts. But it does not work so well for purposes of actions under Rule 10b-5, where at any given time there is a single market price for all investors.

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[66] *TSC*, 426 U.S. at 442-43.

[67] *Id.* at 445 (alteration in original).

[68] *Id.* at 449 (emphasis added).

[69] *Id.* (emphasis added).

[70] *TSC*, 426 U.S. at 449.

[71] *Id*. at 450. The struggle to define materiality is sometimes called the great might/could/would debate. *See* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1024 (5th Ed. 1982). It also conjures images of *Goldilocks and the Three Bears* inasmuch as the Court has rejected tests that are too easy or too difficult in favor of a middling test that is just right.

Although *TSC* seems to suggest that materiality can seldom be determined except at trial, the Court has also held that if there is nothing that a stockholder can do with the information, it cannot be material, and summary judgment may be appropriate.[72] In *Virginia Bankshares, Inc. v. Sandberg*, the Court held: (1) a statement couched in terms of opinion or belief may be materially misleading in violation of Rule 14a-9, but (2) a false statement in a proxy solicitation may not meet the essential link (transaction causation) test if it is addressed solely to stockholders whose combined votes are not sufficient to prevent the action from being taken.[73] The idea that a fact cannot be material if it does not matter how a stockholder votes suggests a corollary for use under Rule 10b-5.[74] If a fact does not affect stock price it cannot be material.[75] Indeed, this seems implicit in the Court's repeated references to the total mix of information.

Finally, the Court again addressed the issue of materiality in *Matrixx Initiatives, Inc. v. Siracusano*.[76] In *Matrixx,* the plaintiff filed a securities fraud class action on behalf of buyers of Matrixx shares based on Matrixx's failure to disclose reports of a possible link between its leading product, Zicam Cold Remedy, and loss of smell (anosmia), which rendered earlier statements misleading.[77] Matrixx argued that anecdotal reports of anosmia were immaterial in that they did not rise to the level of statistical significance.[78] In ruling that the complaint stated a cause of action under Rule 10b-5, the Court reaffirmed the rule laid down in *Basic* that the requirement of materiality "is satisfied when there is a 'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information[,]'"[79] noting that the medical profession itself (as well as the FDA) rely on anecdotal reports in deciding when to conduct further studies.[80] Thus, the complaint adequately alleged information linking Zicam and anosmia that would have been significant to a reasonable investor.[81] It also held that

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[72]Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991).

[73]*Id.* at 1095; *see also* Santa Fe Indus. v. Green, 430 U.S. 462, 474 (1977) (finding no cause of action under Rule 10b-5 for short form merger at allegedly unfair price because no deception was shown).

[74]*See Virginia Bankshares*, 501 U.S. at 1102.

[75]*See In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (1997).

[76]Matrixx Initiatives, Inc. v. Siracusano*,* 131 S.Ct. 1309 (2011).

[77]*Id.* at 1313.

[78]*Id.* at 1319.

[79]*Id.* at 1318 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)).

[80]*Matrixx*, 131 S.Ct. at 1320.

[81]*Id.* at 1317.

Matrixx's withholding of information about reports of adverse effects and about pending lawsuits by Zicam users gave rise to a strong inference of *scienter*.[82] Moreover, the Court declined to adopt a bright-line rule for determining materiality in *Basic*, stating that an "approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive."[83]

The Supreme Court could easily have adopted a price impact test in *Matrixx*. Indeed, the Court pointedly included facts about the price impact of the corrective disclosures therein.[84] When the news first came out (on January 30, 2004) that the FDA was looking into reports of anosmia connected with the use of Zicam, Matrixx stock fell from $13.55 to $11.97 per share.[85] Matrixx responded with a press release (on February 2, 2004) to the effect that such reports were unfounded and misleading because there had been no reports of such effects in any clinical trial and the number of anecdotal reports was not statistically significant, whereupon stock price increased to $13.40.[86] On February 6, *Good Morning America* aired an interview with a doctor who had observed anosmia in ten patients and had earlier presented his findings at a meeting of the American Rhinologic Society, whereupon stock price fell to $9.94.[87] But rather than adopting a price impact test, the Court reiterated the reasonable investor standard in rejecting defendant's argument that where anecdotal evidence of adverse reactions to an over-the-counter drug does not rise to the level of statistical significance, it cannot be a material fact.[88] Indeed, the Court characterized this argument as an effort to establish a bright line rule.[89]

To be sure, one might argue that the idea that price impact equals materiality is itself a bright line test and would be rejected by the Supreme Court as such.[90] There are several responses.

First, the bright-line rules that have been suggested to the Court in the past have been dubious at best. In *Basic* itself, the defendant argued

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[82] *Id.*

[83] *Id.* (quoting *Basic*, 485 U.S. at 236).

[84] *See Matrixx*, 131 S.Ct. at 1315-16.

[85] *Id.*

[86] *Id.* at 1316.

[87] *Id.* at 1315-16.

[88] *Matrixx,* 131 S.Ct. at 1321.

[89] *Id.* at 1318-19.

[90] *See* Basic Inc. v. Levinson, 485 U.S. 224, 246-47 (1988); *see also* SEC Staff Accounting Bull. No. 99, 1999 WL 1123073, at *4 (Aug. 12, 1999) (suggesting that volatility of price may provide guidance as to materiality).

that merger negotiations could not be considered a fact until an agreement on price and structure had been achieved.[91] And in *Matrixx*, the defendants suggested that anecdotal reports about the side effects of a nonprescription cold remedy could not be considered material where they could not be shown to be statistically significant.[92] In both cases, the Court shot down the argument on the grounds that materiality must be considered in light of all the circumstances.[93] But these bright-line rules both smack of special pleading.

Second, although the Court has ruled against specific bright-line tests, it has not said that there can be no bright lines.[94] Surely, the Court would not be opposed to a bright-line test that works—that is neither over-inclusive nor under-inclusive. There is no reason to think that it is good policy to foster unnecessary uncertainty. A bright-line rule that says that a fact is material in the context of a Rule 10b-5 claim only if it has some sort of price impact works in all cases. If there is no price impact, there is no claim anyway.[95]

Finally, the extant FOTM presumption is itself based on price impact. Although *Basic* established a presumption of reliance on market price—the integrity of the market—*Basic* also states that the presumption can be rebutted by a showing that "the misrepresentation in fact did not lead to a distortion of price or that an individual plaintiff traded or would have traded despite his knowing the statement was false."[96] Clearly, price impact is baked into the presumption.[97] Moreover, it is a presumption.[98] If for some reason the presumption

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[91]*Basic*, 485 U.S. at 232-33.

[92]*Matrixx*, 131 S.Ct. at 1313.

[93]*See supra* notes 90-91 and accompanying text.

[94]*See*, *e.g.*, *Basic*, 485 U.S. 224; *see also Matrixx*, 131 S.Ct. 1309. In neither case did the Supreme Court outright reject the possibility of a bright line test to determine materiality in the future. *See Basic*, 485 U.S. 224; *Matrixx*, 131 S.Ct. 1309.

[95]It may also work in proxy fraud cases. If new information causes a change in price, it can be presumed to be material notwithstanding the fact that it might not change the outcome of the vote. The problem is that the plaintiff may prove his case yet not recover, as ultimately happened in *Mills*. 552 F.2d 1239, 1250 (7th Cir. 1977). Delaware has dealt with this problem by developing a rescissory damages remedy by which aggrieved target stockholders may recover the survivor's gain in any interested merger tainted by a breach of fiduciary duty. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983). However, such a rule may be precluded under federal law, which limits damages to actual loss (whatever that means). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 767, 124 Stat. 1376, 1799-00 (2010).

[96]*Basic*, 485 U.S. at 248.

[97]*Id.* at 247.

[98]*Id.* at 247-48.

seems not to be warranted, it may be rebutted.[99] The presumption that materiality entails price impact is at least as good as extant law because it is the law.[100]

III. PRICE IMPACT AND LOSS CAUSATION – KNOW THE DIFFERENCE

Although there is much to recommend the price impact rule of materiality in Rule 10b-5 cases, there are significant problems. First, it is not necessarily easy to determine whether a fact has had an effect on price.[101] As the Court itself has noted, there are all sorts of reasons that the price of a stock may fall or rise.[102] It is also possible that the effect of bad news will be cancelled out by the effect of good news that is disclosed at the same time. [103] Indeed, it is easy to imagine situations in which a material fact might have no price impact. For example, it is theoretically possible that a fact may induce many investors to buy and many investors to sell at the same time, but with no net effect on stock price.[104] A more likely scenario is that the truth may leak out in such a way that there is nothing left to happen pricewise as a result of public corrective disclosure.[105] Indeed, defendants may be tempted to manage disclosure to achieve such a result.[106] Thus, a rule of price impact may encourage bad behavior.[107] But since it is up to the plaintiff to prove loss

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[99] *Id.* at 250.

[100] *See supra* notes 96-99 and accompanying text.

[101] Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342-43 (2005).

[102] *Id*. at 343 (noting the possibility of "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events").

[103] *See id*. at 342 (making both points and noting possible claim that increase in stock price would have been greater but for effects of bad news mixed with good news).

[104] *See* Michael J. Kaufman & John M. Wunderlich, *Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation*, 15 STAN. J.L. BUS. & FIN. 183, 255 (2009) ("[D]iversified investors have no expected net losses from fraud because their expected losses will match their expected gains.").

[105] *See* Andrew M. Erdlen, *Timing is Everything: Markets, Loss, and Proof of Causation in Fraud on the Market Actions*, 80 FORDHAM L. REV. 877, 890 (2011) ("[W]hen a firm announces information that the market expects, or that is already known, market price should not change.")

[106] This is because a plaintiff's burden under a "leakage theory" is difficult to establish. *See*, *e.g.*, *In re* Williams Securities Litigation-WCG Subclass, 558 F.3d 1130, 1138 (10th Cir. 2009) (finding no leakage in 1300 pages of documents).

[107] *See supra* notes 84-89 and accompanying text (suggesting difficulty in establishing causation due to intervening circumstances).

causation anyway—that a misrepresentation was the proximate cause of a loss—such behavior is just as likely under extant law.[108]

Moreover, it is not clear that a dribble out strategy is likely to work.[109] If the idea is to ease down market price in advance of public corrective disclosure, it will usually be possible, and indeed relatively easy, to identify interim movements in stock price through an event study.[110] In short, worries that a price-impact rule might not work are based on extraordinary situations that will often be relatively transparent and that are unlikely to arise any more often than they do now.[111] Nevertheless, a price-impact rule should (presumably) be stated as a presumption—that in the absence of price impact a fact is presumed not to be material or to change the total mix of publicly available information.[112] Again, it is up to the plaintiff to prove loss causation in the end.[113]

Second, it is not clear how one can show price impact without reference to the effect of corrective disclosure.[114] But corrective disclosure is about loss causation.[115] The Court has made it clear that it is not enough to plead that price was inflated on the day of purchase without also pleading that loss causation was a result of corrective disclosure.[116] But the Court has also made it clear that loss causation is not a prerequisite for class certification.[117] In a sense, equating

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[108] Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 338 (2005).

[109] Swack v. Credit Suisse First Boston, 383 F.Supp.2d 223, 243 (D. Mass. 2004) (endorsing litigability of "leakage theory" of loss causation).

[110] *See* Madge S. Thorsen, Richard A. Kaplan & Scott Hakala, *Rediscovering the Economics of Loss Causation*, 6 J. BUS. & SEC. L. 93, 103 (2006) (explaining this process); Kaufman & Wunderlich, *supra* note 104, at 188 (noting the prevalence of event studies in securities fraud litigation). Note that legal scholars have argued that event studies may identify nonstochastic movements in stock price irrespective of market efficiency since market efficiency is effectively built into confidence measurements. *See, e.g.*, Michael L. Hartzmark & H. Nejat Seyhun, *The Curious Incident of the Dog that Didn't Bark and Establishing Cause-and-Effect in Class Action Securities Litigation*, 6 VA. L. & BUS. REV. 415, 423 (2012). Thus, FOTM does not necessarily depend on market efficiency. *See, e.g.*, Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 161 (2009); *cf. In re* Time Warner, Inc. Sec. Litig., 9 F.3d 259, 275 (2d Cir. 1993) (Winter, J., dissenting) (finding no reason to think that disseminating rumors to keep pre-corrective prices high will result in higher post-corrective prices).

[111] *See supra* notes 104-110 and accompanying text.

[112] *See* Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

[113] Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 338 (2005).

[114] *See* Kaufman & Wunderlich, *supra* note 104, at 208.

[115] *See* Lentell v. Merrill Lynch & Co., Inc., 396 F.3d 161, 175 (2d Cir. 2005) (finding that the plaintiff failed to prove that a corrective disclosure caused a price drop).

[116] *See Dura*, 544 U.S. at 342.

[117] *See* Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2186 (2011).

materiality with price impact is trivial in that there can be no recovery if there is no loss.[118] Thus, it may be interesting that price impact entails materiality (and vice versa), but it does not really matter since price impact must ultimately be shown in order to prove damages.[119] In short, price impact and loss causation boil down to the same thing.[120] If you have one, you have the other (though not necessarily vice versa).[121] Thus, the Circuits have found it difficult to speak of one without the other.[122] Still, there is a lurking danger that the Court may see a requirement of price impact as equivalent to a (prohibited) requirement of loss causation. There are three responses.

The simple answer to both of these arguments is that the plaintiff must allege and prove *both* materiality and loss causation. Indeed, the Supreme Court has declared quite emphatically that price impact and loss causation are two very different things.[123] In *Erica P. John Fund, Inc. v. Halliburton Co.*, the Court stated:

> Halliburton concedes 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. Halliburton nonetheless defends the judgment below on the ground that the Court of Appeals did not actually require plaintiffs to prove "loss causation" as we have used that term. According to Halliburton, "loss causation" was merely "shorthand" for a different analysis. The lower court's actual inquiry, Halliburton insists, was whether EPJ Fund had demonstrated "price impact" – that is, whether the alleged misrepresentations affected the market price in the first place.[124]

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[118] *See* Dane A. Holbrook, *Measuring and Limiting Recovery Under Rule 10b-5: Optimizing Loss Causation and Damages in Securities Fraud Litigation*, 39 TEX. J. BUS. L. 215, 223 (2003) (explaining principle that shareholder recovery is limited to losses caused by defendant's conduct).

[119] *Id.* at 226 ("[A]ddressing the loss causation issue necessarily includes addressing the overlapping issue of measuring damages in a Rule 10b-5 suit."). Holbrook also asserts that "in the open market setting, the loss causation issue is largely a non-issue[,]" precisely because the damage computation "takes care of everything." *Id*. at 234.

[120] *Id.* at 226.

[121] *See id.*

[122] *See, e.g., Halliburton*, 131 S.Ct. at 2184.

[123] *Id.* at 2185.

[124] *Id.* at 2186-87 (citations omitted).

Halliburton further concedes that, even if its conception of what the Court of Appeals meant by "loss causation" is correct, the Court of Appeals erred by placing the initial burden on EPJ Fund. According to Halliburton, a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendant. We express no views on the merits of such a framework.[125]

"Price impact" simply refers to the effect of a misrepresentation on a stock price. Halliburton's theory is 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. If the price is unaffected by the fraud, the price does not reflect the fraud.

We do not accept Halliburton's wishful interpretation of the Court of Appeals' opinion. As we have explained, loss causation is a familiar and distinct concept in securities law; it is not price impact. While the opinion below may include some language consistent with a "price impact" approach, we simply cannot ignore the Court of Appeals' repeated and explicit references to "loss causation."

Whatever Halliburton thinks the Court of Appeals meant to say, what it said was loss causation: "[EPJ Fund] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." We take the Court of Appeals at its words. Based on those words, the decision below cannot stand.

Because we conclude the Court of Appeals erred by requiring EPJ Fund 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. To the extent Halliburton has preserved any further arguments against class certification,

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[125] *Id*. at 2187 n.* (citations omitted).

> they may be addressed in the first instance by the Court of Appeals on remand.[126]

It is somewhat puzzling that the Court was so emphatic in *Halliburton* that loss causation is a different element from price impact and materiality. The somewhat cynical explanation is that the Court was looking for an easy out even though the Court chooses the cases it hears. The better explanation is that the Court tends to compartmentalize. Regarding the law of fraud in isolation, it is clear that the plaintiff must prove deception, materiality, *scienter*, reliance, and loss causation.[127] And loss causation does not necessarily follow from either materiality or reliance even though the loss must somehow be connected to it.[128] In *Halliburton*, the Fifth Circuit merely recognized the reality that a class action cannot ultimately succeed unless the plaintiff can show loss causation.[129] But, that does not make loss causation a condition for class certification.[130] In other words, it makes perfect sense to distinguish between reliance and loss causation if one is thinking about an individual claim of fraud.[131]

Moreover, it seems quite clear that one cannot actually rely on price impact—as opposed to the integrity of the market—since by definition price impact happens later, sometime after one trades.[132] Rather, an investor relies on market prices as being fairly established.[133] Thus, for example, the plaintiff must show that market price was artificially high when she bought.[134] The obvious way to prove that price was inflated is to show that it declined when the truth came out.[135] If she succeeds in doing so, she will also have shown loss causation. Again, that does not make loss causation a condition for class certification.[136] Rather, price impact, as opposed to loss causation, is a way to show

[126]*Halliburton*, 131 S.Ct. at 2187 (citations omitted).

[127]Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S.Ct. 761, 768 (2008).

[128]Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 344-46 (2005) (discussing the common-law roots for a securities fraud cause of action thereby requiring a loss connected to the misrepresentation).

[129]*Halliburton*, 131 S.Ct. at 2184.

[130]*Id.* at 2184-85.

[131]*Id.*

[132]*See id.* at 2187.

[133]*Halliburton*, 131 S.Ct. at 2186.

[134]*See* Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 265 (5th Cir. 2007), *abrogated on other grounds by, Halliburton*, 131 S.Ct. at 2185-86.

[135]*See id.* at 271.

[136]*Halliburton*, 131 S.Ct. at 2186.

reliance.[137] The fact that it may also show loss causation is beside the point. In other words, in an ordinary non-class action, plaintiff may be able to show reliance without regard to price impact and may be able to show loss causation without regard to price inflation.[138]

Finally, someone who buys at an inflated price and then sells before corrective disclosure would be able to show reliance but would not be able to show loss causation.[139] If the argument is that individual class members may or may not have relied on the integrity of the market price for reasons individual to each—and assuming such arguments are capable of some kind of acceptable proof—certification should presumably be denied. Although *Halliburton* clearly holds that the plaintiff need not prove the element of loss causation in order to have the action certified as a class action, and thus suggests that one need not prove the elements of a case in advance in order to litigate the merits, the quoted passage also suggests that the Court is receptive to the idea that reliance may be rebutted by lack of price impact, despite the fact that it is difficult to distinguish from loss causation.[140]

To be sure, one danger inherent in a rule equating materiality and price impact is that it may suggest (or confirm) that there is a *prima facie* claim whenever a price change follows a corrective disclosure—which may explain why the *Matrixx* Court was reluctant to go there.[141] It is common practice for plaintiff lawyers to file claims in such circumstances anyway as long as the other elements of the claim can be pleaded in good faith.[142] So the need to plead deception and especially *scienter*—and maybe loss causation—are real hurdles.

The bigger problem may be that the Court has effectively prohibited summary judgment on the question of materiality. Instead, the Court has stuck to the notion that a fact is material if a reasonable investor would want to know about it in deciding whether to trade or how to vote, or if it changes the total mix of information in the marketplace.[143] It is not clear whether these are alternative standards or

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[137]*Id.* at 2184-85.

[138]*See id.*

[139]*See id*. at 2186.

[140]*Halliburton*, 131 S.Ct. at 2185-87.

[141]*See generally* Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309 (2011).

[142]*See* Shaun Mulreed, *Private Securities Litigation Reform Failure: How Scienter Has Prevented the Private Securities Litigation Reform Act of 1995 from Achieving Its Goals*, 42 SAN DIEGO L. REV. 779, 788 (2005) (discussing Congress' intent to alleviate the frequent filing by plaintiff attorneys challenging securities fraud).

[143]TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).

two ways of saying the same thing. It is also possible that the total-mix standard is intended to connote price impact even though its provenance is proxy fraud. Although this is not a *per se* prohibition on summary judgment, it does effectively make materiality a question of fact that can be resolved only at trial.

It is perhaps understandable that the Court is reluctant to permit this central issue to be resolved on motion for summary judgment since there is little else to be litigated beyond deception and *scienter*. As for *scienter,* Congress has imposed heightened pleading requirements through Exchange Act §21D(b)(2), adopted as part of the Private Securities Litigation Reform Act (PSLRA), which provides that:

> in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.[144]

In addition, PSLRA requires that the complaint set forth each misleading statement or omission with particularity and that the plaintiff prove causation.[145] Moreover, PSLRA requires that any complaint not meeting these standards be dismissed and that discovery be stayed pending any such motion.[146] If materiality can be resolved on a motion for summary judgment, there may be little left to litigate.

It has also been argued that if a fact is not material—or believed not to be so—there can be no *scienter* in connection with failing to disclose it. Indeed, the defendants in *Matrixx* made such an argument.[147] The Court rejected that argument because of evidence that the defendants had denied the reports precisely because they were worried about effects on market price.[148] Incidentally, this suggests a way to test for *scienter*. In the context of an action for securities fraud, *scienter* should perhaps require a showing of intent to manipulate stock price, but not necessarily success in doing so. Although this formulation is somewhat inconsistent

[144] 15 U.S.C. § 78u-4(b)(2)(A) (2006).
[145] *Id.*
[146] *Id.*; 15 U.S.C. § 78u-4(b)(3)(B) (2006).
[147] *See* Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309, 1317 (2011).
[148] *Id.* at 1324-25.

with the common law understanding of *scienter*, it may be appropriate where the so-called fraud does not involve gain to the fraudster.[149]

IV. BACK BY POPULAR DEMAND

The issue of materiality was back in the Supreme Court in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*.[150] The issue in *Amgen* was whether the class plaintiff must prove materiality in order to have the action certified as a class action and, perhaps more important, whether the defendant should have the opportunity to show that a misrepresentation is not material so as to rebut the FOTM presumption.[151]

The facts of *Amgen* are relatively simple. The plaintiff filed a securities fraud action against Amgen and several of its officers, alleging public misrepresentations and omissions about safety information relating to two Amgen products used to treat anemia.[152] Specifically, the complaint alleged four actionable misstatements:

> First, Amgen supposedly downplayed the FDA's safety concerns about its products in advance of an FDA meeting with a group of oncologists. Second, Amgen allegedly concealed details about a clinical trial that was canceled over concerns that Amgen's product exacerbated tumor growth in a small number of patients. Third, Amgen purportedly exaggerated the onlabel (that is, for FDA-approved uses) safety of its products. And fourth, Amgen allegedly misrepresented its marketing practices, claiming that it promoted its products solely for onlabel uses when it in fact promoted significant off-label usage, in violation of federal drug branding statutes.
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> Those alleged misstatements and omissions, according to the complaint, inflated the price of Amgen's stock when Connecticut Retirement purchased it. Later, corrective

[149]Although it may suffice for purposes of pleading *scienter* to introduce evidence that management declined to disclose information because of worries about price impact, it cannot be enough to prove *scienter* if it is equally plausible that the management thought the information was immaterial. *Cf.* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313-14 (2007).

[150]*Amgen II*, 133 S.Ct. 1184 (2013).

[151]*Id.* at 1194.

[152]*Id.* at 1193.

disclosures allegedly caused Amgen's stock price to fall, injuring Connecticut Retirement.[153]

The plaintiff moved to certify the action as a class action on behalf of investors who bought during the fraud period under the FOTM theory by which buyers may be presumed to have relied on any falsehood operating in the market.[154] Thereupon, "Amgen sought to introduce evidence that FDA announcements and analyst reports about Amgen's business publicized the truth about the safety issues looming over Amgen's drugs, and thus that Amgen's alleged misrepresentations could not have affected the stock price . . . ."[155] The trial court declined to consider such evidence and certified the action as a class action.[156] On interlocutory appeal, the Ninth Circuit affirmed, ruling that the issue of materiality and thus price impact is one that goes to the merits of the claim and that therefore cannot be considered at the class certification stage.[157]

The Supreme Court affirmed, largely adopting the reasoning of the Ninth Circuit that the question of materiality need not be addressed in connection with certification because the question is one that is common to the class.[158] If the plaintiff proves materiality, it is proved for all.[159] If the action fails because the plaintiff cannot prove materiality, the action fails for all.[160] The Court also agreed with the Ninth Circuit that the opportunity to rebut the presumption of reliance on grounds of immateriality should be seen as just another effort to argue the merits and should be left for trial or summary judgment.[161]

To the lay observer, questions of *when* materiality must be shown and *when* the defendant may seek to rebut the presumption of reliance may appear to be legal technicalities of the worst kind, but they are quite important questions for both federal securities law and the law relating to class actions. Securities fraud actions that are certified as class actions almost invariably settle because of the potential for enormous damages.[162]

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[153]Conn. Ret. Plans & Trust Funds v. Amgen, Inc., 660 F.3d 1170, 1172-73 (9th Cir. 2011), *aff'd by*, 133 S.Ct. 1184 (2013) [hereinafter *Amgen I*].

[154]*Id.* at 1173.

[155]*Id.* at 1177.

[156]*Id.* at 1174.

[157]*See Amgen I*, 660 F.3d at 1177.

[158]*Amgen II*, 133 S.Ct. 1184, 1191, 1194 (2013).

[159]*Id.* at 1191.

[160]*Id.*

[161]*Id.* at 1204.

[162]Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging*

The stakes are so high for defendant companies that they almost always agree to pay something—usually whatever amount of insurance is available.[163] As a result, and since materiality and price impact are unlikely to be resolved on a motion to dismiss or a motion for summary judgment, these issues will never be considered unless they are considered when the action is certified as a class action.[164] Thus, the defendant will never have an opportunity to defend.

In order for an action to be litigated as a class action, the trial court must certify that the action is appropriate for class action treatment.[165] Rule 23(a) of the Federal Rules of Civil Procedure sets forth the general rule for all class actions:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[166]

In addition, if the class action is one for individual damages, it must also satisfy Rule 23(b)(3) which requires that:

> [T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include: (A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular

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Fiduciaries and Fiduciary Judging, 2003 BYU L. REV. 1239, 1241-42, 1256-57 (2003).

[163] *Id.* at 1241-42, 1256-57, 1261 n.91.

[164] *See* Jonathan Eisenberg, *Beyond The Basics: Seventy-five Defenses Securities Litigators Need To Know*, 62 BUS. LAW. 1281, 1296 (2006).

[165] FED. R. CIV. P. 23(c)(1)(A) (2012).

[166] FED. R. CIV. P. 23(a) (2012).

> forum; and (D) the likely difficulties in managing a class action.[167]

Securities fraud is arguably well suited to litigation by class action since most of the elements of a claim under Rule 10b-5 are the same for each member of the plaintiff class.[168] The one exception is the element of reliance.[169] If it is necessary to show that each member of the plaintiff class relied on the alleged misrepresentation, then common questions are not likely to predominate.[170] Moreover, the action is likely to be unmanageable as a class action because of the need to take evidence from each member of the plaintiff class.[171] One might also argue under Rule 23(a) that where reliance must be shown, the claims of the class plaintiff may not be typical and the class plaintiff may not be an adequate representative.[172]

As noted above, the Supreme Court addressed this problem in *Basic*, holding that if a stock trades in an efficient market, the market can be presumed to react to public statements by adjusting stock price.[173] Thus, investors can be presumed to have relied on a public misrepresentation by virtue of their presumed reliance on the integrity of

[167] FED. R. CIV. P. 23(b)(3)(A)-(D) (2012).

[168] *See* Nancy My Nguyen, *Materially Immaterial? Revisiting Standards for Securities Fraud Class Certification in* Amgen v. Connecticut Retirement Plans And Trust Funds, 8 DUKE J. OF CONSTITUTIONAL L. & PUB. POL'Y SIDEBAR 155, 155-58 (2013) *available at* http://scholarship.law.duke.edu/djclpp_sidebar/98/; Zachary Alan Starr, *Fraud on the Market and the Substantive Theory of Class Actions*, 65 ST. JOHN'S L. REV. 441, 449 (1991).

[169] *See* Nguyen, *supra* note 168, at 155-58; *see also* Starr, *supra* note 168, at 449.

[170] Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988).

[171] *Amgen II*, 133 S.Ct. 1184, 1192 (2013)

[172] *See, e.g.*, Greenspan v. Brassler, 78 F.R.D. 130, 132 (S.D.N.Y. 1978) (holding that plaintiff was not typical of the class because of individual reliance determinations). Note that reliance is not a problem in omission cases. *See* Affiliated UTE Citizens of Utah v. United States, 406 U.S. 128, 153 (1972). Since it is usually impossible to prove reliance on an omission anyway, the Supreme Court has held that it is enough that an omission is material to show reliance at least where the defendant owes a duty of disclosure—such as a fiduciary duty—to the plaintiff. *See id*. at 153-54. To be sure, the defendant may seek to prove that some members of the plaintiff class knew the truth, but that has not generally been enough to defeat class action treatment. *See In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 631-32 (3d Cir. 2011). Nor is reliance a problem under the 1933 Act where it is not necessary to prove reliance, although here too the defendant may seek to prove that some members of the class knew the truth and are thus precluded from recovery under §11. Todd R. David et al., *Heightened Pleading Requirements, Due Diligence, Reliance, Loss Causation, and Truth-On-The-Market – Available Defenses to Claims Under Sections 11 and 12 of the Securities Act of 1933*, 11 TRANSACTIONS: TENN. J. BUS. L. 53, 55-56, 63 (2010).

[173] *Basic*, 485 U.S. at 244-46.

the market.[174] Again, it is clear that this presumption is rebuttable.[175] If the market knew the truth or an investor can be shown not to have relied on the misrepresentation, the presumption is rebutted.[176] Nevertheless, it is clear that the burden is on the class plaintiff to show that the action is appropriate for class-action treatment.[177] As the Ninth Circuit stated in *Amgen* itself:

> As the party seeking class certification, Connecticut Retirement "bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met." And the district court facing a class certification motion is required to conduct "a rigorous analysis" to ensure that the Rule 23 requirements are satisfied. Amgen argues that Connecticut Retirement failed to carry that burden because it did not *prove* that Amgen's supposedly false statements were material. If those misrepresentations were *im*material, Amgen contends, they by definition would not affect Amgen's stock price in an efficient market, and thus no buyer could claim to have been misled by an artificially inflated stock price. Thus, Amgen concludes, each individual plaintiff would be left to prove reliance at trial individually—making a class proceeding unwieldy.[178]

What does *proof* mean in this setting? Presumably, it cannot be that the plaintiff is required to prove his case before he can go to trial to prove his case. Here, the Ninth Circuit adopts the reasoning of the Seventh Circuit per Judge Easterbrook:

> The Seventh Circuit, recently faced with this same issue, held that proving materiality is not a precondition to invoking the fraud-on-the-market presumption at the class certification stage: Defendants say that, before certifying a class, a court must determine whether false statements materially affected the price. But whether statements were false, or whether the effects were large enough to be called

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[174] *Id* at 247.
[175] *Id.* at 248.
[176] *Id.* at 248-49.
[177] *Amgen I*, 660 F.3d 1170, 1175 (9th Cir. 2011).
[178] *Id.* at 1175 (citations omitted).

> material, are questions on the merits. Although we concluded in [a prior case] that a court may take a peek at the merits before certifying a class, [we] insisted that this peek be limited to those aspects of the merits that affect the decisions essential under Rule 23. If something about "the merits" also shows that individual questions predominate over common ones, then certification may be inappropriate. Falsehood and materiality affect investors alike, however. It is possible to certify a class under Rule 23(b)(3) even though all statements turn out to have only trivial effects on stock prices. Certification is appropriate, but the class will lose on the merits.[179]

The Ninth Circuit goes on to explain that "[t]he three circuits that require a plaintiff to prove materiality at the class certification stage do so on the apparent rationale that a footnote in *Basic, Inc. v. Levinson* compels it."[180]

Finally, in what seems like an afterthought, the Ninth Circuit notes that:

> Amgen also argues that the district court erred by not affording it an opportunity to rebut the fraud-on-the-market presumption at the class certification stage. Specifically, Amgen sought to introduce evidence that FDA announcements and analyst reports about Amgen's business publicized the truth about the safety issues looming over Amgen's drugs, and thus that Amgen's alleged misrepresentations could not have affected the stock price—

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[179] *Id*. at 1175-76 (quoting Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010)). "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." *Id*. at 1176 (citing *In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 631 (3d Cir. 2011)).

[180] *Amgen I*, 660 F.3d at 1176 (citing *In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 482 (2d Cir. 2008) ("The *Basic* Court thereby set forth a test of general applicability that where a defendant has (1) publicly made (2) a material misrepresentation (3) about stock traded on an impersonal, well-developed (i.e., efficient) market, investors' reliance on those misrepresentations may be presumed."); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 264 (5th Cir. 2007) ("The Supreme Court in *Basic* adopted this presumption of reliance . . . . Reliance is presumed if the plaintiffs can show that '(1) the defendant made public material misrepresentations . . . .'") (citation omitted), *abrogated on other grounds by*, Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179 (2011); *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 8 n.11 (1st Cir. 2005) (noting in dictum that to invoke fraud-on-the-market presumption at class certification stage, plaintiff must prove materiality) (internal citations omitted))).

> the so-called truth-on-the-market defense. *See, e.g.*, *Basic*, 485 U.S. at 248-49 ("[I]f, despite [defendants'] allegedly fraudulent attempt to manipulate market price, [the truth] credibly entered the market and dissipated the effects of the misstatements, those who traded . . . after the corrective statements would have no direct or indirect connection with the fraud."). But as the Supreme Court and Ninth Circuit have explained, the truth-on-the-market defense is a method of refuting an alleged misrepresentation's *materiality*. *See, e.g.*, *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097-98 (1991).[181]

Curiously, the Ninth Circuit ruled that it was correct for the trial court to deny the defendant the opportunity to rebut the presumption of reliance at the certification stage without any reference to the discussion of the issue by either the Second Circuit or the Fifth Circuit or (especially) the Third Circuit, which expressly ruled that materiality need not be proven but that the presumption of reliance may be rebutted at the certification stage.[182] Rather, the Ninth Circuit cited *Virginia Bankshares, Inc. v. Sandberg* for the proposition that the truth-on-the-market defense—that the truth was known to the market and neutralized an alleged misrepresentation—is a method of refuting the materiality of a misrepresentation despite the fact that the Supreme Court in *Basic* hedged as to whether rebutting the presumption of reliance should be a matter for trial or certification, and despite the fact that *Virginia Bankshares* was a proxy fraud case where reliance is not really an issue.[183]

It is useful to consider the whole of what the Supreme Court said in *Basic*:

> The Court of Appeals found that petitioners "made public, material misrepresentations and [respondents] sold Basic stock in an impersonal, efficient market. Thus the class, as defined by the district court, has established the threshold facts for proving their loss." The court acknowledged that petitioners may rebut proof of the elements giving rise to the

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[181] *Amgen I*, 660 F.3d at 1177 (parallel citations omitted).

[182] *See In re DVI*, 639 F.3d at 630-32.

[183] *Amgen I*, 660 F.3d at 1177 (citing *Virginia Bankshares*, 501 U.S. 1083, 1097-98 (1991)).

presumption, or show that the misrepresentation in fact did not lead to a distortion of price or that an individual plaintiff traded or would have traded despite his knowing the statement was false.

Any 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*, will be sufficient to rebut the presumption of reliance. For example, if petitioners could show that the "market makers" were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone. Similarly, *if, despite petitioners' allegedly fraudulent attempt to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements, those who traded Basic shares after the corrective statements would have no direct or indirect connection with the fraud*. Petitioners also could rebut the presumption of reliance as to plaintiffs who would have divested themselves of their Basic shares without relying on the integrity of the market. For example, a plaintiff who believed that Basic's statements were false and that Basic was indeed engaged in merger discussions, and who consequently believed that Basic stock was artificially underpriced, but sold his shares nevertheless because of other unrelated concerns, *e.g.*, potential antitrust problems, or political pressures to divest from shares of certain businesses, could not be said to have relied on the integrity of a price he knew had been manipulated.[184]

The Court of Appeals held that in order to invoke the presumption, a plaintiff must allege and prove: (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations

[184]Basic Inc. v. Levinson, 485 U.S. 224, 248-49 (1988) (emphasis added).

> would induce a reasonable, relying investor to misjudge the value of the shares; and (5) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed.
>
> Given today's decision regarding the definition of materiality as to preliminary merger discussions, elements (2) and (4) may collapse into one.
>
> By accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price. Furthermore, our decision today is not to be interpreted as addressing the proper measure of damages in litigation of this kind.
>
> We note there may be a certain incongruity between the assumption that Basic shares are traded on a well-developed, efficient, and information-hungry market, and the allegation that such a market could remain misinformed, and its valuation of Basic shares depressed, for 14 months, on the basis of the three public statements. *Proof of that sort is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate*. Thus, we see no need to engage in the kind of factual analysis the dissent suggests that manifests the "oddities" of applying a rebuttable presumption of reliance in this case.[185]

It is curious—and a bit disingenuous—that the Ninth Circuit quotes the first bit of italicized language in describing the truth-on-the-market defense and then conveniently ignores Footnote 29, which is precisely the basis for the Second Circuit's ruling that the presumption of reliance may be rebutted at the certification stage.[186] Rather, the Ninth Circuit speculates that the Second Circuit (as well as the Fifth Circuit) must have misread Footnote 27 to indicate that the collapse of reliance and materiality into one factor somehow requires proof of materiality at

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[185] *Id*. at 248-49 n.27-29 (emphasis added) (citations omitted).

[186] *Amgen I*, 660 F.3d at 1177; *In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 485 (2d Cir. 2008).

the certification stage.[187] To the contrary, as the Second Circuit observed, Rule 23 of the Federal Rules of Civil Procedure was amended in 2003 to remove language in Rule 23(c)(1)(C) that class certification may be conditional noting that "the Advisory Committee stated '[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.'"[188]

When Footnote 29 is considered in light of the 2003 amendments, it is difficult to see how *Basic* should not be read as permitting and indeed requiring the consideration of rebuttal evidence at the certification stage. To be clear, if a court must be satisfied that the requirements of Rule 23 have been—and will be—met at the time of certification, it follows that the court must consider rebuttal evidence at the certification stage.[189]

Finally, *Virginia Bankshares* is a proxy fraud case, not a Rule 10b-5 FOTM case.[190] Indeed, if the case stands for anything, *Virginia Bankshares* supports the idea that a defendant should be able to rebut materiality at the certification stage.[191] The case holds that there is no claim for proxy fraud if the votes solicited were unnecessary to approve the transaction—that they *could not* have mattered.[192] If anything, that would seem to suggest that the defendant in a FOTM case should be permitted to show that a fact could not have mattered because it did not affect market price.

V. PROCEDURE TRUMPS SUBSTANCE

Although the Supreme Court could have addressed the definition of materiality and its relationship to the presumption of reliance, the *Amgen* decision turned out to be mostly about procedure and the law relating to class actions.[193] Indeed *Amgen* does not even mention the concept of price impact. To be sure, the Court notes that investors rely on market prices and thus rely on any misrepresentation that affects

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[187] *Amgen I*, 660 F.3d at 1176.

[188] *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 39 (2d Cir. 2006) (opinion by Newman, J. with panel including Sotomayor, J.) (quoting FED. R. CIV. P. 23(c)(1)(C) Advisory Committee Notes (2003)).

[189] *See In re Initial Pub. Offerings*, 471 F.3d at 41-42.

[190] Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1087 (1991).

[191] *See id.* at 1115 (Kennedy, J., concurring in part and dissenting in part).

[192] *Id.* at 1099-1102.

[193] *See generally Amgen II*, 133 S.Ct. 1184, 1191 (2013) ("[t]he issue presented concerns the requirement stated in Rule 23(b)(3) that 'the questions of law or fact common to class members predominate over any questions affecting only individual members'").

market price, at least where the market is efficient.[194] But it is telling that the Court nowhere states that a misrepresentation may be presumed to be material if it can be shown to have affected market price (or vice versa). Thus, *Amgen* changes almost nothing about the law relating to securities fraud other than to make it clear that materiality need not be proven in order for the action to be certified as a class action.[195] In fact, the decision is quite emphatic in reaffirming both the FOTM presumption and its rebuttability, noting the existence of examples set forth in *Basic* as to how the presumption may be rebutted.[196] Nevertheless, *Amgen* does offer a few new tidbits.

First, the Court distinguishes the elements of the claim such as materiality from other facts bearing on certification that must be proven in order to certify the class.[197] In particular, the Court notes that market efficiency and a *public statement* must be proved to trigger the presumption of reliance, but it distinguishes these facts as non-elements of the claim that would not preclude individual recovery.[198] In a similar vein, the Court notes that the plaintiff must prove that it traded during the fraud period.[199] But as the Court points out, this fact relates to whether the named plaintiff is an adequate representative whose claim is typical of the claims of absent class members.[200]

Second, the Court seems to invite motions for summary judgment by repeatedly noting that materiality (and thus the presumption of reliance) may be so challenged.[201] The Court also restates its position that materiality is an objective fact and one that is established for all absent class members in a certified class action.[202] Indeed, the Court suggests that one reason to preclude rebuttal is to maximize the *res judicata* effect of any finding of immateriality.[203] Moreover, by avoiding any discussion of price impact and its relationship to materiality, the Court leaves open the possibility that defendants may seek to rebut the FOTM presumption as part of a motion for summary judgment.[204] But, it is not at all clear whether a court in granting such a motion for lack of

[194] *Id.* at 1192-93.
[195] *Id.* at 1191.
[196] *Id.* at 1193.
[197] *Amgen II*, 133 S.Ct. at 1190-91.
[198] *Id.* at 1209.
[199] *Id.* at 1198.
[200] *Id.*
[201] *See Amgen II*, 133 S.Ct. at 1195-96.
[202] *See id.*
[203] *See id.* at 1203-04.
[204] *See id.* at 1196.

price impact rather than immateriality *per se* would be required to decertify the class, thus leaving open the possibility that the issue could be re-litigated.[205]

Finally, the Court says nothing about rebutting the FOTM presumption on grounds other than immateriality, even though noting that *Basic* sets forth examples of how the FOTM presumption may be rebutted, including by means other than showing lack of price impact.[206] Thus, the question remains open whether such evidence may be offered in response to a motion to certify. Presumably, the question is whether such evidence implicates the merits or not. Although *Amgen* clearly holds that materiality may not be addressed in connection with certification, it also seems to hold that other facts such as market efficiency and publicity, not to mention adequacy of representation and typicality, are fair game.[207] In any event, the Court reiterates its position that the merits may be addressed as necessary, while holding that it is not necessary to address materiality.[208]

On the one hand, *Amgen* confirms that a court may not consider the merits of a case—on the merits—in deciding whether to certify it as a class action.[209] The only question is whether the matter is appropriate for class action treatment—whether it satisfies the terms of Rule 23.[210] Certification is about whether the case may proceed to trial as a class action rather than as an action on behalf of the individual plaintiff.[211] The idea that a plaintiff or defendant should be required to *prove* his case before it can be tried is silly if not preposterous.[212]

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[205] *See Amgen II*, 133 S.Ct. at 1191.

[206] *See id.* at 1193; *see also* Basic Inc. v. Levinson, 485 U.S. 224, 248-49 (1988) ("For example, if petitioners could should that the 'market makers' were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken . . . .").

[207] *Amgen II*, 133 S.Ct. at 1191, 1199 ("While the failure of common, classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class.").

[208] *Id.* at 1191.

[209] *See id.*

[210] *Id.*

[211] *See Amgen II*, 133 S.Ct. at 1191 (identifying the elements required in order to assert a valid certification of a class action under Rule 23(b)(3)).

[212] Justice Breyer made a similar comment during oral argument in *Amgen* regarding the idea that the materiality should be proved in connection with certification: "[I]t can't be the answer we should litigate everything before we litigate anything." Transcript of Oral Argument at 52, *Amgen II*, 133 S.Ct. 1184 (2013) (No. 11-1085).

On the other hand, *Amgen* also confirms that a court must determine—by rigorous analysis—that the case satisfies the terms of Rule 23.[213] With regard to securities-fraud class actions, the big question is whether the case is one in which common questions predominate over any issues that must be resolved individual-by-individual among the members of the class.[214] The most important issue is reliance. If a misstatement is material, presumably it affects market price. If it affects market price, presumably investors have relied on it. If investors can be presumed to have relied on it, then the question of reliance is common to all who bought during the fraud period, and it is appropriate that the case should be tried as a class action if only for the sake of economy.[215] Moreover, it is well-settled that the plaintiff bears the burden of establishing that the case is appropriate for class-action treatment.[216] And it is not enough that the plaintiff makes *some showing* that the case is a proper one for class-action treatment.[217] Rather, as the Second Circuit has held, a court may not certify a class without making a ruling that each Rule 23 requirement is met.[218]

It is curious that the courts find it so difficult to deal with the rule that they may not consider the merits in connection with a motion to certify. It is one thing to consider the merits. It is another thing to consider how the parties intend to prove or disprove the case. Indeed, it is quite common in other settings to proffer evidence (and even arguments) in advance of the actual introduction thereof.[219] The question

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[213]*See Amgen II*, 133 S.Ct. at 1191.

[214]*See id.*

[215]Note that reliance is not the only issue. *See id*. Other issues that arise under Rule 23(a) include: (1) whether the alleged class "'is so numerous that joinder of all members is impracticable'; (2) whether 'there are questions of law or fact common to the class'; (3) whether the litigant's claims are 'typical of the claims . . . of the class'; and (4) whether the litigant will 'fairly and adequately protect the interests of the class. '" *Id*. (quoting FED. R. CIV. P. 23(a)). In addition, as elucidated in *Amgen*, Rule 23(b) requires "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3); *see Amgen II*, 133 S.Ct. at 1191. Moreover, if a misstatement affects market price, it can be presumed to have caused a loss to those who bought during the fraud period. And if a misstatement is not material, the defendant cannot have acted with *scienter* since one cannot infer that the defendant sought to mislead the investing public by a misstatement that did not matter.

[216]*Amgen II*, 133 S.Ct. at 1191.

[217]*See In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 27 (2d Cir. 2006) (opinion by Judge Newman, J. with panel including Sotomayor, J.) (holding the application of a "some showing" standard was error).

[218]*Id.* at 33.

[219]For example, when a party submits a motion for summary judgment, the non-

is not whether the evidence is convincing. The question is whether the evidence works the same for all class members.[220]

In addressing this puzzle in the context of securities-fraud class actions, the Second Circuit has attempted to strike a distinction between findings of fact (as in a trial) and a finding that the requirements of Rule 23 have been met:

> We resist saying that what are required are "findings" because that word usually implies that a district judge is resolving a disputed issue of fact. Although there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings, the ultimate issue as to each requirement is really a mixed question of fact and law. A legal standard, *e.g.*, numerosity, commonality, or predominance, is being applied to a set of facts, some of which might be in dispute. The Rule 23 requirements are threshold issues, similar in some respects to preliminary issues such as personal or subject matter jurisdiction. We normally do not say that a district court makes a "finding" of subject matter jurisdiction; rather, the district court makes a "ruling" or a "determination" as to whether such jurisdiction exists. The judge rules either that jurisdiction exists or that it does not. Of course, in making such a ruling, the judge often resolves underlying factual disputes, and, as to these disputes, the judge must be persuaded that the fact at issue has been established. The same approach is appropriate for Rule 23 requirements. For

moving party will have the burden of proving his or her prima facie case. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[220] It is perhaps arguable that a proffer may somehow prejudice the court. But it is the job of the court not to let itself be prejudiced. In the case of a jury trial, it is a simple matter for the court to hear the proffer outside the presence of the jury. The problem is at least in part one of path dependence. One of the first SFCAs to reach the Supreme Court was *Eisen v. Carlisle & Jacquelin*, in which the issue was whether the trial court could conduct a preliminary hearing into the merits — a mini-trial — in order to predict whether the plaintiff was likely to succeed. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). If so, the idea was that the defendant could be required to foot the bill for notice to class members since Rule 23 provides that fees and expenses be paid out of the recovery pot. *See id*. at 177-78. Not surprisingly, the Supreme Court answered the question in the negative. *Id*. at 178. As with *Mills*, the Court's decision in *Eisen* created as much confusion as clarification. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 112 (2009). Thus, in the wake of *Eisen*, the Court has ruled that the trial court must conduct "a rigorous analysis" in which it may be necessary for the court to probe behind the pleadings. Gen. Tel. Co. of the Southwest. v. Falcon, 457 U.S. 147, 160-61 (1982).

> example, in considering whether the numerosity requirement is met, a judge might need to resolve a factual dispute as to how many members are in a proposed class. Any dispute about the size of the proposed class must be resolved, and a finding of the size of the class, *e.g.*, 50, 100, or more than 200, must be made. At that point, the judge would apply the legal standard governing numerosity and make a ruling as to whether that standard, applied to the facts as found, establishes numerosity.[221]
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> We recognize that Rule 23(b)(3) states that a(b)(3) class is appropriate if the court "finds" predominance and superiority. We think the rule-makers used that verb simply to mean "rules" or "determines," without implying that the requirements are to be "found" as would be a disputed question of fact.[222]

Thus, it is not surprising that the Second Circuit later ruled that materiality must be shown for certification purposes.[223] Accordingly, individual questions of reliance will predominate unless reliance can be presumed, but reliance cannot be presumed in the absence of price impact.[224] In other words, price impact is the price of admission to class-action status.

Nevertheless, one might argue that the fact that reliance cannot be presumed unless the misstatement is material does not undermine the idea that the merits of the claim are the same for every member of the class. As the Ninth Circuit stated in *Amgen* itself:

> [I]f the misrepresentations turn out to be immaterial, then *every* plaintiff's claim fails on the merits (materiality being a standalone merits element), and there would be no need for a trial on each plaintiff's individual reliance. *Either way, the plaintiffs' claims stand or fall together—the critical question in the Rule 23 inquiry.* As the Supreme Court said in *Dukes*, "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather

[221] *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 40 (2d Cir. 2006).
[222] *Id.* at 40 n.12.
[223] *See In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 484 (2d Cir. 2008).
[224] *See id.*

> the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[225]

Accordingly, the Ninth Circuit declined to follow decisions of the Second Circuit and the Fifth Circuit (and dictum in the First Circuit) to the effect that materiality must be proven at the certification stage.[226] Again, the problem is that these courts did not clearly so rule. Rather, they held that the defendant should have the opportunity to *rebut* the presumption of reliance at the certification stage.[227] This is very different from requiring proof of materiality, as both the Supreme Court and the Third Circuit have acknowledged.[228] But the Ninth Circuit cites to the Third Circuit only for the proposition that the plaintiff need not prove materiality for certification purposes.[229] There are several responses to the position taken by the Ninth Circuit, which was adopted more or less whole-hog by the Supreme Court.[230]

First, it is not quite true that all claims stand or fall together. If the presumption is rebutted, the plaintiff can proceed individually and may prove materiality at trial.[231] There is nothing in the definition of materiality that requires a showing of price impact in order to plead an individual claim.[232] Instead, the plaintiff must plead and prove loss causation in order to recover.[233] In any event, failure to show price impact in connection with certification does not operate as a finding of fact as to materiality.[234] Clearly, it cannot do so since a court may not

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[225] *Amgen I*, 660 F.3d 1170, 1175 (9th Cir. 2011), *aff'd by*, 133 S.Ct. 1184 (2013) (second emphasis added) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (citing Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011)).

[226] *See supra* note 180 and accompanying text (noting decisions of these circuits).

[227] *See In re Salomon*, 544 F.3d at 483; Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 270 (5th Cir. 2007), *abrogated on other grounds by* Erica P. John Fund, Inc. v. Halliburton, 131 S.Ct. 2179, 2185 (2011).

[228] *See* Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2186 (2011); *In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 638-39 (2d Cir. 2011).

[229] *Amgen I*, 660 F.3d at 1176.

[230] *See* discussion *supra* Part IV.

[231] *See In re Salomon*, 544 F.3d at 484 (conducting rebuttable presumption analysis).

[232] *See generally* discussion *supra* Part II (discussing the conflicting definitions of materiality).

[233] *See generally* discussion *supra* Part III (discussing the difference between "price impact" and "loss causation").

[234] *See generally* discussion *supra* Part III.

consider the merits in connection with a motion to certify.[235] Accordingly, the action can go forward as an individual action in which the plaintiff must prove materiality as part of the merits, under what may be a more expansive definition thereof.[236] In other words, price impact is the key to a presumption of materiality—and thus a presumption of reliance—but for purposes of certification, not for purposes of the merits.[237]

Incidentally, this analysis also addresses the objection that price impact constitutes an objectionable bright-line test for materiality or that it violates the Court's admonition against summary judgment on the issue of materiality.[238] This is not to say that a defendant cannot move for summary judgment on the issue of materiality at some later stage, although it is difficult to imagine a case in which price impact has been shown and summary judgment could be warranted.[239] In other words, price impact would seem to operate as a finding of materiality *per se*. To be sure, this is a one-way street. But since price impact is arguably a somewhat narrower definition of materiality than the *TSC* standard—and one that necessarily also proves loss causation—it seems justifiable.[240] While there is no doubt that permitting rebuttal evidence at the certification stage will result in some cases being dropped (as opposed to

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[235]*See supra* text accompanying note 220. Thus, the plaintiff may be required to prove materiality again at trial, but proof of price impact for certification purposes might suffice for merits purposes. *Cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983) (availability of 1933 Act remedy does not preclude remedy under Rule 10b-5 since the latter requires proof of additional elements).

[236]Although one might characterize this approach as requiring materiality to be litigated twice, one might also characterize the two standards as aimed at different things: one at certification and the other at the merits. Note the parallel under Delaware law to a hearing on a motion to dismiss and a hearing on demand futility in a derivative action. *See* Aronson v. Lewis, 473 A.2d 805, 814 (1984). In both situations, the plaintiff must show that the business judgment rule does not apply. *See id*. But the standard of proof for establishing demand futility is much higher than it is for surviving a motion to dismiss. *See id*. It is also akin to antitrust cases that involve a quick look by the court at the nature of the violation to see if it should be litigated under the rule of reason. *See* Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).

[237]There is nothing obviously wrong or unwise about adopting rules that alter the merits for actions that are litigated as class actions. Congress did exactly that in PSLRA and SLUSA when adopted special rules that apply only to class actions. *See, e.g.*, *supra* notes 144-46 and accompanying text.

[238]*See* Basic Inc. v. Levinson, 485 U.S. 224, 240-41 (1988).

[239]*Amgen II*, 133 S.Ct. 1184, 1202-03 (2013). Moreover, the standard for summary judgment is higher still than the standard for either dismissal or certification. *Compare* FED. R. CIV. P. 56 *with* FED. R. CIV. P. 41 *and* FED. R. CIV. P. 23.

[240]*See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 445 (1976).

dismissed), most meritorious cases are likely to survive and may even increase in settlement value.[241]

Second, price impact does not necessarily require a change in price.[242] A plaintiff may reply to any rebuttal with evidence, for example, that offsetting disclosures eliminated price impact or that the defendant dribbled out the bad news so as to avoid any dramatic decrease in price.[243] In other words, a plaintiff may argue that but for the cover-up of bad news, stock price would have risen on disclosure of good news and that a plaintiff's loss inheres in the gain that a plaintiff would have realized but for the bad news.[244] A plaintiff may also offer reply evidence to the effect that stock price dropped over time by more than can be explained by normal market forces.[245]

Third, the FOTM presumption of reliance was invented by the Court as a way to permit class certification, and perhaps as a way to permit more investors to recover by making it easier to prove reliance.[246] In any event, the Court made it a *rebuttable* presumption.[247] The Court could have made the presumption irrebuttable. But the Court did not do so despite the fact that it recognized that every investor relies on the market in some sense:

> It has been noted that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap[s] game?" Indeed, nearly every court that has considered the proposition has concluded that where materially misleading

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[241] *Amgen II*, 133 S.Ct. at 1204.

[242] *See Basic*, 485 U.S. at 245.

[243] *See id.* at 249.

[244] *See id*. This argument may run afoul of the rule that one cannot recover more than actual loss, but that is a different issue. *See* 15 U.S.C. § 78bb (2006) (Exchange Act § 28).

[245] *See Basic*, 485 U.S. at 245-47. There is a danger that the standard for certification may be somewhat too high in such cases. It should be enough that there is a reasonable possibility that price impact was masked by other factors. Thus, one could argue that any attempt to rebut on a TOTM theory should be treated as motion for summary judgment by the defendant. This also addresses the point that if we do not address materiality at the certification stage, it will never be litigated because it will invariably be settled. Incidentally, if this is a real worry for defendants they can always file a class action against the plaintiff class as defendants for a declaratory judgment that the facts in question are not material or indeed that loss causation cannot be shown. *See* 28 U.S.C. § 2201(a) (2010). Presumably, the standard of proof in any such case would be one of predominance—more probably than not. *See* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

[246] *Basic*, 485 U.S. at 248.

[247] *Id.*

> statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed.[248]

Nevertheless, the Court has spoken (again) on the issue, noting also that the *Basic* Court did not remand that case for any determination of materiality or price impact, thus cutting off any further debate about when materiality may be addressed.[249] While the *Amgen* Court did not address any other ways in which the presumption of reliance may be rebutted or when such evidence may be introduced, there is more than one way to rebut the FOTM presumption. *Basic* holds that "[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, will be sufficient to rebut the presumption of reliance."[250] *Basic* clearly contemplates at least two different modes of rebuttal. One is based on the idea that the market knew the truth—the truth-on-the-market (TOTM) defense.[251] The other is based on the idea that individual class members can be shown not to have relied on the integrity of the market.[252] Arguably, *Amgen* forecloses consideration of the former before trial, or before a motion for summary judgment.[253] *Amgen* also seems to suggest that the latter may be addressed in connection with a motion to certify inasmuch as such evidence would bear on typicality or adequacy of representation.[254]

As the Third Circuit has stated:

> Once established, the presumption of reliance may be rebutted by "any defense to actual reliance." The Supreme Court provided a non-exhaustive list of ways that defendants can rebut the presumption, including by showing: (1) the market did not respond to the alleged misrepresentations; (2) the misrepresentations were immaterial; (3) a plaintiff did not actually rely on the misrepresentations; or (4) a plaintiff

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[248] *Id.* at 246-47 (alteration in original) (citations omitted).
[249] Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2185 (2011).
[250] *Basic*, 485 U.S. at 248.
[251] *Id.*
[252] *Id.*
[253] *Amgen II*, 133 S.Ct. 1184, 1202 (2013).
[254] *Id.* at 1202-03.

> would have sold [or bought] the securities without relying on the integrity of the market.[255]

If one focuses exclusively on the TOTM defense—as many commentators seem to do—it is arguable that rebuttal evidence could just as well wait for a trial on the merits.[256] If the market knows the truth anyway, there can be no recovery. If the market does not know the truth, then everyone who traded to the contrary was fooled. If the evidence is the same for all class members, certification arguably should follow, but for the fact that the presumption relates to certification and aside from considerations of judicial economy. Thus, it is not clear that the decision in *Amgen* will matter much in the end. Indeed, the price impact rule may work in favor of plaintiffs as often as not. Again, if the defendant fails to rebut materiality, settlement value should be enhanced.

On the other hand, the *Basic* Court clearly recognized the possibility that the FOTM presumption may be rebuttable by showing individual reliance in some way.[257] And most efforts to do so have focused on the representative plaintiff.[258] Most such efforts have failed.[259] The problem is that when this argument works, it tends to disqualify the individual as a representative plaintiff under Rule 23(a).[260] So there is no need to get to the presumption of reliance. One can always find another representative plaintiff who is not subject to such defenses, which raises the question whether there are others who are similarly situated and should be excluded, and thus raises the further question whether the class should be certified at all.[261]

In short, rebuttal evidence focused on the representative plaintiff is redundant of other requirements of Rule 23.[262] It adds nothing to the analysis. But there is no obvious reason why it could not be shown that some non-representative members of the plaintiff class may not have relied on the integrity of the market.[263] The problem is that to admit the possibility of rebuttal on the basis of such evidence is to rebut the

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[255] *In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 637 (2d Cir. 2011).

[256] *See generally* David et al., *supra* note 172.

[257] *Basic*, 485 U.S. at 248-49.

[258] *See, e.g.*, *id.*

[259] *See, e.g.*, *In re DVI*, 639 F.3d at 640-42 (strategy of exploiting inefficiencies in small cap market and use of inside information); *see also* Schleicher v. Wendt, 618 F.3d 679, 688 (7th Cir. 2010) (short selling).

[260] *See Amgen II*, 133 S.Ct. 1184, 1198-99 (2013).

[261] *See Basic*, 485 U.S. at 249-50.

[262] *Amgen II*, 133 S.Ct. at 1195.

[263] *See In re DVI*, 639 F.3d at 631.

presumption. If it is necessary to investigate the motivations of each class member in order to determine if they should remain in the class, reliance simply cannot be presumed.[264] So it should be sufficient to identify one or more trading strategies that eschew reliance on the integrity of the market and perhaps to show that numerous investors are likely to have relied on such strategies.[265] And if the plaintiff class is defined to exclude investors who subscribe to such strategies, it is still necessary to identify such investors, which is likely to make the membership of the class impossible to ascertain.[266] In short, to permit rebuttal based on individual reliance is to rebut the presumption of reliance altogether.

The Third Circuit has addressed these issues at least briefly:

> [Defendant] essentially argues that a subjective belief the market is not perfectly efficient is sufficient to demonstrate plaintiffs did not rely on the integrity of the market price. In support, [defendant] cites *Zlotnick v. Tie Communications*, an appeal from a motion to dismiss in which we held that certain short-selling investors in defendants' company could not invoke a presumption of reliance. [Defendant] urges us to expand *Zlotnick's* narrow holding to the facts here—namely that plaintiffs sought to exploit temporary informational inefficiencies in the market to purchase undervalued securities they expected to rise in price as the market digested relevant public information. *Zlotnick* does not stand for such a broad proposition—its holding is limited to the applicability of the fraud-on-the-market presumption of reliance in a short-selling context—a complex and controversial issue that is not before us.
>
> We read *Basic* to mean that an investor who seeks to use the fraud-on-the-market presumption of reliance must show reliance on publicly available information in making the investment decision regardless of the investor's personal belief as to the security's value. Reliance on the "integrity of the market price" means only that an investor relies on the fact that the price reflects publicly available information

[264]*See* Simer v. Rios, 661 F.2d 655, 668-69 (7th Cir. 1981).
[265]*See In re DVI*, 639 F.3d at 640-41.
[266]*See In re* Initial Public Offering Sec. Litig., 471 F.3d 24, 44 (2d Cir. 2006).

> as the market digests it, and nothing more. The careful research of sophisticated institutional investors, who are preferred as class representatives, constitutes an important means by which publicly available information becomes incorporated into market prices. Here, plaintiffs adequately demonstrated the markets for DVI securities were efficient—that is, they absorbed publicly available information about DVI and reflected it in the securities' prices. Defendants have not made an adequate showing that plaintiffs relied on anything other than publicly available information obtained through careful research that is commonplace among sophisticated institutional investors. [Defendant]'s rebuttal is therefore unavailing. Plaintiffs are entitled to a presumption of reliance.[267]

Presumably, the Third Circuit is correct that disbelief in market efficiency is insufficient to rebut the presumption of reliance.[268] Aside from the obvious problems of proof, such an approach would deny the class action remedy to those investors who need it most—value investors who do research and seek out misvalued stocks—while granting it to those investors who need it least—portfolio and index investors who seek to avoid the expenses of research and to minimize the risks that inhere in stock-picking.[269] As the Third Circuit points out, value investors rely on the integrity of the market even while they try to beat the market.[270] But can we say the same about portfolio investors? Although it might seem that passive price-taking portfolio investors are perhaps the best example of investors who rely on the integrity of the market, they are positively indifferent to the fortunes of individual companies.[271] Although one might argue that not even an index investor would knowingly buy an overvalued stock, it violates the idea of indexing strategy to seek out any company-specific information because to do so must of necessity add to the expenses associated with investing, the minimization of which is a primary goal of the strategy.[272] Thus, while an index investor relies on the integrity of the market as a whole,

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[267] *In re DVI*, 639 F.3d at 641-42 (citations omitted).
[268] *Id*. at 641.
[269] *Id.*
[270] *Id.*
[271] Richard A. Booth, *Index Funds and Securities Fraud Litigation*, 64 S.C. L. REV. 265, 307-08 (2012).
[272] *Id.*

and may even feel some remorse at buying an overvalued stock, such an investor does not rely on the integrity of the market for any individual stock.[273] Rather, an index investor figures that unusual losses (including those from fraud) will be offset by unusual gains (including those from fraud).[274] So it is arguable that the presumption of reliance may be rebutted as to index investors and indeed as to any well-diversified investor.[275]

Aside from whether index investors rely on the integrity of the market in the sense contemplated by the *Basic* Court, the question is whether there are any common trading strategies that eschew reliance on the integrity of the market in the sense that investors would be indifferent to the (costless) knowledge that a stock is mispriced—would buy a stock even if overpriced or sell a stock even if underpriced.

It turns out that there are many examples of such trading strategies.[276]

1. One form of program trading, index arbitrage, involves buying (or selling) stocks and selling (or buying) an index future simultaneously.[277] This strategy depends solely on the spread between the value of the index and the aggregate of the stocks therein.[278] The gain is locked in when the trade is set up.[279] It matters not if one of the stocks bought turns out to be overpriced.[280] This and other forms of program trading account for as much as half of all trading volume.[281]

2. In a short sale, a trader who has identified an overpriced stock, or otherwise wants to hedge against a decrease in market price, borrows

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[273]*Id.* at 292-93 n.143.

[274]*See id.* at 271.

[275]Booth, *supra* note 271, at 318. Since most investors are well diversified, most investors would (or should) oppose securities fraud class actions and would favor derivative actions by which the subject company could recover for any reputational harm flowing from the fraud. *Id*. at 265.

[276]*See generally* Jonathan R. Macey et al., *Restrictions on Short Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash*, 74 CORNELL L. REV. 799, 811-12 (1989).

[277]*See id.*

[278]*See id.*

[279]*See* Richard A. Booth, *The Uncertain Case for Regulating Program Trading*, 1994 COLUM. BUS. L. REV. 1, 12 (1994).

[280]*See id*.

[281]*But see* New York Stock Exchange, Press Release, http://www.nyse.com/press/1362656218797.html (last visited Apr. 21, 2013) ("The data indicated that during Feb. 25-Mar. 1, program trading amounted to 30.5 percent of NYSE average daily volume of 1,733.5 million shares, or 529.1 million program shares traded per day.").

stock and sells it.[282] Eventually, the trader must buy back the stock sold short in order to return it to the investor from whom it was borrowed.[283] The hope is that price will have decreased.[284] Yet it is sometimes necessary to unwind a short sale because it becomes too costly to maintain or because the price of the stock has increased.[285] The irony is that a short seller typically thinks a stock is overpriced (except perhaps where selling short is part of a hedging strategy).[286] So the idea that a short seller should be excluded from the class because he is motivated to buy by the need to cover is to add insult to injury. Nevertheless, a short seller must ultimately believe that market price is too high.[287] Thus, when he buys back a shorted stock—even though forced by circumstance to do so—he must be presumed to buy despite a belief to the contrary.[288]

3. CEOs and other high level officers often set up a plan by which they periodically sell shares they hold in their own company in order to diversify.[289] Rule 10b5-2 provides that by setting up such a plan, one can avoid the danger of insider trading.[290] Since sales are set up in advance, there is no way that they can be motivated by inside information.[291] To be sure, CEOs and other high level officers are likely to be excluded from the plaintiff class anyway.[292]

4. Many investors follow a strategy of so-called dollar-cost averaging by which they invest additional cash periodically, often in an existing portfolio of stocks.[293] For example, an investor may identify

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[282] *See* Macey et al., *supra* note 276, at 799-800.

[283] *See id.*; *see also* Zlotnick v. TIE Commc'ns, 836 F.2d 818, 820 (3d Cir. 1988).

[284] *See* Macey et al., *supra* note 276, at 799.

[285] *See id.* at 809.

[286] *See id*. at 799-800.

[287] *See id.*

[288] *See* Booth, *supra* note 279 at 12; *see also Zlotnick*, 836 F.2d at 823.

[289] *See* Securities and Exchange Commission, FAQ: Insider Trading, http://www.sec.gov/answers/insider.htm (last visited Apr. 21, 2013) ("The rule permits persons to trade in certain specified circumstances where it is clear that the information they are aware of is not a factor in the decision to trade, such as pursuant to a pre-existing plan, contract, or instruction that was made in good faith.").

[290] 17 C.F.R. § 240.10b5-2 (2012).

[291] *See* Securities and Exchange Commission, FAQ: Insider Trading, http://www.sec.gov/answers/insider.htm (last visited Apr. 21, 2013) ("The rule permits persons to trade in certain specified circumstances where it is clear that the information they are aware of is not a factor in the decision to trade, such as pursuant to a pre-existing plan, contract, or instruction that was made in good faith.").

[292] John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L. J. 625, 631 (1987) (describing typical plaintiff classes).

[293] *See, e.g.*, Jon Newberry, *Sowing Cash Receipts: Dollar Cost Averaging May Not Be Best Strategy for Investing Lump Sums*, 81 A.B.A. J. 105, 105 (Aug. 1995).

(say) 50 stocks to hold in equal weights such that each stock represents 2% of the total amount invested. The idea behind such a strategy is to avoid the temptation to time the market by adhering to a disciplined schedule of investing, rather like Odysseus lashing himself to his mast to avoid the Sirens.[294]

5. It is a common practice for investors to set hurdles for themselves as another method of discipline. For example, an investor might decide in advance to buy or sell a stock if its price increases or decreases to a specified level.[295] Indeed, one may do so by placing a limit order with a broker.[296] As with dollar cost averaging, the idea is to self-impose some sort of discipline to counteract natural tendencies to let it ride with a winning investment or to hold onto a losing stock in the hope of recovery.

6. An investor who buys on margin may be forced to sell when the equity in his account falls below the required level or when a stock in his portfolio decreases to a price lower than permitted for use as security.[297]

These are but a few examples of common situations in which investors may buy and sell stocks without regard to fairness of price.[298] To be sure, in some situations an investor would likely deviate from his strategy if he knew the truth. But to seek out such information

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[294] *See, e.g.*, Major Samuel W. Kan, *Setting Servicemembers Up For More Success: Building And Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, 10-JAN ARMY L. 52 (2010) ("Dollar cost averaging forces the investor to invest in both good and bad economic times . . . ."). Although the most widely followed indices are weighted according to market capitalization, there are some indices that are equal weighted (either by shares or dollars). For example, the DJIA is based on an original investment in one share each of 30 different companies. *See* Dow Jones & Co., Inc. v. Int'l Sec. Exch., 451 F.3d 295, 298 (2d Cir. 2006). Moreover, Standard & Poors maintains an equal-weight version of the S&P500. *See id*. As I have argued elsewhere, there are good reasons for individual investors to follow an equal-weighting strategy. *See* Richard A. Booth, *The Suitability Rule, Investor Diversification, and Using Spread to Measure Risk*, 54 BUS. LAW. 1599, 1600-01 (1999).

[295] *See, e.g.*, Securities and Exchange Commission, FAQ: Limit Orders, http://www.sec.gov/answers/limit.htm (last visited Apr. 21, 2013) ("A limit order is an order to buy or sell a stock at a specific price or better.").

[296] *See id.*

[297] *See, e.g.*, Millionaire Corner: Investment Strategies, http://www.millionairecorner.com/article/investment-strategies-buying-margin (last visited Apr. 24, 2013).

[298] Note that some of these examples apply only to seller classes while others apply only to buyer classes. Basic is a strange case because it involves the cover-up of good news. *See* Basic Inc. v. Levinson, 485 U.S. 224, 237 (1988). Although there are a few other such cases, the vast majority of cases involve the cover-up of bad news. *See* Richard A. Booth, *Class Conflict in Securities Fraud Litigation*, 14 U. PA. J. BUS. L. 701, n.3 (2012).

undermines the strategy.[299] In other cases, such as program trading, such knowledge makes no difference.[300]

Although one might argue that investors who buy or sell for other reasons nonetheless rely on the integrity of the market, the same can be said about the examples offered by the *Basic* Court of investors who must sell a stock because of antitrust or political worries.[301] One would think that such an investor who knew that the stock was underpriced would be able to resist selling or somehow arrange to capture the gain if any.[302] Moreover, it is not at all clear why such a seller *should* be denied a remedy under the FOTM theory. One of the problems with the law relating to Rule 10b-5 is that it evolved at a time when the typical investor did his homework and invested in a few good stocks. Almost no one had heard of program trading or index arbitrage before the stock market crash of 1987. Yet *Basic* was decided the following year, largely to fill a gap in the law relating to reliance that left when *Affiliated Ute* was decided in 1972.[303] The point is that FOTM is built on a model of the market that may no longer be accurate. Neither is it clear how certain one must be that he is selling an underpriced stock or buying an overpriced stock. Is some reluctance enough? Or must one be certain in the sense of having inside information and somehow knowing for sure what its significance will be? And how would any of this ever be shown in court? There is no reason for an investor to come forward with his own disqualifying evidence.

To be clear, the foregoing examples are not merely reasons why some investors should be excluded from the plaintiff class. Rather, they are reasons why the class should not be certified since there is likely no way to determine the identity of the investors who should be excluded.[304] In the end, it may be that rebuttal based on TOTM will always fail and that rebuttal based on individual reliance will always succeed. The clear implication is that there is something awry with FOTM. Again, the *Basic* Court could have presumed reliance without the possibility of rebuttal. But it did not do so.[305] The *Basic* Court also provided examples

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[299] *See* Booth, *supra* note 279, at 18-19.

[300] *See id.* at 18.

[301] *Basic*, 485 U.S. at 249. Ironically, it appears that Justice Breyer may have sold Amgen stock in order to participate in the case since he initially recused himself but later participated in oral argument. *See Amgen II*, 132 S.Ct. 1184, 2742 (2012).

[302] *See Basic*, 485 U.S. at 248-49.

[303] *See id.* at 243-44.

[304] *See id*. at 262 (White, J., dissenting in part).

[305] *Id.* at 248 (majority opinion).

of how one might rebut the presumption of reliance based on both TOTM and individual factors.[306] It may be that none of the examples really works, either because it never occurs in nature or because it would be impossible to prove. To be sure, as examples they may not be part of the holding of the case. Indeed, it could also be that the Court misspoke—that although the Court said that the presumption is rebuttable, there is in fact no way to rebut it. If so, it is up to the Court to fix the problem. Until then, the presumption of reliance must itself be presumed to be somehow rebuttable.[307]

In theory, FOTM is simply one way to certify a class.[308] But, it is not clear that there is any other way to certify a class in connection with a claim based on a misrepresentation. To be sure, reliance may be presumed in an omission case, as in *Affiliated Ute*, if the fact is material and there is a duty of disclosure.[309] Interestingly, there is no reference to price impact in *Affiliated Ute*, which is understandable since there was no public market for the securities involved. If the Court were to overrule *Basic*, it may be that most cases involving misrepresentation could be recast as omission cases in which the omission is a failure to correct an earlier statement.[310] Although *Affiliated Ute* involved face-to-face transactions in which the buyers had assumed a fiduciary duty to the sellers—akin to that of an investment adviser—there is no doubt that directors and officers of a corporation owe a duty of candor to stockholders and presumably to potential stockholders.[311]

VI. FURTHER REFLECTIONS

It is difficult to argue with the proposition that if a misrepresentation is material, it is material for everyone.[312] If the plaintiff cannot prove materiality at trial, the action will fail for all.[313] As

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[306] *Basic*, 485 U.S. at 248-49.
[307] *Id.* at 250.
[308] *Id*. at 229-30.
[309] *See* Affiliated UTE Citizens of Utah v. United States, 406 U.S. 128, 153-54 (1972).
[310] *See* Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 429 (5th Cir. 2013); *see also In re* Time Warner Sec. Litig., 9 F.3d 259, 262 (2d Cir. 1993).
[311] *See* Malone v. Brincat, 722 A.2d 5, 11 (Del. 1998); *cf.* S.E.C. v. Cuban, 620 F.3d 551, 554 (5th Cir. 2010); Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 435 (7th Cir. 1987) (both addressing one-on-one fiduciary duties); *but see* Lowe v. S.E.C., 472 U.S. 181, 210 (1985) (discussing distinction between face-to-face fiduciary duties and more general fiduciary duties under Investment Adviser Act).
[312] *See Basic*, 485 U.S. at 247.
[313] *Amgen I*, 660 F.3d 1170, 1175 (9th Cir. 2011).

for the danger that the pressure to settle means that materiality will probably never be tried, the *Amgen* Court responds that it is no different from other facts that are never tried because of the pressure to settle.[314] But materiality itself is not the point. The point is reliance.[315] And reliance cannot be presumed in the absence of price impact.[316] It is a matter of logic not language. If a misrepresentation affects market price, it is presumably material.[317] But it may be material as the Court has defined the word even if it does not affect market price.[318] Reliance may be presumed in the former case, but it cannot be presumed in the latter case.[319]

This is not to suggest that the plaintiff should be required to prove his case in order to get the chance to prove his case. It is only to say that the action should not be tried as a *class* action unless price impact is shown, because otherwise reliance by absent class members cannot be presumed. The plaintiff may still be able to prove his case by proving reliance in fact, as the plaintiff in *Amgen* said it would do if the class was not certified.[320]

The *Amgen* Court reiterated that the presumption may be rebutted at trial or on motion for summary judgment.[321] But why must a defendant wait? If such cases can be resolved early on, why not do so? The defendant ought not to be required to defend itself from the collective claims of thousands of purchasers if the action is doomed to fail. The Court suggests that materiality could be addressed by motion for summary judgment.[322] But any such motion based on the argument that disputed facts cannot be material because they did not affect market price would almost certainly be met with the response that materiality itself is a matter of fact that depends on whether it would be important to a reasonable investor and not whether it affects market price.[323] Similarly, a motion based on the argument that investors suffered no loss would

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[314]*Amgen II*, 133 S.Ct. 1184, 1200 (2013).

[315]*See Basic*, 485 U.S. at 243 ("Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury.").

[316]*See id.* at 248.

[317]*See id.* at 244, 247.

[318]*See id.* at 231 ("[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." (quoting TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976))).

[319]*See Amgen II*, 133 S.Ct. at 1195.

[320]*Amgen I*, 660 F.3d 1170, 1175 (9th Cir. 2011).

[321]*Amgen II*, 133 S.Ct. at 1204.

[322]*Id.* at 1197.

[323]*See Basic*, 485 U.S. at 231.

likely be met with the response that proof of loss is also a matter for trial (as the Court suggested in its 2011 *Halliburton* decision).[324] But the Court cannot have it both ways. It cannot reject an attempt to rebut the presumption for lack of price impact on the ground that it would require the plaintiff to prove materiality before trial and then define materiality as something other than price impact. Still, that is what it has done.

In any event, the *Amgen* Court rejected the judicial economy argument on the dubious ground that if class-action status is denied, individual class members would be tempted to file again for another chance at proving materiality.[325] In effect, the *Amgen* Court ruled that all such cases should get their day in court—if only to bind the masses that fail to opt out.[326] The flaw in this logic is that big investors often opt out anyway to avoid statutory restrictions on class actions and to negotiate for a better settlement than they might be able to able to get as a member of the class where the terms of any settlement must be approved by the court.[327]

This increasingly common opt-out strategy raises the question as to why we need securities fraud class actions at all. In the case of Amgen, 82.35% of its stock is held by institutions.[328] So what is to prevent these institutions from joining together in an ordinary non-class action to recover their losses? It may be that the *Amgen* Court ruled as it did in part because of the worry that small investors would be excluded from recovery. Indeed, the statement by the *Amgen* plaintiff that it would go it alone could be seen as a veiled threat.[329] Otherwise, it would seem to suggest that the plaintiff did not much care whether class action status was granted. This may explain why the Court went on at some length about the importance of private securities litigation and why it was reluctant to tinker with the FOTM presumption that it had created 25 years earlier.[330] As Justice Ginsburg stated in her opinion for the

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[324] Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2185-86 (2011).

[325] *Amgen II*, 133 S.Ct. at 1201.

[326] *See id.*

[327] *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice"*, 30 CARDOZO L. REV. 407, 417 (2008).

[328] *Amgen, Inc. (AMGN) Institutional Ownership & Holdings*, NASDAQ (Apr. 12, 2013), http://www.nasdaq.com/symbol/amgn/institutional-holdings.

[329] *Amgen I*, 660 F.3d 1170, 1175 (9th Cir. 2011).

[330] *Amgen II*, 133 S.Ct. at 1200-01. Does it matter that Congress considered the possibility of overruling Basic in connection with PSLRA but declined to do so? Probably not. *Cf.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 84 (2006) (construing SLUSA connection requirement independently of judicially imposed standing requirement in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)).

majority, "Congress, the Executive Branch, and this Court, moreover, have 'recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions [by the DOJ and SEC].'"[331]

Yet most legal scholars agree that class actions do little to compensate investors while at the same time foisting excessive liability onto defendants.[332] To be specific, diversified investors—such as the institutions that own 82% of Amgen—are just as likely to sell an overpriced stock as to buy one. Over time, losses are offset by gains. Moreover, because the defendant company pays, its stock price falls by more than it otherwise would, creating a feedback effect that increases the potential damage award.[333] In other words, holders compensate buyers for losses that are magnified by the class action itself.[334] Given that portfolio investors such as institutions often hold more shares than they buy during the fraud period, they often lose more because of a class action than they gain from any settlement.[335] To be sure, the settlement may be covered by insurance.[336] But if so, the company will pay higher premiums in the future.[337]

But wait. There's more. Since the plaintiffs in a class action can theoretically recover their entire loss, they may be better off than they would have been if there had been no fraud, in which case they would have suffered whatever loss came from the timely disclosure of bad news. The only genuine loss comes from the *additional* price decrease attributable to enforcement costs (such as fines and defense expenses) and increases in the cost of capital (due to loss in trust in management). In other words, the measure of damages includes losses that investors would suffer even in the absence of fraud. Even though plaintiffs

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[331] *Amgen II*, 133 S.Ct. at 1201 (quoting Tellabs, Inc. v. Makor Issues & Fights, Ltd., 551 U.S. 30, 313 (2007)).

[332] *See, e.g.*, Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade*, 2009 WIS. L. REV. 297, 331-32 (2009); *see also* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1309, 1327 (2008); *see also* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1545-46 (2006); *see also* Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 282-83 (2004).

[333] Richard A. Booth, *The End of the Securities Fraud Class Action as We Know It*, 4 BERKELEY BUS. L.J. 1, 9 (2007).

[334] Booth, *supra* note 271, at 265.

[335] *See id.* at 287.

[336] *See* Booth, *supra* note 298, at 718.

[337] *Id*. at 719.

seldom, if ever, recover in full, the strength of the case derives from the potential for damages. Defendants must assume the worst. In short, settlements are negotiated in the shadow of the law. As a result, too many cases are filed, seeking damages in excess of true economic loss, and creating excessive deterrent effect.

Although one might argue that fraud cannot be over-deterred, fraud is a bit of a misnomer where neither the defendant corporation nor its directors and officers have traded. To be sure, investors may be deceived by an over-optimistic press release, but these are cases involving trading in already outstanding shares, not offerings of new stock. Moreover, it may be too strong to say that investors are deceived. In *Amgen*, one of the supposedly offending statements was that an upcoming meeting of the FDA would not consider the safety of a flagship Amgen drug.[338] That statement was apparently wrong.[339] The Federal Register had listed the matter on the FDA agenda.[340] It seems unlikely that such a misstatement could affect market price as Amgen tried to argue. Even if the speaker sought to influence the market by downplaying the significance of news reports, as in the Court's 2011 *Matrixx* decision, management is not necessarily in a good position to know what the effect will be on market price.[341] What is material to the market may seem trivial to a company spokesperson—or vice versa. In any event, the effect of the too-generous damages formula under existing law is that managers are reluctant to speak as freely as they might and investors are left with less information.

Moreover, the true loss suffered by investors in any *meritorious* case—from enforcement costs and increases in the cost of capital—is a loss that is suffered by the corporation and thus by all of the stockholders, not just buyers.[342] It is a loss that should be recovered by the corporation in a derivative action from the individuals who lied to the market, rather than by individual investors in a class action. A derivative action is perfectly tailored to fix the genuine harm caused by securities fraud.[343] Stockholders are made whole (in theory) when the corporation recovers, in that they are restored to where they would have been if there had been no fraud.[344] And, it is a more potent deterrent because the

[338] *Amgen II*, 133 S.Ct. 1184, 1203 (2013).
[339] *Id.*
[340] *Id.*
[341] Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309 (2011).
[342] *See* Booth, *supra* note 298, at 766.
[343] *See generally id.*
[344] *See id.* at 730.

individual wrongdoers pay—even though the amount at stake may be much smaller.

If this view of securities fraud litigation is correct—which it is—the threat that a large investor might sue individually becomes quite worrisome. If successful, such an action over-compensates the plaintiff investor at the expense of other investors for losses that should have been recovered by the corporation for the benefit of all stockholders. In other words, to permit individual recovery on such claims is to divert an asset of the corporation to the plaintiff stockholder to the exclusion of other stockholders.[345] Fortunately, the courts have the power to deal with this problem. Since the rules require that a class claim for damages be superior to other means of resolving the dispute, it would seem that the rules require that if a claim can be handled as a derivative action, it must be so handled.[346]

In his concurrence in *Amgen*, Justice Alito stated that it may be appropriate to reconsider the FOTM presumption.[347] Although the Court decides only about 100 cases annually, it has seen fit to address this one issue three times in three years in *Amgen*, *Matrixx*, and *Halliburton*.[348] And that is not to mention several other such cases decided since 2005 and a slew of other cases about class actions in general.[349] Since it takes only four votes for the Court to take a case, and since Justices Kennedy, Scalia, and Thomas dissented in *Amgen*,[350] it seems likely that the matter will be back before the Court soon. Judicial economy is one thing for a lowly trial judge. It is quite another for the Supremes.

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[345] *See id.* at 766; Smith v. Waste Mgmt., Inc., 407 F.3d 381, 384-85 (5th Cir. 2005) (holding that misrepresentations at issue harmed the corporation as a whole, and thus a direct suit was not the proper avenue for relief); Shirvanian v. DeFrates, 161 S.W.3d 102, 110 (Tex. App. 2004) (finding that misrepresentations at issue constituted misuse of corporate assets and thus the proper claim is derivative); *see also* Cowin v. Bresler, 741 F.2d 410, 414 (D.C. Cir. 1984) ("Requiring derivative enforcement of claims belonging in the first instance to the corporation also prevents an individual shareholder from incurring a benefit at the expense of other shareholders similarly situated.").

[346] *See* FED. R. CIV. P. 23(a) (2012).

[347] *Amgen II*, 133 S.Ct. 1184, 1204 (2013) (Alitio, J., concurring).

[348] *Amgen II*, 133 S.Ct. 1184; Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309 (2011); Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2179 (2011).

[349] *See*, *e.g.*, Am. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013); *see also* Whirlpool Corp. v. Glazer, 133 S.Ct. 1722 (2013); *see also* Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013); *see also* Standard Fire Ins. Co. v. Knowles, 133 S.Ct. 1345 (2013); *see also* Wal-mart v. Dukes, 131 S.Ct. 2541 (2011).

[350] *Amgen II*, 133 S.Ct. at 1204-05.

VII. CONCLUSION

The FOTM theory is a judicially created presumption of reliance that is focused primarily on facilitating class actions.[351] As such the Court is free to change it as it sees fit. Although *Amgen* has exposed (or emphasized) numerous contradictions inherent in FOTM that could justify overruling *Basic* and eliminating the FOTM presumption of reliance altogether, the Court chose to affirm on the narrowest of possible grounds—that materiality is a matter of merits that may not be decided as a matter of class certification.[352] As a result, materiality is not likely to be litigated otherwise since once a case is certified as a class action, it invariably settles. The *Amgen* Court does seem to encourage motions for summary judgment on the issue of materiality at least insofar as it may be possible to prove that the facts in question had no effect on market price. Nevertheless, it is regrettable that the Court did not reverse *Amgen* since there is little doubt about price impact in most meritorious cases. Where there is doubt, it may be necessary for the court to receive evidence on the question to determine if price impact has been masked somehow. In the end, if plaintiffs cannot show price impact, they will not be able to show damages or loss causation anyway. So it is unlikely that many (if any) meritorious cases would fail for lack of class certification. But regardless of how the courts deal with materiality in the wake of *Amgen*, the decision does not appear to preclude rebuttal of the FOTM presumption on other grounds such as typicality and adequacy of representation.

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[351] *See id.* at 1192.
[352] *See id.* at 1204.