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Supreme Court: “Generic Nature” of Misstatements in Securities Action May Help Defendants Defeat Class Certification



In a significant decision on securities class actions, the U.S. Supreme Court last week held that the generic nature of alleged misrepresentations will often be "important evidence of a lack of price impact" that can be used by defendants to defeat class certification. [Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys., No. 20-222](#) (June 21, 2021). Although Justice Amy Coney Barrett's opinion for the Court did not go quite as far as the defense bar may have hoped in rebalancing the securities class action playing field, it nonetheless provides useful guidance on how the generic nature of challenged statements can be used by defendants, particularly in inflation-maintenance cases, in an effort to disprove price impact and thereby rebut the [Basic](#) presumption of reliance and defeat class certification.

### **Background**

The full background on the *Goldman Sachs* case can be found in our [update from earlier this year](#), but here are the critical facts and issues. In 2010 the stock price of petitioner Goldman Sachs Group, Inc. (Goldman) declined after disclosure of significant government enforcement activity—a filed SEC action and a DOJ investigation—focusing on whether the company should have disclosed conflicts of interests related to certain collateralized debt obligation (CDO) transactions. Shareholders sued, claiming that these alleged "corrective" disclosures revealed the falsity of generic representations that Goldman had made in earlier SEC filings, such as "we have extensive procedures and controls that are designed to identify and address conflicts of interest" and "integrity and honesty are at the heart of our business." Plaintiffs did not claim that these allegedly false statements artificially increased Goldman's stock price. Rather, they pursued an "inflation-maintenance" theory,

which posits that false statements can have actionable price impact by maintaining a previously inflated stock price and preventing it from decreasing.

After extensive litigation in the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit, the Supreme Court granted certiorari on two legal questions regarding class certification:

- Whether a defendant may show a lack of price impact by submitting evidence regarding the generic nature of the alleged misstatements, even though such evidence is also relevant to the substantive element of materiality (which plaintiffs need not prove at class certification); and
- Whether a defendant seeking to rebut the presumption of reliance bears only a burden of producing evidence to rebut the presumption, as opposed to also bearing the burden of persuading the court that the evidence is sufficient to rebut the presumption.

## The Court's Opinion

On the first question, the Court was unanimous—the generic nature of the challenged misstatements "often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory." Finding that the Second Circuit's opinion was unclear as to whether that court took into account "*all* record evidence related to price impact," including the generic nature of the statements, the high court vacated and remanded. (Justice Sotomayor dissented in part and would not have remanded; in her view the Second Circuit properly considered, and rejected, Goldman's evidence and arguments.)

Importantly, the Court adopted a key argument from Goldman's briefing and provided guidance on the application of the price impact inquiry in inflation-maintenance cases. Such a case relies on the inference that a stock price drop is equal to the amount of inflation maintained by a prior misrepresentation. As the Court observed, this inference "starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure"—for example, when the alleged false statement is very generic and the alleged corrective disclosure is specific. The Court noted that under those circumstances, "it is less likely that the specific disclosure *actually corrected* the generic misrepresentation" (emphasis added), and therefore there is "less reason to infer front-end price inflation—that is, price impact—from the back-end price drop."

On the second question, a 6-3 majority of the Court held that defendants bear both the burden of production and the burden of persuasion to show a lack of price impact. However, in an apparent effort to soften the practical impact of this holding on public company defendants, which have often had a difficult time in proving a negative, the Court stated that a class should be certified only if all evidence relating to price impact, both "direct and indirect," shows that it is "more likely than not that the alleged misrepresentations had a price impact." According to the Court, the impact of the burden of persuasion will ultimately be felt in only those limited cases where "the evidence is in equipoise," in which case the plaintiff would prevail. Indeed, the Court went so far as to say that "the burden of persuasion should rarely be outcome determinative."

Although it remains to be seen whether district courts will fully heed the Court's observations on the practical implications of assigning the burden of persuasion on price impact to defendants, the *Goldman Sachs* decision provides defendants with some clearer pathways to rebut the *Basic* presumption of reliance, especially in inflation-maintenance cases, and thereby defeat class certification.

## Authors

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