FEDERAL JURISDICTION AND PROCEDURE

Class Actions — Certification Requirements Under SEC Rule 10b-5 — Amgen Inc. v. Connecticut Retirement Plans & Trust Funds

To attain certification of a section 10(b) securities-fraud class action, a plaintiff must satisfy the elements of Rule 23(a) of the Federal Rules of Civil Procedure — numerosity, commonality, typicality, and adequacy of representation — and demonstrate under Rule 23(b)(3) that common questions of law or fact predominate over individual ones. To succeed on the merits, the class must prove reliance on a material misrepresentation or omission.[1] While proving that each class member personally relied on a defendant's falsehoods would ordinarily defeat predominance and preclude class certification, in *Basic Inc. v. Levinson*[2] the Supreme Court removed the "unrealistic evidentiary burden" for plaintiffs trading on an "impersonal market" of having to prove that they bought stock because of a company's falsehoods.[3] Instead, the *Basic* Court posited that a company's stock price in an efficient market reflects all *material* public information, allowing purchasers to invoke a rebuttable presumption of reliance on the price and all the information it reflects as an accurate measure of the stock's intrinsic value.[4] Last Term, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[5] the Supreme Court ruled that proposed classes invoking the *Basic* presumption can wait until after class certification to prove materiality, which is both an element of the presumption and a merits element of securities fraud.[6] The Court's holding departs from its prior instruction that trial judges look closely to ensure that common questions predominate before certifying a class. Nonetheless, *Amgen* furthers the primary purposes of securities-fraud class actions without placing undue pressure on defendants to settle frivolous cases.

In April 2007, Connecticut Retirement Plans and Trust Funds filed a securities-fraud class action in the Central District of California against Amgen Inc. and several of its officers and directors.[7] The complaint alleged that the biotechnology company had made materially false and misleading statements and omissions regarding the safety

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[1] *E.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005).

[2] 485 U.S. 224 (1988).

[3] *Id.* at 245.

[4] *Id.* at 241–47.

[5] 133 S. Ct. 1184 (2013).

[6] *Id.* at 1194–97.

[7] Conn. Ret. Plans & Trust Funds v. Amgen, Inc., No. CV 07-2536, 2009 WL 2633743, at *1 (C.D. Cal. Aug. 12, 2009). The plaintiffs brought suit under sections 10 and 20(a) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. §§ 78j, 78t(a) (2012), and Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. § 240.10b-5 (2013), promulgated thereunder.

of two anemia drugs, resulting in an inflated stock price.[8] The security's value declined after Amgen made corrective disclosures, creating financial losses for those who had bought stock at the distorted price.[9]

In March 2009, Connecticut Retirement Plans invoked the *Basic* presumption and moved to certify a class under Rule 23(b)(3), comprising all investors who had bought Amgen stock during the inflationary period.[10] Amgen argued that the presumption was inapposite, because the plaintiff had failed to prove all five elements detailed in *Basic*[11] and because Amgen could nonetheless show that concerns over the drugs' safety were publicly known when the falsehoods were made.[12] Judge Gutierrez rejected both contentions and certified the class. Noting that the *Basic* factors "appear[] to be more of an observation" regarding how a court might apply the presumption than a directive "to apply a five element test,"[13] that those factors "concern the merits," and that precedent forbids merits inquiries prior to class certification,[14] he held that proof of an efficient market is sufficient to trigger *Basic*.[15] Judge Gutierrez also ruled that Amgen's truth-on-the-market defense had to wait until summary judgment, since defenses of nonreliance are not grounds for denial of class certification under Ninth Circuit law.[16]

On interlocutory appeal, the Ninth Circuit affirmed. Writing for a unanimous panel, Judge Silverman[17] noted that certification is proper when classwide proceedings can produce common answers to central issues, such that the claims "stand or fall together."[18] In the securities-fraud context, if falsehoods are material, *Basic* makes the central issue of reliance common to the class.[19] If they are immaterial, "every plaintiff's claim fails on the merits," because materiality is also a merits element, and the central issue of materiality is a common one.[20]

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[8] *Conn. Ret. Plans*, 2009 WL 2633743, at *1.

[9] *Id.*

[10] *Id.* at *4, *8.

[11] *Id.* at *8. *Basic* held that proof of the following is required for the presumption to apply:

> (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 would induce a reasonable, relying investor to misjudge the value of the shares; and (5) that the plaintiff traded the shares [during the inflationary period].

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

[12] *Conn. Ret. Plans*, 2009 WL 2633743, at *12–13. Under the "truth-on-the-market" defense, a misrepresentation is immaterial if the truth is already publicly known. *Id.* at *13.

[13] *Id.* at *9.

[14] *Id.* at *11.

[15] *Id.* at *12.

[16] *Id.* at *14.

[17] Judge Silverman was joined by Judge Wardlaw and District Judge Sessions of the District of Vermont, sitting by designation.

[18] Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1175 (9th Cir. 2011).

[19] *Id.*

[20] *Id.* (emphasis omitted).

Therefore, plaintiffs must prove before certification that the market was efficient and the falsehoods were public, but they need only allege materiality with sufficient plausibility to survive a motion to dismiss.[21]

The Supreme Court affirmed.[22] Writing for the Court, Justice Ginsburg[23] cautioned that merits inquiries are permissible "only to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied."[24] Rule 23(b)(3) demands that "*questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."[25] Since materiality is assessed from a reasonable investor's perspective, it is proved through evidence common to the class, and the alleged falsehoods are equally material or immaterial for all investors.[26] Therefore, requiring proof of materiality before certification would "put the cart before the horse" by making the class "first establish that it will win the fray."[27] And because Amgen's truth-on-the-market defense would only refute materiality, the lower courts correctly excluded it.[28]

Justice Ginsburg found that policy considerations confirmed the propriety of the decision. First, requiring precertification proof of materiality would hinder an important mechanism for enforcing federal antifraud securities laws.[29] Second, because class-certification findings are not binding at trial, such a requirement would "waste judicial resources" by necessitating factual findings on the issue of materiality at the class-certification stage and again at trial.[30] And while class certification can place pressure on defendants to settle, Congress declined to eliminate the *Basic* presumption or to demand that a securities-

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[21] *Id.* at 1177; *see also id.* at 1175. Judge Silverman also held that, apart from the dictates of Rule 23, *Basic* did not require proof of materiality as a prerequisite to certification. *Id.* at 1176.

[22] The Court granted certiorari to resolve a circuit split. *Compare id.* at 1177, *In re* DVI, Inc. Sec. Litig., 639 F.3d 623, 631–32 (3d Cir. 2011), *and* Schleicher v. Wendt, 618 F.3d 679, 687 (7th Cir. 2010), *with In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 486 n.9 (2d Cir. 2008).

[23] Justice Ginsburg was joined by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, and Kagan. Justice Alito also wrote a brief concurrence urging the Court to reconsider the validity of the *Basic* presumption in light of recent evidence impugning its economic premises. *Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring). Justice Thomas similarly noted that the *Basic* decision, which was based on microeconomic theorization instead of legal analysis, was "questionable." *Id.* at 1208 n.4 (Thomas, J., dissenting). The majority replied only by noting that the parties had not asked the Court to reconsider *Basic*. *Id.* at 1193 n.2 (majority opinion).

[24] *Id.* at 1195.

[25] *Id.* at 1191.

[26] *Id.* While the efficiency of the market and the public nature of the falsehoods are also proved through common evidence, materiality alone is a merits element. *Id.* at 1199. Therefore, if the market were inefficient or the alleged falsehoods were kept private, class members could try to prove reliance individually, and individualized reliance issues would predominate. *Id.* But if the certified class failed to prove materiality, no class member could prevail on the merits. *Id.*

[27] *Id.* at 1191.

[28] *Id.* at 1203–04.

[29] *Id.* at 1201–02.

[30] *Id.* at 1201.

fraud plaintiff prove every element of his claim prior to class certification when it recently enacted legislation to curb vexatious settlements and other perceived abuses of securities-fraud litigation.[31]

Justice Thomas dissented,[32] accusing the majority of defying Rule 23(b)(3) by certifying a class without ensuring that reliance was susceptible of classwide proof. Because materiality is indispensable to the *Basic* presumption, which is crucial to preventing individual reliance questions from predominating, a court cannot discern that reliance is a common question until a plaintiff proves materiality.[33] And while a certified class that later failed to prove materiality would lose on the merits, that class should never have reached that stage because it failed Rule 23(b)(3)'s requirements,[34] and "Rule 23, as well as common sense, requires class certification issues to be addressed first."[35]

Justice Scalia filed a separate dissent, arguing that the need to prove materiality before class certification stems from *Basic* rather than from Rule 23(b)(3). He relied on the fact that *Basic* upheld the class-certification order "subject on remand to such adjustment, if any, as developing circumstances demand," which he read to include adjustment upon a showing of immateriality.[36] Justice Scalia insisted that the Court's decision would create substantial pressure for defendants to settle even the most frivolous class actions, as "*all* market-purchase and market-sale" classes would be entitled to certification, and he lamented this "unquestionably disastrous" consequence.[37]

While the majority claimed to rely entirely on the "plain language of Rule 23(b)(3),"[38] its decision is incompatible with Court precedent requiring trial judges to conduct a robust inquiry into a plaintiff's satisfaction of every Rule 23 element before granting class certification. Nonetheless, *Amgen* best effectuates the primary justifications for securities-fraud class actions: deterrence, compensation, efficiency, and judicial legitimacy. And contrary to Justice Scalia's parade of hor-

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[31] *Id.* at 1199–201. Instead, Congress imposed, inter alia, higher pleading burdens, limits on attorney's fees and damages awarded to lead plaintiffs, and sanctions for frivolity. *Id.* at 1200.

[32] Justice Kennedy joined Justice Thomas in full, and Justice Scalia joined except as to Part I-B.

[33] *Amgen*, 133 S. Ct. at 1206, 1212 (Thomas, J., dissenting).

[34] *Id.* at 1211. For the majority, the fact that failure to prove materiality would dissolve the entire class's claims confirmed the propriety of certification. *Id.* at 1197 n.5 (majority opinion).

[35] *Id.* at 1211 (Thomas, J., dissenting). Justice Thomas also presented evidence that "[m]ateriality was central to the development, analysis, and adoption of the fraud-on-the-market theory both before *Basic* and in *Basic* itself." *Id.* at 1216; *see also id.* at 1213–16.

[36] *Id.* at 1205 (Scalia, J., dissenting) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 250 (1988)) (internal quotation mark omitted). The majority argued that this interpretation was untenable, given that *Basic* remanded for reconsideration of summary judgment in light of a new materiality standard but did not decertify the class. *Id.* at 1202–03 (majority opinion). Instead, *Basic* was merely indicating that class-certification orders can be amended as cases unfold. *Id.* at 1202 n.9.

[37] *Id.* at 1206 (Scalia, J., dissenting).

[38] *Id.* at 1196 (majority opinion).

ribles, the decision does not leave public corporations defenseless against frivolous class actions seeking to loot their coffers.

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[39] When individual monetary claims are at stake, that exception is warranted only where common questions predominate, because predominance ensures "the class cohesion that legitimizes representative action in the first place."[40] Because "Rule 23 does not set forth a mere pleading standard,"[41] class certification is only proper if a court finds predominance "after a rigorous analysis."[42] That analysis requires "a thorough examination of the factual and legal allegations,"[43] including determinations of witness credibility and a weighing of conflicting expert testimony.[44] A plaintiff must prove every matter relevant to predominance[45] by a preponderance of the evidence.[46] While a rigorous analysis "[f]requently . . . entail[s] some overlap with the merits of the plaintiff's underlying claim,"[47] that redundancy does not lessen a judge's obligation to ensure satisfaction of every Rule 23 element.[48]

In concluding that a rigorous analysis of materiality was unnecessary, the *Amgen* majority erroneously conflated the merits element of materiality with the preliminary requirement of common reliance.[49]

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39 Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).

40 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). In injunctive relief class actions, predominance is "self-evident." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011).

41 *Wal-Mart*, 131 S. Ct. at 2551.

42 Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982). While the Court elucidated this standard under Rule 23(a), "[t]he same analytical principles govern Rule 23(b)," which "[i]f anything, . . . is even more demanding." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).

43 Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001); *accord In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006); Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

44 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 322–25 (3d Cir. 2008) (reversing for failure to weigh expert opinions on key predominance issue); *Blades*, 400 F.3d at 575 (sustaining judge's resolution of experts' dispute over whether common evidence could prove class injury).

45 *See Hydrogen Peroxide*, 552 F.3d at 323 ("[A]ny matter relevant to a Rule 23 requirement . . . calls for rigorous analysis."); *IPO*, 471 F.3d at 41 (noting that a rigorous analysis requires a judge to "find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established").

46 *See* Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 228–29 (5th Cir. 2009); *Hydrogen Peroxide*, 552 F.3d at 320–21; Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008). *But see* Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 418 n.8 (6th Cir. 2012) (refusing to decree an evidentiary standard).

47 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

48 *See id.*; Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–33 (2013) (finding a class improperly certified where the judge "refus[ed] to entertain arguments . . . that bore on the propriety of class certification, simply because [they] would also be pertinent to the merits determination"); *see also, e.g.*, *IPO*, 471 F.3d at 41 (holding that the need to evaluate each Rule 23 element "is not lessened by overlap," even when a merits element is identical to a Rule 23 requirement).

49 *See Amgen*, 133 S. Ct. at 1212 (Thomas, J., dissenting).

While materiality is inherently a common question, reliance is a personalized inquiry that precludes class certification absent showings by the plaintiff that the falsehoods were material and that *Basic* otherwise applies. Moreover, the majority wrongly contended that failure to prove materiality cannot destroy class cohesion.[50] In part, cohesion prevents actual and potential "inequity at the *precertification* stage."[51] At that phase of the litigation, materiality is relevant only as it pertains to the *Basic* presumption, because courts lack the "authority to conduct a preliminary inquiry into the merits" for non-pretrial purposes.[52] Where falsehoods are immaterial, a subset of investors can prove reliance directly, causing "disparate factual circumstances" to exist within the class[53] and destroying precertification class cohesion.

Because cohesion is necessary during all stages of class proceedings, the Court's traditional approach to certification would have required judges to test satisfaction of every prerequisite of classwide reliance through a rigorous analysis. Market efficiency, publicity, and materiality are "essential predicate[s]" of the *Basic* presumption.[54] If any element is absent, *Basic* is inapplicable, individual reliance issues predominate, and class certification is improper. Consequently, trial judges should have been directed to ensure that all three elements are satisfied by a preponderance of the evidence before certifying a class. That rigorous analysis would have entailed weighing all of the materiality evidence, including the defendant's truth-on-the-market defense. By upholding class certification based on an allegation of materiality, the Court converted predominance in securities-fraud class actions into a "mere pleading standard." If expanded to other contexts, *Amgen* could provide a means to vitiate the rigorous-analysis requirement.

Nonetheless, mandating a finding of materiality at the class-certification stage would have been inimical to the policies that securities-fraud class actions promote, which are fourfold: First, class actions deter wrongdoing by supplementing public enforcement with private attorneys general.[55] Second, they compensate victims for harms that are too small to merit individual litigation, by aggregating

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[50] *See id.* at 1196 (majority opinion).

[51] Ortiz v. Fibreboard Corp., 527 U.S. 815, 858 (1999) (emphasis added); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (requiring cohesion to certify a settlement class).

[52] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (reversing the district court's assignment of the costs of providing notice to class members to the defendant, which had been predicated on a finding that the class was likely to prevail on the merits); *see also Wal-Mart*, 131 S. Ct. at 2552 n.6 (interpreting *Eisen*'s language to mean that judges may not inquire into the merits for any reason other than to "determine the propriety of certification").

[53] Gates v. Rohm & Haas Co., 655 F.3d 255, 264 (3d Cir. 2011) (quoting Carter v. Butz, 479 F.2d 1084, 1089 (3d Cir. 1973)) (internal quotation mark omitted).

[54] *Amgen*, 133 S. Ct. at 1195.

[55] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("[The] classwide suit is an evolutionary response to the existence of injuries unremedied by . . . regulatory action . . . .").

claims and distributing litigation costs.[56] Third, where multiple persons have sufficiently large claims to merit separate lawsuits, class actions conserve judicial and party resources by jointly deciding common issues of law and fact.[57] Finally, class actions preserve judicial legitimacy by avoiding inconsistent rulings on common questions.[58]

Class actions play an essential role in deterring securities fraud and compensating victims for their losses. While section 10(b) does not expressly create a private right of action and there is no evidence that Congress intended to fashion one,[59] the Court has implied it as a tool to combat securities fraud.[60] Private actions provide a "most effective weapon" in enforcing the securities laws and are a "necessary supplement" to action by the SEC,[61] which lacks the resources to detect all misconduct and is susceptible to agency capture.[62] Unlike SEC litigators, class counsel are incentivized and able to "pioneer legal theories, hire cutting-edge experts, [and] design sophisticated damage models."[63] Empirically, class actions earn over half the total monetary sanctions achieved by public and private enforcement,[64] and private actors and the SEC police companies with different market capitalizations.[65] Because CEOs exaggerate their chances of being sued and subsequently held liable, the existence of the class action device moderates their behavior.[66] Moreover, class action filings hold CEOs ac-

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[56] *Amchem*, 521 U.S. at 617; Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985); *Deposit Guar. Nat'l Bank*, 445 U.S. at 339; *Eisen*, 417 U.S. at 161.

[57] Califano v. Yamasaki, 442 U.S. 682, 701 (1979); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 466 n.12 (1975); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974).

[58] *See* Montana v. United States, 440 U.S. 147, 153–54 (1979) (explaining that preclusion "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions," *id.* at 154).

[59] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976).

[60] Blue Chip Stamp v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

[61] J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); *see also* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 345 (2005); Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

[62] Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic* Ex Post *Regulation*, 43 GA. L. REV. 63, 101–04 (2008); *see also* James D. Cox et al., *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 895 (2005) (reporting that only 19% of settled class actions were accompanied by SEC enforcement).

[63] Burch, *supra* note 62, at 91; *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 112–13 (2005) (providing examples of legal innovations spurred by private enforcement suits).

[64] COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT 71 (2006). "[E]ven in major scandals where the SEC has brought its own action, the damages paid in securities class actions are usually . . . a multiple of those paid to the SEC." John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1543 (2006). "[F]rom an economic standpoint," the key to deterrence "is that the violator be confronted with the costs of his violation[,] . . . not that he pay them to his victims." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 785 (8th ed. 2011).

[65] Cox et al., *supra* note 62, at 902 (noting that firms subject to both private and SEC action have average market capitalizations six times greater than firms subject only to private action).

[66] *See* Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1495 (1996).

countable for their companies' misdeeds by increasing the probability of executive turnover.[67] Securities-fraud class actions also compensate victims for losses that would otherwise go unremedied. For most private investors, losses sustained from fraud are likely too small to warrant personal litigation. Consequently, their portion of the $27.2 billion attained through all settlements of securities-fraud class actions since 2008[68] — roughly $7.3 billion[69] — is entirely a windfall.[70]

Amgen thus preserves the deterrent and compensatory effect that securities-fraud class actions provide. Materiality is not only difficult to prove,[71] but also "one of the most unpredictable and elusive concepts of the federal securities laws,"[72] making it challenging for potential plaintiffs to evaluate their prospects of victory at trial. Demanding proof of materiality by a preponderance before certification would have presented "an additional obstacle to making a successful challenge," which would have dissuaded litigants from acting as private enforcers of the securities laws and recouping some of their losses.[73]

Amgen also makes securities-fraud class actions more efficient and safeguards judicial legitimacy. Because findings made at the class-certification stage are not binding at trial,[74] *Amgen* avoids repeat de-

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[67] Greg Niehaus & Greg Roth, *Insider Trading, Equity Issues, and CEO Turnover in Firms Subject to Securities Class Actions*, 28 FIN. MGMT., Winter 1999, at 52, 64–67 (finding a 19% increase in CEO turnover over similarly sized firms that also experienced large stock price drops); Philip E. Strahan, Securities Class Actions, Corporate Governance and Managerial Agency Problems 22–24 (July 1998) (unpublished manuscript) (on file with the Harvard Law School Library) (finding an 11.3% increase after accounting for the effects of steep declines in stock price).

[68] *See* RENZO COMOLLI ET AL., NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2012 FULL-YEAR REVIEW 31 fig.28 (2013).

[69] In 2009, private investors held 27% of stock in the top 1000 U.S. corporations. MATTEO TONELLO & STEPHAN RABIMOV, CONFERENCE BD., THE 2010 INSTITUTIONAL INVESTMENT REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION 27 (2010).

[70] Critics of the ability of securities-fraud class actions to meaningfully compensate victims often recite statistics showing that class actions recover an insignificant share of investor losses, *see, e.g.*, Coffee, *supra* note 64, at 1545, such as the fact that the median ratio of settlement amount to investor losses was only 1.8% in 2012, COMOLLI ET AL., *supra* note 68, at 33 fig.30. But that statistic masks the fact that settlements under $20 million, which constituted 59% of all settlements that year, compensated investors for 17% of their losses. *See id.* at 29 fig.27, 32 fig.29.

[71] A fact is material only if there is "a *substantial* likelihood that [its] disclosure . . . would have been viewed by [a] reasonable investor as having significantly altered the 'total mix' of information . . . available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (emphasis added). To avoid inundating shareholders with trivial information, the *Basic* Court took caution not to set "too low a standard of materiality." Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

[72] SEC v. Bausch & Lomb Inc., 565 F.2d 8, 10 (2d Cir. 1977); *see also* Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 BUS. LAW. 317, 319 (2007) ("Materiality determinations in individual cases tend to be so fact-specific that the accumulated body of published case law provides limited guidance . . . .").

[73] Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 382 (1970) (refusing to recognize the fairness of a merger as a total defense under section 14(a) of the 1934 Act out of similar concerns).

[74] *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 24 (1st Cir. 2008); *In re* Initial Pub.

terminations on the issue of materiality and the attendant possibility of contradictory rulings within a single proceeding. More importantly, a properly certified class action has a greater preclusive effect, binding all adequately represented class members to the court's judgment and preventing them from filing identical class actions against the defendant or relitigating issues resolved by the first court in individual actions.[75] By contrast, a proposed class that fails to satisfy Rule 23 does not bind unnamed class members, allowing class counsel to repeatedly refile the complaint on behalf of different named plaintiffs until finding a judge willing to grant certification.[76] And while judges are supposed to "apply principles of comity" when deciding whether to certify a copycat class action,[77] the Seventh Circuit recently held that certification is not improper if a judge provides "plausible reasons" for disagreeing with the previous decision(s).[78] If materiality were a prerequisite to class certification, a finding of immateriality would have no preclusive effect on unnamed class members in later class actions or individual cases. Class counsel would thus be incentivized to continually refile the identical lawsuit, a process that would be both inefficient and injurious to judicial legitimacy. Under *Amgen*, courts will delay assessing materiality until the summary judgment stage, and class members will have only one bite at the materiality apple.

While the harms of certifying class actions based on immaterial falsehoods might outweigh the benefits if defendants feel financial pressure to settle frivolous claims, the threat of *in terrorem* settlements is greatly exaggerated. Defendants can use a variety of procedural devices, including motions for dismissal and summary judgment, to prevent meritless claims from reaching a jury.[79] They can invoke over

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Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006); Unger v. Amedisys Inc., 401 F.3d 316, 323 (5th Cir. 2005).

75 *See* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874, 880 (1984).

76 Smith v. Bayer Corp., 131 S. Ct. 2368, 2380–81 (2011). Counsel are limited only by the 1934 Act's statute of repose, which bars the filing of section 10(b) claims beyond five years after an alleged violation, 28 U.S.C. § 1658(b)(2) (2006), and is not tolled while another putative class action is pending, *see* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991).

77 *Smith*, 131 S. Ct. at 2382.

78 Smentek v. Dart, 683 F.3d 373, 377 (7th Cir. 2012) (Posner, J.) (interpreting comity as merely "requiring a court to pay respectful attention to the *decision* of another judge in a materially identical case, but no more than that even if it is a judge of the same court or a judge of a different court within the same judiciary"). *But see* Baker v. Microsoft Corp., 851 F. Supp. 2d 1274, 1280 (W.D. Wash. 2012) (refusing to certify an identical class action filed in the same district court because to do so would be to "step into the shoes of the Ninth Circuit and effectively overrule a fellow member of this court" in violation of "well-settled principles of judicial comity").

79 Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 346 (2010); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1393 (2003) ("Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims.").

seventy-five distinct defenses in contesting securities-fraud claims.[80] Dispositive motions are usually resolved quickly,[81] and courts minimize litigation costs by staying discovery in the interim.[82] Of all the securities-fraud class actions filed since 2000, only 44.3% survived motions to dismiss, and 24.8% of defendants' motions for summary judgment were granted.[83] Consequently, only 57.5% of cases settled,[84] a rate lower than that for all civil lawsuits.[85] Moreover, because corporations typically have significant liability insurance, "the likelihood of their being forced into insolvency by plaintiff [trial] victories is reduced."[86] Therefore, the *in terrorem* settlement is "a beast like the unicorn, more discussed than directly observed."[87] And where frivolity is not a concern, the law favors settlement of class actions.[88]

Despite *Amgen*'s plaintiff-friendly departure from the rigorous-analysis requirement, securities-fraud class actions have a precarious future. Accounting for 21.6% of securities cases filed by private litigants in the second quarter of 2013,[89] they occupy a significant portion of federal dockets. Yet, with Justices Scalia, Kennedy, Thomas, and Alito calling for the Court to reconsider the *Basic* presumption and the *Amgen* majority failing to rush to its defense, the Court seems poised to revisit its viability in a coming Term. Because securities-fraud class actions promote important policy objectives, the Court should think carefully before making them impossible to certify.

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[80] *See generally* Jonathan Eisenberg, *Beyond the Basics: Seventy-Five Defenses Securities Litigators Need to Know*, 62 BUS. LAW. 1281 (2007).

[81] THOMAS E. WILLGING ET. AL, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 173 tbls.28 & 29 (1996) (describing the results of a study of all class actions in four district courts, in which the median time for rulings was between 2.6 and 7.4 months for motions to dismiss and between 3.5 and 9.0 months for summary judgment motions).

[82] *See* 15 U.S.C. § 78u-4(b)(3)(B) (2012).

[83] *See* COMOLLI ET AL., *supra* note 68, at 17 fig.15, 22 fig.20.

[84] *See id.* at 23 fig.21.

[85] *See* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2002 (2004) (estimating that between 65% and 70% of civil cases settle).

[86] Silver, *supra* note 79, at 1414 (describing the climate in securities suits as one in which uninsured assets are presumed unreachable); *see also* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 512 (1997) ("[A]pproximately 96% of securities class action settlements are within the typical insurance coverage, with the insurance proceeds often being the sole source of . . . funds."). A corporation also gains long-term benefits by developing a reputation for refusing to settle frivolous claims, making litigation sometimes a "more cost-effective and . . . pragmatic business solution." Kaufman & Wunderlich, *supra* note 79, at 365.

[87] Coffee, *supra* note 64, at 1536 n.5; *see also* Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127, 1229 (2005) ("The [*in terrorem*] argument . . . has an initial superficial persuasiveness but upon closer inspection appears to be an illusion.").

[88] *See* Kaufman & Wunderlich, *supra* note 79, at 363 & n.234; Silver, *supra* note 79, at 1389.

[89] *See* ADVISEN INS. INTELLIGENCE, D&O CLAIMS TRENDS: Q2 2013, at 3 exhibits 2 & 4 (2013).