Amgen and the Fraud-on-the-Market Class Action: Frozen in Time?

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I. INTRODUCTION

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*,[1] a solid majority of the Supreme Court held that proof of the materiality of alleged misstatements or omissions was not necessary or appropriate to certify a class action on behalf of investors who bought or sold in the aftermath of the falsehoods. At issue was the meaning—both substantively and procedurally—of the so-called "fraud on the market" presumption that had been established by the Court twenty-five years earlier in *Basic Inc. v. Levinson*,[2] whereby all such investors are presumed to have relied on the alleged fraud if they traded in an "efficient" market for those securities that was distorted by fraud. The majority in *Amgen* said that the class certification inquiry in the face of such a presumption is limited to those issues not susceptible to class-wide proof. Materiality, being a single

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[1] 133 S.Ct. 1184 (2013).

[2] 485 U.S. 224 (1988). I have explored *Basic* extensively in prior work, particularly Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wisc. L. Rev. 151; see also Donald C. Langevoort, *Theories, Assumptions and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 886-96 (1992); Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 Nw. U. L. Rev. 135, 182-86 (2002). The *Amgen* dissenters cast doubt on *Basic* by pointing out that it was decided a four-justice majority. Due to vacancies and recusals, the Court's most committed business conservatives did not participate in the case (though it is worth noting that the Reagan-appointee dominated SEC, surprisingly, came in as amicus on the side of the plaintiffs). See 2009 Wis. L. Rev. at 156-57, 163. In any event, as the *Amgen* majority points out, *Basic* is officially a majority opinion, meriting precedential weight. 133 S.Ct. at 1192 n. 1.

objective inquiry, is a class-wide question and hence not directly relevant to certification. Three justices (Scalia, Thomas and Kennedy) disagreed, in two separate dissents, saying that proof of materiality is a condition precedent to earning the presumption of reliance, without which certification necessarily fails because commonality unravels. Justice Alito joined the majority but wrote a concurrence to suggest that the *Basic* presumption has a shaky foundation that warrants future reconsideration by the Court.

This article is a reader's guide to the securities law aspects of *Amgen*. Those not deeply familiar with securities class actions might well see the decision (putting aside Alito's provocative concurrence) as entirely procedural, and thus not particularly interesting. After all—as both sides conceded in their debate about who exactly was putting the cart before the horse[3]—plaintiffs plainly bear the burden of proving materiality in order to win their case. The question is when, i.e., whether it occurs pre-discovery.[4] The dissenters' main argument was that it is efficient to get rid of cases where the misstatements are likely to be immaterial earlier rather than later, and not unfair given the generous gift that *Basic's* presumption affords the plaintiff class when materiality can be established.

But of course there is much more to the opinion than timing. Leaving materiality to trial means, in all likelihood, that a jury would make that determination instead of the judge. As we shall see, materiality debates often turn on a mix of qualitative and quantitative evidence, the latter not likely to be understood particularly well by lay jurors. Defendants may reasonably suspect that they will fare better before a judge for this reason

[3] Compare 133 S.Ct. at 1191 with id. at 1211 (Thomas, J., dissenting).

[4] Materiality determinations are aided by discovery to the extent that they deal with questions like the probability of an event's occurrence at the time of the public statements, or how seriously the issue was taken inside the company at the time. On the other hand, stock price reaction evidence—which as we will see, becomes a central issue much of the time—tends not to be. Even that, however, takes time to develop. The lower courts that had made materiality an issue in class certification disagreed as to who had the burden of proof on the defendant to rebut materiality. See In re Salomon Analyst Metromedia Lit., 544 F.3d 474 (2d Cir. 2008)(plaintiff's burden); In re DVI Inc. Securities Litig., 639 F.3d 623 (3d Cir. 2011)(defendant may rebut).

alone. Moreover, at trial there may be little to control for the trumping effect of hindsight bias—the inflated inference that because something bad happened later on, those on the inside must have suspected it all along and so bear responsibility for it.[5] This fear, given the large sums of money at stake plus the high costs of litigating just to get to trial, supposedly contributes to settlement pressure, which happens almost inevitably if a class is certified and survives motions to dismiss or for summary judgment. Thus plaintiffs' strong desire to defer as many contestable issues as possible to trial, and for defendants to fight vigorously for pre-discovery resolution of the same. *Amgen* was just one of many settings where defendants have pushed for such an acceleration of a merits issue, and the Court's rejection was thus a significant strategic win for plaintiffs in countering these moves.

Given the Supreme Court's recent pro-defendant inclinations in securities class actions and class actions generally (including another sizable win for the class action defense-side just a few weeks after *Amgen*[6]), this settlement-bolstering win might seem surprising. I will leave to the civil procedure experts the task of reconciling *Amgen* with the noticeably contrary trend in class action litigation that is increasingly open to some degree of "merits" inquiry,[7] and simply assume that the Court sees the fraud-on-the-market class action as sui generis given, among other things, the distinctive informational properties of modern financial markets.

The dissenters worked hard to find in the *Basic* case itself an implicit pre-certification materiality requirement in order to make this move seem not just a simple exercise of judicial policy-making, the evidence for

[5] See G. Mitu Gulati et al., *Fraud by Hindsight*, 98 Nw. U. L. Rev. 773 (2004). This is important because the approach to materiality with respect to speculative, future-oriented events is to ask the jury to balance the probability that the event would come to pass as of the time of the fraud against its likely magnitude—essentially an expected value calculation. This test was endorsed in a separate holding in *Basic*. On the somewhat surprising background to the Court's resolution of this issue, see Donald C. Langevoort, *Investor Protection and the Perils of Corporate Publicity:* Basic Inc. v. Levinson, in THE ICONIC CASES IN CORPORATE LAW 257 (Jonathan Macey, ed. 2008).

[6] Comcast Corp. v. Behrends, 133 S.Ct. 24 (2013).

[7] See Linda Mullenix, *Class Action Cacophony at the Supreme Court*, Nat'l L.J. (April 15, 2013), at 28.

which did not impress the majority. In fact, the parties could not find any instances where a court insisted on a materiality showing as crucial to class certification until the mid-2000s. If such a requirement was implicit in *Basic*, it stayed latent for a surprisingly long period of time.[8] Reading the defense-side briefs in *Amgen* gives the clear impression they thought the Court would bless this tough stance to class certification simply because it was sound conservative policy to do so.

That takes us to a point in the opinion that seems crucial to assembling the majority. A strong thrust of the dissents was the "in terrorem" effect of class certification, impelling settlements even where merits issues like materiality and scienter are questionable—by now a familiar point in the case law—as good reason for an early assessment of materiality. This, of course, invokes the debate that has raged ever since *Basic* about purported class action abuses, and which led Congress to substantially reform private securities litigation in 1995. In recent years, defendants have vigorously been making the argument that Congressional action in the Private Securities Litigation Reform Act has implicitly "frozen" the outer limits of fraud-on-the-market class actions, precluding the judiciary from further extension. This connects to the conservative critique of 10b-5 litigation generally, which despises its origins in the form of a judicially implied right rather than Congressional action, and has long claimed that these litigation scope issues are warrant legislative reform than judicial invention.[9] The Supreme Court's *Stoneridge* decision articulates the "frozen in 1995" idea explicitly.[10]

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8 Unmentioned in *Amgen* is the Sixth Circuit's opinion on remand in *Basic*, which rejected requests for summary judgment on materiality and sent the case to the district court for trial (prior to which the case settled). See Levinson v. Basic Inc., 871 F.2d 562 (6th Cir. 1989). The court expressly affirmed the class certification even though materiality remained a live issue at trial.

9 See Donald C. Langevoort, *Lies Without Liars?* Janus Capital *and Conservative Securities Jurisprudence*, Wash. U. L. Rev. (forthcoming, 2013).

10 Stoneridge Inv. Partners v. Scientific-Atlanta Inc., 552 U.S. 148, 165-66 (2008)("It is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the §10(b) private cause of action as then defined but chose to extend it no further"). *Stoneridge* was addressing the extent of secondary liability in fraud-on-the-market suits.

But that is presumably a two-way street, indicating just as strongly that those doctrines that were firmly in place in 1995 are protected by that same logic. Albeit without an explicit reference to *Stoneridge*, the *Amgen* majority makes much of the fact that Congress rejected efforts to overturn *Basic*, while at the same time making so many substantive and procedural changes (but not to the relevant aspects of class certification) to counter settlement pressure.[11] Justice Thomas says in dissent that this implied endorsement of *Basic* and the foundations of fraud-on-the-market does not preclude courts from adjusting the contours of the right of action by "interpreting" *Basic*.[12] That is true, but only within bounds. Given the well-established status of materiality as a fact question in numerous Supreme Court decisions both pre- and post-1995,[13] the majority's point that Congress could have adjusted the law relating to materiality determinations if it had wanted, but chose other reforms instead, has considerable strength. This inference was a central part of the Seventh Circuit opinion rejecting the role of materiality in class certification written by Frank Easterbrook,[14] a potent endorsement of this idea by someone quite expert in both the theory and practice of private securities litigation. I suspect that an instinct about separation of powers, more than anything, brought the Chief Justice over to the plaintiff's side in *Amgen*, just as it persuaded Judge Easterbrook.

II. MATERIALITY, PRICE DISTORTION AND CORRECTIVE DISCLOSURE

The disagreement in *Amgen* was about whether an early showing of materiality in an evidentiary hearing should be the price plaintiffs have to

[11] 133 S.Ct. at 1200-01.
[12] Id. at 1213 n.9.
[13] E.g., TSC Inc. v. Northway, 426 U.S. 438 (1976); Basic Inc. v. Levinson, supra; Matrixx Inc. v. Siricusano, 131 S.Ct. 1309 (2011).
[14] Schleicher v. Wendt, 618 F.3d 679 (7^{th} Cir. 2010), a case cited repeatedly by the majority in *Amgen* without invoking Easterbrook by name.

pay for *Basic's* generous presumption of reliance and the class certification that readily follows.[15] That obscures the real debate.

Materiality is a deceptively simple idea, describing that which reasonable investors likely consider important, i.e., relevant to the value of the issuer's securities. It is generally a fact question, but for years courts have fought over the appropriate size of the "immaterial as a matter of law" category whereby courts can and do dismiss cases on the pleadings, prior to discovery. The "puffery" defense is the best known example, readily embraced as a means of getting rid of complaints where the alleged misrepresentation was in the form of general corporate optimism.[16] The assumption here is that reasonable investors don't (or shouldn't) put stock in vague representations of the sort that have no solid factual content. While this category is well established, the Supreme Court has twice warned against too heavy-handed a judicial usurpation the fact-intensive materiality inquiry, in *Basic* itself[17] and then more recently in *Matrixx Inc. v. Siricusano*.[18]

When plaintiffs bring a securities class action, the pleadings inevitably claim that the truth withheld from investors was very important. Apart from disputing what the truth was (a pure fact question) or whether it was fully appreciated by the defendant (a scienter inquiry) the most common form of rebuttal is a "truth on the market" claim: that the market already knew the truth, so that whatever the defendant said was unimportant

[15] *Basic* permits a rebuttable presumption of reliance upon a showing that an investor traded during the relevant class period (i.e., after the misrepresentation but before correction), that the trading was on an "efficient" market, and that there was a material, public misstatement that distorted the market price. This presumption of reliance, in turn, has been seen as essential to a finding of commonality under Rule 23(b)(3) of the Federal Rules of Civil Procedure to justify class certification.

[16] See JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 639-42 (7th ed. 2013).

[17] In *Basic*, the Court ruled that speculative information about merger negotiations could be material, rejecting a "materiality as a matter of law" claim that such negotiations only become important when an agreement in principle is reached between the parties. See note [4] supra.

[18] 131 S.Ct. 1309 (2011)(rejecting a claim that statistically insignificant instances of harmful effects from a new drug were necessarily immaterial).

even if it was false.[19] This can be established qualitatively, by calling market participants as witnesses and demonstrating, through contemporaneous publicity or published research, that there was an adequate understanding of the true state of affairs to disregard management's supposed deception. The latter appears to be what defendants were anxious to do in *Amgen*.

As one can imagine, however, this kind of evidence is normally countered by plaintiff's own experts and publicity survey. For some time now, the question of whether there is a noticeable stock price reaction to the alleged misstatement has been considered the best test to resolve contests between fraud-on-the-market and truth-on-the-market.[20] Where a corporate lie is particularly dramatic and credible—false corporate "news"—we can expect a visible and prompt price reaction, usually on the upside. Indeed, that intuition is the basis of the fraud-on-the-market presumption. And that stock price distortion—measurable via an event study—would tell us nearly everything necessary for plaintiffs to succeed or fail. The reaction itself suggests that the information is material, and that distortion triggers *Basic's* presumption of reliance. The amount of the price distortion in turn might also be a good measure of damages. Indeed, it was this promise of a rigorous, empirical approach to materiality,[21] reliance and causation via the event study tool that made the fraud-on-the-market theory appealing even to fairly conservative judges and academics, a story I have explored in depth elsewhere.[22]

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[19] See COX ET AL., supra, at 637-39.

[20] Jonathan Macey et al., *Lessons from Financial Economics: Materiality, Reliance and Extending the Reach of* Basic v. Levinson, 77 Va. L. Rev. 1017, 1021 (1991).

[21] See Roger Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 25 Wm. & Mary L. Rev. 373 (1984), cited in *Basic*.

[22] See Langevoort, Basic *at Twenty*, supra, at 163-64. The seminal work here is Daniel Fischel, *Use of Modern Financial Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1 (1982); Frank H. Easterbrook & Daniel Fischel, *Optimal Damages in Securities Cases*, 58 U. Chi. L. Rev. 611 (1985); Daniel Fischel, *Efficient Capital Markets, the Crash, and Fraud on the Market Theory*, 74 Cornell L. Rev. 907 (1989). Easterbrook and Fischel gather these ideas together in their classic book THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Credit on the conservative side is also due to Judge Patrick Higginbotham, who introduced this kind of economic analysis to the

But the simplicity was an illusion.[23] As was the case in *Amgen*, the typical fraud-on-the-market case does not involve a single dramatic lie. Rather, it involves a story that begins when the issuer is doing reasonably well. Gradually, however, things start turning bad and eventually the issuer is forced to reveal its troubles, at which point the stock price is much lower than it was during the good times. Plaintiffs will work to show that management knowingly or recklessly concealed those troubles. But concealment is not necessarily unlawful (another one of *Basic's* fundamental lessons), and so there will have to be a showing that particular misstatements or actionable omissions (usually half-truths) distorted the stock price. For a variety of reasons, finding measurable distortion is often hard. First, the alleged lies come out in dribs and drabs, and allegedly have the effect to preventing a decline in the stock price, not actually pumping it up. Second, these alleged lies are often coupled with lots of other information about the issuer, some of which was presumably accurate. There is simply no way of measuring distortion with precision in settings like these. Often there is no visible change in stock price at all, on which defendants seize for their truth-on-the-market defense.

Well before *Basic*, plaintiffs responded to this difficulty by turning attention not to the date(s) of the alleged lie(s) but rather the event of corrective disclosure—when the truth was later on brought home to the market. When there was a big stock price drop after such disclosure, plaintiffs would argue by backwards induction that this was the drop was a good measure of the cumulative extent of the original distortion (and the right measure of damages as well).[24] But once the inquiry extends to a potentially lengthy period of time between the original lie and the corrective disclosure, it is likely that there will be many intervening or supervening events that also make their way into the correction, making it hard—if not

law of fraud-on-the-market case law, before Easterbrook and Fischel, in In re LTV Sec. Litig., 88 F.R.D. 134 (N.D. Tex. 1980). Judge Higginbotham, later promoted to the Fifth Circuit, has had a significant impact on the law since then as well.

[23] See Jill E. Fisch, *The Trouble with* Basic: *Price Distortion after* Halliburton, Wash. U. L. Rev. (forthcoming, 2013).

[24] See, e.g., Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. Rev. 883 (1990).

impossible—to disentangle all the effects with any econometric rigor. The case law in this area exploded in the aftermath of the Supreme Court's *Dura Pharmaceuticals* decision,[25] with its insistence that plaintiffs put forth persuasive evidence of a price correction attributable to the fraud in order to establish "loss causation," as is their statutory burden after the PSLRA.

Exploring how the courts have responded to all this is beyond the scope of my article;[26] it is by all accounts a doctrinal and practical mess.[27] Courts vary considerably in how much they demand of plaintiffs, but many cases are insistent that if plaintiffs cannot show with rigorous evidence that there was either a price distortion at the time of the fraud or a deflation in price later on due to the revelation of the truth (not some separate causal event), they lose. Of course, if this burden is imposed only at the trial on the merits, it may be largely illusory for the reasons discussed earlier—the case will be settled before then. In response, more aggressive courts began finding ways to accelerate this inquiry, taking us to the present controversies. As an effort to weed out these cases, class certification was appealing because it would permit an early evidentiary hearing, going well beyond the pleadings. The Supreme Court has now shut the door on using class certification to do this, first holding that loss causation is not an appropriate certification inquiry in *Halliburton*,[28] then holding the same with respect to materiality in *Amgen*.[29]

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[25] Dura Pharmaceuticals v. Broudo, 544 U.S. 336 (2005).

[26] See Fisch, supra; Langevoort, Basic *at Twenty*, supra, at 178-89.

[27] See Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811 (2009); James C. Spindler, *Why Shareholders Want their CEO's to Lie More After* Dura Pharmaceuticals, 95 Geo. L.J. 653 (2007); Allen Ferrell & Atanu Saha, *Loss Causation Requirement for Rule 10b-5 Causes of Action: The Implications of* Dura Pharmaceuticals v. Broudo, 63 Bus. Law. 163 (2007); Elizabeth Chamblee Burch, *Reassessing Damages in Securities Fraud Class Actions*, 66 Md. L. Rev. 348 (2007); Merritt B. Fox, *After* Dura: *Causation in Fraud-on-the-Market Actions*, 31 J. Corp. L. 829 (2006); Michael J. Kaufman, *At a Loss: Congress, the Supreme Court and Causation under the Federal Securities Laws*, 2 N.Y.U. J. L. & Bus. 1 (2005).

[28] Erica John Fund v. Halliburton Corp., 131 S.Ct. 2179 (2011). See Fisch, Halliburton, supra.

[29] Technically, price distortion might be seen as different from both materiality and loss causation. Shortly after *Amgen*, on remand in *Halliburton*, the Fifth Circuit held that these

Even though plaintiffs have won a considerable strategic victory here, this kind of pre-discovery skirmishing resembles the game of whack-a-mole in the way that these issues keep reappearing under different labels.[30] For example, in a controversial series of opinions pioneered by then Judge Alito in the Third Circuit,[31] where there is no stock price reaction to a misrepresentation or omission (or to the corrective disclosure when that is used for backwards inference), the information can be deemed immaterial as a matter of law and the case dismissed for that reason alone, quite apart from class certification.[32]

If read strictly, this is a troubling doctrine.[33] The question of why there was no immediately visible stock price reaction is factually complex. Sometime reactions to information are delayed because of the subtlety of the disclosure or its "buried" nature, even in well-developed markets. Sometimes there is no reaction because, as noted earlier, the alleged fraud diffuses a price reaction that would have occurred in the absence of the

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two cases together are properly read to foreclose any price distortion argument as part of the class certification decision. Erica P. John Fund v. Halliburton Co., 2013 WL 1809760 (5th Cir. 2013).

[30] Still uncertain, for example, is the extent of plaintiffs' pleading burden with respect to price distortion and loss causation. Even summary judgment is a possibility, notwithstanding the highly disputed factual nature of these issues. See In re Williams Co. Sec. Litig., 558 F.3d 1130 (10th Cir. 2009). The court found a way to summary judgment via *Daubert*. The district court, properly in the Tenth Circuit's view, excluded the plaintiff's expert evidence entirely for failing to make the necessary scientific showing for admissibility; thus there was no factual contest any more. In sum, *Williams* concedes the likelihood of serious fraud closely connected with the reasons companies typically go bankrupt—hidden financial weakness—and yet dismissed the class action in its entirety.

[31] E.g., In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997); for perhaps the most notorious example, not by Alito, see In re Merck & Co. Sec. Litig., 432 F.3d 261 (3d Cir. 2005), which uses immateriality as a matter of law even though there clearly was a later corrective reaction to the news once it became salient enough. Compare, e.g., Greenhouse v. MCG Capital Corp., 392 F.3d 650 (4th Cir. 2004). See generally Stefan Padfield, *Who Should Do the Math? Materiality Issues in Disclosure that Require Investors to Calculate the Bottom Line*, 34 Pepperdine L. Rev. 927 (2007).

[32] That could be an explanation for Justice Alito's choice to concur rather than dissent in *Amgen*: he may have been convinced that class certification is not the right place to deal with these issues because there are other pre-discovery opportunities for dismissal when price distortion isn't obvious.

[33] See Langevoort, Basic *at Twenty*, supra, at 189-91.

fraud, and there is no obvious corresponding correction event because the information has already leaked into the market or because the correction has been bundled with other good news about the issuer. While there will be some cases where the mix of qualitative and qualitative evidence of truth-on-the-market is strong enough to justify pre-discovery dismissal,[34] most are likely to involve substantial ambiguity.

So what this is really all about is the burden of uncertainty. Some believe that as a matter of policy, fraud-on-the-market lawsuits should not go forward in the absence of persuasive qualitative and quantitative evidence of price distortion, even though all of the above is possible, simply because the resulting speculativeness invites too much questionable litigation and costly settlements.[35] We will take up aspects of this issue in the remainder of my article. For now, simply note that the disagreement about who has to show evidence of price distortion, and what that evidence consists of, has by no means disappeared from the pre-discovery battles after *Amgen*.[36]

III. ON WHAT? EFFICIENCY, RELIANCE AND REBUTTABILITY

I have written at length elsewhere about the confusion *Basic* creates in trying to explain the precise nature of the presumed reliance, and how and why this relates to market efficiency.[37] Unfortunately, *Amgen* repeats rather than resolves this muddle. This allows Justice Alito, in his concurrence, to put in play the future of the presumption insofar as it may

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[34] E.g., Smith v. Circuit City Stores, 286 F. Supp.2d 707, 721 (E.D. Va. 2003).

[35] See John C. Coffee, Jr., *Causation by Presumption?,* 60 Bus. Law. 533 (2005).

[36] Perhaps even within class certification, there will be an opportunity to try to use their evidence of an absence of price distortion to argue that the market is therefore not efficient. See Lassaad Turki & Mark Allen, Amgen—*What Has Not Been Said So Far!,* 45 Sec. Reg. & L. Rep. (BNA) 1046 (June 3, 2013). My sense is that this kind of argument has to be evaluated very cautiously. See pp. --- infra.

[37] See Langevoort, Basic *at Twenty*, supra, at 166-78.

rely on a "faulty economic premise" in light of our more nuanced (and to some extent skeptical) understanding of market efficiency. The dissenters seem anxious to do the same.[38]

Market efficiency is the basic idea that as a result of competitive research by market professionals and other mechanisms, "news" about an issuer will be promptly incorporated into its stock price, so that traders thereafter cannot reasonably expect to profit from such news.[39] It follows that most traders should not try—they can and should "free ride" on the professionals' work by simply assuming that the consensus price is the best publicly-available estimate of the security's value. Index funds are commonly given as a good example of a rational, low-cost investment strategy in response to market efficiency.[40]

Basic's muddle is this. There are plenty of free-riders in the market. But there are just as many, if not more, who try to identify mispricing opportunities—stocks that seems undervalued or overvalued—and hence are not trusting the market to have gotten the valuation right. Of course some of these do the research and actually rely on the misinformation, but not all. Any presumption based simply on the assumption of passive free-riding will be necessarily over-inclusive,[41] which raises disturbing questions about excessive liability as a result, because each and every class member is entitled to damages.

[38] 133 S.Ct. at 1206 Scalia, J.)("the regrettable consequences of the four justice opinion in *Basic*); id. at 1212-13 n. 4 (Thomas, J.)("The *Basic* decision is itself questionable"). The majority opinion recognizes the kinds of questions modern finance raise about efficiency—including its non-binary character, but truncates the discussion by stressing that this is not the case to address these issues.

[39] Actually, it starts simply from the empirical observation that after a prompt period of adjustment to news, there are no significant cumulative abnormal returns—the price is as likely to go up as down—so that we can fairly say that the information has been impounded in the stock price. The precise mechanisms of market efficiency remain contested. See Ronald Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J. Corp. L. 715 (2003).

[40] See Burton Malkiel, *The Efficient Market Hypothesis and its Critics*, 17 J. Econ. Persp. 59 (2003).

[41] See Grigori Erenburg et al., *The Paradox of "Fraud-on-the-Market Theory": Who Relies on the Efficiency of Market Prices?,* 8 J. Empirical Leg. Studies 260 (2011).

But this is not the only, or the standard, justification for a presumption of reliance. Midway through *Basic*—and again in *Amgen*[42]—there is a subtle shift to the idea of reliance on "price integrity" for what is being presumed. An investor assumes that the market price is undistorted by fraud, even if he or she thinks the stock may be under- or over-valued. Here, active as well as passive investors would be entitled to the presumption, even in the absence of actual reliance, which is how *Basic* has generally been understood by commentators[43] and applied by the courts.[44]

Yet the muddle doesn't end here, because rational investors don't really *assume* any such thing. Sadly, corporate fraud is not uncommon; one recent estimate suggests that the probability of any given public company engaging in fraud in a particular year is as much as 14.5%.[45] In an efficient market, this fraud risk is priced, not assumed away.

What *Basic* does, as much as anything, is create an *entitlement* to an undistorted stock price via, as I have described it, an act of juristic grace.[46] This is no different from what happens in the common law of fraud. In a face-to-face negotiation between strangers, there is no reason to assume that what the counterparty is saying is the truth. Yet the law creates a right to rely on sufficiently factual misrepresentations, at least, in order to promote efficient economic exchange in the face of palpable uncertainty about honesty, by making it safe to assume honesty.[47]

The most straight-forward way of articulating this—advocated by Easterbrook and Fischel, for example—is to jettison reliance entirely and

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[42] 133 S.Ct. at 1192-93.

[43] See, e.g., Fischel, *Crash*, supra.

[44] See, e.g., Black v. Finantra, Inc., 418 F.3d 203 (2d Cir. 2005); In re Worldcom Inc. Sec. Litig., 219 F.R.D. 267, 282 (S.D.N.Y. 2003).

[45] See ALEXANDER DYCK ET AL., HOW PERVASIVE IS CORPORATE FRAUD? (Feb. 2013), available at www.ssrn.com/abstract=2222608.

[46] Langevoort, Basic *at Twenty*, supra, at 161. A pre-*Basic* recognition of this is Lipton v. Documation Inc., 734 F.2d 740, 748 (11th Cir. 1984)("The theory . . . actually facilitates Congress' intent . . . by enabling a purchaser to rely on an expectation that the securities markets are free from fraud.") *Basic* cites *Lipton*, with a page cite to this quote but not the quote itself. 485 U.S. at 246.

[47] See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 111 (7th ed. 2007).

give investors a right to recover whenever they show price distortion that harmed them.[48] This is a pure causation approach, and there is a fascinating back story to *Basic* here. Private correspondence between Justices Blackmun and Brennan while *Basic* was being was being drafted shows Blackmun stubbornly insisting that "transactional reliance" has to be preserved and a simple causation approach rejected.[49] Their main point of disagreement has to do with whether a trader who was committed to selling without regard to the price (their hypothetical is someone who decides to divest immediately the shares of a company doing business in South Africa) is harmed by fraud-induced price distortion: Brennan's causation approach says yes, Blackmun's transactional approach says no. Blackmun does edit the opinion in a couple of places to accommodate Brennan's preferred locution of "price reliance,"[50] though still unconvinced that there is much to the distinction. Brennan disagrees (and is not sure that Blackmun yet understands his point) but finally gives up, willingly concurring because he realizes that once the presumption is invoked, the possibility that anyone will try to rebut it and challenge individualized reliance will be rare.[51] Largely, he was right. But Blackmun's insistence on maintaining

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[48] See note --- supra; see also Fisch, Halliburton, supra.

[49] A copy of these letters is on file with the author. The phrase "transactional reliance," referring to Blackmun's insistence that actual reliance is essential, seems to be Brennan's. He distinguishes this from his preferred idea of "price reliance." See Letter of January 22, 1988, from Brennan to Blackmun, at 1 ("I fear that the Court's opinion may be read as approving transactional reliance rather than price reliance")(on file with author). Adam Pritchard uncovered this correspondence in the course of his historical research, and I am grateful to him for the copies.

[50] See Letter of January 25 from Blackmun to Brennan, at 1. I suspect that these edits and additions were the reason *Basic* is so hard to understand as to reliance—it tries to reconcile the price and transactional ideas (while clearly preserving the latter) without recognizing the underlying tension.

[51] See Letter of January 27 from Brennan to Blackmun ("The difference between us is now clear. In my view, the market relies on the defendant's misstatement, and plaintiffs are defrauded because they are forced to act through the market. Your view requires that in addition plaintiffs specifically depend on the integrity of the market, that is, that the market is fair.") Whether he was aware of it or not, Brennan was channeling Easterbrook and Fischel in these comments.

transactional reliance as the basis for the presumption leaves the decision incoherent and unsatisfying.[52]

Consider the important case of the index fund.[53] Index funds are the poster children for passive low-cost investment, compelled to buy or sell stocks solely to maintain a weighted average of the chosen market index. They thus seem to fit perfectly within the free-riding vision articulated in *Basic* and *Amgen*.[54] But these investors are entirely insensitive to information insofar as their entire methodology is just to mirror the index. Even if told the truth about a particular issuer, they would still have to buy or sell to conform to the index. So why aren't they just like the investor who committed to divest from South Africa?

A possible way out of the muddle is to see the entitlement to undistorted stock prices as granted to the market generally. If so, then there might be a number of different ways to rely that are within the zone of protection. One is through passivity, assuming that the market is doing the best possible job of valuation in light of the entitlement. This might include index funds even if their actual decisions are information-less, though this is still not entirely clear.[55] Another is through active investing, either through actual reliance on the misinformation in question or an investment strategy that seeks to beat the market but nonetheless utilizes the prevailing market price as an informational component of the investment decision. In other

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52 My point here goes solely to the effort to describe the presumption in reliance terms. To me, *Basic* would make a great deal of sense in terms of conferring an entitlement to rely on the integrity of the market, which I think was what Brennan (and Easterbrook and Fischel) were reaching for. For an elaboration of the economic justification for protecting reliance of this sort, see Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 Duke L.J. 711, 771-80 (2006). Brennan does use the term "price reliance", but it is clear from the analysis in his letters that what he really meant was "price dependency," since traders in an organized market have no choice but to accept the prevailing market price.

53 See RICHARD A. BOOTH, INDEX FUNDS AND SECURITIES FRAUD LITIGATION (Jan. 2012), available at http://papers.ssrn.com=1996587.

54 For cases including index investors within the presumption of reliance, see, e.g., In re Lehman Bros. Sec. Litig., 2013 WL 440622 (S.D.N.Y. 2013).

55 Index investing relies more heavily on portfolio diversification than market efficiency to deal with issuer-specific risk.

words, assuming an acceptable showing of price distortion—which is what the *Amgen* majority and dissenters were arguing about—the presumption is properly given to any active or passive purchaser or seller during the class period to whom the integrity of the stock price could be relevant, i.e., who would not necessarily have made the same investment decision had the truth been revealed. That is essentially the approach used recently to justify a disqualification of a plaintiff from taking advantage of *Basic's* presumption of reliance where the purchaser was a sophisticated active investor with a valuation model that incorporated a set of factors entirely separate from what the issuer was concealing from the market.[56] The court suggested that this was an extremely rare holding, in no way suggesting that active traders are normally disqualified from the presumption of reliance.

There are two implications from all of this. One is that once we see *Basic's* presumption as deriving from an entitlement to ignore the risk of fraud (i.e., be compensated if that right is frustrated), the majority's approach in *Amgen* makes more sense conceptually. Price distortion is not a predicate to the reliance; instead, the reliance is on the presumed absence of distortion (price integrity), so that distortion merely establishes the injury from the misplaced reliance, a true class-wide merits inquiry.

Much more important, however, is what all this says in response to Justice Alito's question of whether our contemporary understanding of market efficiency should prompt the Court to reconsider *Basic's* presumption. If we take that question literally, the answer is clearly no.

I have explored this question in depth, in an article Alito cites and elsewhere,[57] and so will be relatively brief. Our contemporary understanding of financial markets makes clear that perfect efficiency is just

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[56] See Gamco Investors v. Vivendi S.A., 2013 WL 765122 (S.D.N.Y. 2013).

[57] Although *Basic* is not entirely clear about market efficiency, a key footnote indicates that the majority was not insisting on anything approaching perfect efficiency. 488 U.S. at 247 n.24. That footnote has been consciously disregarded by courts that have obsessed on high levels of efficiency to justify the presumption of reliance. See In re Polymedica Corp., 432 F.3d 1, 11-12 (1st Cir. 2005); Langevoort, Basic *at Twenty*, supra, at 168-73.

an ideal; all markets fall short, some more than others.[58] Informational efficiency (i.e., how quickly information is impounded in price so that subsequent price moves return to random) varies based on how widely followed the issuer is as well as the nature of the information. Obscure information is impounded more slowly than salient information, even for blue-chip issuers. And sentiment-based investors (noise traders) can sometimes move prices "irrationally" for sustained periods of time, producing both underreaction and overreaction to both news and pseudo-news before the forces of efficiency cause a correction.[59]

None of this, however, undermines a presumption of reliance that is based either on the relative wisdom of passivity or an entitlement to assume stock price integrity. Finance experts have hardly backed off the suggestion that index investing and other passive strategies are wise for most investors, even if the face of market imperfections.[60] Index strategies remain popular, and profits from active trading strategies as elusive as ever.[61] Stock price integrity is a worthy policy goal even in the face of (inevitably) imperfect efficiency. The key question in assessing the presumption of reliance is whether the market segment in which the securities are traded is such that it has *sufficient* efficiency properties to make us reasonably confident that misinformation is likely to distort the stock price.[62] Most well-organized markets meet this condition. Efficiency, in other words, is just a proxy for those markets in which passive investing is reasonable.

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[58] On legal and regulatory manifestations of this contemporary understanding, see Henry T.C. Hu, *Efficient Markets and the Law: A Predictable Past and an Uncertain Future*, 4 Ann. Rev. Fin. Econ. 179 (2012).

[59] For citations and elaboration, see Langevoort, *Animal Spirits*, supra. See also Lynn Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. Corp. L. 635 (2003); William O. Fisher, *Does the Efficient Market Hypothesis Help Us Do Justice in a Time of Madness?,* 54 Emory L.J. 843 (2005).

[60] See Malkiel, supra.

[61] See Gilson & Kraakman, supra.

[62] See Langevoort, Basic *at Twenty*, supra, at 161-62; Macey et al., supra, at 1021 ("The legal system should not withhold redress from an injured plaintiff simply because he owns the security of a corporation traded in a market considered by some court to be 'inefficient'"); Bradford Cornell & James C. Rutten, *Market Efficiency, Crashes and Securities Litigation*, 81 Tul. L. Rev. 443, 456 (2006)(efficiency inquiry with respect to the presumption of reliance should be a relative one, and not overly demanding).

Post-*Amgen*, the defense-side has shown an inclination to continue the class certification battle as to price distortion by using the apparent absence of evidence of distortion as evidence that for the issuer in question, its market must thus not be efficient—raising something that clearly is a certification issue.[63] The complete absence of typical "cause and effect" relationships between the release of news and appropriate stock price movements would undermine an efficiency argument, but such complete absence is rare.[64] Courts should be very cautious about this kind of attempt, keeping in mind, as we have just seen, that relative efficiency need not be all that high to justify the presumption of reliance. There can be many reasons for under-reaction, including that the market had figured out the essential truth on its own without waiting for corrective disclosure from the issuer, or that the significance of the information was hard to glean from the particular disclosure in question. But the case law invites this argument, with some courts being unrealistically demanding,[65] even though it makes very little sense.

What we do lose faith in as a result of a more realistic assessment of market efficiency is the sharpness of the tools used to test for materiality, causation and damage. In an imperfectly efficient market, we can expect fraud to distort prices, but in ways that might display under-reaction or over-reaction to value-related information. Even though we might be fairly confident that there was harm, measuring that harm becomes more speculative.[66] As we saw in Part II, some of the fervent intellectual support for the fraud-on-the-market presumption in the 1980s came from the belief that the event study and related econometric methods would simplify and add lawsuit-diminishing rigor to the determination of whether alleged fraud actually harmed investors. That promise has not been fulfilled, which no

[63] See note --- supra.

[64] E.g., Cornell & Rutten, supra, at 448.

[65] See Langevoort, Basic *at Twenty*, supra, at 168-77; more recently, see Meyer v. Greene, 710 F.3d 1189 (11th Cir. 2013). This often takes the form of a court saying that once a market is deemed efficient for certification purposes, plaintiffs must shoulder the burden of showing that the evidence on materiality and/or loss causation is consistent with near-perfect efficiency.

[66] See Langevoort, Basic *at Twenty*, at 180; Cornell & Rutten, supra, at 457-63.

doubt has soured some judges on the entire enterprise. To me this explains the emergence over the last decade of doctrines that plaintiffs put forward a compelling empirical case or lose at the outset, against which *Amgen* is a notable push-back.

In giving such a confident "no" answer to Justice Alito's specific question of whether imperfect market efficiency undermines *Basic*, I am by no means suggesting that there are not larger policy questions here. There are serious doubts about whether fraud-on-the-market lawsuits generate more costs than benefits for investors and/or our capital markets, much more so than in 1988 when *Basic* was decided.[67] The remainder of my article will touch on some of these larger questions. But for now, a reminder from Part I. The courts may have invented the fraud-on-the-market lawsuit, but the question of their soundness was squarely on Congress' plate in 1995. Congress chose some very aggressive reforms (heightened pleading standards, the safe harbor for forward-looking information, proportionate liability, etc.) but all within the framework established by *Basic*, without fundamentally altering the presumption.[68] It would be difficult to cut back significantly on the presumption of reliance based on new developments in finance (conventional and behavioral) if the Court really believes that the contours of private securities liability were essentially frozen almost twenty years ago by Congressional action and acquiescence.

[67] There is now a large literature on this debate. The critique is thoroughly described in, e.g., William Bratton & Michael Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69 (2011) and John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implications*, 106 Colum. L. Rev. 1534 (2006). For a particularly helpful exploration of the arguments and empirical evidence, pushing back on some of the critiques, see James D. Cox & Randall Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of the Empirical Evidence of the Enforcement of U.S Securities Laws*, 6 Eur. Comp. & Fin. L. Rev. 164 (2009).

[68] See Unger v. Amedisys Inc., 401 F.3d 316, 322 n.4 (5th Cir. 2005)(revisiting *Basic* is for Congress); Langevoort, *Animal Spirits*, supra, at 182-86; Nathaniel Carden, Comment, *Implications of the Private Securities Litigation Reform Act for Judicial Presumptions of Market Efficiency*, 65 U. Chi. L. Rev. 879 (1998). One provision of the PSLRA—dealing with market price bouce-backs—seems clearly to assume some degree of market inefficiency.

IV. PRICE DISTORTION: DIGGING MORE DEEPLY

The fraud-on-the-market theory was devised to create a form of corrective justice—compensating investors for real losses. It might also have beneficial effects in terms of deterring fraud, but that has always been secondary. Justice Blackmun's stubborn insistence that the reliance requirement be preserved by making the presumption rebuttable underscores this.

Contemporary scholarship has been critical of fraud-on-the-market as a compensatory device, however. The arguments are by now familiar enough that we can summarize here, too.[69] First, fraud produces windfall gains for many investors along with losses—indeed, putting aside insider trading in its various forms, the marketplace losses and gains are roughly equal. Active traders are as likely to be winners as losers. Compensating for the losses while ignoring the gains, even for the same investor, leads to systematic overcompensation over time. Second, because payments in judgment or settlement come from either a liability insurance policy or the company itself, investors themselves are funding these payouts, directly or indirectly—the so-called "circularity" argument.[70] (We have known for some time that payouts by individual wrongdoers, i.e., company managers, are extremely uncommon[71]). Together, these points argue that the fraud-on-the-market system is a very costly, and somewhat unnecessary, pocket-shifting mechanism.

[69] See sources cited in note – supra.
[70] See TOM BAKER & SEAN GRIFFITH, ENSURING CORPORATE MISCONDUCT 134-36 (2010). See also Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 Wisc. L. Rev. 333; James J. Park, *Shareholder Compensation as Dividend*, 108 Mich. L. Rev. 323 (2009).
[71] See Michael Klausner et al., *How Protective is D&O Insurance in Securities Class Actions—An Update*, 26 PLUS J., no. 5 (May 2013).

While this argument has substantial traction, the main counterpoint is that that the injuries are real when investors trade at distorted prices, and simply can't be assumed away by hoping that the victims will make up their losses elsewhere.[72] Fraud causes injury to everyone who trades at a distorted price without regard to whether there was meaningful reliance—essentially the idea that Justice Brennan was pushing on Justice Blackmun. One can then add on the deterrence argument: price distortion is a social harm with many externalities,[73] and has to be policed. The fraud-on-the-market class action is put forth by its proponents as practically necessary, if not conceptually clean, for achieving both of these objectives.[74]

In this debate, two less familiar points are worth making about price distortion. In theory, all plaintiffs should ever recover is the amount of the price distortion at the time of the fraud (the conventional out-of-pocket measure), so long as the truth was revealed before the plaintiff unwound its position. But for a variety of reasons, litigants and courts shifted focus to corrective disclosure as the key to damages,[75] rather than price distortion per se. *Dura* solidified this by stressing loss causation, making corrective disclosure even more central to the assessment of plaintiffs' injuries. As we have seen, this has made a mess of loss causation and damage measurements, and inspired the procedural moves designed to weed out the speculative cases (and most cases are at least somewhat speculative) early on.

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[72] See Thomas A. Dubbs, *A Scotch Verdict on "Circularity" and Other Issues*, 2009 Wis. L. Rev. 455; see also Fisch, *Confronting Circularity*, supra; Cox & Thomas, supra.

[73] See, e.g., Urska Velikonja, *The Costs of Securities Fraud*, 54 Wm. & Mary L. Rev. (forthcoming, 2013).

[74] For a critique on the value-added deterrence from private litigation, see Amanda Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. Pa. L. Rev. 2173 (2010). For evidence of a deterrence effect, see JARED JENNINGS ET AL., THE DETERRENCE EFFECT OF SEC ENFORCEMENT AND CLASS ACTION LITIGATION (June 2011), available at http://ssrn.com/abstract=1868578 (class actions cause more compliant behavior by peer firms of those targeted); see also Brian McTier & John Wald, *The Causes and Consequences of Securities Class Actions*, 17 J. Corp. Fin. 649 (2011).

[75] The key step here came when courts abandoned a strict out-of-pocket measure in favor of a modified one that used the corrective disclosure date as a baseline for computing damages, thereby making it closer to a rescission remedy. E.g., Harris v. American Inv. Co., 523 F.2d 220, 226 (8th Cir. 1975), cert. denied, 423 U.S. 1054 (1976).

Ironically, however, in the Blackmun-Brennan correspondence while *Basic* was being written, Blackmun says that while he wants to avoid any discussion of damages in the opinion, he agrees that the strict out-of-pocket measure (which Brennan sees as the necessary corollary to his "price reliance" approach[76]) makes more sense than a rescissionary one that would give the full merger value to the former Basic shareholders. Had that impression made its way into the *Basic* opinion, the history of loss causation and the emphasis on corrective disclosure under Rule 10b-5 might have taken a completely different turn. Only price distortion would have been important.

But what *is* price distortion, really? We have already seen the challenge when the effect of the alleged lie is to lull investors into thinking that nothing has changed about the company's fundamentals, when change is indeed occurring. Beyond this, the focus on measuring the market effects of corrective disclosure obscures an underappreciated counterfactual difficulty about the nature of securities fraud in the first place.[77] Securities regulation imposes only a limited duty on issuers and their managers to reveal the truth—much can lawfully be concealed if the issuer prefers, especially with respect to forward-looking information. That is a central point made in *Basic*. However, *if* the issuer chooses to comment on a matter, it must do so truthfully. Hence there is a large category of cases where it is ambiguous what is meant by comparing the price that prevailed at the time of the fraud with the price that would have prevailed in the absence of the fraud. Is it the world where there simply was no lie or half-truth (but in which the issuer could have kept quiet about the truth) or are we assuming a (legally non-existent) duty to reveal everything? This is a

[76] Letter of January 25, 1988, from Blackmun to Brennan, at 2 ("I had not thought the opinion supported an argument for receiving the merger price . . . an argument we both agree is largely implausible, but because it has not been briefed or discussed, we should not presume to reject it out of hand here")(on file with author). See also Letter of January 27, 1988, from Brennan to Blackmun ("if [there is no rebuttal and] the measure of damages is ultimately resolved as the difference between the price actually received and the price that would have been received had the market been fair, my view and your view will lead to identical results, although by somewhat different routes").

[77] See Donald C. Langevoort, *Compared to What? Econometric Evidence and the Counterfactual Difficulty*, 35 J. Corp. L. 183 (2009).

very tricky inquiry, but note that many investors deserve little or no recovery for reliance on price integrity when the former is the right way of asking the question.

Imagine, for example, a company that falsely states that things are going smoothly for its flagship product when they really are not. If the market price was $20 per share at the time, such an announcement would have little effect on the price to the extent that the information just confirms prior market expectations. Had the truth been told, assume that the price would have dropped to $15. Should post-fraud purchasers receive $5 per share? Only if we are confident that the right counterfactual is revelation of the truth. If the more plausible counterfactual is instead that the issuer chose (lawfully) to stay silent, those purchasers would presumably have paid $20 for the stock even absent the fraud, and thus suffered no real economic harm. In other words, the assumption that there are causal losses to purchasers or sellers whenever there are material lies or omissions is not necessarily true. Whenever the issuer had no legal duty to reveal the truth, harm follows only when the effect of the lie or half-truth was to prevent discovery of the truth. As tricky and important as this inquiry is,[78] it is ignored entirely by contemporary doctrine, which simply assumes the truth-telling counterfactual by focusing solely on the market effects associated with discovering the truth later on. In sum, we cannot say as confidently as we do that fraud necessarily means investor injury in a setting that presumes reliance on "price integrity."[79]

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[78] It is of course hard to think through whether the company would have been able to stay silent on a matter in the face of shareholder, analyst and financial press scrutiny. Typically, the half-truth is designed to throw these groups off their guard.

[79] This, of course, is in addition to any doubts that we may have based on the possibility of sentiment-driven overreactions to disclosures. See Langevoort, *Animal Spirits*, supra; Cornell & Rutten, supra, at 463-68. All of this has long suggested to me that we revisit our entire remedial approach in the fraud-on-the-market setting, making it more clearly a deterrence-based mechanism. See Donald C. Langevoort, *Capping Damages for Open Market Securities Fraud*, 38 Ariz. L. Rev. 639 (1996).

V. CONCLUSION

In his dissent, Justice Thomas traces the history of the fraud-on-the-market prior to *Basic* by reference to two "signposts,"[80] one of which was the seminal Ninth Circuit case of *Blackie v. Barrack*.[81] That was a fruitless effort in terms of reading it to say that materiality was crucial to class certification—it holds no such thing—but also ironic. Famously, *Blackie* justified the fraud-on-the-market presumption entirely in pragmatic terms. While it expresses an intuition about organized markets and the importance of price integrity, the main idea is simple: without class certification there will be no practicable mechanism to address the harm from securities fraud. Candidly admitting that its approach risked over-inclusion in the plaintiff class, the court reminded its readers that the securities statutes were to "be liberally construed to effectuate its remedial purposes, and that that purpose may be served only by allowing an over-inclusive recovery to a defrauded class if the unavailability of the class device renders the alternative a grossly under-inclusive recovery."[82]

Basic starts out saying much the same thing, stressing that presumptions exist mainly to do justice, but then wanders into the efficient markets discussion as if it offers a better way of understanding reliance in modern financial markets. It doesn't, generating the uncertainty about class certification that eventually led to *Amgen*.

Today the Supreme Court is no long enamored with the "liberally construed" rhetoric,[83] which naturally invites those dissatisfied with how things have turned out to question the premises on which the fraud-on-the-market presumption rests. The majority in *Amgen* responds to the defense-side request to allow them an early shot at materiality within the class

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[80] 133 S.Ct. at 1213-14. The other was a *Harvard Law Review* student note.
[81] 524 F.2d 891 (9th Cir. 1975).
[82] Id. at 906 n.22.
[83] See A.C. Pritchard, *Launching the Insider Trading Revolution:* SEC v. Capital Gains Research Bureau, in RESEARCH HANDBOOK ON INSIDER TRADING 33, 50-51 (Stephen M. Bainbridge, ed., 2013).

certification decision by invoking old-school civil procedure. How much this was also animated by sense that the relative balance between plaintiffs and defendants struck at the time Congress entered the debate twenty years ago should be respected will determine much about the future of private securities class actions.