

[Securities Regulation Daily Wrap Up, TOP STORY—U.S.: DOJ amicus sees no reason to revisit Basic, says Goldman case should be remanded, \(Feb. 3, 2021\)](#)

Securities Regulation Daily Wrap Up

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An octet of amicus briefs were filed, all of which took some issue with the Second Circuit's handling of the generic statements Goldman Sachs class certification.

The Department of Justice has filed an amicus brief urging that the Supreme Court vacate and remand the petition in the Goldman Sachs petition concerning the rebuttal of the *Basic* presumption. The DOJ generally takes the position that the Second Circuit was correct in upholding class certification in this matter. The brief argues for remand, however, to clarify whether the appellate court held that the generic nature of the alleged misstatements is legally irrelevant to a court's determination of price impact.

Background. The [petition](#) asks the court to reverse a [decision](#) upholding class certification in a suit alleging that Goldman Sachs Group, Inc., falsely represented its ability to remain conflict-free despite participating in a conflicted collateralized debt obligation. At issue is whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson* by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality. The Court [granted](#) certiorari on December 11, 2020.

The petition argues that a court should not reject price-impact evidence simply because it may also have implications for merits issues. In this case, a divided Second Circuit panel rejected Goldman Sachs' position, stating that a contrary rule would permit a defendant to smuggle materiality into a Rule 23 price-impact inquiry at the class-certification stage. A dissenting judge suggested that a reviewing court should be able to consider misrepresentations for their price impact, even if it looks like the court is assessing materiality. In the instant case, the dissent said no reasonable investor would have been moved by Goldman Sachs' "generic statements."

DOJ urges vacate and remand. The [DOJ's brief](#) concludes that the case should be remanded for further consideration. The brief agrees with the Second Circuit's position that there is no categorical rule that misstatements phrased in general terms are legally incapable of affecting a security's price. On the other hand, the brief continues, one reading of the decision is that it holds that the generic nature of the alleged misstatements is legally irrelevant to a court's determination of price impact. This position is incorrect, the DOJ says in agreement with Goldman Sachs, because evidence of the nature of the alleged misstatements may be important in determining whether the alleged violations more likely than not affected the market price. It is unclear, however, whether the court erroneously treated evidence about the nature of the alleged misstatements as legally irrelevant or simply found the evidence insufficient to establish clear error in the district court's assessment of price impact. So, the brief concludes, the Court should vacate the Second Circuit's judgment and remand for further proceedings on this point.

The DOJ also notes that the Second Circuit correctly held that a defendant seeking to rebut the presumption of reliance by showing a lack of price impact bears the burden of persuasion to show that the alleged misstatements had no impact on price. But, to overcome the *Basic* presumption, a defendant must prove a lack of price impact. Goldman Sachs maintains that once it introduced evidence suggesting a lack of price impact, the burden of persuasion shifted to the respondents. This position lacks any support, the brief says, in either the Rules of Evidence or Court precedent, and to hold otherwise would negate [Halliburton II's](#) recognition (in

Justice Ginsburg's words) that "it is incumbent on the defendant to show the absence of price impact." There is no reason, the brief says in sum, for the Court to revisit the framework set forth in *Basic*.

SEC officials support. The DOJ's brief is just one of many amicus briefs filed in this matter on February 1, 2021. A septet of briefs filed by various amici in support of Goldman Sachs argues that the Second Circuit's decision should be reversed, or at least vacated and remanded. Among these, a brief filed by a group of former [SEC officials](#) and law professors argues that the Second Circuit has precluded consideration of the generic nature of the challenged statements when assessing price impact; as the DOJ noted, this essentially nullifies the decision in *Halliburton II*. The brief observes that corporations routinely include generic statements of principle similar to those at issue in this case and that such statements can be "weaponized by plaintiffs." The brief also posits that a defendant seeking to rebut the *Basic* presumption only bears the burden of production, arguing that Rule 301 of the Rules of Evidence states that the party against whom a presumption is directed only bears "the burden of producing evidence to rebut the presumption," while the burden of persuasion remains with the original party. Other briefs made [similar arguments concerning claims](#) based on [generic statements](#).

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