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Beyond *Halliburton*:
Expanding the Right to Rebut Presumptions of Reliance

by Geoffrey M. Wyatt

In last June's decision in *Halliburton v. Erica P. John Fund*, 134 S. Ct. 2398 (2014), the Supreme Court revisited the use of a presumption of reliance in securities-fraud cases. Although it declined to overrule prior precedent and abolish the presumption's use as a rationale for treating securities-fraud claims as class actions, the Court clarified that defendants do have a right to present evidence to rebut the presumption at the class-certification stage. That ruling could have important implications for class certification even beyond the securities context—particularly in consumer-fraud cases.

Halliburton addressed a presumption first recognized by a four-justice majority of the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). As *Halliburton* described it, *Basic* established that "plaintiffs could satisfy the reliance element" of a securities-fraud claim "by invoking a presumption that a public, material misrepresentation will distort the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation."[1] It was long acknowledged that the presumption was rebuttable at the merits stage of the proceeding, but the central dispute in *Halliburton* was over whether rebuttal evidence must be allowed at the class-certification stage.

The Court held that it must. As it explained, the presumption does not operate to relieve a plaintiff of its burden to prove that the requirements for class certification are met. Instead, it allows a plaintiff to attempt to prove that reliance will be a common issue indirectly—by proving "publicity, materiality, market efficiency, and market timing," which are the "prerequisites for invoking the presumption."[2] In response, a defendant can attempt to dispute commonality of reliance, either with evidence negating the prerequisites for applying the presumption, or with "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's price."[3]

This holding has clear implications for other cases—including consumer-fraud cases—where, for example, some courts have been willing to apply a presumption of reliance where the defendant is accused of making identical misrepresentations to every member in the class.[4] In this context, many courts applying presumptions of reliance have done so without seriously analyzing how those presumptions should operate at the class-certification stage.

Indeed, in practice, "presumptions" of reliance in consumer-fraud cases have often proven conclusive, at least at the class-certification stage, because courts almost never make any allowance for the defendant to contest causation or reliance once the presumption is determined to apply. Occasionally, a court will acknowledge, as a theoretical matter, that "defendants may introduce evidence to rebut the inference of reliance."[5] But few, if any, courts have given serious attention to the question of how it would be manageable to give effect to this right in the class setting.

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[1] *Halliburton*, 134 S. Ct. at 2417.
[2] *Id*. at 2412.
[3] *Id.* at 2416.
[4] *See, e.g.*, *Vasquez v. Superior Court*, 484 P.2d 964, 971-73 (Cal. 1971).
[5] *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658 (C.D. Cal. 2009).

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Indeed, once a class is certified, the tendency of courts has been to prevent defendants from taking discovery from absent class members that would be necessary to test the proposition that they relied on the representation at issue.[6] Thus, as a practical matter, class certification frequently operates to foreclose challenges to reliance—in effect altering the elements of the claim for the plaintiff and stripping defendants of critical defenses.

This approach is clearly improper. Even before *Halliburton* took up the question of rebutting presumptions at class certification, the Supreme Court had given clear signs that the class-certification analysis must account for all available defenses, even if their individualized nature would frustrate class treatment. In *Wal-Mart Stores v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541 (2011), the Court made clear that "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims" and that the class device is procedural in nature and thus cannot modify the parties' substantive rights.[7] Applying the same logic, *Halliburton* made clear that presumptions likewise cannot be construed to alter the essential elements of a claim or to artificially limit the evidence a defendant can present to show that proof of those elements will vary from one individual to the next.[8]

It remains to be seen whether the lower courts will get the message, as the early returns are mixed. In one recent case applying *Halliburton* outside the securities context, for example, the U.S. Court of Appeals for the First Circuit assumed without deciding that a presumption of causation might be appropriate in certain antitrust cases—specifically, in a case involving the delayed marketing of generic prescription drugs based on an alleged agreement with a brand manufacturer not to compete, a presumption that "economically rational consumers faced with two identical products would purchase the less expensive alternative."[9] The court did not develop the point much further. It did acknowledge—citing *Halliburton*—that such a presumption would have to be "subject to rebuttal by the defendant," but it did not explain how such a rebuttal would work in practice.[10]

A pending appeal that could address this issue more directly is *Rikos v. Procter & Gamble*, a case alleging that Procter & Gamble falsely advertised that its probiotic product Align confers digestive health benefits. The district court certified five statewide classes, concluding that reliance could be presumed on a class-wide basis because no consumer would use Align if it did not deliver the promised benefits. On appeal, Procter & Gamble argues that the district court improperly barred the company from presenting compelling evidence rebutting that presumption—specifically, that "between 33% and 60% of consumers purchased Align because of doctors' recommendations" rather than representations in packaging or advertising.[11] The district court erred, Procter & Gamble argues, because "*Halliburton* makes clear that district courts must consider evidence at the class certification stage which rebuts legal presumptions that, if left unchallenged, could satisfy class criteria."[12]

The record in the case would appear to provide the Sixth Circuit with a strong basis to articulate some long-overdue constraints on the use of presumptions of reliance in consumer cases. In the meantime, defendants should continue to press for the expansion of *Halliburton*'s logic in resisting the rote application of reliance presumptions in other cases.

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[6] *See, e.g.*, *Garden City Employees' Retirement Sys. v. Psychiatric Solutions, Inc.*, No. 3:09-882, 2012 U.S. Dist. LEXIS 145807, at *7-12 (M.D. Tenn. Oct. 10, 2012) (noting that absent class member discovery "is rarely permitted" and denying defendants leave to propound interrogatories on absent class members in order to determine whether they relied on allegedly material representations that were the basis of a presumption of reliance).

[7] *Id.* at 2561; *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (class action rule is procedural and thus "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

[8] *See Dukes*, 134 S. Ct. at 2412 ("While the presumption makes it easier for plaintiffs to prove reliance, it does not alter the elements of the [claim]."); *id.* at 2417 ("[W]e see no reason to artificially limit the inquiry at the certification stage" with respect to proof of reliance.).

[9] *In re Nexium Antitrust Litig.*, --- F.3d ----, 2015 WL 265548, at *7 (1st Cir. Jan. 21, 2015).

[10] *Id.*

[11] Opening Brief for Appellant the Procter & Gamble Co., 2015 WL 401585, at *40 (6th Cir. filed Jan. 20, 2015).

[12] *Id.* at *42.

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