

Certifying a class in securities fraud actions after 'Goldman Sachs'

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In June 2021, the U.S. Supreme Court in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021), vacated the certification of a securities fraud class while making two central holdings. First, it held that, at the class certification stage, courts may consider the “generic” nature of the alleged misrepresentations at issue to determine whether those misrepresentations affected the stock price of the security at issue (and, therefore, whether the plaintiff could invoke the so-called *Basic* presumption that it relied on those misrepresentations by relying on the stock price).

In September 2021, a Colorado district court in Brokop v. Farmland Partners Inc. certified a class action alleging that defendants misrepresented the company's related-party loans.

Second, the Court held that defendants bear the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence. The Court explained that the “district court’s task is simply to assess all the evidence of price impact — direct and indirect — and determine whether it is more likely than not that the alleged misrepresentations had a price impact.”

In the months since the decision, several district courts have had the opportunity to complete that task. This article describes how the *Goldman* holdings have played out in those cases.

For example, in September 2021, a Colorado district court in *Brokop v. Farmland Partners Inc.*, 2021 WL 4913970 (D. Colo. Sept. 30, 2021), certified a class action alleging that defendants misrepresented the company’s related-party loans. The court applied *Goldman* to determine whether the defendants met their burden to prove a lack of price impact. *Id.* at *5. The court found insufficient the defendants’ expert evidence showing that, among other things: (1) information about the loans was publicly available before the alleged corrective disclosure revealing the loans and,

(2) other negative information contained in the same alleged corrective disclosure more likely impacted the price.

The court concluded that the supposed publicly available information was in an obscure deed and trust — not reasonably available to investors — and that the expert did not conduct a quantitative study. *Id.* Accordingly, considering “all of the offered price impact evidence,” the court concluded that the alleged misstatements “more likely than not impacted the stock price” during the class period. *Id.* at *7.

That same month, a district court in the Southern District of New York granted certification of a proposed class alleging that the defendants failed to disclose information about a potential link between the company’s breast implants and cancer. *In re Allergan PLC Sec. Litig.*, 2021 WL 4077942, at *1 (S.D.N.Y. Sept. 8, 2021).

Defendants argued that the company’s stock price drop after the alleged corrective disclosure — an announcement of a recall of the breast implants — must have been due to some other reason because the price did not fluctuate in response to previous reports of a potential link to cancer. *Id.* at *12. The court rejected this argument because the previous reports did not focus on the risk of a recall, and the plaintiff alleged that the defendants downplayed those reports.

In October 2021, a district court in the Central District of California certified a class alleging misstatements in the company's financial results.

Moreover, the court declined to credit the defendants’ expert because he misidentified the dates and did not review the contents of some of the prior reports. The court concluded that, because the defendant failed to prove that the recall announcement “was not associated with a negative price impact,” the defendants had not rebutted the *Basic* presumption. *Id.* at *12.

Similarly, in October 2021, a district court in the Central District of California certified a class alleging misstatements in the company's financial results. *In re Mattel, Inc. Sec. Litig.*, 2021 WL 4704578, at *1 (C.D. Cal. Oct. 6, 2021). In that case, the stock price declined when Mattel announced that it had received an anonymous whistleblower letter, intended to investigate the undisclosed contents, and would cancel a bond offering. *Id.* at *4.

in December 2021, on remand from the Supreme Court, the district court in Goldman once again granted class certification.

Relying on *Goldman's* observation that the link between a price drop and prior inflation "starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure," the defendants argued that the whistleblower announcement could not support an inference of price impact because it revealed nothing about the alleged misrepresentations. *Id.* at *4-5.

The court distinguished *Goldman*, however, stating that the "generic representations in *Goldman* — e.g., "Integrity and honesty are at the heart of our business" — are nothing like [the] highly specific financial statements" at issue that "contained material misstatements." *Id.* at *5. Moreover, the court emphasized that *Goldman* did not "hold that any 'corrective disclosure' must fully reveal the actionable fraud to support price impact." *Id.* at *5-6. Given the "undisputed evidence" that the whistleblower disclosure resulted in a stock price decline, the defendants failed to meet their burden of "proving no price impact." *Id.* at *6.

Finally, in December 2021, on remand from the Supreme Court, the district court in *Goldman* once again granted class certification.

In re Goldman Sachs Grp., Inc. Sec. Litig., 2021 WL 5826285 (S.D.N.Y. Dec. 8, 2021). In light of the Supreme Court's decision, the district court stated that it must evaluate whether an inference of price impact "is fatally undermined by the generic nature of [the] misstatements, a 'mismatch' in genericness between misstatement and corrective disclosure, or other common-sense factor." *Id.* at *8.

In response to the defendants' expert evidence that investors do not rely on generic statements, the court concluded, among other things, that the "alleged misstatements were not so generic as to diminish their power to maintain pre-existing price inflation." *Id.* at *11. Thus, the defendants failed to carry their burden, which "is not merely to prove that the alleged misstatements were one of several sources of price impact, nor even that other sources loomed larger," but "by a preponderance, that the alleged misstatements had no price impact whatsoever." *Id.* at *12.

As these cases show, although the Supreme Court in *Goldman* held that courts can consider the generic nature of statements, to date either the issue has not been squarely addressed or the district court concluded that the statements were not sufficiently generic to negate a finding of price impact. Rather, district courts have focused on the second *Goldman* holding — that, assessing all evidence, they "determine whether it is more likely than not that the alleged misrepresentations had a price impact."

In applying this instruction, district courts so far appear to have viewed a purported corrective disclosure coupled with a stock price decline as evidence of likely price impact sufficient to invoke the *Basic* presumption, and have, in effect, required defendants to affirmatively negate either that the stock price declined or that the decline was linked in any way to the alleged misstatements.

Courts have yet to articulate what expert or other evidence would be sufficient to satisfy this showing. We expect courts and litigants to continue to define the contours of these analyses as they seek to apply *Goldman* to the facts and circumstances of their particular cases.

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