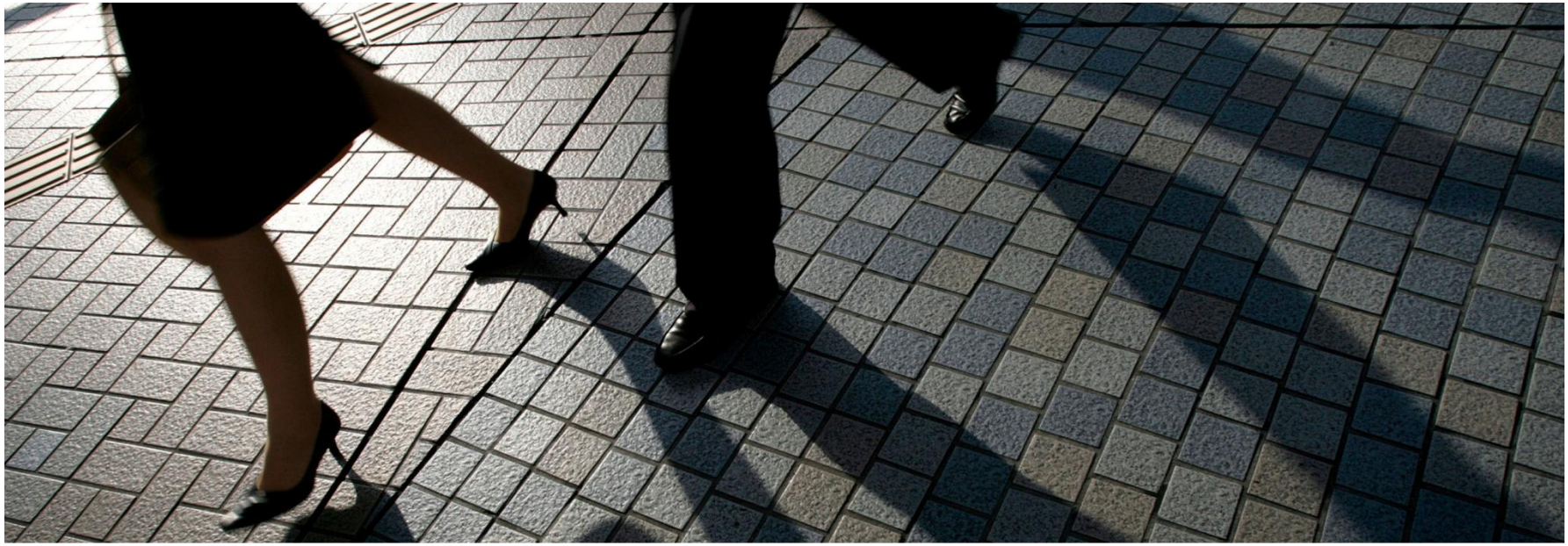

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Hot Topics in Class Action Litigation

October 7, 2015

Presenters:

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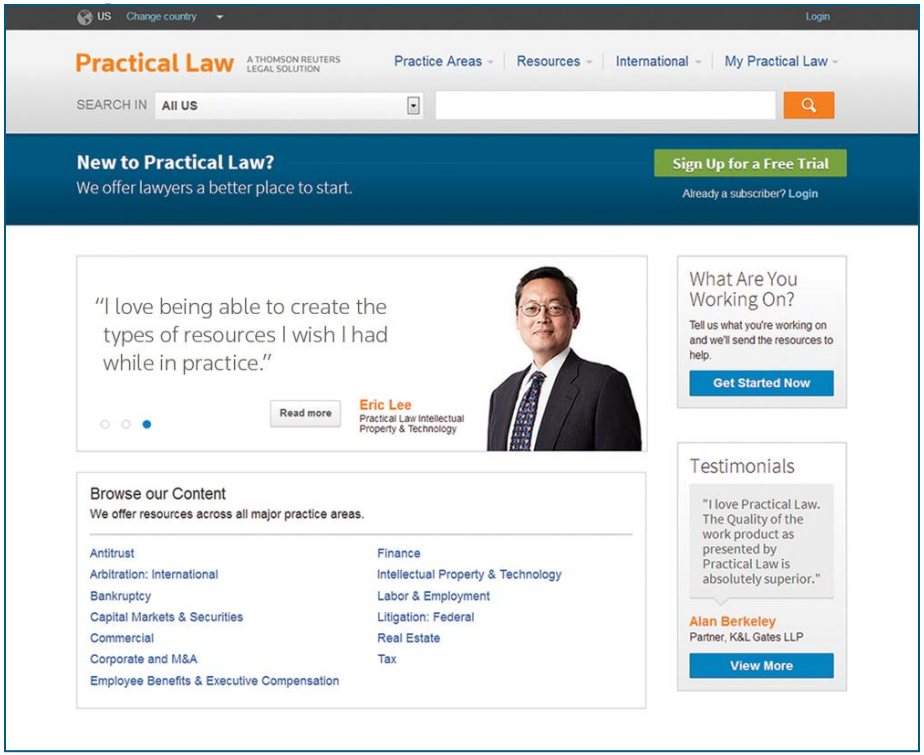

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Introduction and Agenda

- Class action cases to be decided in the Supreme Court's October 2015 Term.
- Securities fraud class actions and the element of reliance.

Class Action Cases on the Supreme Court's Docket

The Changing Landscape of Class Action Litigation: *Comcast* and *Dukes*

- In 2011 and 2013, the US Supreme Court issued two landmark decisions largely hailed as altering the landscape of class action litigation (*Comcast Corp. v. Behrend, 133 S. Ct 1426 (2013)*; *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)*).
- In these decisions, the Court addressed, among other things, the high threshold plaintiffs must meet to be entitled to class certification:
  - Federal Rule of Civil Procedure (FRCP) 23 sets out more than a "mere pleading standard."
  - The party seeking class certification must be prepared to affirmatively prove that the FRCP 23 statutory prerequisites are met.
  - Certification is only appropriate if the court is satisfied, after a "rigorous analysis," that the prerequisites of the rule have been met.
  - The required rigorous analysis frequently overlaps with the merits of the plaintiff's underlying claim.
  - These standards apply to FRCP 23(a) as well as FRCP 23(b).

(*Comcast Corp., 133 S. Ct at 1432; Dukes, 131 S. Ct. at 2551*.)

The October 2015 Term

- However, in the upcoming October 2015 term alone, the Court is poised to decide *three* significant class action cases. The issues before the Court include:
  - Mooting strategies and FRCP 68 offers of judgment.
  - Standing in statutory damages cases.
  - Individual differences and injury in FRCP 23(b)(3) class actions.
- In addition, there are several other divisive issues percolating in the US Courts of Appeals that could find their way to the Supreme Court in upcoming terms, including:
  - The non-statutory prerequisite of ascertainability.

Mooting Strategies and Offers of Judgment

- An offer of judgment under FRCP 68 encourages resolution of litigation by potentially shifting costs against a prevailing party.
- In general, FRCP 68 allows the defendant to serve the plaintiff with an offer that will allow judgment on specified terms.
  - If the offer is accepted, the court enters judgment and terminates the case.
  - If the offer is rejected, and the plaintiff ultimately receives a less favorable judgment, the plaintiff must pay the defendants costs, which in some cases included attorneys' fees.
- FRCP 68 offers of judgment can therefore be a powerful tool for defendants.

Mooting Strategies and Offers of Judgment

- In the context of class actions, defendants sometimes offer judgment for *complete relief* to the representative plaintiff before a class certification motion is filed or decided.
  - This potentially ends the litigation early and individually.
  - This sometimes is known as “picking off” the representative plaintiff.

Mooting Strategies and Offers of Judgment

- One divisive issue, which the rule does not address, is whether this type of offer for complete relief, *even when unaccepted*, effectively moots:
  - The representative plaintiff's individual claims.
  - The putative class claims.
- Under these circumstances, the case arguably becomes "moot" because the plaintiff has been offered his full demand and the controversy is no longer "live" (see, for example, *Hooks v. Landmark Indus., Inc., 797 F.3d 309, 313 (5th Cir. 2015)*; *Chapman v. First Index, Inc., 796 F.3d 783, 786 (7th Cir. 2015)*).

Mooting Strategies and Offers of Judgment

- In 2013, the Supreme Court skirted this issue in *Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)*. However, in dissent, Justice Kagan noted:

> No more in a collective action brought under the FLSA than in any other **class action may a court, prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole** . . . . It is our plaintiff Smith's choice, and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end.

(*133 S. Ct. at 1536 (Kagan, J. dissenting)* (emphasis added).)

- Notably, appellate courts tackling this issue since *Genesis Healthcare* have largely sided with Justice Kagan's rationale.

Mooting Strategies and Offers of Judgment

- The Court has granted *certiorari* to take the issue head on.
- The following questions are before the Court:
  - Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on its claim.
  - Whether the answer is any different when the plaintiff has asserted a class claim under FRCP 23, but receives an offer of complete relief before any class is certified.

(See *Campbell-Ewald Co. v. Gomez, 135 S. Ct. 2311 (2015)*.)

- *The Court will hear argument in this case on October 14*.

Standing in Statutory Damages Cases

- Another notable issue relates to class actions based on statutory damages.
  - Often arises in cases alleging violations of certain consumer protection statutes that allow for a set amount of damages per violation, but do not require a showing of actual harm or damage.
  - Plaintiffs counsel may compile sufficiently numerous alleged violations to bring a putative class action with potentially staggering financial liability.
  - In these cases, however, the putative class sometimes includes members that may have suffered a violation of the statutory right without suffering any *actual injury*.
  - As a result, the issue is whether those plaintiffs have Article III standing, which limits the court's jurisdiction to hearing cases involving actual, concrete and particularized injury-in-fact.

Standing in Statutory Damages Cases

- The case before the Court, *Spokeo, Inc. v. Robins, 135 S. Ct. 1892 (2015),* exemplifies the standing issue in these types of cases.
- The plaintiff sued Spokeo, a website operator that provides information about people, for violating the Fair Credit Reporting Act, by publishing inaccurate information about him, such as that he held a graduate degree and was married and wealthy, which were allegedly untrue.
- The Ninth Circuit held the plaintiff had standing.
  - Where the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.
  - Alleged violations of statutory rights are sufficient to satisfy Article III's injury-in-fact requirement.

(*Robins v. Spokeo, 742 F.3d 409, 412-14 (9th Cir. 2014)*.)

Standing in Statutory Damages Cases

- The Supreme Court granted *certiorari* to consider whether Congress may confer Article III standing on a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke federal jurisdiction, by authorizing a private right of action based on a bare violation of a federal statute (see *Spokeo, Inc. v. Robins, 135 S. Ct. 1892 (2015)*).
- *The Court is scheduled to hear argument in this case on November 2.*

Standing in Statutory Damages Cases

- A wide range of *amicus* briefs were filed in connection with *Spokeo,* ranging from financial services to retail to media to technology.
- For example, a joint brief from a host of social media and technology companies noted:

> [These] suits typically are styled as putative class actions and seek millions or even billions of dollars in statutory damages based on allegations of technical or trivial statutory violations and/or novel, untested legal theories. . . . Where the only injury alleged is an injury-in-law, the requirement of a common injury may no longer serve the intended gating function to limit the availability of the class action mechanism.

Brief for *Amicus Curiae* including Ebay, Facebook, Google, Linkedin, Netflix, Twitter and Yahoo.

Individual Differences and Injury in FRCP 23(b)(3) Class Actions

- Under FRCP 23(b)(3), a court may not certify a class action unless "there are questions of law or fact common to the class" that "predominate over any questions affecting only individual members."
- One of the big issues associated with establishing predominance relates to how to handle class members who have suffered varying damages.

Individual Differences and Injury in FRCP 23(b)(3) Class Actions

- The Supreme Court has touched on this issue previously:
  - In *Comcast Corp. v. Behrend*, the Court found that damages models must be capable of establishing damages on a classwide basis. Absent this showing, "questions of individual damages calculations will inevitably overwhelm questions common to the class." (*133 S. Ct. at 1433*.)
  - In *Wal-Mart Stores, Inc. v. Dukes*, the Court discussed the *commonality* requirement and noted that it "requires the plaintiff to demonstrate that the class members 'have suffered the same injury'." The Court also rejected the idea that there could be a "trial by formula" to determine the backpay award, without individualized proceedings. (*131 S. Ct. at 2551, 2561*.)

Individual Differences and Injury in FRCP 23(b)(3) Class Actions

- Nonetheless, there has been continued debate about how differences in the injury putative class members may or may not have suffered impact class certification.
- The weight of authority seems to agree that differences in damages calculations should not defeat class certification (see, for example, *Pulaski & Middleman LLC v. Google, Inc., No. 12-16752, 2015 WL 5515617, at *6 (9th Cir. Sept. 21, 2015)* ("[D]ifferences in damage calculations do not defeat class certification after *Comcast*"); *Roach v. T.L. Cannon Corp., 778 F.3d 401, 407 (2d Cir. 2015)*; *In re Nexium Antitrust Litig., 777 F.3d 9, 21 (1st Cir. 2015).*)

Individual Differences and Injury in FRCP 23(b)(3) Class Actions

- In June 2015, the Court granted *certiorari* in *Tyson Foods, Inc. v. Bouaphakeo,* a labor and employment case in which meat processing workers alleged underpayment for time "donning and doffing" protective equipment necessary to their job.
- The Court is asked to decide two questions related to the impact of individual differences among class members during class certification:
  - Whether differences among individual class members may be ignored and a class action certified under FRCP 23(b)(3), where liability and damages will be determined using statistical techniques that presume all class members are identical to the average observed in a sample.
  - Whether a class action may be certified under FRCP 23(b)(3) even when the class contains potentially hundreds of members who may not have been injured or have no legal right to any damages.

(See *135 S. Ct. 2806 (2015)*.)

- *The Court is scheduled to hear argument in this case on November 10.*

Individual Differences and Injury in FRCP 23(b)(3) Class Actions

- The question at issue in *Tyson* also is connected to whether putative class members must demonstrate standing, for example whether they have suffered an injury-in-fact, *at all*. To this end, the Court's decision also could resolve a separate split on this issue:
  - **Third Circuit**: Holding that unnamed, putative class members need not establish Article III standing and noting that, in *Tyson Foods*, the Supreme Court may comment on this issue (*Neale v. Volvo Cars of North America, LLC, 794 F.3d 353, 362 & n.2 (3d Cir. 2015)*).
  - **Second Circuit**: Stating that "[n]o class may be certified that contains members lacking Article III standing," and concluding that the class must be "defined in such a way that anyone within it would have standing" (*Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)).*

Ascertainability

- Finally, one issue that may soon find its way to the Supreme Court relates to the non-statutory prerequisite of ascertainability.
- Ascertainability requires that the proposed class be readily identifiable by objective, as opposed to subjective, criteria.
- There is now a clear split in the circuits over how plaintiffs may establish an ascertainable class at the certification stage.

Ascertainability

Third Circuit: The Third Circuit takes a particularly strong stand on ascertainability, imposing a high burden on class plaintiffs to establish an ascertainable class (See *Carrera v. Bayer Corp., 727 F.3d 300, 306-309 (3d Cir. 2013)*).

Seventh Circuit: The Seventh Circuit recently rejected the Third Circuit's heightened ascertainability approach. The court found that nothing in the rule implies a heightened inquiry beyond the usual certification analysis (*Mullins v. Direct Digital LLC, 795 F.3d 654, 658 (7th Cir. 2015)*; see also *Rikos v. Procter & Gamble Co., No. 14-cv-4088, 2015 WL 4978712, at *22 (6th Cir. Aug. 20, 2015)* ("We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts.").)

Ascertainability

- As the federal circuit courts start to take sides over ascertainability, this will certainly be an important area to watch in class action litigation.

Securities Fraud Class Actions

Securities Fraud Class Actions: Background

- Plaintiffs filed 170 new federal class action securities cases in 2014, 85% of which included SEC Rule 10b-5 claims.

	2010	2011	2012	2013	2014
Rule 10b-5 Claims	66%	71%	85%	84%	85%
Alleged Misrepresentations in Financial Documents	93%	94%	95%	97%	94%

- Rule 10b-5 provides an implied private right of action to recover damages based on material misstatements or omissions in connection with the sale or purchase of a security.
- We anticipate that plaintiffs will continue to assert Rule 10b-5 claims at similar rates, as seen in the 85 new federal class action securities cases in the first half of 2015.

Data compiled by Cornerstone Research and Stanford Law School Class Action Clearinghouse

Securities Fraud Class Actions: *Halliburton II*

- *Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (Halliburton II)* is the third in a series of decisions addressing the burdens at class certification for securities fraud actions.
- Prevailing in a securities fraud claim generally requires that plaintiffs show reliance, the element at issue in *Halliburton II,* as well as:
  - A material misrepresentation or omission.
  - Scienter.
  - A connection with the purchase or sale of a security.
  - Economic loss.
  - Loss causation.
- Other recent Supreme Court decisions in this area include:
  - *Erica P. John Fund, Inc. v. Halliburton Co. (2011) (Halliburton I)* (proof of loss causation not required at the class certification stage).
  - *Amgen Inc. v. Connecticut Ret. Plans and Trust Funds (2013)* (proof of materiality not required at the class certification stage).

Securities Fraud Class Actions: *Halliburton II*

- In *Halliburton II*, a putative class action, investors alleged that Halliburton made misrepresentations designed to inflate its stock price, in violation of section 10(b) and Rule 10b-5, relying on the fraud-on-the-market presumption to satisfy the reliance element of their claim.
- Under *Basic v. Levinson (1988),* because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations may be presumed for purposes of a Rule 10b-5 action.
- A plaintiff who cannot establish the presumption's applicability must show direct reliance, by establishing that:
  - He was aware of a company's statement.
  - He engaged in a transaction based on that specific misrepresentation.

Securities Fraud Class Actions: *Halliburton II*

- The fraud on the market presumption is critical in securities fraud class actions, because:
  - A plaintiff who wishes to represent a class of investors must show that the reliance determination can be made on a class-wide basis.
  - Without the fraud-on-the-market presumption, the reliance inquiry would always require an individualized determination.

Absent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class.

Amgen, 133 S. Ct. at 1193.

Securities Fraud Class Actions: *Halliburton II*

- In *Halliburton II*, petitioners asked the Court to:
  - Overrule or substantially modify the fraud-on-the-market presumption of reliance recognized in *Basic v. Levinson (1988).*
  - Clarify whether defendants may rebut the fraud-on-the-market presumption of reliance before class certification by showing the absence of price impact.
- The Court:
  - Reaffirmed that plaintiffs can satisfy the reliance element by invoking the fraud on the market presumption, ensuring the continuing viability of Rule 10b-5 class actions.
  - Settled a split in the lower courts by holding that defendants must be afforded an opportunity to rebut the presumption of reliance before class certification with evidence of a lack of price impact.

Securities Fraud Class Actions: *Halliburton II*

- To invoke the fraud-on-the-market presumption, the plaintiff must allege that:
  - The alleged misrepresentations were publicly known.
  - They were material.
  - The stock traded in an efficient market, meaning that the market price reacts quickly to new information.
  - The plaintiff traded the stock between the time when the misrepresentations were made and when the truth was revealed.
- The plaintiff must prove publicity, market efficiency, and trade timing before class certification, generally through expert analysis.

Securities Fraud Class Actions: *Halliburton II*

- The fraud-on-the-market presumption at issue in *Halliburton II* reflects the Court's reasoning in *Basic* that:
  - Certain well developed markets are efficient processors of public information.
  - In those types of "efficient" markets, the market price of shares will reflect all publicly available information.
  - An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price.
- *Halliburton II* recognized that the markets for some securities are more efficient than the markets for others, and even a single market can process different kinds of information, more or less efficiently, depending on:
  - How widely the information is disseminated.
  - How easily it is understood.

Securities Fraud Class Actions: *Halliburton II*

- Once a plaintiff invokes the presumption at the certification stage, the defendants may rebut the presumption by arguing that the particular misrepresentations at issue had no impact on the stock price.
- To rebut the presumption, the defendant must make a showing that severs the link between the alleged misrepresentation and either:
  - The price received (or paid) by the plaintiff.
  - The plaintiff's decision to trade at a fair market price.

> [I]f the defendant shows that the alleged misrepresentation did not, for whatever reason, actually affect the market price, or that a plaintiff would have bought or sold the stock even if he had been aware that the stock price was tainted by fraud, the defendant has rebutted the presumption of reliance.

Halliburton II, 134 S. Ct. at 2408.

Securities Fraud Class Actions: Reliance and Class Certification Today

- *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, slip op. at 7, 11 (N.D. Tex. July 25, 2015): After considering detailed testimony by both parties' experts, and placing the burden on Halliburton to prove a lack of price impact, the district court certified a class as to one of the six misstatements alleged by the plaintiff.
- In holding that the defendant bears both the burden of production and the burden of persuasion on price impact, this decision is in line with four decisions:
  - *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 CIV. 3461 PAC, 2015 WL 5613150, at *4 (S.D.N.Y. Sept. 24, 2015).
  - *Aranaz v. Catalyst Pharm. Partners, Inc., 302 F.R.D. 657, 673 (S.D. Fla. 2014).*
  - *McIntire v. China MediaExpress Holdings, Inc., 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014).*
  - *Wallace v. Intralinks, 302 F.R.D. 310, 317 (S.D.N.Y. 2014).*

Securities Fraud Class Actions: Reliance and Class Certification Today

- *Halliburton II* provides defendants facing securities claims with an opportunity to defeat claims at the class certification stage, with caveats:
  - No class action defendant in any published decision has successfully defeated class certification by rebutting the presumption of reliance.
  - To the extent courts place the burden on the defendants to disprove price impact, the benefit of the doubt will go to plaintiffs.
  - Where a court is considering dueling expert opinions on highly technical matters—event studies, control groups, and multiple comparison adjustments—that benefit is considerable.

> [P]roving an absence of price impact seems exceedingly difficult, especially at the class certification stage in which it must be assumed that the alleged misrepresentation was material.

Aranaz, 302 F.R.D. at 673

Securities Fraud Class Actions: Key Strategies

- At the class certification stage, focus on proof of market efficiency, which plaintiffs have the burden to prove under *Halliburton II* and without which a class will not be certified.
- Consider deferring price impact arguments until summary judgment.
  - While a defendant can mount a price impact challenge to rebut the fraud-on-the-market presumption at class certification, doing so may be risky.
  - If the challenge proves unsuccessful and yields an unfavorable opinion, the court may be predisposed against the same price impact evidence at the summary judgment stage or at trial.
- Retain an expert to perform an analysis early in the case, to:
  - Evaluate whether the alleged misrepresentations actually impacted the price of the stock, a critical measure of market efficiency.
  - Refine the analysis over the course of a litigation, particularly with preliminary estimates of potential damages and loss causation and materiality issues.

Questions

About the Speakers

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Sarah joined Practical Law from Skadden, Arps, Slate, Meagher & Flom LLP, where she was a senior litigation associate representing clients on a wide range of matters. Prior to joining Skadden, she clerked for the Honorable Debra Freeman in the Southern District of New York. Before that, she was a litigation associate at Moses & Singer LLP. She is also an Adjunct Professor of Legal Writing at Fordham Law School.

Dharma Betancourt Frederick, Senior Legal Editor, *Practical Law Litigation*

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