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***In this issue …*** *on March 5, the Supreme Court heard oral arguments in the case of* Halliburton Co.*, [the petitioner]* versus Erica P. John Fund. Inc*. [the respondent].*

## Introduction

As described in the November 2013 edition of this newsletter, the U.S. Supreme Court was poised to accept or reject the petition from Halliburton Co. seeking to overrule or substantially modify the decision handed down by the court in *Basic Inc. v. Levinson*. At issue was the premise underpinning most securities class action lawsuits, that because stock markets are efficient, embedding all publically available information —including misrepresentations— investors need only buy shares in a company to then claim they were the victims of a fraud committed on the market when alleged misrepresentations are revealed.

As many readers will know, on November 15, 2013, the Supreme Court agreed to hear the case. During the following months various parties filed briefs supporting either side, leading up to March 5, when oral arguments from opposing counsels were heard by the court. The oral-argument stage is probably more for the benefit of the Supreme Court justices than for the opposing counsel. It gives the justices a chance to quiz the counsels about general or specific concerns. The ensuing dialog can also offer hints as to how the justices might decide the case after their private deliberations.

## Reading the Signs

Because of the importance of Supreme Court decisions, and because oral arguments offer such a tantalizing insight into how the justices might be thinking, the transcripts are pored over by observers and pundits, looking for clues. This case was no exception: Journalists, law firms, and bloggers rushed to offer their interpretations. A quick search of the Internet will show no shortage of such commentary, much of it articulate, informed, and thoughtful —if sometimes impenetrable for non-lawyers. Of course, the justices are aware that everything they say will be scrutinized, so it is possible that a justice might affect an air of non-commitment —while he or she is already resolved on their position.

## A General Consensus

Opinion and analysis tended to coalesce around two points: The first was that the justices appeared in no rush to overrule the court's decision on *Basic*. Although at least four justices had voted to hear the case, there seemed little overt desire to send *Basic* packing.

The second conclusion was that justices were exploring a compromise position. The most prominent form this took was when Justice Kennedy cited a brief filed by "law professors" in which these professors had proposed an "event study" to be employed at some point in the class action process. The goal of defendants would be to show that, notwithstanding the fraud-on-the-market theory, an alleged misrepresentation had produced no effect on the company's stock price, and so the presumption contained in the *Basic* decision could actually be rebutted, with the case likely being dismissed.

## What Else the Transcript Tells Us

Rather than speculate on the eventual outcome —speculative commentary being widely available— it is worth examining the transcript to see what else it might tell us about the philosophy of the Supreme Court.

### Respect for Congress

A fundamental role of the Supreme Court is to decide if statutes enacted by Congress are constitutional, if those statutes are challenged. But the court also pays close attention to the intent of Congress as evidenced in its legislation.

This includes noting what Congress did not do, as well as what it did do, and the *Halliburton* transcript accordingly notes Congressional actions or inactions. For example, Justice Kagan, addressing Halliburton's counsel: "And that's especially so in a case like this where Congress had every opportunity, and has declined every opportunity, to change *Basic* itself." [*page 5*]

Later, when Justice Scalia is trying to ascertain how an overruling of *Basic* would impact the federal Private Securities Litigation Reform Act of 1995 (PSLRA), he asks respondent's counsel, "What if we adopted the professor's … approach, would those provisions of the PSLRA still be effective?" [*page 41*].

And Justice Ginsburg: "Whatever it might have been at the beginning, given the most recent legislation, Congress took a look at the 10b–5 action and it made a lot of changes. It made pleading requirements. It's difficult to say that this —Congress would have legislated all those constraints if it thought there was no action to begin with." [*page 51*].

### Practical Implications of Decisions

Decisions made by the court have an impact in the real world. Justice Kagan asked the Deputy Solicitor General, who was appearing for the respondent, what would happen if *Basic* were overruled: "How would that affect the securities industry and how would it affect individual decision making with respect to securities?" [*page 47*]. The Deputy Solicitor General's response: "… I don't know that the SEC (Securities and Exchange Commission) has a defined view about what the consequences would be, but certainly the consequences are potentially dramatic."

### Importance of Precedent

Hovering over most Supreme Court deliberations is the importance of precedent: the fundamental acknowledgement that a previous decision by the court was not handed down lightly, and so should not be overturned lightly. This principle is formally known by the Latin phrase *stare decisis*, roughly meaning "to let stand that which has been decided."

A sense of what the principle means to the court can be gained from the confirmation hearing testimony of Chief Justice Roberts in 2005:

> *I do think it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough —and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question. And you do look at these other factors like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under* stare decisis. [page 144]

The term was only invoked once in the transcript —ironically by counsel for the petitioners— who cited the "traditional principles of *stare decisis*" [*page 54*] in order to then point out that "intervening developments" had made it an appropriate time for *Basic* to be overruled.

## SUMMARY

The oral arguments in *Halliburton* show, among other things, that the Supreme Court Justices have a keen awareness of the issues and a good grasp of how securities class action lawsuits currently unfold. The relatively easy ride given to respondent's counsel and the popularity of discussing some middle ground

suggest that a complete overruling of *Basic* is perhaps less likely than it might have been. But that widely held expectation could easily be proved wrong; a decision is expected in June or July. ❖

*Regardless of the outcome of* Halliburton, *Chicago Underwriting Group will continue to provide competitive and consistent D&O coverage. Contact any of our D&O underwriters.*

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