

Uldaho Law

## Digital Commons @ Uldaho Law

---

Articles

Faculty Works

---

Summer 2015

### Answering Halliburton II's Unanswered Question: Burdens of Production and Persuasion on Price Impact at Class Certification

Wendy Gerwick Couture

*University of Idaho College of Law, [wgcouture@uidaho.edu](mailto:wgcouture@uidaho.edu)*

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/faculty\\_scholarship](https://digitalcommons.law.uidaho.edu/faculty_scholarship)



Part of the [Securities Law Commons](#)

---

#### Recommended Citation

43(2) Sec. Reg. L. J. 167 (2015)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

# Answering *Halliburton II*'s Unanswered Question: Burdens of Production and Persuasion on Price Impact at Class Certification

By Wendy Gerwick Couture\*

## I. Introduction

In the Supreme Court's 2014 ruling in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"),<sup>1</sup> the Court held that a defendant can rebut the fraud-on-the-market presumption of reliance at class certification by showing the absence of price impact. Left unanswered by the Court is the allocation of the burdens of production and persuasion with respect to price impact at class certification. This Essay seeks to answer this question, drawing from the Court's guidance in *Wal-Mart Stores, Inc. v. Dukes*<sup>2</sup> and *Comcast Corp. v. Behrend*<sup>3</sup> on the merits inquiry required at class certification and Federal Rule of Evidence 301's guidance on the allocation of burdens of production and persuasion with respect to presumptions. Ultimately, this Essay proposes a step-by-step analytical pathway to guide courts and litigants as they engage in a merits inquiry about price impact at the class certification stage.

This Essay proceeds in six additional parts. Part II reviews the *Halliburton II* ruling, demonstrating that the allocation of burdens of production and persuasion on price impact at class certification is left unanswered and explaining why this allocation is potentially outcome-determinative. Part III discusses the Supreme Court's guidance in *Wal-Mart* and *Comcast* on the merits inquiry required at class certification, arguing therefrom that district courts should certify a class unless no reasonable jury could find price impact. Part IV examines Federal Rule of Evidence 301, arguing that Rule 301's allocation of burdens of production and persuasion should guide district courts' determination of whether a reasonable jury could find price impact. Part V presents this Essay's recommendation as a step-by-step analytical pathway. Part VI compares this Essay's recommendation to the case law on price impact, demonstrating that it is consistent

---

\*Wendy Gerwick Couture is an Associate Professor at the University of Idaho College of Law, where she teaches securities regulation and white collar crime.

with some courts' treatment of price impact and inconsistent with the pre-*Halliburton II* case law in the Second Circuit. Finally, Part VII briefly concludes, posing some additional questions left unanswered by *Halliburton II*.

## II. *Halliburton II*'s Unanswered Question

Reliance is an element of a private cause of action for securities fraud under § 10(b) of the Securities Exchange Act<sup>4</sup> and Rule 10b-5<sup>5</sup> promulgated thereunder.<sup>6</sup> If the members of a plaintiff class had to show individualized reliance on a defendant's alleged misrepresentations, the Federal Rule of Civil Procedure 23(b)(3) class certification requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members"<sup>7</sup> would fail.<sup>8</sup>

There is another way to show reliance, however, which is common to the class as a whole and which allows common questions to predominate over individual ones: by showing that the defendant committed a "fraud on the market." This way of showing reliance, first recognized by the Supreme Court in *Basic Inc. v. Levinson*,<sup>9</sup> has two essential components. First, an alleged misrepresentation has a price impact because material "public information generally affects stock prices."<sup>10</sup> Second, most investors who purchase at the market price do so in reliance on the integrity of market price,<sup>11</sup> thus indirectly relying on the alleged misrepresentation itself (which impacted the market price).<sup>12</sup>

A plaintiff can show the two components of "fraud on the market" reliance by invoking presumptions. In order to invoke a presumption of the first component (price impact), the plaintiff must establish the following two prerequisites by a preponderance of the evidence: (1) that the alleged material misrepresentation was publicly disseminated; and (2) that the market was efficient.<sup>13</sup> In order to invoke a presumption of the second component (purchase in reliance on the integrity of the market price), a plaintiff must show that investors "purchased the stock at the market price during the relevant period."<sup>14</sup> At class certification, a defendant can prevent the invocation of these presumptions by demonstrating that the plaintiff has failed to meet its burden of establishing these prerequisites (with the exception of materiality<sup>15</sup>).

Once invoked, the fraud-on-the-market presumption of reliance is rebuttable. In *Basic*, the Court acknowledged that each component of the presumption is rebuttable at the merits stage. For example, during the merits stage of the case, defendants could rebut the first component—price impact—by showing "that the 'market makers' were privy to the truth . . . and thus that the market price would not have been affected by their

misrepresentations.”<sup>16</sup> Likewise, during the merits stage, defendants could rebut the second component—investors’ reliance on the integrity of the market price—by showing that a plaintiff believed the alleged misrepresentations to be false and nonetheless purchased or sold the securities “because of other unrelated concerns, *e.g.*, potential antitrust problems, or political pressures.”<sup>17</sup> In *Halliburton II*, the Court held that the first component of the presumption—price impact—can also be rebutted at the class certification stage; a defendant need not wait until the merits stage of the case to rebut price impact.<sup>18</sup> The Court explained that price impact is “*Basic*’s fundamental premise” and that “[i]t thus has everything to do with predominance at the class certification stage.”<sup>19</sup> Thus, after *Halliburton II*, “[d]efendants may seek to defeat the *Basic* presumption at that [class certification] stage through direct as well as indirect price impact evidence.”<sup>20</sup>

The open question after *Halliburton II* is the allocation of burdens of production and persuasion on price impact at class certification.<sup>21</sup> Somewhat naively, the Majority Opinion appears to view price impact as binary: either price impact exists or it does not, and the district court can just look at “the evidence” at class certification and discern whether it exists. Here are the Majority Opinion’s statements about price impact evidence at class certification, with emphasis added:

- Halliburton contends that defendants should at least be allowed to defeat the presumption at the class certification stage *through evidence that the misrepresentation did not in fact affect the stock price*. We agree.<sup>22</sup>
- Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs’ claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant’s study, the plaintiff has carried its burden to prove market efficiency, but that *the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit*. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund’s view, the plaintiffs’ action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed. Such a result is inconsistent with *Basic*’s own

logic.<sup>23</sup>

- Price impact is thus an essential precondition for any Rule 10b-5 class action. While *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply.<sup>24</sup>
- [D]efendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.<sup>25</sup>

In reality, however, price impact is a fact question like any other. Professor John C. Coffee, Jr. gave the following example of how the district court at class certification might be faced with competing evidence on price impact:

Suppose then that, at the class certification hearing, defendants show that on the corrective disclosure the market declined, but the response was significant only at the 90% level of confidence (and not the conventional 95% level). Have defendants met their burden when they actually show that there was a 90% chance of price distortion? Plaintiffs may further respond that the market also declined the prior week when a prominent securities analyst predicted that the company would make a corrective disclosure indicating that it had earlier overstated (but again the market's response was below the 95% level of confidence). Plaintiffs will argue that the information leaked out (or was deliberately disseminated) in multiple steps to minimize its impact, but defendants will respond that they have shown that plaintiffs cannot ultimately prove loss causation. Who wins? Statisticians and proceduralists may disagree here as to what the court's response should be.<sup>26</sup>

Indeed, Justice Ginsburg's *Halliburton II* concurrence, joined by Justices Breyer and Sotomayor, seems to have anticipated this problem: "But the Court recognizes that it is incumbent upon the defendant to show the absence of price impact. The Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims."<sup>27</sup> Even this statement, however, leaves open the standard by which the defendants must make a showing of absence of price impact in order to defeat class certification. As with any fact question, the burdens of production and persuasion with respect to price impact will often be outcome-determinative, and post-*Halliburton II* the district courts must struggle with this question without guidance from the Supreme Court.

In response, this Essay seeks to provide guidance on the burdens of production and persuasion on price impact at class certification. This question involves the intersecting issues of (1)

the plaintiff's burden of proof on the merits at class certification; and (2) the effect of a presumption about the merits on burdens of proof and persuasion. This Essay addresses each issue in turn and then makes a recommendation that integrates them into one analytical framework.

### III. The Plaintiff's Burden of Proof on the Merits at Class Certification

As the Supreme Court recently clarified in *Wal-Mart* and *Comcast*, a plaintiff has the burden of proving the Rule 23 prerequisites of class certification, including commonality (at issue in *Wal-Mart*) and predominance (at issue in *Comcast*).<sup>28</sup> Ordinarily, the merits of the plaintiff's case—*i.e.*, whether the plaintiff will win or lose—should be reserved for the merits stage of the case and not addressed at class certification.<sup>29</sup> Sometimes, however, a component of the merits of the plaintiff's case and the prerequisites of class certification are intertwined because, if the plaintiff is unable to prove that component at the merits stage, the Rule 23 requirements of commonality or predominance will likewise fail.<sup>30</sup> For example, in *Wal-Mart*, the plaintiffs attempted to certify a class consisting of current and former female employees of Wal-Mart, alleging that Wal-Mart's policy of affording local managers discretion over pay and promotions led to an unlawful disparate impact on female employees.<sup>31</sup> The merits of the disparate impact claim were relevant at class certification because, "[w]ithout some glue holding the alleged reasons for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."<sup>32</sup> Likewise, in *Comcast*, the plaintiffs attempted to certify a class consisting of subscribers to Comcast's cable-television services, alleging that Comcast and its subsidiaries had violated the Sherman Act, thus reducing the level of competition from "overbuilders" and causing the plaintiffs damages.<sup>33</sup> The merits of the plaintiffs' damages claim were relevant at class certification because, absent a model "establishing that damages are capable of measurement on a classwide basis," the predominance element would fail.<sup>34</sup>

Applying this standard to a securities fraud class action, only those components of the merits of a securities fraud claim that are intertwined with the predominance requirement are relevant at class certification. For this reason, as the Court held *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, materiality is not relevant at class certification because the failure of materiality would not destroy the predominance requirement.<sup>35</sup> Rather, if the materiality element ultimately fails on the merits, the case would be still be resolved classwide, just for the defendant.<sup>36</sup> Price impact, on the other hand, as the Court held in

*Halliburton II*, is relevant to class certification because—absent price impact—the class will splinter, with individual suits able to proceed with individualized showings of reliance but classwide resolution pursuant to the “fraud on the market” showing of reliance rendered impossible.<sup>37</sup>

If a component of the merits of the plaintiff’s case is relevant at class certification because it is intertwined with the commonality or predominance requirements, the next question is how strong the plaintiff’s merits showing must be at class certification in order to satisfy the commonality and predominance requirements. This merits showing is one step removed from the Rule 23 showing.<sup>38</sup> In Professor George Rutherglen’s words: “It follows that the plaintiff must present some evidence on the merits in order to demonstrate compliance with Rule 23 when the issues overlap. The crucial question is: how much evidence?”<sup>39</sup> The Circuits are split on this question. For example, the Third Circuit requires plaintiffs to prove merits intertwined with Rule 23 prerequisites by a “preponderance of the evidence,”<sup>40</sup> while the Sixth Circuit merely requires a “rigorous analysis” of the merits.<sup>41</sup>

Here, *Wal-Mart* and *Comcast* likewise provide guidance: the relevant component of the plaintiff’s merits case must be “capable of” classwide resolution.<sup>42</sup> Citing Professor Richard A. Nagareda, the Court explained that the central question as applied to the merits is “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.”<sup>43</sup>

In neither opinion did the Court equate its “capable of” test with a “preponderance of the evidence” standard. Rather, this “capable of” test is comparable to the tests applied to the merits when a defendant moves for summary judgment<sup>44</sup> or judgment as a matter of law,<sup>45</sup> whereby a court determines “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”<sup>46</sup> Indeed, the Court’s application of the “capable of” test in *Wal-Mart* and *Comcast* mimics the analysis when a court rules on a defendant’s motion for summary judgment or judgment as a matter of law. In *Wal-Mart*, the Court considered whether the plaintiffs were “capable of” proving disparate impact, which was necessary to establish the Rule 23 requirement of commonality. The Court reviewed whether there was evidence of a general policy of discrimination, finding that it was “entirely absent here.”<sup>47</sup> The Court examined the plaintiffs’ expert testimony and found that it “does nothing to advance respondents’ case.”<sup>48</sup> The Court also reviewed whether the plaintiffs’ statistical and anecdotal evidence showed a common mode of exercising discretion, finding that “their evidence falls well short.”<sup>49</sup> The Court found that the studies were “insufficient

to establish that respondents' theory can be proved on a classwide basis" because of a "failure of inference."<sup>50</sup> Likewise, the anecdotal evidence was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."<sup>51</sup> In summary, the Court found that the plaintiffs had provided "no convincing proof of a companywide discriminatory pay and promotion policy."<sup>52</sup> In *Comcast*, the Court considered whether the plaintiffs were "capable of" establishing damages attributable to the overbuilder theory, which was necessary to establish the Rule 23 requirement of predominance. The Court examined the plaintiffs' damages model, finding that "it does not even attempt" to "measure only those damages attributable to that theory."<sup>53</sup> The Court stated that "[t]here is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised."<sup>54</sup> The Court also noted "the model's inability to bridge the differences between supra-competitive prices attributable in general and supra-competitive prices attributable to the deterrence of overbuilding."<sup>55</sup>

Several scholars, including Professor Robert H. Klonoff and Professor Rutherglen, agree that, when a component of the merits case is intertwined with the Rule 23 prerequisites, the court should certify the class if the plaintiff presents sufficient evidence of that component to withstand a defendant's motion for summary judgment.<sup>56</sup> First, if a court applied a higher evidentiary standard to the merits, such as a preponderance of the evidence standard, the court would usurp the role of the fact finder,<sup>57</sup> potentially in violation of the Seventh Amendment.<sup>58</sup> In addition, applying a higher evidentiary standard to merits questions at class certification would create the potential for conflicting rulings on motions for class certification and motions for summary judgment, disrupting the flow of the case.<sup>59</sup> Applying the same evidentiary standard to the merits at class certification and at summary judgment shows proper deference to the role of the fact finder and prevents the possibility of inconsistent rulings.

Applying *Wal-Mart* and *Comcast's* "capable of" test to the element of price impact at class certification, therefore, the district court should determine if the plaintiffs are "capable of" establishing price impact. This inquiry should mimic the court's inquiry when ruling on a defendant's motion for summary judgment or judgment as a matter of law.<sup>60</sup> In short, if there is a genuine dispute as to price impact because a reasonable jury would have a legally sufficient evidentiary basis to find price impact,<sup>61</sup> the court should certify the class because the plaintiff has shown "the capacity of a classwide proceeding to generate common answers."<sup>62</sup> On the other hand, if there is no genuine dispute as to price



impact because a reasonable jury would not have a legally sufficient evidentiary basis to find price impact,<sup>63</sup> the court should not certify the class because a classwide proceeding does not have the “capacity” to generate common answers.

Before applying this standard to price impact at class certification, however, a court must determine the effect of the fraud-on-the-market presumption and rebuttal evidence on whether a reasonable jury would have a legally sufficient evidentiary basis to find price impact. In other words, once the plaintiff has invoked the presumption, when does a defendant’s rebuttal evidence prevent a reasonable jury from finding price impact, such that class certification should be denied? It is to that question that this Essay now turns, guided by Federal Rule of Evidence 301.

#### **IV. Federal Rule of Evidence 301’s Burdens of Production and Persuasion**

Federal Rule of Evidence 301 provides the following guidance about the burdens of production and persuasion with respect to presumptions in civil cases:

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.<sup>64</sup>

Federal Rule of Evidence 101 defines a “civil case” as “a civil action or proceeding.”<sup>65</sup>

The preliminary question is whether Rule 301 applies to class certification determinations of price impact in securities fraud cases. The Supreme Court has not explicitly adopted Rule 301 for purposes of the fraud-on-the-market presumption of reliance. The Court in *Basic* cited Rule 301 for the proposition that “presumptions are useful devices for allocating the burdens of proof between parties,”<sup>66</sup> but the Court did not state that Rule 301 applies to the fraud-on-the-market presumption of reliance. Despite the parties’ extensive citation to Rule 301 in their briefing in *Halliburton II*,<sup>67</sup> the Court in *Halliburton II* did not mention Rule 301 in its opinion.<sup>68</sup> There are several possible explanations for this omission. Perhaps the Court was not able to reach consensus on the burdens of production and persuasion and thus left this question unanswered, to be developed by the lower courts. Justice Ginsburg’s brief concurrence on the issue of burdens of production and persuasion suggests that there were indeed behind-the-scenes discussions among the Justices about how these burdens would play out at class certification.<sup>69</sup> Or perhaps the Court recognized that explicitly stating that Rule 301 applies at class certification would appear to answer by implication another

unanswered question—whether the standards for expert admissibility under Federal Rule of Evidence 702<sup>70</sup> and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>71</sup> apply in class certification proceedings,<sup>72</sup> and the Court did not want to resolve this hotly debated issue via the back door. Regardless of the Court's rationale, however, the lower courts are left to determine whether Rule 301 applies to price impact at class certification, and if so, the import thereof.

By its terms, Rule 301 applies to “a civil action or proceeding,” which encompasses class certification hearings, and the two arguments that Rule 301 should not apply to the presumption of price impact at class certification are unconvincing. First, arguably, the Federal Rules of Evidence *in toto* do not apply at class certification hearings. In support of this argument, the Supreme Court in *Eisen v. Carlisle & Jacquelin*, when rejecting an inquiry into the merits of the plaintiff's case at class certification, stated the following in *dicta*:

Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.<sup>73</sup>

As clarified in *Wal-Mart* and *Comcast*, however, despite *Eisen*'s broad rejection of an inquiry into the merits at class certification, a merits inquiry is required at class certification when the merits intersect with the Rule 23 requirements of commonality or predominance.<sup>74</sup> Therefore, in order to prevent the danger of prejudice that the *Eisen* Court foresaw, the rules of procedure and evidence should apply at the class certification stage, at least to the extent that there is an inquiry into the merits. Moreover, as discussed above, the merits inquiry at class certification should dovetail with the merits inquiry on motions for summary judgment and motions for judgment as a matter of law, to which Rule 301 applies.<sup>75</sup> If Rule 301 did not apply at class certification, there would be a disconnect between the rulings at class certification and at summary judgment, which would undercut the purpose of the merits inquiry at class certification.<sup>76</sup>

Second, arguably, because the fraud-on-the-market presumption of reliance is an interpretation of § 10(b) of the Securities Exchange Act, a federal statute “provide[s] otherwise,” rendering Rule 301 inapplicable.<sup>77</sup> This argument is unconvincing because the fraud-on-the-market presumption is a “judicially created doctrine designed to implement a judicially created cause of action,”<sup>78</sup> rather than a presumption created by statute. Not surprisingly,

then, § 10(b) is silent about the burdens of production and persuasion with respect to the presumption of reliance and thus fails to provide for an effect other than that specified by Rule 301.<sup>79</sup> Moreover, the Court has explicitly applied Rule 301 to another judicially created presumption, where the statute failed to mention the presumption or its effect. In particular, the Court has applied Rule 301 to the *McDonnell Douglas* framework, which is a judicially created doctrine to implement a claim for discriminatory treatment under Title VII of the Civil Rights Act of 1964.<sup>80</sup> Therefore, because neither argument against the applicability of Rule 301 at class certification is convincing, courts should look to Rule 301 for guidance on the burdens of production and persuasion on price impact at class certification.

In particular, because the inquiry into the merits at class certification mimics an inquiry into the merits in response to a defendant's motion for summary judgment or for judgment as a matter of law,<sup>81</sup> Rule 301's dictates about the burdens of production and persuasion at those stages of the case should guide courts when determining whether to grant class certification. If under Rule 301's allocation of burdens of production and persuasion, a defendant's motion for summary judgment or judgment as a matter of law on price impact should be denied, the court should certify the class. If, on the other hand, under Rule 301's allocation of burdens, a defendant's motion for summary judgment or judgment as a matter of law on price impact should be granted, the court should not certify the class.

Rule 301 envisions two scenarios with respect to a defendant's motion for summary judgment or judgment as a matter of law on a presumed element of the plaintiff's case. Under the first scenario, the plaintiff establishes the basis facts to invoke the presumption of the element, and the defendant does not offer any rebuttal evidence. Under the second (and more difficult) scenario, the plaintiff establishes the basic facts to invoke the presumption of the element, and the defendant offers rebuttal evidence of the non-existence of the element. This Essay analyzes each scenario, guided by Rule 301 and the Court's application of Rule 301 to the *McDonnell Douglas* framework, and applies the resultant guidance to the price impact inquiry at class certification.

Under the first scenario, the plaintiff establishes the basic facts to invoke the presumption of the element, and the defendant does not offer any rebuttal evidence. Under Rule 301, a plaintiff has a legally sufficient basis for a reasonable jury to find the existence of the element.<sup>82</sup> Therefore, a defendant's motion for summary judgment or judgment as a matter of law with respect to that element should be denied.<sup>83</sup> (Indeed, under this scenario, if the trier of fact found the existence of the basic facts, the *plaintiff*

would be entitled to judgment as a matter of law with respect to that element.<sup>84</sup>).

The Court has exemplified Rule 301's treatment of this first scenario in the context of the *McDonnell Douglas* framework, which the Court developed to determine whether a plaintiff has proved the element of intentional discrimination under Title VII. Under the first step of this framework, as applied to alleged racial discrimination, if the plaintiff establishes the *prima facie* case "(i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualification," then the plaintiff is entitled to a presumption of intentional discrimination.<sup>85</sup> As explained by the Court, "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."<sup>86</sup> This is consistent with how Rule 301 treats this first scenario.<sup>87</sup>

Applying this first scenario to price impact, if the plaintiff establishes the basic facts to invoke the presumption of price impact (*i.e.*, public dissemination and market efficiency), the plaintiff has a legally sufficient basis for a reasonable jury to find price impact. Therefore, if the plaintiff invokes the presumption and the defendant offers no rebuttal evidence, the class should be certified. This is consistent with long-established practice, affirmed in *Halliburton II*.<sup>88</sup>

Under the second scenario, the plaintiff establishes the basic facts to invoke the presumption of the element, and the defendant offers rebuttal evidence of the non-existence of the element. Under Rule 301, if the defendant's rebuttal evidence is not strong enough that a reasonable jury could find the non-existence of the element, the presumption remains unrebutted.<sup>89</sup> If, however, the defendant's rebuttal evidence is strong enough that a reasonable jury could find the non-existence of the element, the presumption disappears.<sup>90</sup> Then, the inquiry becomes whether a reasonable jury, looking at all of the evidence, could nonetheless find the existence of the element. Although the presumption itself disappears, the jury may still consider the basic facts that gave rise to the presumption and make natural inferences therefrom.<sup>91</sup> Summary judgment or judgment as a matter of law should be granted only if, considering all of the evidence, a reasonable jury could not find the existence of the element.<sup>92</sup> When making this determination, the court should consider (1) the natural inferences from the basic facts that gave rise to the now-disappeared

presumption; (2) the defendant's evidence of the non-existence of this element; (3) any reasons to find the defendant's evidence unconvincing; and (4) any additional evidence of the element offered by the plaintiff.

The Court has also exemplified Rule 301's treatment of this second scenario in the context of the *McDonnell Douglas* framework. As explained by the Court, the defendant meets its burden of rebutting the presumption of intentional discrimination "if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."<sup>93</sup> To meet this burden, the defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."<sup>94</sup> If the defendant fails to meet this burden, the court must enter judgment for the plaintiff as a matter of law.<sup>95</sup> If the defendant meets this burden, however, the presumption disappears.<sup>96</sup> If the presumption disappears, in order to prevent summary judgment or judgment as a matter of law, a plaintiff must show that a rational factfinder could conclude that the action was intentionally discriminatory.<sup>97</sup> When considering whether the plaintiff has met this burden, the court should consider the natural inferences that arise from the plaintiff's establishment of the *prima facie* case,<sup>98</sup> the defendant's evidence of the non-discriminatory reason for the employer's action, any evidence that the defendant's proffered reason is pretextual, and any additional evidence of intentional discrimination by the defendant.<sup>99</sup> The plaintiff need not produce any additional evidence to meet this burden if the elements of the *prima facie* case, coupled with the factfinder's disbelief of the reasons put forward by the defendant, would permit the trier of fact to infer the ultimate fact of intentional discrimination.<sup>100</sup>

Applying this second scenario to price impact, the first question is whether the defendant on rebuttal has produced sufficient evidence that a reasonable jury could find the absence of price impact. If not, the presumption remains unrebutted, and the court should certify the class. If so, the presumption of price impact disappears. If the presumption of price impact disappears, the Court must then consider whether, looking at all of the evidence, a reasonable jury could find the existence of price impact. When making this determination, the court should consider (1) the natural inferences about price impact arising from the public dissemination of the alleged misrepresentation into an efficient market; (2) the defendant's evidence of the lack of price impact; (3) any reasons to find the defendant's evidence of lack of price impact unconvincing; and (4) any additional evidence of price impact offered by the plaintiff. The court should deny certification only if, considering all of this evidence, the court determines that no reasonable jury could find the element of price impact.

## V. This Essay's Recommended Analytical Pathway

In summary, this Essay recommends that, when analyzing the element of price impact for purposes of class certification, courts should apply *Wal-Mart* and *Comcast*'s "capable of" test to determine the capacity of a classwide proceeding to generate common answers.<sup>101</sup> In short, if a reasonable jury could find price impact, the court should certify the class.<sup>102</sup> When making that determination, the Court should apply Rule 301's guidance on the burdens of production and persuasion with respect to a presumption about an element of the plaintiff's case, as developed in the context of a defendant's motion for summary judgment or judgment as a matter of law.<sup>103</sup> This Essay's recommendation can be summarized in the following analytical pathway:

Step One: Has the plaintiff established the basic facts giving rise to the presumption of price impact (*i.e.*, public dissemination of the alleged misrepresentation and market efficiency)? If not, the plaintiff has failed to show that a reasonable jury could find price impact, and class certification should be denied. If so, the court should proceed to Step Two.

Step Two: Has the defendant offered any rebuttal evidence of the non-existence of price impact? If not, the court should certify the class because the defendant has failed to rebut the presumption of price impact and a reasonable jury could thus find the existence of price impact. If so, the court should proceed to Step Three.

Step Three: Based on the defendant's rebuttal evidence, could a reasonable jury find the non-existence of price impact? If not, the court should certify the class because the defendant has failed to rebut the presumption of price impact and a reasonable jury could thus find the existence of price impact. If so, the defendant has rebutted the presumption of price impact, and the court should proceed to Step Four.

Step Four: Disregarding the presumption of price impact and examining all of the evidence, including the natural inferences from the public dissemination of the alleged misrepresentation into an efficient market, the defendant's evidence of lack of price impact, any reasons to find the defendant's evidence of lack of price impact unconvincing, and any additional evidence of price impact offered by the plaintiff, could a reasonable jury find the existence of price impact? If so, the court should certify the class because it is "capable of" classwide resolution. If not, the court should not certify the class.

## VI. Comparison of this Essay's Recommendation to the Case Law on *Halliburton II*

This Essay's recommendation is consistent with some courts'

applications of *Halliburton II* and inconsistent with other courts' applications. For example, the court's analysis in *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Financial Corp.*<sup>104</sup> is consistent with this Essay's recommendation. In that case, the plaintiffs successfully invoked the presumption of price impact.<sup>105</sup> In rebuttal, the defendants offered an event study that showed that a corrective disclosure had not significantly impacted the stock price.<sup>106</sup> Then, the defendants argued that, because the plaintiffs' expert had conducted no event study of his own, class certification must be denied.<sup>107</sup> The court rejected this contention, noting that "nothing in *Halliburton II* requires the plaintiffs to produce an event study in opposition to defendants' event study on a class certification motion."<sup>108</sup> Then, the court examined the defendants' expert's event study and found various reasons that the defendants' expert's event study was unconvincing, including that it failed to account for the difference between a 24% decline in the defendant company's stock price on the date of the corrective disclosure and only a 6.11% decline on the New York Stock Exchange on the same date.<sup>109</sup> The court thus concluded that price impact was "properly reserved for a jury to decide" and certified the class.<sup>110</sup>

The *Regions Financial Corp.* court's ruling is consistent with this Article's recommendation. Under this Article's recommendation, after the defendant's production of an event study that would enable a reasonable jury to find the absence of price impact, the presumption of price impact disappeared, and the inquiry at class certification became whether, based on a review of the evidence as a whole, a reasonable jury could find price impact. A review of all of the evidence, including that the alleged misrepresentation was publicly disseminated into an efficient market and that there were reasons to find the defendant's event study unconvincing, demonstrated that a reasonable jury could find price impact despite the absence of an event study by the plaintiffs. Therefore, under this Essay's recommendation, the court correctly reserved this question for the jury and granted class certification.

This Essay's recommendation is inconsistent with the Second Circuit's pre-*Wal-Mart*, pre-*Halliburton II* case law on price impact, which several district courts have found to survive *Halliburton II*.<sup>111</sup> Under the Second Circuit's case law on price impact, once the presumption is invoked, the class should be certified unless the defendant proves the absence of price impact by a preponderance of the evidence.<sup>112</sup> The Second Circuit's rule differs from this Essay's recommendation both with respect to the burden of production and the burden of persuasion.

With respect to the burden of production, under this Essay's

recommendation, the defendant can rebut the presumption of price impact by producing evidence that would allow a reasonable jury to find an absence of price impact. This burden of production is lower than the “preponderance of the evidence” burden of production placed on the defendant by the Second Circuit.

With respect to the burden of persuasion, under this Essay’s recommendation, once the defendant has met the burden of production, class certification should be denied only if, based on a review of all of the evidence, no reasonable jury could find price impact. The Second Circuit would require a denial of class certification if the defendant showed the absence of price impact by a mere preponderance of the evidence. The Second Circuit’s standard would compel denial of class certification more often than this Essay’s recommendation because a defendant’s showing of the absence of price impact by a mere preponderance of the evidence (which would compel denial of class certification under the Second Circuit’s standard) does not mean that a reasonable jury could not find price impact<sup>113</sup> (which is this Essay’s standard for denying class certification).

## VII. Conclusion

In conclusion, this Essay seeks to provide guidance on one question left unanswered by *Halliburton II*: the burdens of production and persuasion on price impact at class certification. This Essay proposes a framework drawn from the Court’s guidance in *Wal-Mart* and *Comcast* on merits inquiries at class certification and Rule 301’s guidance on the burdens of production and persuasion with respect to presumptions.

This is not the only question left unanswered. For example, *Halliburton II* likewise leaves open the following questions: How can a party prove price impact or the lack thereof with respect to alleged confirmatory misrepresentations? For an alleged non-confirmatory misrepresentation, does a drop upon disclosure of “the truth” prove price impact, even if the statement did not cause an initial positive impact when it was made? Conversely, for an alleged non-confirmatory misrepresentation, does an initial positive impact when a statement is made prove price impact, even if there is not a drop upon disclosure of “the truth”? If a price drop upon disclosure of the truth is sufficient to show price impact, is there still an analytical distinction between price impact for purposes of the fraud-on-the-market presumption of reliance and price impact for purposes of loss causation? As suggested by Justice Breyer during the *Halliburton II* oral argument, if the class were explicitly confined to those investors “that bought it on the market at the same time, [and] had no information,”<sup>114</sup> the element of price impact would operate similarly to the element of materiality because a failure of proof at the merits



stage would not splinter the class (rather, the defendant would simply win);<sup>115</sup> if a class were so defined, could price impact be left to the merits rather than addressed at class certification?

Hopefully, this Essay will inspire other scholars to engage in a discussion about the many questions left unanswered by *Halliburton II*, including the burdens of production and persuasion on price impact at class certification.

## NOTES:

<sup>1</sup>*Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407, 189 L. Ed. 2d 339, Fed. Sec. L. Rep. (CCH) P 98003, 88 Fed. R. Serv. 3d 1472 (2014) (hereinafter “*Halliburton II*”).

<sup>2</sup>*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52, 180 L. Ed. 2d 374, 112 Fair Empl. Prac. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919, 78 Fed. R. Serv. 3d 1460 (2011).

<sup>3</sup>*Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515, 2013-1 Trade Cas. (CCH) ¶ 78316, 85 Fed. R. Serv. 3d 118 (2013).

<sup>4</sup>15 U.S.C.A. § 78j(b).

<sup>5</sup>17 C.F.R. § 240.10b-5.

<sup>6</sup>*Halliburton II*, 134 S. Ct. 2398 at 2407.

<sup>7</sup>Fed. R. Civ. P. 23(b)(3).

<sup>8</sup>*Halliburton II*, 134 S. Ct. at 2408.

<sup>9</sup>*Basic Inc. v. Levinson*, 485 U.S. 224, 250, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).

<sup>10</sup>*Halliburton II*, 134 S. Ct. at 2410.

<sup>11</sup>*Id.* at 2410–11.

<sup>12</sup>*Basic*, 485 U.S. at 247 (“An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentation, therefore, may be presumed for purposes of a Rule 10b-5 action.”).

<sup>13</sup>*Halliburton II*, 134 S. Ct. at 2414 (“First, if a plaintiff shows that the defendant’s misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price.”).

<sup>14</sup>*Id.* (“Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant’s misrepresentation.”).

<sup>15</sup>*Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1199, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013) (“Materiality thus differs from market-efficiency and publicity predicates in this critical respect: While the failure of common, classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class.”); *see also, infra*, text accompanying notes 35–36.

<sup>16</sup>*Basic*, 485 U.S. at 248.

<sup>17</sup>*Id.* at 249.

<sup>18</sup>*Halliburton II*, 134 S. Ct. at 2417.

<sup>19</sup>*Id.* at 2416.

<sup>20</sup>*Id.* at 2417.

<sup>21</sup>Meyer Eisenberg, *Halliburton II: Where Do We Go From Here?*, The CLS Blue Sky Blog (July 10, 2014), at <http://clsbluesky.law.columbia.edu> (“The Court clearly reaffirms the *Basic* opportunity for the defendants to rebut the presumption of reliance at certification. By what standard?”).

<sup>22</sup>*Halliburton II*, 134 S. Ct. at 2414.

<sup>23</sup>*Id.* at 2415.

<sup>24</sup>*Id.* at 2416.

<sup>25</sup>*Id.* at 2417.

<sup>26</sup>John C. Coffee, Jr., *Death by One Thousand Cuts*, The CLS Blue Sky Blog (June 30, 2014), at <http://clsbluesky.law.columbia.edu>.

<sup>27</sup>*Halliburton II*, 134 S. Ct. at 1417 (J. Ginsburg, concurring).

<sup>28</sup>*Comcast*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551–52.

<sup>29</sup>*Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 9 Fair Empl. Prac. Cas. (BNA) 1302, 7 Empl. Prac. Dec. (CCH) P 9374A, Fed. Sec. L. Rep. (CCH) P 94570, 1974-1 Trade Cas. (CCH) ¶ 75082, 18 Fed. R. Serv. 2d 877, 4 Envtl. L. Rep. 20513 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”).

<sup>30</sup>*Comcast*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551.

<sup>31</sup>*Wal-Mart*, 131 S. Ct. at 2548; *see also* 42 U.S.C.A. § 2000e-2(k).

<sup>32</sup>*Wal-Mart*, 131 S. Ct. at 2552.

<sup>33</sup>*Comcast*, 133 S. Ct. at 1430–31.

<sup>34</sup>*Id.* at 1433.

<sup>35</sup>*Amgen*, 133 S. Ct. at 1196.

<sup>36</sup>*Id.* (“Connecticut Retirement’s failure to present sufficient evidence of materiality to defeat a summary-judgment motion or to prevail at trial would not cause individual reliance questions to overwhelm the questions common to the class. Instead, the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate.”).

<sup>37</sup>*Halliburton II*, 134 S. Ct. at 2416.

<sup>38</sup>Olson, “Chipping Away”: The Misguided Trend Toward Resolving Merits Disputes As Part of the Class Certification Calculus, 43 U.S.F. L. Rev. 935, 960 (2009) (describing “the critical distinction” between showing “compliance with Rule 23” and showing “that the plaintiffs could prove their claims on a class-wide basis”).

<sup>39</sup>Rutherglen, *The Way Forward After Wal-Mart*, 88 Notre Dame L. Rev. 871, 882 (2012).

<sup>40</sup>*In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320, 2008-2 Trade Cas. (CCH) ¶ 76453 (3d Cir. 2008), as amended, (Jan. 16, 2009) (“Factual

determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.”).

<sup>41</sup>*Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 418 n.8, 81 Fed. R. Serv. 3d 832 (6th Cir. 2012) (“The Sixth Circuit uses the ‘rigorous analysis’ requirement, never mentioning whether a ‘preponderance’ standard is appropriate. The Supreme Court did the same in *Wal-Mart*. We see no reason to superimpose a more specific standard than the Supreme Court . . .”).

<sup>42</sup>*Comcast*, 133 S. Ct. at 1433; *Wal-Mart*, 131 S. Ct. at 1551.

<sup>43</sup>*Wal-Mart*, 131 S. Ct. at 2551 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis added by the Supreme Court)).

<sup>44</sup>Fed. R. Civ. P. 56 (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

<sup>45</sup>Fed. R. Civ. P. 50 (permitting the granting of judgment as a matter of law “[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue”).

<sup>46</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S. Ct. 2505, 91 L. Ed. 2d 202, 12 Media L. Rep. (BNA) 2297, 4 Fed. R. Serv. 3d 1041 (1986).

<sup>47</sup>*Wal-Mart*, 131 S. Ct. at 2553.

<sup>48</sup>*Id.* at 2554.

<sup>49</sup>*Id.* at 2555.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 2556.

<sup>52</sup>*Id.* at 2556–57.

<sup>53</sup>*Comcast*, 133 S. Ct. at 1433.

<sup>54</sup>*Id.* at 1433.

<sup>55</sup>*Id.* at 2435.

<sup>56</sup>Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 760 (2013) (“In sum, the court at class certification should conduct a rigorous review of the evidence supporting class certification. That means it should satisfy itself that plaintiffs’ evidence, if credited by the fact finder, would establish the elements of the claims on a classwide basis.”); *Rutherglen*, *supra* note 39, at 886 (“The standard for meeting the burden of production in opposition to a motion for summary judgment should be sufficient to resolve issues on the merits relating to certification.”).

<sup>57</sup>*Klonoff*, *supra* note 56, at 756 (“Ultimately, in cases in which the court denies certification because it credits defendant’s evidence over plaintiff’s evidence, the . . . approach usurps the jury’s role to weigh and adjudicate conflicting evidence. If, for example, both plaintiffs and defendants in an antitrust case have presented admissible, probative expert testimony on how classwide impact will be established, the weighing of such evidence should be done by the jury at trial.”).

<sup>58</sup>Kauffman and Wunderlich, *The Unjustified Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. Mich. J.L. Reform 323, 355

(2010) (“Rule 23 must fit within the confines of the Seventh Amendment. The judicial creation of merits barriers to class certification is inconsistent with the Seventh Amendment.”).

<sup>59</sup>See Rutherglen, *supra* note 39, at 885 (“The overriding concern should be to keep rulings on certification, insofar as they implicate the merits, consistent with rulings on summary judgment. If the two get out of sync, certification might be denied despite the existence of class-wide issues that should go to trial. A motion to certify should not be denied when a motion for summary judgment by the defendant, raising the same issues on the merits, would also be denied.”).

<sup>60</sup>Id. at 883 (“When certification involves an examination of the evidence, the accepted standards for summary judgment can be easily adapted to that end.”).

<sup>61</sup>See Fed. R. Civ. P. 50, 56.

<sup>62</sup>*Wal-Mart*, 131 S. Ct. at 2551.

<sup>63</sup>See Fed. R. Civ. P. 50, 56.

<sup>64</sup>Fed. R. Evid. 301.

<sup>65</sup>Fed. R. Evid. 101(b)(1).

<sup>66</sup>*Basic*, 485 U.S. at 245.

<sup>67</sup>*Halliburton II, Reply for Petitioners*, 2014 WL 689551, at \*23 (U.S. Feb. 21, 2014); *Halliburton II, Brief for Respondents*, 2014 WL 356636, at \*56 (U.S. Jan. 29, 2014); *Halliburton II, Brief for Petitioners*, 2013 WL 6907610, at \*29, 55 & 56 (U.S. Dec. 13, 2013).

<sup>68</sup>See *Halliburton II*, 134 S. Ct. 2398.

<sup>69</sup>Id. at 2417 (Ginsburg, J., concurring).

<sup>70</sup>Fed. R. Evid. 702; Fed. R. Evid. 101 (“These rules apply to proceedings in United States courts.”).

<sup>71</sup>*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993).

<sup>72</sup>See *Comcast*, 133 S. Ct. at 1432–35 (holding that the class was improperly certified without addressing whether the district court must rely on admissible evidence at the class certification hearing); *id.* at 1436 (Ginsburg, J., dissenting) (“Abandoning the question we instructed the parties to brief does ‘not reflect well on the processes of the Court.’”); *Comcast*, 133 S. Ct. 24, 24 (2012) (“Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted limited to the following question: ‘Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.’”); *Wal-Mart*, 131 S. Ct. at 2554 (“The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so, but even if properly considered . . .”).

<sup>73</sup>*Eisen*, 417 U.S. at 178.

<sup>74</sup>*Comcast*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551.

<sup>75</sup>See, *supra*, text accompanying notes 44–63.

<sup>76</sup>See Rutherglen, *supra* note 39, at 885.

<sup>77</sup>Fed. R. Civ. P. 301.

<sup>78</sup>*Halliburton II*, 134 S. Ct. at 2411.

<sup>79</sup>15 U.S.C.A. § 78j(b); *see also* 21B Fed. Prac. & Proc. Evid. § 5123 (2d ed. 2014) (“[T]he better view is that a statute ‘otherwise provides’ only when it explicitly provides for some effect other than that specified by Rule 301.”).

<sup>80</sup>*St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507–11, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 62 Fair Empl. Prac. Cas. (BNA) 96, 61 Empl. Prac. Dec. (CCH) P 42322, 37 Fed. R. Evid. Serv. 581 (1993) (applying Rule 301 to the burdens of production and persuasion under the *McDonnell Douglas* framework); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 Fair Empl. Prac. Cas. (BNA) 965, 5 Empl. Prac. Dec. (CCH) P 8607 (1973) (holding modified by, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 16 Employee Benefits Cas. (BNA) 1881, 61 Fair Empl. Prac. Cas. (BNA) 793, 61 Empl. Prac. Dec. (CCH) P 42186 (1993)).

<sup>81</sup>*See, supra*, text accompanying notes 44–63.

<sup>82</sup>H.R. Conf. Rep. 93-1597, 1974 U.S.C.C.A.N. 7098, 7099, 1974 WL 11681 (Dec. 15, 1974) (adopting the Senate amendment) (“Under the Senate amendment, a presumption is sufficient to get a party past an adverse party’s motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact.”).

<sup>83</sup>21B Fed. Prac. & Proc. Evid. § 5126 (2d ed. 2014) (applying Rule 301 to the presumption of mailing, which is an element of the plaintiff case) (“In the first situation, the party testifies to the basic facts of the mailing presumption and the opponent introduces no evidence to prove non-receipt but moves for a directed verdict on the issue of notice. Here the motion must be denied . . .”); *Jones on Evid. Civ. & Crim’l* § 4:10 (7th ed. 1992) (“The presumption satisfies a party’s burden of production as to the presumed fact. It therefore enables a party to survive a motion for a directed verdict (as to the presumed fact) at the end of its direct case.”).

<sup>84</sup>Weinstein’s Fed. Evid. § 301.02[1] (2d ed. 2014) (“Under this rule, if a basic fact (Fact A) is established, then the fact-finder must accept that the presumed fact (Fact B) has also been established, unless the presumption is rebutted.”).

<sup>85</sup>*McDonnell Douglas*, 411 U.S. at 802.

<sup>86</sup>*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 25 Fair Empl. Prac. Cas. (BNA) 113, 25 Empl. Prac. Dec. (CCH) P 31544, 9 Fed. R. Evid. Serv. 1 (1981).

<sup>87</sup>*Id.* at n. 7 (characterizing this initial showing under *McDonnell Douglas* as “the establishment of a legally mandatory, rebuttable presumption”).

<sup>88</sup>*Halliburton II*, 134 S. Ct. at 2414.

<sup>89</sup>Handbook of Fed. Evid. § 301.12 (7th ed. 2012) (“Pursuant to Rule 301 adopting the ‘bursting bubble’ theory, a presumption vanishes entirely upon the introduction of evidence sufficient to support a finding by a reasonable jury that the nonexistence of the presumed fact is more probably true than not true. The bursting bubble theory is easy to apply, since the court need only determine whether the requisite contrary evidence has been introduced . . . If the court finds in the negative, the jury is instructed to find the presumed fact if they find the basic fact to have been proved.”); *Jones on Evid. Civ. & Crim’l* § 4:45 (7th ed. 1992) (“If the party relying on the presumption satisfies its burden of production as to the basic facts and the party adversely affected by the presumption fails to satisfy its burden of production to rebut the presumed fact, the lat-

ter party suffers a directed verdict as to the presumed fact.”).

<sup>90</sup>21B Fed. Prac. & Proc. Evid. § 5126 (2d ed. 2014) (“Most writers reject this invitation to anarchy and interpret Rule 301 to require that rebutting evidence suffice to support a finding of the nonexistence of the presumed fact . . . The case law supports this reading of Rule 301.”); Weinstein’s Fed. Evid. § 301.02[2] (2d ed. 2014) (“Evidence presented to rebut a presumption must be sufficient to overcome a directed verdict.”); Handbook of Fed. Evid. § 301.1 (7th ed. 2012) (“If evidence is introduced sufficient to support a finding contrary to the existence of the presumed fact, the presumption is rebutted and has no further function at the trial.”); Fed. R. of Evid. Manual § 301.02[4] (10th ed. 2011) (“The rule does not explicitly state how much opposing evidence is needed to take a presumption out of a case. However, the only logical conclusion is that the opponent must produce the same amount of evidence necessary to avoid a directed verdict or peremptory instruction in the usual context of a civil case.”).

<sup>91</sup>H.R. Conf. Rep. 93-1597, 1974 U.S.C.C.A.N. 7098, 7099, 1974 WL 11681 (Dec. 15, 1974) (“If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.”); *see also* 21B Fed. Prac. & Proc. Evid. § 5126 (2d ed. 2014) (applying Rule 301 to the presumption of mailing, which is an element of the plaintiff case) (“[S]uppose that after the proponent has established the basic facts of the mailing presumption (whether by mailing or otherwise), the opponent responds with evidence that the notice was never received; that is, the opponent produces evidence of the nonexistence of the presumed fact . . . [E]ven in the face of countervailing evidence the Rule 301 presumption retains sufficient vitality to compel an instruction . . . Writers agree that dissipation of the 301 presumption does not mean that the opponent is entitled to a directed verdict; but they are more likely to limit this to presumptions that have a logical core.”); Handbook of Fed. Evid. § 301.1 (7th ed. 2012) (“The disappearance of the presumption does not deprive the offered evidence of whatever probative value it otherwise has. Thus the natural inference, if any, which flows from the basic fact remains to be considered. Under certain circumstances, such natural inference may be itself sufficient to support a jury finding.”); Handbook of Fed. Evid. § 301.12 (7th ed. 2012) (“However if the presumption is found to have been rebutted, i.e., the bubble has burst, any underlying inference remains to be considered by the trier of fact and is a potential subject for jury instruction.”); Jones on Evid. Civ. & Crim’l § 4:10 (7th ed. 1992) (“[After the presumption disappears,] [t]he ultimate burden of persuasion remains where it rested from the outset; a jury may still infer the presumed fact from the basic facts, but only if it finds the inference sufficiently probable or persuasive.”).

<sup>92</sup>21B Fed. Prac. & Proc. Evid. § 5126 (2d ed. 2014) (applying Rule 301 to the presumption of mailing, which is an element of the plaintiff case) (“Returning now to our hypothetical case about the use of the mailing presumption to prove notice, we must consider a fourth possibility; although improbable in practice, the opponent of the presumption might carry the ‘third burden’ of proof by producing so much evidence of non-receipt that no reasonable jury could find that notice was received . . . When the opponent carries the ‘third burden,’ this shifts the burden of production back to the proponent who must introduce other evidence of receipt or suffer a directed verdict.”).

<sup>93</sup>*Burdine*, 450 U.S. at 254.

<sup>94</sup>*Id.* at 255.

<sup>95</sup>*St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125

L. Ed. 2d 407, 62 Fair Empl. Prac. Cas. (BNA) 96, 61 Empl. Prac. Dec. (CCH) P 42322, 37 Fed. R. Evid. Serv. 581 (1993) (“At the close of the defendant’s case, the court is asked to decide whether an issue of fact remains for the jury to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—i.e., has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action.”).

<sup>96</sup>*Burdine*, 450 U.S. at 255 (“If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted.”); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105, 82 Fair Empl. Prac. Cas. (BNA) 1748, 78 Empl. Prac. Dec. (CCH) P 40045 (2000) (“Respondent met this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records.”).

<sup>97</sup>*Reeves*, 530 U.S. at 148.

<sup>98</sup>*Burdine*, 450 U.S. at 255 n.10 (“In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case.”).

<sup>99</sup>*Reeves*, 530 U.S. at 148–49 (“Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff’s prima facie case, the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly may be considered on a motion for judgment as a matter of law.”).

<sup>100</sup>*Hicks*, 509 U.S. at 511; *see also Burdine*, 450 U.S. at 255 n.10 (“Indeed, there may be some cases where the plaintiff’s initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant’s explanation.”).

<sup>101</sup>*See, supra*, text accompanying notes 42–43.

<sup>102</sup>*See, supra*, text accompanying notes 44–63.

<sup>103</sup>*See, supra*, text accompanying notes 81–100.

<sup>104</sup>*Local 703, I.B. of T. Grocery and Food Employees Welfare Fund v. Regions Financial Corp.*, 2014 WL 6661918 (N.D. Ala. 2014).

<sup>105</sup>*Id.* at \*3.

<sup>106</sup>*Id.* at \*6.

<sup>107</sup>*Id.* at \*8.

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* at \*8–10.

<sup>111</sup>*E.g., McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, Fed. Sec. L. Rep. (CCH) P 98152, 89 Fed. R. Serv. 3d 756 (S.D. N.Y. 2014) (“*Halliburton II* did not change Second Circuit case law . . .”).

<sup>112</sup>*In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 484, Fed. Sec. L. Rep. (CCH) P 94861, 71 Fed. R. Serv. 3d 1144 (2d Cir. 2008) (abrogated by, *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013)) (“[D]efendants are allowed to rebut the presumption, prior to class

certification, by showing, for example, the absence of a price impact.”); *In re Sadia, S.A. Securities Litigation*, 269 F.R.D. 298, 314, Fed. Sec. L. Rep. (CCH) P 95806 (S.D. N.Y. 2010) (“The burden then shifts to Sadia to demonstrate by a preponderance of the evidence that Sadia’s misstatements and omissions had *no price impact*.”); *Fogarazzo v. Lehman Bros., Inc.*, 263 F.R.D. 90, 103 (S.D. N.Y. 2009) (“The Court therefore finds that plaintiffs are entitled to the fraud on the market presumption. It is defendants’ burden to rebut the presumption by a preponderance of the evidence by demonstrating that RSL did not experience any price impact as a result of the publication of analyst reports.”).

<sup>113</sup>9B Fed. Prac. & Proc. Civ. § 2524 (3d ed.) (“The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury might reasonably find a verdict for that party . . . Although Rule 50 permits judgment as a matter of law if there is no legally sufficient basis to find for the nonmovant, it has been stated that Rule 50 requires a legally sufficient evidentiary basis to find for the movant. These two formulations are not equal, and the second appears erroneous.”).

<sup>114</sup>*Halliburton II*, Oral Argument Transcript, at 47:10-13 (March 5, 2014) (J. Breyer, questioning), at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-317\\_e18f.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-317_e18f.pdf).

<sup>115</sup>*Halliburton II*, Oral Argument Transcript, at 47:14-16 (March 5, 2014) (Malcolm L. Stewart, Deputy Solicitor General, responding) (“If the class were defined in that manner, as people who had no such information, then—the class wouldn’t splinter.”).