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Price Impact Possibilities

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*By Wendy Gerwick Couture**

I. Introduction

In *Basic Inc. v. Levinson*, the Court adopted the fraud-on-the-market presumption of reliance.[1] This presumption encompasses two constituent presumptions: first, material misrepresentations publicly disseminated into an efficient market are presumed to be reflected in the market price; and second, plaintiffs are presumed to rely on the integrity of the market price when making their investment decisions.[2] When these two constituent presumptions are combined, plaintiffs are presumed to rely on the misrepresentations themselves when purchasing or selling securities.

In *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), the Court held that defendants could rebut the fraud-on-the-market presumption of reliance at the class certification stage by showing the absence of "price impact":

> 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.[3]

In effect, the absence of price impact would directly undercut the first constituent presumption of the *Basic* presumption.[4] The price impact inquiry is binary—"simply 'was there impact,' not 'how large was the distortion.' "[5]

In the wake of *Halliburton II*, courts and scholars have wrestled with the focus of the price impact inquiry. Assuming that the case involves an unduly positive statement, does the price impact inquiry focus on the existence of a price increase at the time of the statement, a price drop upon the disclosure of the truth, or both? In this essay, I identify ten unique scenarios (or price impact possibilities) and argue that the appropriate price impact inquiry varies depending on which scenario is alleged.

This essay proceeds in five additional parts. In Part II, I explain the current uncertainty about the focus of the price impact inquiry. In Part III, I argue that "price impact" is best understood

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as "price distortion," such that it requires a comparison with the no-fraud counterfactual scenario. In Part IV, I identify the variables relevant to the no-fraud counterfactual scenario and combine these variables to identify ten potential scenarios, each with a unique price impact inquiry. In Part V, I consider the implications of these ten price impact possibilities, and, in Part VI, I briefly conclude.

II. Uncertainty About the Focus of the Price Impact Inquiry

In *Halliburton II*, the Court stated that defendants could rebut the fraud-on-the-market presumption of reliance with "evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock."[6] But the Court did not provide guidance on the circumstances in which the inquiry should focus on front-end impact, back-end impact, or both.[7] For example, Geoffrey Miller asks: "[W]hat happens when the defendant introduces evidence showing that the price of the security was not impacted when the truth came out, but the plaintiff responds with evidence showing that the price was impacted when the false statement was originally made?"[8]

To date, most courts have focused on back-end impact.[9] As explained by Merritt B. Fox, this has a logical basis: "If the correction negatively affects price at the time of its disclosure, the misstatement must have made the price higher than it otherwise would have been. Why else, after all, would the truth have had a negative effect on price?"[10] And yet, as recognized by Jill E. Fisch, back-end impact is only "circumstantial evidence of ex ante price distortion."[11] Indeed, back-end impact might demonstrate, not merely a response to the substance of the corrective disclosure, but also a response to the revelation "that the company had previously provided false information to the market (perhaps inadvertently, perhaps not, but false nonetheless)."[12] This second revelation might cause so-called "collateral damage,"[13] incurred because investors might anticipate an SEC investigation or shareholder class action,[14] which would require the firm to expend defense costs[15] and potentially to pay penalties or damages,[16] and because investors might lose trust in the firm's management and internal controls.[17]

The uncertainty about the focus of the price impact inquiry has played out most prominently in the context of alleged confirmatory (or "maintenance") misrepresentations, which merely confirm the market's preexisting (incorrect) expectations and thus, logically, do not move the stock price at the time that the statements become public.[18] For example, as explained by Donald C. Langevoort, "if the market had been anticipating earnings of $3 per share, then lying by reporting earnings of $3 would probably have little if any impact on the price of the stock."[19] Most (but not all[20]) courts[21] and scholars[22] have analyzed the price impact of an alleged confirmatory misrepresentation—not by examining whether there was price movement at the time of the misrepresentation—but by examining whether there was price movement at the time of the corrective disclosure.

In sum, there is uncertainty about the focus of the price impact inquiry. Does the presence of *either* front-end *or* back-end impact always prevent the defendant from rebutting the fraud-on-the-market presumption of reliance, or only in some circumstances (such as alleged confirmatory misrepresentations)? Stated another way, are there any circumstances in which the absence of front-end impact (despite the existence of back-end impact), or the absence of back-end impact (despite the existence of front-end impact), rebuts the presumption?

III. Price Impact as Price Distortion

In order to answer these questions, I first contend that "price impact" should be understood as synonymous with "price distortion" rather than "price movement." The essence of the fraud-on-the-market presumption of reliance is the notion that investors, by trading at the market price, indirectly relied on the alleged misrepresentation because it distorted the market price.[23] In articles published shortly before *Halliburton II*, Professor Fisch described price distortion as "the core concept on which the *Basic*'s reasoning depends,"[24] and Lucian A. Bebchuk & Allen Ferrell argued that "[t]he issue of whether there is a class of investors similarly situated in terms of reliance should turn on whether there is fraudulent distortion."[25]

The *Halliburton II* Court likewise equated the concepts of price impact and price distortion, using the terms interchangeably:

> More than 25 years ago, we held that plaintiffs could satisfy the reliance element of the Rule 10b-5 cause of action by invoking a presumption that a public, material misrepresentation will *distort* the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation. We adhere to that decision . . . [But] defendants 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.[26]

Indeed, post-*Halliburton II*, numerous scholars have treated the concepts of price impact and price distortion as synonymous.[27] Therefore, the price impact inquiry should focus on the existence of price distortion.

Price distortion is inherently comparative. A price is distorted by fraud if there is a difference between (1) the stock price in the world in which the allegedly fraudulent misrepresentation was made (the real world) and (2) the stock price in the imaginary world in which there was no fraud (the no-fraud counterfactual scenario).[28] As Professor Langevoort explains, "price distortion is the difference between the price that prevailed and the price had there been no fraud."[29] Therefore, any inquiry into price impact must likewise include an inquiry into the no-fraud counterfactual scenario.

IV. Price Impact Possibilities

A. Variables Relevant to the No-Fraud Counterfactual Scenario

The applicable no-fraud counterfactual scenario depends on several variables. First, one must identify the relationship among the alleged misrepresentation, the market's expectation, and the corrective disclosure. Second, one must determine whether the no-fraud counterfactual scenario envisions disclosure of the truth or silence.

1. Relationship Among the Misrepresentation, the Market's Expectation, and the Corrective Disclosure

The first variable relevant to the no-fraud counterfactual scenario depends on the relationship among the alleged misrepresentation, the market's expectation prior to the representation, and the alleged corrective disclosure.[30] The Seventh Circuit provided the following helpful examples of how these elements interact to affect the no-fraud counterfactual inquiry:

> For example, say the president of a company lies to the public about earnings ("We made $200 million more than we predicted this year!") and immediately afterward the company's stock price rises by $10. The new price could be inflated by exactly $10 if in reality the company had merely met expectations and its stock price would have remained the same had the president told the truth. Or the inflation could be *less than* $10 if, say, the company really only made $100 million more than predicted and the stock price would have risen by only $5 had the president told the truth. And the inflation might be significantly *more than* $10 if the company had actually made less than predicted and the stock price would have fallen had the truth been known. Note too that a stock can be inflated even if the price remains the same or declines after a false statement because the price might have fallen even more (e.g., "We only lost $100 million this year," when actually losses were $200 million).[31]

In sum, there are five unique scenarios,[32] reflecting differing relationships among the alleged misrepresentation, the market's expectation prior to the representation, and the alleged corrective disclosure. For ease of reference, I have assigned each scenario a shorthand name.

First is the "Misdirecting Misrepresentation." In this scenario, the misrepresentation conveys information that is more favorable than what the market anticipated, while the corrective disclosure conveys information that is worse than what the market had anticipated prior to the misrepresentation.

Second is the "Inflating Misrepresentation." In this scenario, the misrepresentation conveys information that is more favorable than what the market anticipated, while the corrective disclosure conveys information that is consistent with what the market had anticipated prior to the misrepresentation.

Third is the "Aggrandizing Misrepresentation." In this scenario, the misrepresentation conveys information that is more favorable than what the market anticipated; the corrective disclosure conveys information that is still more favorable than what the market had anticipated prior to the misrepresentation, but the corrective information is worse what was conveyed by the misrepresentation.

Fourth is the "Confirming Misrepresentation." In this scenario, the misrepresentation conveys information that is consistent with what the market anticipated, while the corrective disclosure conveys information that is worse than what the market had anticipated prior to the misrepresentation.

Fifth is the "Soft-Landing Misrepresentation." In this scenario, the misrepresentation conveys information that is worse than what the market anticipated, while the corrective disclosure conveys information that is even worse than what was conveyed by the misrepresentation.

2. Accurate Disclosure or Silence

The second variable relevant to the no-fraud counterfactual scenario depends on whether the no-fraud counterfactual scenario envisions (1) disclosure of the truth or (2) silence. For ease of reference, I have labeled the former Type A and the latter Type B.

Type A misrepresentations are made, in lieu of accurate disclosure, when a company has a duty to speak (*e.g.*, because of SEC line-item reporting requirements).[33] The no-fraud counterfactual scenario is accurate disclosure.

Type B misrepresentations are made, in lieu of silence, when a company does not have a duty to speak. The no-fraud counterfactual scenario is silence.[34] Professor Langevoort provides the following example of a Type B misrepresentation:

> Suppose a pharmaceutical company is having troubles with Food & Drug Administration (FDA) inspectors, who are threatening it with the possibility of significant sanctions, which the company is trying

> to head off. Assume further that this is something about which there is no immediate line-item disclosure requirement. However, in some public statement, the company says or suggests that its dealing with the FDA are unproblematic, which is materially false.[35]

Certainly, a company could voluntarily make an accurate disclosure rather than making a Type B misrepresentation, but the securities laws (including the prohibition on securities fraud) do not require the company to do so.

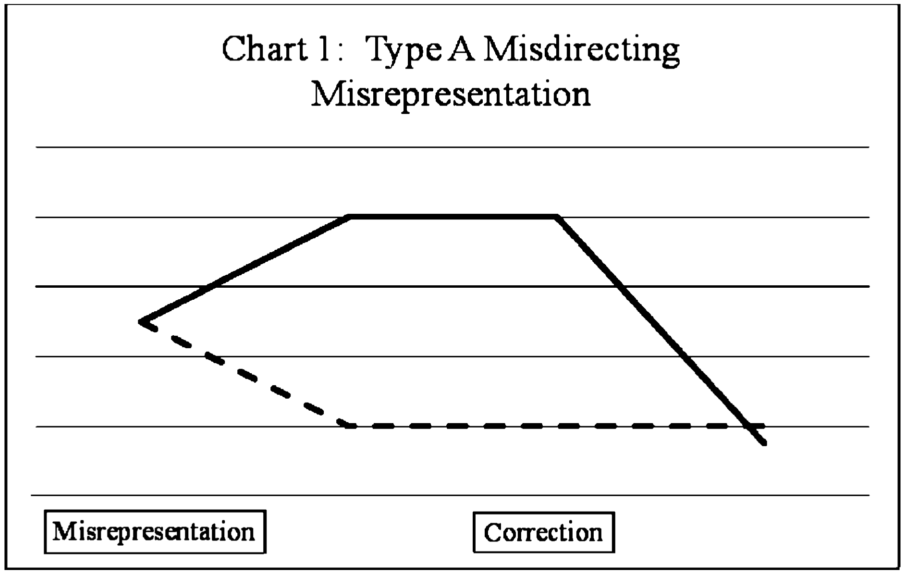
Most courts and scholars have assumed that, when analyzing the price distortion of an alleged misrepresentation, the no-fraud counterfactual scenario is accurate disclosure.[36] This is an incomplete analysis, however, because it assumes that all misrepresentations are Type A. A notable exception is Professor Langevoort, who in a 2009 article discussing the appropriate counterfactual scenario to use when measuring damages, recognized the existence of what I have labeled Type B misrepresentations: "[W]e cannot simply say that the counterfactual to an alleged misrepresentation is necessarily the revelation of the truth. If there was no duty to disclose and silence was a realistic option, then that actually may be the more likely counterfactual 'no fraud' state of the world."[37] In a recent post-*Halliburton II* article, Professor Langevoort applied this earlier insight to price impact.[38]

B. Ten Price Impact Possibilities

Combining the above-identified variables (the five scenarios reflecting varying relationships among the alleged misrepresentation, the market's expectation prior to the representation, and the alleged corrective disclosure and the two types of misrepresentation with differing no-fraud counterfactual scenarios) results in ten price impact possibilities.

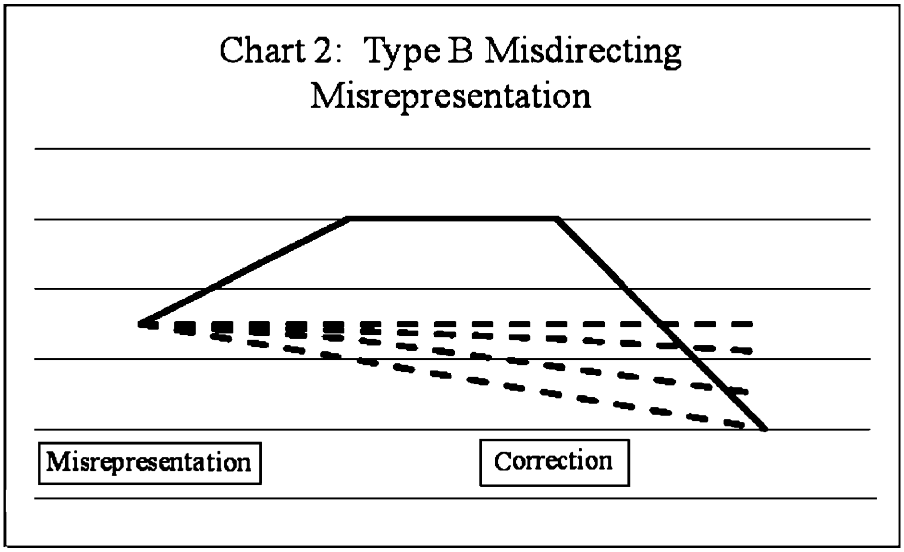
Below are hypothetical price charts depicting each possibility. The solid line represents the actual price movement, and the dotted line represents the no-fraud counterfactual scenario. The difference between the solid and dotted lines reflects the price distortion, or price impact. These charts are simplified. First, they assume that the market price is unaffected by other information between the time of the alleged misrepresentation and the alleged corrective disclosure. Second, they assume that an event study can differentiate the impacts of the alleged misrepresentation and the alleged corrective disclosure from the *simultaneous* impacts of overall market changes[39] and other firm-specific news.[40] Despite these simplifications, these charts provide guidance on the appropriate focus of the price impact inquiry for each possibility.

1. Type A Misdirecting Misrepresentation



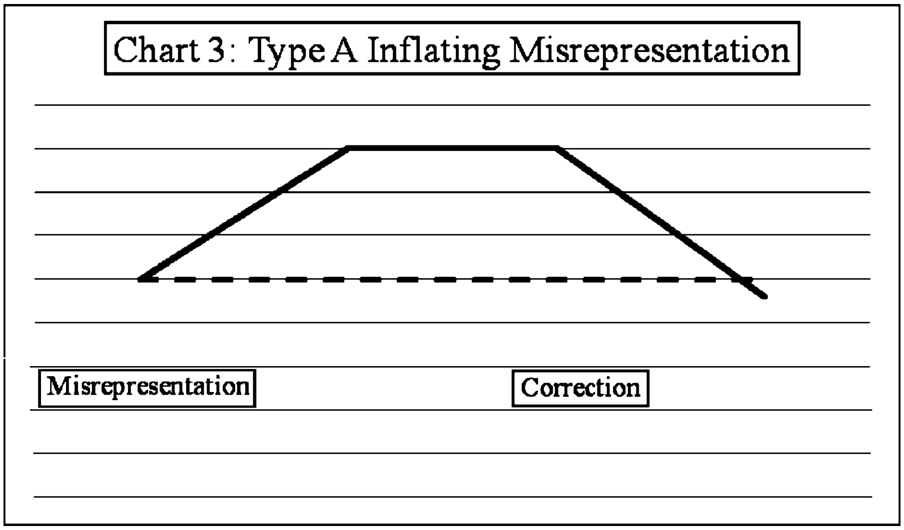
The solid line in Chart 1 depicts the hypothetical price movement of a Misdirecting Misrepresentation, where the alleged misrepresentation conveys information that is more favorable than what the market anticipated, while the corrective disclosure conveys information that is worse than what the market had anticipated prior to the alleged misrepresentation. The dotted line depicts the no-fraud counterfactual scenario, where the company had the duty to disclose the truth at the time of the alleged misrepresentation. The difference between the two lines reflects the price impact of the alleged misrepresentation. As Chart 1 shows, in order for the evidence of price impact to be consistent with this scenario, there should be *both* (1) a front-end price increase, which under-measures the amount of price impact, *and* (2) a back-end price drop, which (because of collateral damage) may slightly over-measure the amount of price impact.

2. Type B Misdirecting Misrepresentation



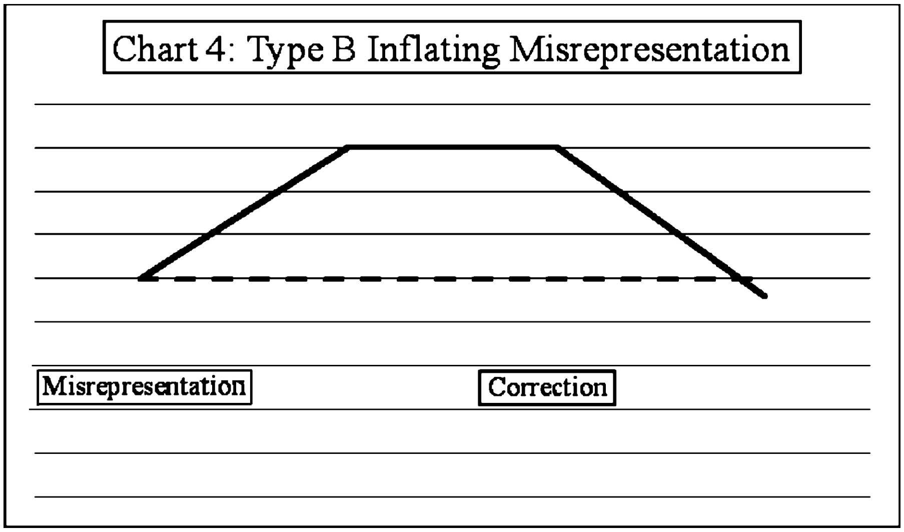
The solid line in Chart 2 is identical to the solid line in Chart 1 because both charts depict a Misdirecting Misrepresentation, but the dotted no-fraud counterfactual line differs. Here, where the company did not have a duty to speak, there is a spectrum of no-fraud counterfactual scenarios. On one end of the spectrum, if the company had merely remained silent, the information might have never reached the market, leading the market price to remain steady (albeit inflated above fundamental value). On the other end of the spectrum, if the company had not misdirected the market, the information might have seeped into the market price even sooner. The difference between the solid line and the spectrum of dotted lines reflects the price impact of the alleged misrepresentation. As Chart 2 shows, in order for the evidence of price impact to be consistent with this scenario, there should be *both* (1) a front-end price increase, which might under-measure the amount of price impact (*e.g.*, if the information would have been reflected in the market price even sooner if the company had remained silent), *and* (2) a back-end price drop, which might over-measure the amount of price impact (*e.g.*, if the information would never have reached the market if the company had not spoken).

3. Type A Inflating Misrepresentation



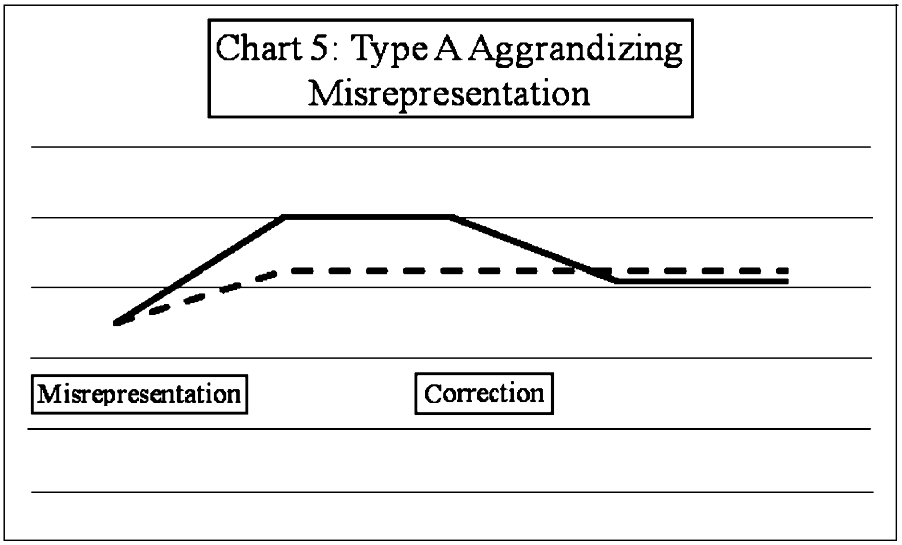
The solid line in Chart 3 depicts the hypothetical price movement of an Inflating Misrepresentation, where the misrepresentation conveys information that is more favorable than what the market anticipated, while the corrective disclosure conveys information that is consistent with what the market had anticipated prior to the misrepresentation. The dotted line depicts the no-fraud counterfactual scenario, where the company had the duty to disclose the truth at the time of the alleged misrepresentation. The difference between the two lines reflects the price impact of the alleged misrepresentation. As Chart 3 shows, in order for the evidence of price impact to be consistent with this scenario, there should be *both* (1) a front-end price increase, which exactly measures the amount of price impact, *and* (2) a back-end price drop, which (because of collateral damage) may slightly overmeasure the amount of price impact.

4. Type B Inflating Misrepresentation



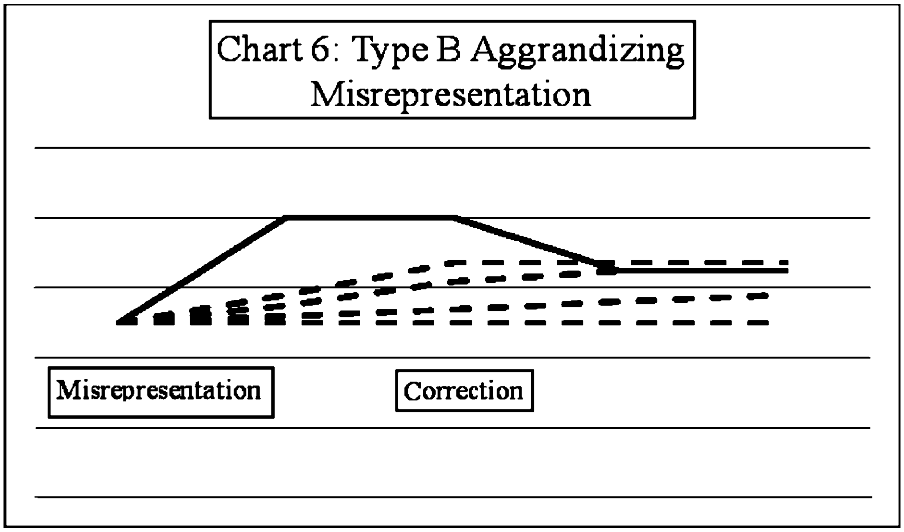
The solid line in Chart 4 is identical to the solid line in Chart 3 because both charts depict an Inflating Misrepresentation. Likewise, the dotted line in Chart 4 is identical to the dotted line in Chart 3 because, in this context, the Type A and Type B counterfactual scenarios do not differ. If the company had remained silent, market expectations would have remained unchanged, consistent with what would have happened if the company had instead disclosed the truth. Therefore, as Chart 4 shows, in order for the evidence of price impact to be consistent with this scenario, there should be *both* (1) a front-end price increase, which exactly measures the amount of price impact, *and* (2) a back-end price drop, which (because of collateral damage) may slightly over-measure the amount of price impact.

5. Type A Aggrandizing Misrepresentation



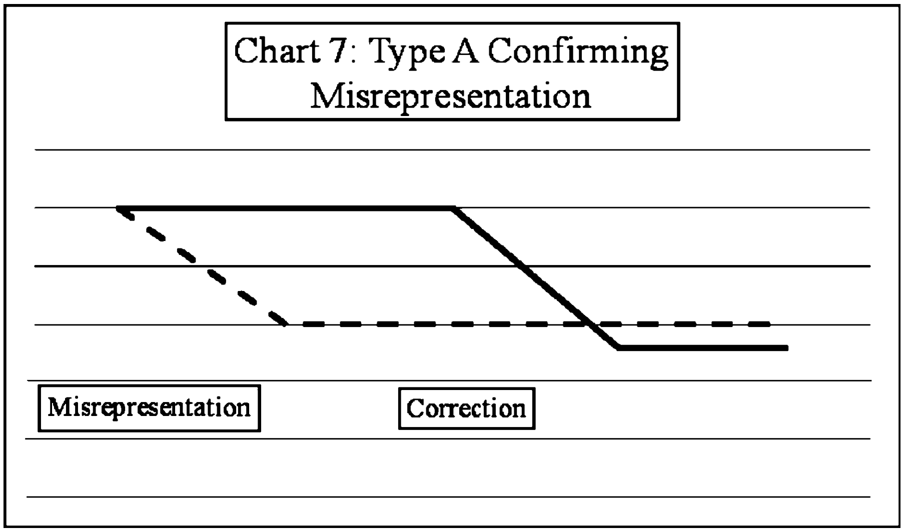
The solid line in Chart 5 depicts the hypothetical price movement of an Aggrandizing Misrepresentation, where (1) the alleged misrepresentation conveys information that is more favorable than what the market anticipated, and (2) the corrective disclosure conveys information that is more favorable than what the market had anticipated prior to the alleged misrepresentation but worse than what was conveyed by the misrepresentation. The dotted line depicts the no-fraud counterfactual scenario, where the company had the duty to disclose the truth at the time of the alleged misrepresentation. The difference between the two lines reflects the price impact of the alleged misrepresentation. As Chart 5 shows, in order for the evidence of price impact to be consistent with this scenario, there should be *both* (1) a front-end price increase, which over-measures the amount of price impact, *and* (2) a back-end price drop, which although more closely correlated with the amount of price impact may (because of collateral damage) slightly over-measure it.

6. Type B Aggrandizing Misrepresentation



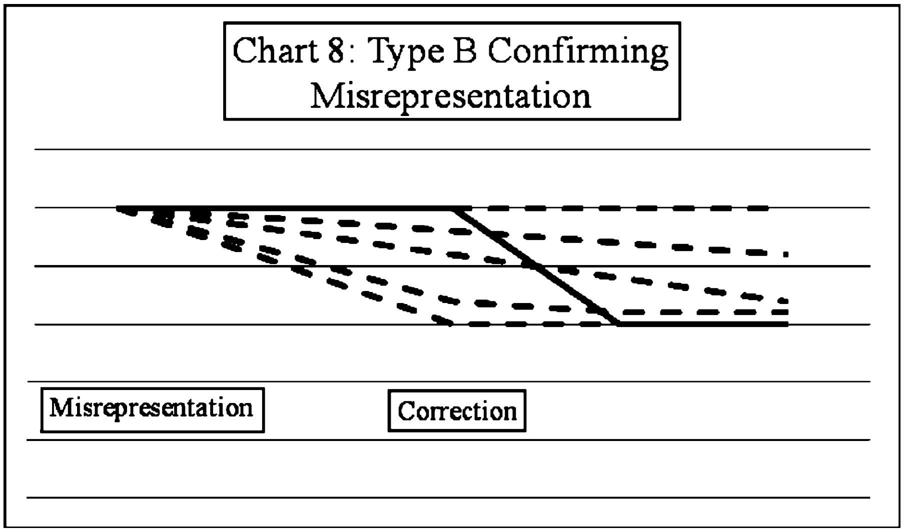
The solid line in Chart 6 is identical to the solid line in Chart 5 because both charts depict an Aggrandizing Misrepresentation, but the dotted no-fraud counterfactual line differs. Here, where the company did not have a duty to speak, there is a spectrum of no-fraud counterfactual scenarios. On one end of the spectrum, if the company had merely remained silent, the information might have never reached the market, leading the market price to remain steady (albeit deflated below fundamental value). On the other end of the spectrum, if the company had not spoken at all, the information might have seeped into the market price even sooner. The difference between the solid line and the spectrum of dotted lines reflects the price impact of the alleged misrepresentation. As Chart 6 shows, in order for the evidence of price impact to be consistent with this scenario, there should be *both* (1) a front-end price increase, which might over-measure the amount of price impact (*e.g.*, if the information would have been reflected in the market price even sooner if the company had remained silent), *and* (2) a back-end price drop, which might under-measure the amount of price impact (*e.g.*, if the information would never have reached the market if the company had not spoken).

7. Type A Confirming Misrepresentation



The solid line in Chart 7 depicts the hypothetical price movement of a Confirming Misrepresentation, where the alleged misrepresentation conveys information that is consistent with what the market anticipated, while the corrective disclosure conveys information that is worse than what the market had anticipated prior to the misrepresentation. The dotted line depicts the no-fraud counterfactual scenario, where the company had the duty to disclose the truth at the time of the alleged misrepresentation. The difference between the two lines reflects the price impact of the alleged misrepresentation. As Chart 7 shows, in order for the evidence of price impact to be consistent with this scenario, there should be a back-end price drop, which may (because of collateral damage) slightly over-measure the price impact.

8. Type B Confirming Misrepresentation



The solid line in Chart 8 is identical to the solid line in Chart 7 because both charts depict a Confirming Misrepresentation, but the dotted no-fraud counterfactual line differs. Here, where the company did not have a duty to speak, there is a spectrum of no-fraud counterfactual scenarios. On one end of the spectrum, if the company had merely remained silent, the information might have never reached the market, leading the market price to remain steady (albeit inflated above fundamental value).[41] On the other end of the spectrum, if the company had not spoken at all, the information might have seeped into the market price even sooner, without the prolonging effect of the confirming misrepresentation.[42] The difference between the solid line and the spectrum of dotted lines reflects the inflationary price impact of the alleged misrepresentation, if any. As Chart 8 shows, in order for the evidence of price impact to be consistent with this scenario, there should be a back-end price drop; but even if there is a back-end price drop, there might not be any inflationary price impact (because the price might have remained inflated absent the alleged misrepresentation and correction).

9. Type A Soft-Landing Misrepresentation

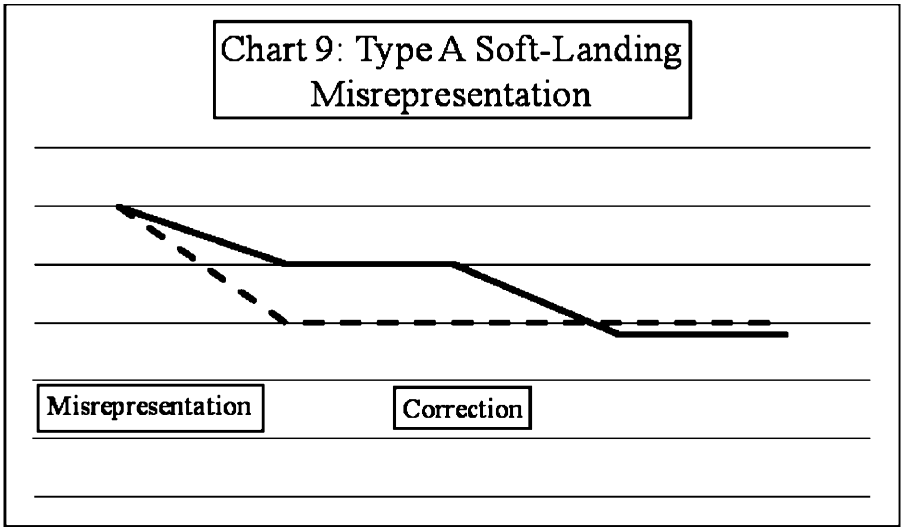
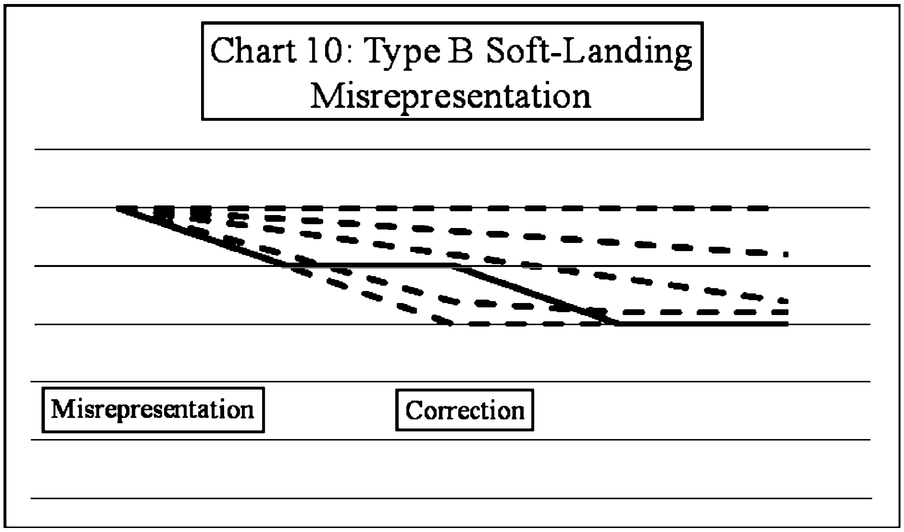


Chart 9: Type A Soft-Landing Misrepresentation

The solid line in Chart 9 depicts the hypothetical price movement of a Soft-Landing Misrepresentation, where (1) the alleged misrepresentation conveys information that is worse than what the market anticipated, and (2) the corrective disclosure conveys information that is even worse than what was conveyed by the alleged misrepresentation.[43] The dotted line depicts the no-fraud counterfactual scenario, where the company had the duty to disclose the truth at the time of the alleged misrepresentation. The difference between the two lines reflects the price impact of the alleged misrepresentation. As Chart 9 shows, in order for the evidence of price impact to be consistent with this scenario, there should be a back-end price drop, which may (because of collateral damage) slightly over-measure the price impact.

10. Type B Soft-Landing Misrepresentation



The solid line in Chart 10 is identical to the solid line in Chart 9 because both charts depict a Soft-Landing Misrepresentation, but the dotted no-fraud counterfactual line differs. Here, where the company did not have a duty to speak, there is a spectrum of no-fraud counterfactual scenarios. On one end of the spectrum, if the company had merely remained silent, the information might have never reached the market, leading the market price to remain steady (albeit inflated above fundamental value). On the other end of the spectrum, if the company had not spoken at all, the information might have seeped into the market price even sooner, without the softening effect of the misrepresentation. The difference between the solid line and the spectrum of dotted lines reflects the inflationary price impact of the alleged misrepresentation, if any. As Chart 10 shows, in order for the evidence of price impact to be consistent with this scenario, there should be a back-end price drop; but even if there is a back-end price drop, there might not be any inflationary price impact (because the price might have been even more inflated absent the alleged misrepresentation and correction).

V. Implications of Price Impact Possibilities

The above charts reveal several insights about the price impact inquiry, each of which is discussed below.

A. The Screening Role of Back-End Impact

For each of the ten price impact possibilities discussed above, a back-end price drop is necessary (but not necessarily sufficient) in order for the evidence to be consistent with price impact (assuming, of course, that an event study can differentiate the impact of the alleged corrective disclosure from the *simultaneous* impacts of overall market changes and other firm-specific news[44]). In Charts 1, 3, 4, 5, 7, and 9, the back-end price drop may slightly over-measure the amount of price impact. In Charts 2, 8, and 10, the back-end price drop may greatly over-measure the amount of price impact, if any. In Chart 6, the back-end price drop may under-measure the amount of price impact. Regardless, however, in each case, absent any back-end price drop associated with the alleged corrective disclosure, the evidence is inconsistent with price impact. Therefore, regardless of the type of alleged misrepresentation, the initial focus of the price impact inquiry should be on the existence, or non-existence, of a back-end price drop.

B. The Appropriate Analysis of Confirming Misrepresentations

As demonstrated by Charts 7 and 8, the price impact inquiry for alleged Confirming Misrepresentations should focus solely on back-end impact and ignore the absence of front-end impact. Although this insight is consistent with the analyses of most courts and scholars to date,[45] it differs from the Eighth Circuit's recent decision in *IBEW Local 98 Pension Fund v. Best Buy Co*.[46]

As alleged in *Best Buy*, the company issued a press release at 8:00 a.m. on September 14, 2010, which announced that Best Buy was increasing its full-year earnings per share ("EPS") guidance by ten cents.[47] In a 10:00 a.m. conference call with analysts that same morning, the CFO stated that "earnings were in line with our original expectations for the year" and that "we are on track to deliver and exceed our annual EPS guidance."[48] On December 14, 2010, Best Buy issued a press release reporting a decline in third quarter sales and a reduction in EPS guidance.[49] The district court held that the 8:00 a.m. press release statement was protected by the safe harbor for forward-looking statements but that the 10:00 a.m. conference call statements were not protected.[50] The district court also certified the class.[51] On interlocutory appeal, the Eighth Circuit considered whether the defendants had rebutted the *Basic* presumption. First, the Eighth Circuit credited evidence that, although the price increased on September 14, the price increase occurred after the 8:00 a.m. press release and before the 10:00 a.m. conference call and thus was not evidence of a front-end impact of the statements in the 10:00 a.m. conference call.[52] Second, the Eighth Circuit reasoned that the "Best Buy executives' conference call statements added nothing to what was already public."[53] Finally, in light of the "overwhelming evidence of no 'front-end' price impact," the court held that Best Buy had rebutted the *Basic* presumption, despite the evidence of a decline in price on December 14.[54]

I argue that, instead, the Eight Circuit's analysis should have proceeded as follows. First, the court should have classified the 10:00 a.m. statements on September 14 as alleged Confirming Misrepresentations. The 10:00 a.m. statements conveyed information that was consistent with what the market anticipated (by virtue of the 8:00 a.m. statement on the same date), while the alleged corrective disclosure on December 14 conveyed information that was worse than what the market had anticipated immediately prior to the 10:00 a.m. statements. Indeed, in dissent, Judge Murphy criticized the majority opinion because "it does not address IBEW's theory that the conference call maintained Best Buy's stock price at its inflated level."[55]

Second, the court should have classified the 10:00 a.m. statements as Type A or Type B. The SEC does not require line-item disclosure of EPS guidance;[56] therefore, if Best Buy had a duty to disclose the truth during the 10:00 a.m. conference call, it would derive from the duty to correct or update the EPS guidance disclosed at 8:00 a.m. As explained by Bruce Mendelsohn and Jesse Brush in a recent article published in this journal, however, the scope of the duties to correct and update are currently unsettled.[57] Drawing from their article, there are two potential arguments for treating these as Type A statements: (1) Best Buy might have had a duty to correct the 8:00 a.m. EPS guidance because, as alleged, it was incorrect at the time that it was disclosed; or (2) Best Buy might have had a duty to update the EPS guidance because it remained alive in the marketplace, having been made merely two hours prior.[58] On the other hand, there are two potential arguments for treating these as Type B statements: (1) Best Buy might not have had a duty to correct the 8:00 a.m. EPS guidance because it was a forward-looking statement rather than a statement of historical fact; and (2) there might not be a duty to update forward-looking statements, regardless of whether they remain alive in the marketplace.[59] Therefore, under current law, it is unclear whether the allegations in Best Buy were appropriately analyzed under Chart 7 or Chart 8.

Regardless, however, contrary to the Eighth Circuit's analysis, the absence of front-end impact was irrelevant. Rather, evidence of a price drop on December 14 upon the alleged corrective disclosure was consistent with price impact. If the 10:00 a.m. statements were properly classified as Type B, despite evidence of a back-end drop, Best Buy could have nonetheless attempted to rebut the *Basic* presumption by arguing that, if the company had merely remained silent about EPS guidance during the 10:00 a.m. conference call, the price would have remained steady.

Indeed, in dissent, Judge Murphy argued: "Best Buy could have rebutted the presumption of reliance by producing evidence showing that the alleged misrepresentations had not counteracted a price decline that would otherwise have occurred. Best Buy produced no such evidence, and the presumption was not rebutted."[60] Therefore, regardless of whether the alleged confirmatory misrepresentations made during the 10:00 a.m. conference call were appropriately classified as Type A or Type B, the Eighth Circuit should have affirmed the district court's order certifying the class.

C. The Special Importance of Burdens of Production and Persuasion for Type B Confirming and Soft-Landing Misrepresentations

As demonstrated by Charts 8 and 10, Type B Confirming and Soft-Landing Misrepresentations present an array of potential price impact scenarios, even assuming a back-end price drop. At one end of the spectrum, even if there is evidence of a back-end price drop, there might not be any price impact (*e.g.*, if the truth would never have reached the market if the company had merely remained silent).[61] At the other end of the spectrum, the back-end price drop might reliably approximate price impact (*e.g.*, if the truth would have reached the market sooner if the company had merely remained silent).[62]

Where on this spectrum a particular case lies depends on the applicable counterfactual scenario. And yet, how might a party prove when (and if) the truth would have reached the market if the company had remained silent? Absent a crystal ball, this is inherently unknowable, and thus unprovable. (Indeed, in response to Judge Murphy's *Best Buy* dissent discussed above in Part V.B., one wonders how Best Buy might have proffered evidence "showing that the alleged misrepresentations had not counteracted a price decline that would otherwise have occurred" if Best Buy had remained silent.[63]) Therefore, the burdens of production and persuasion on price impact are especially important for Type B Confirming and Soft-Landing Misrepresentations.

To date, most courts have placed the burdens of production and persuasion on price impact on the defendant.[64] A few commentators (including this author) have suggested that these burdens should be governed by Federal Rule of Evidence 301, such that the defendant bears the initial burden of production but, if met, the plaintiff bears the ultimate burden of persuasion.[65] Regardless, however, every commentator and court agrees that the defendant bears, at the very least, the initial burden of production. Therefore, in the context of Type B Confirming and Soft-Landing Misrepresentations, assuming the existence of a back-end price drop, the defendant is probably incapable of rebutting the *Basic* presumption, despite the (unprovable) possibility that that truth would never have reached the market if the company had merely remained silent.

D. The Impact on Pleading Incentives

As discussed above in Part V.A., the existence of a back-end price drop associated with the alleged corrective disclosure is necessary in order for the evidence to be consistent with price impact, regardless of which of the ten price impact possibilities is alleged. Yet, as demonstrated by Charts 1-6, the existence of a front-end price increase associated with the alleged misrepresentation is also necessary in order for the evidence to be consistent with price impact for Misdirecting, Inflating, and Aggrandizing Misrepresentations. As such, to the extent that plaintiffs allege a Misdirecting, Inflating, or Aggrandizing Misrepresentation, the absence of *either* a front-end increase *or* a back-end drop should rebut the *Basic* presumption. Therefore, there is an incentive for plaintiffs to allege, at least in the alternative, that all alleged misrepresentations are either Confirming or Soft-Landing Misrepresentations because the absence of a front-end price increase is not inconsistent with price impact for these types of misrepresentations. A number of commentators have already noted that allegations of confirmatory misrepresentations may be more common than allegations of non-confirmatory misrepresentations;[66] in light of the impact of this pleading decision on the price impact inquiry, this trend will likely continue.

VI. Conclusion

In sum, I argue that, because price impact is properly understood as price distortion, the price impact inquiry in inherently comparative. I further argue that the appropriate no-fraud counterfactual scenario depends on (1) whether the alleged misrepresentation is appropriately classified as a Misdirecting, Inflating, Aggrandizing, Confirming, or Soft-Landing Misrepresentation; and (2) whether the alleged misrepresentation is Type A (because the defendant had a duty to speak) or Type B (because the defendant could merely have remained silent). Drawing therefrom, I contend that there are ten price impact possibilities and that the focus of the price impact inquiry depends on which scenario is alleged, as demonstrated above in Charts 1–10. Finally, I argue that this analysis yields meaningful insights about the screening role of a back-end price decrease, the appropriate analysis of alleged Confirming Misrepresentations, the importance of burdens of production and persuasion on price impact, and the incentives for plaintiffs to allege Confirming or Soft-Landing Misrepresentations.

NOTES:

[1]*Basic Inc. v. Levinson*, 485 U.S. 224, 248–49, 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).

[2]*Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414, 189 L. Ed. 2d 339, Fed. Sec. L. Rep. (CCH) P 98003, 88 Fed. R. Serv. 3d 1472 (2014) (hereinafter *Halliburton II*).

[3]*Id.* at 2416.

[4]*Id.* at 2414 ("In the absence of price impact, *Basic* 's fraud-on-the-market theory and presumption of reliance collapse.").

[5]Langevoort, Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton, 57 Ariz. L. Rev. 37, 47 (2015) (hereinafter Langevoort, *Judgment Day*); *accord Strougo v. Barclays PLC*, 312 F.R.D. 307, 327, Fed. Sec. L. Rep. (CCH) P 99015, 93 Fed. R. Serv. 3d 1768 (S.D.N.Y. 2016) ("The fact that other factors contributed to the price decline does not establish by a preponderance of the evidence that the drop in the price of Barclays ADS was not caused *at least in part* by the disclosure of the fraud at LX."); *In re Goldman Sachs Group, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 98823, 2015 WL 5613150, *7 (S.D.N.Y. 2015) ("[The defendants' expert's] analysis fails to demonstrate that no part of the decline was caused by the corrective disclosure."); *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, Fed. Sec. L. Rep. (CCH) P 98584 (N.D. Tex. 2015), leave to appeal granted, 2015 WL 10714013 (5th Cir. 2015) ("Although the Court finds that at least some of Halliburton's stock price decline on that date is likely attributable to uncertainty in the asbestos environment that also impacted other companies with asbestos exposure, Halliburton has not demonstrated that uncertainty caused the entirety of Halliburton's substantial price decline."); *Aranaz v. Catalyst Pharmaceutical Partners Inc.*, 302 F.R.D. 657, 672, Fed. Sec. L. Rep. (CCH) P 98198 (S.D. Fla. 2014) ("[E]ven assuming arguendo that [an important company announcement] was substantially more important than the alleged misrepresentation . . ., it does not follow that the misrepresentation did not account for any of the 42% spike in stock price.").

[6]*Halliburton II*, 134 S. Ct. at 2414.

[7]*See* Greenberg and Wolfe, Halliburton II: Supreme Court Clarifies Longstanding Securities Fraud Class Certification Issue, 46 Tex. J. Bus. L. 17, 30–31 (2014) ("Is it sufficient to offer evidence that the price of the company's stock did not move in response to the alleged misrepresentations at the time the misrepresentations were made? . . . Is the evidence of price decline following a corrective disclosure sufficient for a plaintiff to show price impact at the class certification stage? The Supreme Court did not address these questions in *Halliburt on II*. . .").

[8]Miller, The Problem of Reliance in Securities Fraud Class Actions, 57 Ariz. L. Rev. 61, 67 (2015).

[9]*E.g.*, *Burges v. Bancorpsouth, Inc.*, 2016 WL 1701956, *3 (M.D. Tenn. 2016) ("Defendants argue that the proper focus is on the price impact at the time of the alleged misrepresentations themselves, not at the time of the later corrective statement, but *Halliburton* says only that defendants may present evidence that the misrepresentation did not in fact affect the stock price, not that the price impact is determined only at the time of the alleged misrepresentations."); *Hatamian v. Advanced Micro Devices, Inc.*, Fed. Sec. L. Rep. (CCH) P 99040, 2016 WL 1042502, *7 (N.D. Cal. 2016) ("Price impact in

securities fraud cases is not measured solely by price increase on the date of a misstatement; it can be quantified by decline in price when the truth is revealed."); *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, Fed. Sec. L. Rep. (CCH) P 98584 (N.D. Tex. 2015), leave to appeal granted, 2015 WL 10714013 (5th Cir. 2015) ("Fraud on the market securities litigation typically focuses on a price change at the time of a corrective disclosure. If a particular disclosure causes the stock price to decline at the time of disclosure, then the misrepresentation must have made the price higher than it would have otherwise been without the misrepresentation.").

[10]Fox, Halliburton II: It All Depends on What Defendants Need to Show to Establish No Impact on Price, 70 Bus. Law. 437, 441 (2015).

[11]Fisch, The Trouble with Basic: Price Distortion After Halliburton, 90 Wash. U.L. Rev. 895, 922 (2013) (hereinafter Fisch, *Trouble*); *see also* Fox, *supra* note 10, at 441 (characterizing "the price effect of the corrective disclosure" as "only an indirect way of figuring out whether the original misstatement inflated price in the first place").

[12]Coates IV, Securities Litigation in the Roberts Court: An Early Assessment, 57 Ariz. L. Rev. 1, 15 (2015) ("Corrective disclosure, it should be remembered, reveals two things which affect price simultaneously: they reveal the information in the corrective disclosure, and they reveal that the company had previously provided false information to the market (perhaps inadvertently, perhaps not, but false nonetheless).").

[13]Dunbar and Sen, Counterfactual Keys to Causation and Damages in Shareholder Class-Action Lawsuits, 2009 Wis. L. Rev. 199, 231.

[14]Fisch, The Future of Price Distortion in Federal Securities Fraud Litigation, 10 Duke J. Const. L. & Pub. Pol'y 87, 95 (2015) (hereinafter Fisch, *Future*) ("The corrective disclosure may also reveal the potential for subsequent litigation, leading the market to reflect that litigation risk in its price reaction.").

[15]Booth, What Counts as Price Impact for Securities Fraud Purposes?, 10 Va. L. & Bus. Rev. 37, 50 (2015) ("[S]tock price may fall still further . . . to reflect the direct expenses of defense, including fines and penalties, as well as attorney fees and expenses . . .").

[16]*Id.* at 49 ("[S]tock price falls a bit more because the defendant company must pay the claim, thus reducing cash and magnifying the loss—hereinafter 'feedback damages.' To be sure, the claim may be paid by insurance, but the company eventually pays through higher insurance rates going forward.").

[17]Booth, *supra* note 15, at 50 ("[S]tock price may fall still further to reflect management misbehavior and a concomitant loss of market trust . . ."); Fisch, *Future*, *supra* note 14, at 95 ("Among other things, the corrective disclosure reveals not just the falsity of the prior statement but questions about management integrity or internal controls.").

[18]Gross, The Road Map for Class Certification Post-Halliburton II, 46 Loy. U. Chi. L.J. 485, 492 (2015) ("In the absence of any earnings 'surprise,' the market price will likely remain the same and be 'maintained' by the 'confirmatory lie.' "); Bebchuk & Ferrell, Rethinking Basic, 69 Bus. Law. 671, 692 (2014) ("Second, there are situations in which an event study at the time of misrepresentation will be of limited utility. If the misstatement was a so-called confirmatory lie—that is, a misstatement made so as to meet market expectations—then a failure to document a price reaction to it would not be expected *even* assuming the misstatement had a fraudulent impact. In such a situation, the confirmatory lie might prevent a stock price drop that would have occurred had the truth been told."); Fisch, *Trouble*, *supra* note 11, at 921 ("Many instances of se-

curities fraud involve attempts to avoid or delay disclosure of negative corporate developments such as a decline in earnings, problems with a product, and the like. The fraud may take the form of failing to disclose new developments or repeating overly positive disclosures from the past that are no longer accurate. Because the fraud merely confirms existing market expectations, it is unlikely to have any immediate effect on stock price.").

[19]Langevoort, Compared to What? Econometric Evidence and the Counterfactual Difficulty, 35 J. Corp. L. 183, 185 (2009) (hereinafter Langevoort, Compared to What?).

[20]*IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 782, Fed. Sec. L. Rep. (CCH) P 99067 (8th Cir. 2016) ("This overwhelming evidence of no 'front-end' price impact rebutted the *Basic* presumption."); *id.* at 784 (Murphy, J., dissenting) ("[The majority] does not address IBEW's theory that the conference call maintained Best Buy's stock price at its inflated level. The majority has thus not joined the circuit courts that have recognized price maintenance theories to be cognizable under the Securities Exchange Act.").

[21]*E.g.*, *In re Goldman Sachs Group, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 98823, 2015 WL 5613150, *6 (S.D.N.Y. 2015) ("Plaintiffs' argument is that the misstatements simply served to maintain an already inflated stock price . . . [S]o the fact that there was no stock price increase when the statements were made does not suggest a lack of price impact."); *City of Sterling Heights General Employees' Retirement System v. Prudential Financial, Inc.*, Fed. Sec. L. Rep. (CCH) P 98620, 2015 WL 5097883, *12 n.8 (D.N.J. 2015) ("[I]t does not necessarily follow from the mere absence of a statistically significant change in the stock price that there was no price impact. It is possible that those statements assisted in maintaining an inflated price for Prudential's stock—a possibility that Defendants do not rule out."); *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 95, Fed. Sec. L. Rep. (CCH) P 98605 (S.D.N.Y. 2015) ("Plaintiffs' theory is that the false LIBOR submissions artificially maintained the stock price, not that they artificially inflated the price of the stock. For these reasons, a regression analysis seeking to prove market efficiency that fails to show statistically significant price movements on the days identified in the Complaint in which false LIBOR statements were made does not necessarily sever the link between 'the price received (or paid) by the plaintiff[s.]' "); *Local 703, I.B. of T. Grocery and Food Employees Welfare Fund v. Regions Financial Corp.*, 2014 WL 6661918, *4 (N.D. Ala. 2014) ("[D]efendants recognize that, accepting plaintiffs' theory that the price of Regions' stock remained artificially high due to misrepresentative 'confirmatory information,' then a price impact should be evidence on the date of defendants' 'corrective disclosure.' ").

[22]*E.g.*, Gross, *supra* note 18, at 493 (discussing "price maintenance/confirmatory lies") ("[S]o long as the price moves significantly at the time of the corrective disclosure, and the correction clearly relates to a series of prior statements, 'impact' should be evident."); Coates, *supra* note 12, at 15 ("In such [confirmatory misrepresentation] cases, there will only be price impact when corrective disclosure is made, not at the time the lie was made."); Murdock, The Significance and Impact of Price Distortion in the Fraud-on-the-Market Theory After Halliburton II, 46 Loy. U. Chi. L.J. 551, 581 (2015) ("[W]here the misleading statements are confirmatory, price distortion is established not by price movement at the time of the misrepresentation, but rather when the corrective disclosure is made."); Bebchuk & Ferrell, *supra* note 18, at 692 ("Another potential use of an event study would be to measure whether there was a price reaction when the market learned the truth about the misstatement—that is, at the time of a corrective disclosure. This could be relevant to the question of

whether the misstatement at the time it was made resulted in fraudulent distortion (even if it was a confirmatory lie).").

[23]*Basic*, 485 U.S. at 241–49.

[24]Fisch, *Trouble*, *supra* note 11, at 913.

[25]Bebchuk & Ferrell, supra note 18, at 686.

[26]*Halliburton II*, 134 S. Ct. at 2417 (emphasis added).

[27]*E.g.*, Langevoort, *Judgment Day*, *supra* note 5, at 56 (equating "price impact" with "price distortion"); Gross, *supra* note 18, at 490 ("[F]raud on the market" has now come full circle . . ., with price impact now restored to the formula to satisfy class-wide reliance by demonstrating that defendants' deceptive statements distorted the price of the stock in question . . ."); Murdock, *supra* note 22, at 559 (equating "price impact" with "price distortion").

[28]*Glickenhaus & Co. v. Household Intern., Inc.*, 787 F.3d 408, 415, Fed. Sec. L. Rep. (CCH) P 98527 (7th Cir. 2015) ("It's very difficult to know exactly how much stock-price inflation a false statement causes because it requires knowing a counterfactual: what the price would have been without the false statement."); *see also* Fox, *supra* note 10, at 440 ("Did the misstatement inflate the price relative to what it would have been but for the misstatement . . .?"); Fisch, *Trouble*, *supra* note 11, at 906 ("The counterfactual nature of the reliance inquiry . . . extends to misrepresentation cases as well.").

[29]Langevoort, *Judgment Day*, *supra* note 5, at 56; *see also* Bebchuk & Ferrell, *supra* note 18, at 688 ("Fraudulent distortion merely turns on whether the market price is different from what it otherwise would have been absent the fraud."); Langevoort, *Compared to What?*, *supra* note 19, at 183 (discussing the appropriate counter-factual scenario in the context of measuring damages) ("The elegant vision—indeed, any use of event studies or other econometric evidence—says that we are to measure the historic state of the world resulting from the alleged fraud against a counterfactual world of no fraud . . .").

[30]*See* Gross, *supra* note 18, at 493 ("Thus, experts will need to consider not only whether the price moved at the time of the original announcement, but the market expectations at the time."); Bebchuk & Ferrell, *supra* note 18, at 691 ("If the misstatement was a surprise to the market, such as the case when our hypothetical firm told the market that its earnings were $2 when the market expected only $1, a statistical analysis of whether the market price reacted upon learning of the information could be probative of whether fraudulent distortion exists.").

[31]*Glickenhaus & Co. v. Household Intern., Inc.*, 787 F.3d 408, 415, Fed. Sec. L. Rep. (CCH) P 98527 (7th Cir. 2015).

[32]*Compare* Murdock, *supra* note 22, at 562 (identifying "two basic paradigms involving fraudulent misrepresentations"); Graziano, Halliburton II: A Net Positive for Plaintiff Investors, 51 Trial 16, 19 (2015) ("There are three principal scenarios.").

[33]*See* Langevoort and Gulati, The Muddled Duty to Disclose Under Rule 10b-5, 57 Vand. L. Rev. 1639 (2004).

[34]*Basic*, 485 U.S. at 239 n.17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.").

[35]Langevoort, *Compared to What?*, *supra* note 5, at 186.

[36]*E.g.*, Murdock, *supra* note 22, at 563–64 ("[A]s a sophisticated analysis would appreciate, there is clearly price distortion because, *if the truth were told*, the price would decline as opposed to remaining stable.") (emphasis added);

Fisch, *Trouble*, *supra* note 11, at 922 ("The amount of the price distortion . . . requires counterfactual analysis—the extent to which the market would have reacted *if accurate disclosure had been made*.") (emphasis added); *see* Langevoort, *Compared to What?*, *supra* note 19, at 187 ("To date, courts have ignored this problem almost entirely by simply invoking the truth-telling counterfactual as a matter of course.").

[37]Langevoort, *Compared to What?*, supra note 19, at 185; *id.* at 183–84 (" 'No fraud' is understood to mean 'if the truth had been told.' . . . [I]s it necessarily the right counterfactual in the first place? After all, there is another way of thinking about 'no fraud': the hypothetical state of the world had the defendant never said anything false or misleading.").

[38]Langevoort, *Judgment Day*, *supra* note 5, at 57 ("Hence there is a large category of cases where it is ambiguous what is meant by comparing the price that prevailed at the time of the fraud with the price that would have prevailed in the absence of the fraud. Is it the world where there simply was no lie or half-truth (but in which the issuer could have kept quiet about the truth) or are we assuming a (legally non-existent) duty to reveal everything?").

[39]Fox, *supra* note 10, at 443 ("The first step in conducting an event study is to determine the market-adjusted change in the issuer's share price at the time that the corrective disclosure becomes public. The market-adjusted change is the difference between the observed price change and what the simultaneous change in overall stock market prices predicts would have been the issuer's price change.").

[40]*Id.* ("The second step is to determine the likelihood that, among the bits of firm-specific news affecting price this day, the corrective disclosure is one.").

[41]*See* Langevoort, *Compared to What?*, *supra* note 19, at 185 ("To stay with the example [in which the company states that it expects earnings of $3], assume that the market was expecting earnings of $3, and the company privately discovers that earnings are only $2.50. If it said nothing or engaged in mere puffery, in all likelihood the expectations would not change. If we were to use that counterfactual instead of the truth-revelation one, there are no damages at all to recover.").

[42]*See FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1314, Fed. Sec. L. Rep. (CCH) P 96548 (11th Cir. 2011) ("Fraudulent statements that prevent a stock price from falling can cause harm by prolonging the period during which the stock is traded at inflated prices. We therefore hold that confirmatory information that wrongfully prolongs a period of inflation—even without increasing the level of inflation—may be actionable under the securities laws."); *id.* at 1311 ("That is, defendants can be liable for knowingly and intentionally causing a stock price to remain inflated by preventing preexisting inflation from dissipating from the stock price.").

[43]*E.g.*, *Schleicher v. Wendt*, 618 F.3d 679, 684, Fed. Sec. L. Rep. (CCH) P 95932 (7th Cir. 2010) ("That Conseco's stock was falling during the class period is irrelevant; fraud could have affected the speed of the fall. If a firm says that it lost $100 million, when it actually lost $200 million—and analysts had expected it to announce that it lost only $50 million—then the announcement will cause the stock's price to fall. But the fall won't be as much as the truth had produced.").

[44]*See*, *supra*, notes 39-40.

[45]*See*, *supra*, notes 21-22.

[46]*IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 784, Fed. Sec. L. Rep. (CCH) P 99067 (8th Cir. 2016).

[47]*Id.* at 777.

[48]*Id.*

[49]*Id.*

[50]*Id.* at 778.

[51]*Id.* at 777.

[52]*Id.* at 783.

[53]*Id.* at 782.

[54]*Id.* at 782–83.

[55]*Id.* at 784.

[56]Skadden, Arps, Slate, Meagher & Flom LLP, Corporate Finance Alert: Earnings Guidance (Sept. 2012), at http://www.skadden.com/newsletters/Corporate_Finance_Alert_Earnings_Guidance.pdf.

[57]Mendelsohn and Brush, The Duties to Correct and Update: A Web of Conflicting Case Law and Principles, 43 Sec. Reg. L.J. 67 (2015).

[58]*Id.*

[59]*Id.*

[60]*Best Buy*, 818 F.3d at 784.

[61]*See* Langevoort, *Compared to What?*, *supra* note 19, at 185.

[62]*See* Lipton, Searching for Market Efficiency, 57 Ariz. L. Rev. 71, 75 (2015) ("[I]t is not implausible that the statements involved in these kinds of claims do influence market prices, at least some of the time. At the very least, a company's sudden failure to proclaim compliance with the law when it had previously done so would likely be noticed, particularly in today's world of computerized analysis of public disclosures.").

[63]*Best Buy*, 818 F.3d at 784.

[64]*E.g.*, *Strougo v. Barclays PLC*, 312 F.R.D. 307, 326, Fed. Sec. L. Rep. (CCH) P 99015, 93 Fed. R. Serv. 3d 1768 (S.D.N.Y. 2016) ("Defendants also attempt to prove a lack of price impact by reference to the price change on the corrective disclosure date. To succeed, defendants must prove by a preponderance of the evidence that the price drop on the corrective disclosure date was not due to the alleged fraud."); *In re Goldman Sachs Group, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 98823, 2015 WL 5613150, *7 (S.D.N.Y. 2015) ("But here, where Defendants cannot demonstrate a complete absence of price impact, and where Plaintiffs have demonstrated an efficient market, the *Basic* presumption applies . . ."); *City of Sterling Heights General Employees' Retirement System v. Prudential Financial, Inc.*, Fed. Sec. L. Rep. (CCH) P 98620, 2015 WL 5097883, *12 (D.N.J. 2015) ("[T]he defendant bears the burden to prove a lack of price impact through direct evidence."); *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, Fed. Sec. L. Rep. (CCH) P 98584 (N.D. Tex. 2015), leave to appeal granted, 2015 WL 10714013 (5th Cir. 2015) ("[T]he Court finds that both the burden of production and the burden of persuasion are properly placed on [the defendant]."); *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434, Fed. Sec. L. Rep. (CCH) P 98152, 89 Fed. R. Serv. 3d 756 (S.D.N.Y. 2014) ("The defendant bears the burden to prove a lack of price impact."); *Aranaz v. Catalyst Pharmaceutical Partners Inc.*, 302 F.R.D. 657, 672, Fed. Sec. L. Rep. (CCH) P 98198 (S.D. Fla. 2014) ("Because Defendants have the burden of showing an absence of price impact, they must show that price impact is inconsistent with the results of their analysis. Thus, that an

absence of price impact is consistent with their analysis is insufficient."); *Wallace v. IntraLinks*, 302 F.R.D. 310, 317, Fed. Sec. L. Rep. (CCH) P 98208 (S.D.N.Y. 2014) ("Defendants bear the burden to show a lack of price impact.").

[65]Couture, Answering Halliburton II's Unanswered Question: Burdens of Production and Persuasion on Price Impact at Class Certification, 43 Sec. Reg. L.J. 167 (2015) (arguing that, drawing from Rule 301, courts should follow a four-step analytical pathway when analyzing price impact at class certification); *see also IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, Fed. Sec. L. Rep. (CCH) P 99067 (8th Cir. 2016) (citing Rule 301) ("We agree with the district court that, when plaintiffs presented a prima facie case that the *Basic* presumption applies to their claims, defendants had the burden to come forward with evidence showing a lack of price impact."); *Hatamian v. Advanced Micro Devices, Inc.*, Fed. Sec. L. Rep. (CCH) P 99040, 2016 WL 1042502, *7 n.5 (N.D. Cal. 2016) ("Defendants propose a burden shifting analysis under which plaintiffs should assume the burden after a defendant's showing of no statistically significant price impact. The Court need not reach this issue because there is a showing of a statistically [significant] price impact here."); *but see* Fox, *supra* note 10, at 458 ("The problem is that the fraud-on-the-market presumption is no ordinary presumption and its special features do not allow a straightforward application of Rule 301.").

[66]Coates, *supra* note 12, at 15 ("[A] common form of misstatement is the 'confirmatory lie,' i.e., a statement that merely confirms what the market already (falsely) believes about a company, such as an earnings release that matches analyst expectations (when in fact the company's earnings are falsely inflated by fraud)."); Murdock, *supra* note 22, at 563 ("[A]nother, and possibly more typical, situation arises when there has been a series of positive developments and then an unanticipated problem occurs. Rather than acknowledging the problem, management continues to make positive statements that are designed, not necessarily to increase the price of the stock, but to retard a decline."); Gross, *supra* note 18, at 492 (noting that "stock prices often do not move in response to the initial dissemination of fraudulent statements").