Halliburton at the Supreme Court

What’s at Stake in Halliburton Co. v. Erica P. John Fund

Ten years ago, Justice Scalia and then-Vice President Dick Cheney took the duck-hunting trip that became a national scandal. The duck hunt took place a mere three weeks after the Supreme Court agreed to decide a case in which Mr. Cheney was the defendant, and that involved questions about the private meetings of Cheney’s energy taskforce. Environmental organizations were concerned about the influence of big oil and drilling companies on taskforce decisions, and the duck-hunting trip raised the same concerns about the Supreme Court. After all, Vice President Cheney served as C.E.O. of the massive oil company Halliburton from 1995 until 2000.

This week, Halliburton itself is at the Supreme Court, and the stakes are enormous. In Halliburton Co. v. Erica P. John Fund, Inc., the company is being sued by an investment fund that supports the Archdiocese of Milwaukee’s programs for inner city youth and the mentally ill. In defending the suit, Halliburton is asking the Justices to overturn a decades-old precedent that has set the “foundation for modern, private securities litigation.” A ruling in Halliburton’s favor would eviscerate the ability of shareholders to use class action lawsuits to challenge fraudulent conduct. Halliburton deserves attention not just for the specific questions of law it presents, but also for the broader implications it has for access to justice in our courts, and whether justice will be dispensed equally to all or reserved only for the privileged few. The Court should—contrary to some of its recent decisions—use the Halliburton case as an opportunity to stand up not just for shareholder rights, but also for access to justice for all Americans.

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Halliburton Co. v. Erica P. John Fund, Inc.: What’s at Stake

The Halliburton case puts in question a longstanding precedent upholding the rights of investors defrauded out of their savings by the very company they have chosen to back.

To succeed on a claim of securities fraud, plaintiffs generally must prove “reliance”—that is, that they relied on a fraudulent misrepresentation when they invested in certain securities. In its 1988 decision Basic Inc. v. Levinson, however, the Supreme Court recognized that this poses a nearly insurmountable task for investors who buy securities on an open exchange, and is particularly unfair when applied to shareholder class actions. Using pragmatic logic, the Court explained that requiring each individual investor to prove actual reliance “would place an unnecessarily unrealistic evidentiary burden on the [securities fraud] plaintiff who has traded on an impersonal market,” and would effectively serve as a “barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation.”

To avoid this absurd result, the Court recognized a rebuttable presumption of reliance based on the “fraud-on-the-market” theory. This doctrine presumes that a stock’s market price “reflects all publicly available information,” including any “public material misrepresentations.” Consequently, when an investor purchases stock at the market price, she presumptively relies on the integrity of that price as influenced by the alleged misrepresentation. Defendant corporations can rebut this presumption by showing either that the stock price never in fact incorporated the misrepresentation, or that the plaintiffs were aware of the misrepresentation when purchasing the stock. Importantly, the fraud-on-the-market presumption can be invoked collectively by putative class members to show reliance when seeking class certification.

Since the Court’s Basic, Inc. decision, the “fraud-on-the-market” presumption has been a critical mechanism for allowing shareholders to sue big businesses for fraud through class action lawsuits. Moreover, Congress has since reformed securities litigation on multiple occasions without abandoning or modifying the presumption.

In Halliburton, the fraud-on-the-market theory serves as the basis for an investor class action against Halliburton. As noted earlier, the lead plaintiff, the Erica P. John Fund, Inc. (“EJP Fund”), supports the Archdiocese of Milwaukee’s programs for inner city youth and the mentally ill. The EJP Fund filed suit against Halliburton and its president and CEO on behalf of a class of investors, alleging, among other things, that the company knowingly understated its liability for claims from asbestos victims, resulting in investor losses.

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7 Id. at 245.
8 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.6 (2011).
9 485 U.S. at 246-47.
12 Asbestos companies, including Dresser Industries (now Halliburton) notoriously lied for decades about the risks of asbestos exposure for workers and consumers. The Environmental Working Group, “Something in the Air: the
However, Halliburton has asked the Court to do away with the time-honored precedent established in *Basic* and, with it, any realistic possibility that shareholders can hold their executives accountable for harmful fraudulent conduct. Unfortunately, the Roberts Court has already undone longstanding precedents in areas ranging from pleading standards to arbitration to voting rights. Halliburton is counting on the Court to do so again here.

Yet the Court can do serious damage to investors even without overruling or limiting precedent. In the event that the Supreme Court upholds *Basic*, Halliburton has a back-up plan to disarm the securities class action. Halliburton argues that it should be able to rebut the presumption of reliance to block class certification with evidence that the alleged misrepresentations had no “price impact”—meaning that the stock price neither increased because of the misrepresentations, nor dropped down when the truth was revealed. But as the Fifth Circuit Court of Appeals correctly explained in its opinion below, this contention is a naked attempt to force shareholders to prove the merits of their claims at the class certification stage, and to relitigate an issue that the Supreme Court has already decided.

At class certification, the question “is not whether the plaintiffs will fail or succeed, but whether they will fail or succeed together.”14 Allowing plaintiffs to form a class is appropriate when the questions of law and fact they have in common predominate over those they have individually. Accordingly, the Supreme Court has already held that there is no need for shareholders to prove the essential elements of “loss causation”16—that revealing the truth caused the stock price to drop—or “materiality”17—that the misrepresentation was material to the stock price—in order to certify a class and move forward to the merits of their claims. There’s no point in resolving these issues at class certification because they necessarily apply to the class as a whole, and do not turn on the circumstances of each individual investor. Thus, if the class later fails to establish either loss causation or materiality, then all their claims fail on the merits, and there is no risk that individual plaintiffs will go it alone in another round of litigation.

The same is true of “price impact.” Whether a misrepresentation affected the stock price (in either direction) depends on evidence common to every plaintiff who purchased the stock during the relevant period.18 Indeed, if there was no price impact then the plaintiffs could never prove that the misrepresentation caused their loss—an element the Supreme Court has expressly held belongs in the later merits stages of litigation, like trial or summary judgment, and not at class certification.

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15 Fed. R. Civ. P. 23(b). Rule 23 also sets forth additional requirements for class certification that are not relevant here.
18 *See Erica P. John Fund,* 718 F.3d at 434.
certification. The Supreme Court has previously rejected this very attempt at dismantling the shareholder class action, and it should do so again.

A decision in favor of Halliburton would have severe implications for all individuals and organizations seeking to hold businesses accountable for misconduct. If the Supreme Court were to overturn or substantially modify its seminal holding in Basic Inc. v. Levinson, it would be reaching back more than 25 years to pull the rug out from under investors everywhere who have been defrauded by executives with a fiduciary duty to act in shareholders’ interests. In many instances, it would essentially be giving businesses like Halliburton a “get out of jail free” card to defraud their own shareholders without consequence. And more broadly, it would be another instance of the Supreme Court’s making it increasingly difficult for individuals and organizations harmed by corporate wrongdoers—including the very stockholders on whose investments the corporations rely—to access justice in America.

The Roberts Court’s Record on Access to Justice

The Roberts Court has repeatedly ruled against everyday Americans seeking access to the courts, from upholding forced arbitration clauses that erect an impenetrable barrier between wronged individuals and the courts; to narrowing consumers’ ability to form class action suits against employers and big businesses; to creating extra and unnecessary burdens for plaintiffs in the pleading stage of a case, making it harder for an individual to bring her case at all.

More and more consumers and workers are being kept out of court by the increasing use of forced arbitration clauses in the fine print of contracts—and by the Roberts Court’s decisions upholding this insidious practice. In AT&T Mobility v. Concepcion, the Supreme Court upheld a forced arbitration clause that barred AT&T’s customers from filing a class action suit. This decision dealt a severe blow to consumers, who are often unknowingly bound by these boilerplate contracts when purchasing a good or service. Consequently, many cases that would bring corporate abuse and misconduct to light in an open court proceeding are forced into arbitration. These proceedings are usually held in private, conducted by arbitrators hired by the corporation, with no pre-trial discovery to unearth necessary evidence, and thus with little chance of fairness for the wronged consumers.

The Roberts Court further expanded the ability of corporations to dodge liability through forced arbitration clauses in American Express Co. v. Italian Colors Restaurant. In American Express, a case brought by small businesses alleging antitrust violations, the Court held that the Federal Arbitration Act precludes courts from invalidating arbitration agreements—even in cases where the cost of individual arbitration would prevent the vindication of rights under federal law. In an example of the Roberts Court overreaching to overrule established precedent, this decision nullified the longstanding “effective vindication” doctrine, which allowed courts to invalidate arbitration agreements that would impede parties’ ability to protect their rights under

19 Amgen, 133 S. Ct. at 2186.
22 133 S. Ct. at 2311-12.
23 See The Roberts Court and Judicial Overreach, supra note 13, at 11.
federal law. As a result of *AT&T Mobility* and *American Express*, the Supreme Court has made it increasingly difficult for individuals to bring corporate misconduct to light and hold these corporations accountable for violations of the law.

Even if individuals are able to bypass forced arbitration, the Roberts Court has erected further barriers limiting their ability to band together to seek justice. Beyond the securities fraud context presented in *Halliburton*, the class action tool has long been effective in allowing similarly-situated plaintiffs to pool their resources and form a class. This device is especially useful in cases where small monetary amounts are at stake and it is not economically feasible to proceed with an individual suit. But in *Wal-Mart Stores, Inc. v. Dukes*, a case in which more than one million women alleged discrimination in pay and promotions, the Supreme Court significantly limited Americans’ ability to form a class by raising the threshold requirements for a class certification. As a result, in cases where individual recoveries do not justify the costs of litigation, big businesses that have acted illegally will likely escape liability for misconduct, even when, as in *Wal-Mart*, the conduct allegedly harms more than one million victims across the country.

In addition to restrictions on class actions, the Roberts Court has made it harder for individuals to sue by raising the pleading standard for civil complaints. In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Supreme Court imposed a new “plausibility” standard. This new standard means that, to survive a motion to dismiss and earn plaintiffs access to discovery, claims must give rise to a “reasonable inference” of liability. Before these cases, a motion to dismiss would succeed only when it “appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Following *Twombly* and *Iqbal*, fewer cases are able to survive the initial stages of litigation, and fewer individuals have their day in court.

Finally, proposed amendments to the Federal Rules of Civil Procedure threaten to tip the scale even further. Some of these proposed rules would limit the amount of information parties are able to request at the outset of a case, requiring parties to seek permission from a judge to request additional information. In cases where one party disproportionately holds the evidence needed for the plaintiff to prove his or her case—consumer, employment, and discrimination cases, for example—it can be impossible, without access to the discovery process, to obtain the information necessary to survive the heightened pleading standard established in *Iqbal*. The result will be even more victims who cannot get past the initial stages of litigation, and more

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25 *Dukes*, 131 S. Ct. at 2541.
28 556 U.S. at 678.
29 *Twombly*, 550 U.S. at 561.
corporate wrongdoers who evade accountability. Although these changes were not proposed by the Supreme Court as such, they were proposed by the Judicial Conference’s Advisory Committee on the Federal Rules of Civil Procedure—a committee whose members are all appointed by the Chief Justice. In addition, if, despite an outpouring of fierce opposition, the Advisory Committee continues to recommend these changes, they will need to be approved and officially promulgated by the Supreme Court before they go into effect.

In fighting litigation at all costs and urging the courts to erect these barriers, corporations have been known to assert that they are simply aiming to protect their shareholders. In Halliburton, however, the Roberts Court is being asked protect corporations from even their own investors.

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Given the Roberts Court’s record thus far, the question in Halliburton Co. v. Erica P. John Fund is whether the Court will continue to support corporate interests over individuals’ ability to seek justice. In Halliburton, it is not just consumers versus corporate interests, or employees versus employers; it is a Fortune 500 corporation that brings in more than $28 billion in revenue annually attempting to shut the courthouse doors on the very people who have invested in the company’s success.

This time around, there is no need for there to be a duck-hunting trip to raise alarms about what may be influencing the Supreme Court’s decisions. In deciding Halliburton the Court should buck its own trend by upholding precedent and affirming shareholders’ ability to band together and access justice.