

The Best Thing about *Best Buy*: It Carries Little Precedential Weight

On April 12, 2016, the Eighth Circuit issued a much anticipated decision in *IBEW Local 98 Pension Fund, et al. v. Best Buy Co., Inc., et al.*, No. 14-3178. The opinion, which reversed the district court's certification of a class of investors, was the first circuit court decision to interpret the United States Supreme Court's decision in *Halliburton v. Erica P. John Fund* ("Halliburton II"). As you may recall from previous Shareholder Advocate articles, *Halliburton II* held that defendants could rebut the bedrock fraud-on-the-market presumption of reliance afforded to plaintiffs in securities class actions by offering evidence that an alleged misstatement had no price impact on the company's share price. Although the 2-1 decision is admittedly less than favorable for investors, don't expect a ripple effect in sister circuits or a sea change in the class certification process. The underlying fact pattern in the case is unusual and unlikely to be repeated in future cases. Therefore we expect the decision to be confined mostly to its facts.

Factual and Procedural Background

Three statements are at issue in this case. The first comes from a press release issued by Best Buy before the markets opened on September 14, 2010 at 8:00 a.m, announcing that the company was increasing its full year EPS guidance. An hour and a half later, Best Buy's stock opened at \$37.25 per share, up 7.5% from the prior day's close. At 10:00 a.m., shortly after market open on September 14, 2010, Best Buy held a conference call with investors in which the Chief Financial Officer ("CFO") stated that company's "earnings are essentially in line with our original expectations for the year" and "we are pleased that we are on track to deliver and exceed our annual EPS guidance." Best Buy's stock closed at \$36.73 per share on September 14, 2010.

Plaintiffs alleged that the three September 14, 2010 statements artificially inflated Best Buy's stock price until the truth was revealed on December 14, 2010, when the Company issued a press release announcing that it had reduced its 2011 EPS. Later, in a December 14, 2010 conference call Best Buy's CFO noted that third quarter sales were "lower than expected." The stock closed at \$35.52, down 14.8% from the prior day's closing price.

On a motion to dismiss, the district court dismissed the September 14, 2010 statement made in the press release, holding that it was a forward looking statement accompanied by meaningful cautionary language. The two statements made during the conference call remained in the case as actionable misstatements.

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On a motion for class certification Plaintiffs invoked the fraud-on-the-market presumption of reliance and offered an expert event study in support. Plaintiffs' expert concluded that Best Buy's stock increased in reaction to all three statements, but his analysis *did not* separate out the price impact of the statements in the 8:00 a.m. press release versus the 10:00 a.m. conference call. In response, defendants' expert opined that the price increased *after* the 8:00 a.m. press release, *but before* the 10:00 a.m. conference call – therefore the conference call statements, the only remaining actionable statements in the case, had no impact on Best Buy's stock. In an unusual turn of events, plaintiffs' expert *agreed* with defendants' expert that the conference call statements did “not immediately increase the stock price” but instead allowed the stock price to remain inflated until the December 14, 2010 disclosure. Ultimately, the district court agreed with plaintiffs' expert and certified the class, holding that “price impact can be shown by a decrease in price following the revelation of the fraud” and that defendants had “not offered evidence to show Best Buy's stock price did not decrease when the truth was revealed.”

The Eighth Circuit's Decision

On appeal, the Eighth Circuit reversed, holding that defendants had successfully rebutted the fraud-on-the-market presumption. The Eighth Circuit noted “defendants . . . present[ed] strong evidence on this issue – *the opinion of plaintiffs' own expert.*” Opinion at 11 (emphasis in original). The court further explained that plaintiffs' theory that the conference call statements maintained the artificially inflated stock price until the December 14, 2010 corrective disclosure was insufficient to refute defendants' showing of no price impact. Specifically, the court explained that because the price increase was attributable to the “non-fraudulent press release” and the substance of the conference call statements two hours later were “virtually the same” as those in the press release, defendants have demonstrated that there was no immediate price impact from the conference call statements. *Id.* at 12.

The dissent criticized the majority for failing to understand plaintiffs' “price maintenance theory” – a theory that has been “recognized as cognizable by at least two other circuit courts.” Dissent at 14. Under the price maintenance theory, a misstatement is “presumed to be reflected in the market price of the stock . . . because the stock's price was fraudulently prevented from declining.” *Id.* at 14. Under that theory, to defeat the presumption of reliance, defendants are required to provide evidence “showing that the alleged misrepresentations had not counteracted a price decline that would otherwise have occurred.” Here, the dissent concluded that “Best Buy produced no such evidence, and the presumption was not rebutted.” Further, the dissent explained that the statements in the conference call were *not* “virtually the same” as those in the press release because they also contained “statements of current facts reflecting upon Best Buy's current position and historical performance up until that point in the fiscal year.”

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Analysis and Implications

As previously noted, we believe *Best Buy* will be largely confined to its facts and will carry little precedential value. It is unlikely that future cases will have both misrepresentations that occur so close in time and offer an expert opinion that not only fails to parse out the impact of each individual disclosure, but also admits that certain disclosures had no immediate price impact. Nevertheless, the decision does carry with it important implications for expert analyses going forward. Whereas in the past it may have seemed appropriate to group together disclosures that are close in time for purposes of price impact, plaintiffs should now strive, to the extent possible, to offer expert reports that approach each disclosure individually and provide an analysis of how that specific disclosure impacted the stock price.

Additionally, as highlighted by the dissent, the opinion leaves open for interpretation the contours and applicability of a price maintenance theory, including whether the theory is legally cognizable and, if so, what evidence is necessary to rebut reliance under such a paradigm.

Finally, Best Buy has set the stage for two other cases pending before circuit courts. The Second Circuit has agreed to review a class certification decision in *In re Goldman Sachs Group, Inc. Sec. Litig.*, No. 16-250, and briefing is ongoing in the Fifth Circuit regarding an interlocutory appeal of the class certification decision in *Halliburton*, No. 15-11096.

Conclusion

In conclusion, we think the overall impact of *Best Buy* will be limited. The case will be readily distinguishable in cases with different expert testimony and/or cases with alleged misstatements that are further apart in time. Nevertheless, the decision has breathed new life into the class certification battle, and we anticipate the defense bar will use creative tactics to try to shoehorn their cases into the confines of *Best Buy*. We will continue to monitor cases on this issue, including those pending in the Second and Fifth Circuits, and will keep you apprised of any developments.

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