

## Halliburton Decision To Test High Court Gift To Defendants

By **Ed Beeson**

*Law360, New York (December 03, 2014, 7:50 PM ET)* -- The Texas federal judge overseeing the long-running securities class action against Halliburton Co. this week found herself faced with a difficult choice that will likely influence how other courts weigh the "price impact" studies allowed under a related U.S. Supreme Court decision rendered this summer.

Attorneys want to know how closely courts like U.S. District Court Judge Barbara M.G. Lynn's will scrutinize the economic studies that defendants in large securities cases now get to present before their adversaries go up for class certification. Such studies are intended to show proof that a defendant's allegedly false statements did not impact the price of their stock, a potentially devastating blow to a plaintiff's claims.

The high court handed defendants this power as part of its landmark decision in *Halliburton Co. v. Erica P. John Fund Inc.* In many ways, Judge Lynn now has the first crack at defining how the bench will review such submissions. On Monday, she held a hearing on the competing studies that parties presented to her, and her eventual decision will be closely watched.

"Whatever decision she makes is going to be important because this is a question that is still just in the beginning of being addressed by the district courts, which means every decision has a material impact on the weight of authority out there," said Daniel Laguardia, a partner with Shearman & Sterling LLP.

The Supreme Court's June 23 decision in the Halliburton case was most notable because it refused to overturn the bedrock of securities litigation established in 1988's *Basic Inc. v. Levinson* decision — the presumption that in an efficient marketplace, one can rely on the market to take into account all available information when pricing a security.

But defense attorneys still cheered when justices gave their clients the right to rebut the price impact question at an earlier stage than the merits. Doing so gives companies another tool to knock out lawsuits before they reach the crucial point of class certification. The ruling prompted Halliburton to file its emergency motion to stay discovery while the class certification question gets revisited.

In the same breath, though, there has been grousing over the lack of direction by the Supreme Court about how district judges should weigh these studies when determining whether a class should be certified.

One of the questions Judge Lynn's decision may help shape is whether hearings like the one she held are

intended to evaluate market efficiency or whether they are intended to look into the actual causes of a stock price decline, said Michelle Reed, a partner at Akin Gump Strauss Hauer & Feld LLP.

"This is a bellwether case in many ways," she said.

But one of the challenges judges will have to contend with is what to do when competing versions of the truth by expert witnesses are both convincing.

That appeared to be what Judge Lynn grappled with on Monday when she described the choice before her as a "stark" one. It was not clear whose side of the story she would accept, said Reed, who attended the hearing as an observer.

"She didn't give any indication about which way she would rule," she said, though she noted that Judge Lynn did take issue with some of the methodology by the plaintiffs' expert.

The plaintiffs' expert sought to define the company's stock plunge in December 2001 following a large jury verdict as a correction to earlier statements the company had made about its anticipated exposure to asbestos litigation. On the other side, the defendants' expert said the 40 percent stock drop is not pegged to any prior misstatements by the company, but to market volatility at the time and uncertainty over asbestos litigation in general.

"She's struggling because you have two credible experts putting forward evidence," said Todd Cosenza, a partner with Willkie Farr & Gallagher LLP.

But if the decision comes down to making a choice between one convincing argument and another, it may very well be that Judge Lynn takes a more cautious route.

"If it's that close, I think she would be inclined to certify the class," Cosenza said. Doing so at least leaves open the possibility that the price impact question gets revisited at the merits stage and at trial.

Another pressure on her decision is how to square it with other Supreme Court rulings, such as its holding in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, which said plaintiffs don't have to prove materiality of a fraudulent statement to get their class certified.

If the judge picks apart, or disaggregates, the allegedly fraudulent statements and finds they were not material to any eventual price decline in the defendant's stock, that could be seen as running afoul of the Amgen ruling.

"If the judge is the disaggregator, in some ways she's determining materiality," Cosenza said. "Amgen says she's not supposed to do that."

Reed said whatever settlement the parties may eventually hatch will be heavily dependent on what Judge Lynn rules on the price impact studies. But she added that "even if she grants class certification, she can still issue an opinion that might not increase value of settlement."

The Erica P. John Fund is represented by Kim E. Miller, Lewis S. Kahn and Neil Rothstein of Kahn Swick & Foti LLC and David Boies and Carl E. Goldfarb of Boies Schiller & Flexner LLP.

Halliburton is represented by Thomas E. O'Brien, Jessica B. Pulliam, David D. Sterling, Robb L. Voyles and

John B. Lawrence of Baker Botts LLP and Donald E. Godwin and R. Alan York of Godwin Lewis PC.

The case is Erica P. John Fund Inc. et al. v. Halliburton Co. et al., case number 3:02-cv-01152, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Jess Davis. Editing by Katherine Rautenberg and Philip Shea.

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