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LIMITATIONS OF THE "TRUTH ON THE MARKET" DEFENSE: RECENT APPELLATE DECISIONS

Adjudication of the "truth on the market" defense in securities fraud cases was traditionally reserved for trial on a full evidentiary record. However, in the wake of the Supreme Court's 2021 Goldman Sachs *decision, corporate defendants have pressed the district courts to entertain truth on the market arguments at the class certification stage as a means to "sever the link" between the alleged misrepresentations and the stock drops following disclosure of the fraud. This article explores the limitations of the truth on the market defense as illustrated by recent decisions from the Third and Ninth Circuits.*

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Historically, "truth on the market" — the argument that the allegedly concealed facts in a securities fraud were known to the public prior to the alleged "corrective disclosure" of the fraud — was a matter for trial. When Section 10(b) defendants raised the defense in opposition to class certification, courts would routinely punt on the issue, declaring it a merits question to be decided on a full record.

This changed with the Supreme Court's decision in *Goldman Sachs v. Arkansas Teacher's Retirement System*, holding that a district court may need to make factual findings as to a truth on the market defense — even if it implicates the merits of the case. Since *Goldman*, defendants have tried to breathe new life into the defense.[1] In addition to arguing a "mismatch" between the misrepresentation and the corrective disclosure — which *Goldman* explains makes it less likely that the disclosure "actually corrected" the misrepresentation[2] — defendants are now more prone to argue truth on the market at class certification. Frequently, the analysis involves a detailed assessment of analyst commentary, media reports, stock price movements, expert testimony, and other evidence that sheds light on the question of what information was publicly known prior to the alleged disclosure of the fraud.

Notwithstanding the post-*Goldman* vibrancy of truth on the market challenges at the class certification stage, two recent decisions by the Third and Ninth Circuits underscore the limitations of the defense. These decisions illuminate the difficulties defendants face in proving that the allegedly concealed "truth" was "conveyed to the public with a degree of intensity and credibility" — whether by analysts, the press, or the

[1] *Goldman Sachs Grp. v. Ark. Teacher Ret. Sys.*, 594 U.S. 113 (2021).

[2] *Id*. at 123.

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defendants themselves — "sufficient to counter-balance" the misleading information created by the fraud.[3]

TRUTH ON THE MARKET FROM *BASIC* TO *GOLDMAN*

Over 35 years ago, the Supreme Court held in *Basic Inc. v. Levinson* that investors who buy or sell stock at the market price do so "in reliance on the integrity of that price," and that because all publicly available information is reflected in that price, reliance on material misstatements made by a public company may be presumed for purposes of a securities fraud claim under the Exchange Act.[4] The Court stressed, however, that this presumption may be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[5] One way to sever the link, the Court instructed, is by demonstrating that "news of the [truth] credibly entered the market and dissipated the effects of the [prior] misstatements," but noted that "[p]roof of that sort is a matter for trial."[6]

This rule was affirmed years later in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, where the Court held that a plaintiff was not required to prove materiality at class certification — and thus the question of whether the misstatement was immaterial because the allegedly concealed "truth" was already "on the market" was deferred until trial.[7] Given this holding, coupled with the more general statement from *Amgen* that courts should refrain from "engag[ing] in free-ranging merits inquiries at the certification stage,"[8] courts were, according to one district judge, "understandably reluctant to consider truth on the market defenses at class certification" or to shorten putative class periods based on such a defense.[9]

However, when the Supreme Court revisited the *Basic* presumption in *Goldman*, it made plain that in assessing whether a misrepresentation impacted the stock price, "*[a]ll* probative evidence," "qualitative as well as quantitative," must be considered.[10] This "price impact" analysis encompasses the question of whether the truth was disseminated before the alleged corrective disclosure so as to "sever the link" between misrepresentation and price.

On remand, the Second Circuit in *Goldman* ultimately decertified the class on the ground that there was a "mismatch" between the overly generic alleged misstatements and the more specific corrective disclosure.[11] However, in an earlier (and often overlooked) portion of the decision, the circuit court notably rejected Goldman's truth on the market argument that a series of news reports before the corrective disclosure had already exposed the fraud. As the Second Circuit explained, to the extent such prior reports were "similar to the information" revealed through the corrective disclosure, there was a clear "qualitative difference in the respective buckets of news" before and after the corrective disclosure, particularly given that the disclosure "was *unencumbered by any of the denials or mitigating commentary* that had rendered prior reports less jarring."[12]

Notwithstanding the Second Circuit's rejection of the truth on the market defense on remand, *Goldman* has spurred the defense bar to make full-frontal truth-on-the-market assaults at class certification, advancing arguments that were traditionally reserved for trial. Two recent appellate decisions affirming class certification orders illustrate the obstacles defendants face in meeting

[3] *San Diego Cnty. Emps. Ret. Ass'n v. Johnson & Johnson*, 2025 WL 2176586, at *3 (3d Cir. July 30, 2025).

[4] 485 U.S. 224, 247-248 (1988).

[5] *Id.*

[6] *Id.*

[7] 568 U.S. 455 (2012).

[8] *Id.* at 466.

[9] *Pardi v. Tricida*, 2024 WL 4336627, at *6 (N.D. Cal. Sept. 27, 2024).

[10] 594 at 122.

[11] *Ark. Teacher Ret. Sys. v. Goldman Sachs*, 77 F.4th 74, 99-103 (2d Cir. 2023).

[12] *Id.* at 91-92 (emphasis added).

their burden of persuasion and rebutting the *Basic* presumption.

Johnson & Johnson

The Third Circuit recently rejected a truth on the market defense in *San Diego County Employees Retirement Association v. Johnson & Johnson*.[13] This case involves the alleged concealment of asbestos in J&J's talc products and representations made to investors about the purported asbestos-free nature of those products. The plaintiffs claimed that J&J's misrepresentations were corrected through a series of reports disclosing lawsuits against J&J brought by women suffering from ovarian cancer allegedly caused by J&J's talc products, subsequent reports of internal J&J documents showing carcinogens in the products at issue, and ultimately, news of a $4.69 billion verdict against J&J, the first suit where a jury found that J&J's talc products caused cancer.

On appeal of the district court's order certifying the class, J&J argued that because "there can be no price impact unless the alleged corrective disclosure contains information that is both new and corrective," the presumption was rebutted as the information in the corrective disclosures was already public.[14] The Third Circuit rejected J&J's claim, explaining that its argument "ignores the fact that disclosures based on public information may nevertheless communicate a new signal to the market in certain situations."[15] As the court acknowledged, "republication of information by a more credible source to a broader audience may convey to the market that the information is particularly significant or worthy of monitoring."[16] Similarly, the Third Circuit noted, "a disclosure that compiles and expertly analyzes stray bits of publicly available information can also communicate new, value-relevant information" — citing to cases in which the corrective disclosures were news articles or analyst reports containing "extensive and tedious research."[17]

Relatedly, the Third Circuit reaffirmed that "a disclosure will not 'correct' the market price unless it is 'conveyed to the public with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements,' including statements by a defendant denying the truth of the information in the corrective disclosures."[18] Quoting Judge McMahon's opinion in *Signet Jewelers Securities Litigation*, the court expounded: "'Where, as here, a purported 'disclosure' is accompanied by a corporate denial, it is no 'disclosure' at all, since such a denial is counteractive, misleading, and can cause investors to doubt the contents of the purported disclosure.'"[19]

The Third Circuit affirmed the district court's finding that price impact was not rebutted because "[e]ach [alleged corrective] disclosure could have communicated new, value-relevant information to investors . . . ."[20] One of the six partial disclosures was a Law360 article that discussed testimony from a product liability trial against J&J and a 1975 report containing accusations from a J&J supplier who claimed to have found asbestos in J&J's products. The Third Circuit held that "[al]though the trial testimony was public, what happened in one particular courtroom may not have become simultaneously known in the marketplace and it may take more than one day for the information to be incorporated into a stock price."[21]

Another disclosure was the announcement of a $4.69 billion jury verdict against J&J in the first product liability case. The court again rejected a truth on the market defense, explaining that "although the evidence adduced and arguments made at trial were technically public, the jury's conclusion expressed in the verdict — i.e., that J&J's products caused harm — would have provided new information suggesting the falsity of the alleged misrepresentations Plaintiff identified." Citing to principles of proximate cause, the court added that "a large jury verdict might provide a new signal to the market about future liability and hence the risks the company faced from the alleged misrepresentations."[22]

A third corrective disclosure was a pair of Reuters articles which the court found "provided new, value-relevant information" because "it reflected a robust synthesis and analysis of thousands of pages of

[13] 2025 WL 2176586.

[14] *Id.* at *3.

[15] *Id.*

[16] *Id.*

[17] *Id.* at *3 & n.9.

[18] *Id.* at *3.

[19] *Id.* (quoting 2019 WL 3001084, at *16 (S.D.N.Y. July 10, 2019)) (cleaned up).

[20] *Id.* at *4.

[21] *Id.* at *4 n.11.

[22] *Id.*

information obtained from a variety of difficult-to-understand sources."[23]

Zillow

On the heels of *Johnson & Johnson*, the Ninth Circuit addressed price impact in *Jaeger v. Zillow Group., Inc.*[24] In this case, the plaintiffs alleged that Zillow made several misrepresentations regarding its now-defunct Instant Buyer or "iBuying" business, including falsely attributing the increase in the number of the company's home acquisitions to improvements in its pricing models that "sharpened [its] offer strength" and "strong growth in consumer demand."[25] The plaintiffs claimed that, in actuality, the increase in demand was due to Zillow's use of "overlays" that boosted its offer price for homes by as much as seven to eight percent.[26] The plaintiffs alleged that Zillow's misstatements were corrected through a series of disclosures, culminating with the company's announcement that it was shuttering its iBuying business.[27]

At class certification, the defendants sought to rebut the *Basic* presumption as to one of the corrective disclosures — a report from KeyBanc indicating that many of the houses Zillow was selling were listed for less than Zillow paid — contending that the information in the report was already public.[28] The district court disagreed, noting that "a disclosure based on publicly available information can, in certain circumstances, constitute a corrective disclosure, like when the alleged corrective disclosure provides new information to the market that was not yet reflected in the company's stock price."[29] The court found that "multiple commentators" had attributed the decline in Zillow's stock price to the KeyBanc report which was widely discussed in the media for several weeks after its publication.[30]

In unanimously affirming the district court's order, the Ninth Circuit rejected Zillow's claim that the KeyBanc report contained stale information — building off of the Third Circuit's analysis in *Johnson & Johnson* that disclosures interpreting or analyzing already public information may convey a new signal to investors.[31] As the Ninth Circuit found, "[t]he record suggests that [the allegedly concealed] information was not widely discussed or accessible until the KeyBanc report was released."[32] This is consistent with prior Ninth Circuit holdings in the loss causation context that "some information, although nominally available to the public, can still be 'new' if the market has not previously understood its significance."[33]

CONCLUSION

The dictate of *Goldman* that courts assess "[a]ll probative evidence" of price impact has emboldened defendants to take up truth on the market challenges at class certification — arguments that beforehand were reserved for summary judgment or trial. Despite the new vitality of this defense, in application, it has proven unsuccessful in many cases, including in *Johnson & Johnson* and *Zillow*, either because the purported disclosures of the truth were not amply transmitted to the investing public or were counteracted by market-lulling statements made contemporaneously by the defendants. Either way, these recent decisions highlight that the truth on the market inquiry is highly fact-driven, putting what were traditionally jury questions before the district court on a full evidentiary record. ■

[23] *Id.*

[24] 2025 WL 2741642 (9th Cir. Sept. 26, 2025).

[25] *Jaeger v. Zillow Grp., Inc.*, 746 F. Supp. 3d 1025, 1030 (W.D. Wash. 2024).

[26] *Id.*

[27] *Id.* at 1031.

[28] *Id.* at 1031, 1037.

[29] *Id.* at 1037 (quoting *In re Genius Brands Int'l, Inc. Sec. Litig.*, 97 F.4th 1171, 1186 (9th Cir. 2024)).

[30] *Zillow*, 746 F. Supp. 3d at 1037.

[31] *Zillow*, 2025 WL 2741642, at *2.

[32] *Id.* (citing *Genius Brands*, 97 F.4th at 1186).

[33] *In re BofI Holding, Inc. Sec. Litig.,* 977 F.3d 781, 794-95 (9th Cir. 2020) (cited in *Zillow*).