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SECURITIES CLASS ACTION LITIGATION

'Oscar': Misinterpretation of Fraud-on-the-Market Theory

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It has been a year since the U.S. Court of Appeals for the Fifth Circuit's decision in Oscar Private Equity Investments v. Allegiance Telecom Inc. [FN1] imposed new barriers to class certification for securities fraud cases filed in the Fifth Circuit; however, to date, no other circuit court has followed its lead.

The reason is twofold. First, Oscar's holding is in direct conflict with controlling Supreme Court precedent. Second, by creating new certification requirements, the Fifth Circuit has inappropriately placed the burden on plaintiffs to prove the merits of their case prior to trial.

Oscar imposes a greater obstacle for plaintiffs seeking class certification than has ever been required before. It holds that plaintiffs alleging a claim under §10(b) of the Securities Exchange Act can invoke a fraud-on-the-market theory presumption of reliance only if they first establish loss causation at the class certification stage. [FN2] In so holding, the Fifth Circuit appears to overrule the Supreme Court decision in Basic v. Levinson, [FN3] which established a presumption of reliance for plaintiffs who traded in an efficient market. Not surprisingly, it appears that most, if not all, federal courts outside the Fifth Circuit agree with Judge James L. Dennis' dissent in Oscar in which he characterizes the majority's opinion as 'a breathtaking revision of securities class action procedure that eviscerates Basic's fraud-on-the-market presumption, creates a split from other circuits by requiring minitrials on the merits of cases at the class certification stage, and effectively overrules legitimately binding circuit precedents.' [FN4]

Fraud-on-the-Market and Class Certification

Plaintiffs seeking class certification must meet the four criteria of Rule 23(a) of the Federal Rules of Civil Procedure (i.e., numerosity, commonality, typicality, and adequacy of representation) [FN5] and at least one of three categories of Rule 23(b). [FN6] Pursuant to Rule 23(b)(3), class plaintiffs are required to show that common questions of law or fact predominate. [FN7] In other words, '[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' [FN8] When deciding whether a claim under §10(b) meets the predominance requirement for class certification, courts examine the underlying cause of action to determine whether each element of the claim is common to the class. [FN9] The elements of a securities fraud claim under §10(b) are: (i) a material misrepresentation (or omission); (ii) scienter (i.e., a wrongful state of mind); (iii) a connection with the purchase or sale of a security; (iv) reliance; (v) economic loss; and (vi) loss causation (i.e., a causal connection between the material misrepresentation and the loss). [FN10]

Whether common issues of reliance predominate is often the most significant issue at class certification. The individualized nature of reliance means that requiring proof of reliance from each member of the proposed plaintiff class would effectively prevent plaintiffs from proceeding in a class action, since individual issues would then overwhelm the common ones.

The Supreme Court addressed the issue of establishing the predominance of reliance at class certification in Basic v. Levinson. The Court adopted the fraud-on-the-market theory for §10(b) cases, holding that plaintiffs alleging claims of securities fraud are entitled to a rebuttable presumption of reliance on a misrepresentation if they can show that the security they purchased or sold traded in an efficient market. [FN11] The Court in Basic explained that in an efficient market, the price of a 'company's stock is determined by the available material information regarding the company and its business.' [FN12] The Court reasoned that because a company's stock price is determined by all publicly available information, when public material misrepresentations about a company are made, investors relying on the market price have also indirectly relied on the material misrepresentation. [FN13] Consequently, the Court held that an investor who purchased or sold in an efficient market is entitled to a presumption of reliance by virtue of having traded stock at a certain market price, even if the investor did not directly rely on the misstatements. [FN14]

Basic held that to invoke a presumption of reliance based on fraud-on-the-market, a class plaintiff must simply show that defendants made material misrepresentations, the shares were traded in an efficient market and that the plaintiff traded the shares during the class period. [FN15] Market efficiency is established by circumstantial indicia of efficiency such as, '(1) the [stock's] average...trading volume; (2) the number of securities analysts -- following and reporting on the stock; and (3) the existence of empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price.' [FN16] Moreover, if 'a security is listed on the NYSE...or a similar national market, the market for that security is presumed to be efficient.' [FN17] At the same time, Basic placed the burden on defendants to establish the absence of loss causation or disprove reliance in order to overcome the presumption of reliance. [FN18]

Since Basic, the fraud-on-the-market theory has been essential to class certification in securities fraud cases. Without the fraud-on-the-market theory, each plaintiff would have to show that they relied on a defendant's misrepresentations. Such a requirement would not only be unduly burdensome, but would also likely destroy the existence of a 'common question' and would, therefore, prevent plaintiffs from proceeding in a class action. [FN19] Following Basic, lower courts have applied the presumption of reliance based on the fraud-on-the-market theory to allow class plaintiffs to prevail on the argument that common questions predominate over individualized ones. [FN20]

Fraud-on-the-Market Misconstrued in 'Oscar'

The Fifth Circuit turns Basic and its progeny on their heads in Oscar Private Equity Investments v. Allegiance Telecom Inc. Writing for the Court in Oscar, Judge Patrick E. Higginbotham departs from the Supreme Court's decision in Basic by holding that plaintiffs seeking class certification are entitled to the fraud-on-the-market presumption of reliance only if they prove loss causation. [FN21]

The Facts

In Oscar, investors filed a class action lawsuit against Allegiance, claiming that the telecommunications provider made misrepresentations about the number of telephone lines it had installed, thereby artificially increasing its stock price in violation of §10(b) of the Securities Exchange Act. [FN22] Plaintiffs alleged that when the company finally revealed the true amount of telephone lines, the price of Allegiance stock significantly dropped. [FN23] In moving for class certification, plaintiffs relied on the fraud-on-the-market theory articulated in Basic to establish reliance on defendant's misrepresentations. [FN24] While the district court certified the class, the Fifth Circuit vacated, holding that 'the class certified fails for wont of any showing that the market reacted to the corrective disclosure.' [FN25] The court reasoned that although Allegiance stock fell 28 percent after defendants restated the amount of installed telephone lines, there were other negative announcements made on the same day

that could have caused the drop in the stock's price. [FN26] The court held that the plaintiffs failed to provide sufficient evidence of loss causation in order for the class to be certified and, therefore, were not entitled to the fraud-on-the-market presumption. [FN27]

In Oscar, the Fifth Circuit blatantly ignored Basic's holding that a presumption of reliance is established upon the showing of a material misstatement regarding a security traded in an efficient market. Instead, Oscar imposes a more stringent burden on plaintiffs, requiring 'more than proof of a material misstatement; we require proof that the misstatement actually moved the market.' [FN28]

A New Element Added

Specifically, Oscar adds a new element to class certification, holding that 'loss causation must be established at the class certification stage by a preponderance of all admissible evidence' in order to trigger the fraud-on-the-market presumption. [FN29] Thus, while Basic allowed plaintiffs to establish reliance by showing that they traded in a market where material representations or omissions would generally be reflected in the stock price, Oscar requires plaintiffs to show that the particular misrepresentation caused the stock price to decline. While the former could be shown through circumstantial indicia of efficiency and is essentially a formality for stocks traded on public exchanges such as NYSE and NASDAQ, the latter requires extensive expert testimony and is by no means a sure thing. The Fifth Circuit not only made it infinitely harder for plaintiffs to show the commonality of reliance at class certification, but also shifted the burden of proof of loss causation to plaintiffs and required plaintiffs to prove loss causation at class certification rather than at trial.

As argued by the plaintiffs in Oscar, proof of loss causation at the class certification stage 'improperly combines the market efficiency standard with actual proof of loss causation.' [FN30] Unlike reliance, loss causation is not a significant issue at class certification. It does not present problems of whether common questions predominate because the issue of whether defendants' misrepresentations caused a decline in stock price is common to all members of a class.

Acknowledging its divergence from Supreme Court precedent, the Fifth Circuit notes, 'that Basic 'allows each of the circuits room to develop its own fraud-on-the-market rules.'' [FN33] Even if the Supreme Court gave the circuit courts this flexibility, Oscar takes it to the extreme, preventing a presumption of reliance until loss causation is established at the class certification stage. Consequently, plaintiffs are denied the fraud-on-the-market presumption of reliance as soon as defendants introduce even a possibility that something other than a material misrepresentation caused a decline in the stock price, in plain disregard of Basic. Tellingly, the Fifth Circuit is the only circuit that has required plaintiffs to satisfy this high burden at the class certification stage.

As noted in Basic, 'the fundamental purpose of the [Securities Exchange] Act [is to] implement[] a philosophy of full disclosure.' [FN34] Accordingly, 'a private cause of action [] for a violation of §10(b)...constitutes an essential tool for enforcement of the [] Act's requirements.' [FN35] Oscar's holding thwarts this purpose by adding obstacles for plaintiffs to overcome at the class certification stage, thereby making it easier for defendants to mislead investors. Indeed, requiring proof 'that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline' [FN36] would permit defendants to immunize themselves by concealing disclosures with other negative non-fraud-related statements. Such actions, would make it increasingly difficult for plaintiffs to prove that the 'misstatement actually moved the market' [FN37] because more than one statement may have caused a decline in the stock's price. Proving loss causation in such cases would, therefore, become increasingly difficult. Class certification was not meant to impose such a high burden upon plaintiffs. [FN38]

Judge Higginbotham predicates the holding in Oscar on the language in Basic stating that the presumption of reliance may be rebutted by '[a]ny showing that severs the link between the alleged misrepresentation...the price received (or paid) by the plaintiff.' [FN39] He concludes that Basic allows defendants to challenge a fraud-on-the-market presumption during class certification by arguing that a misrepresentation did not affect the market price. [FN40] In fact, he makes it a requirement for plaintiffs to prove loss causation before they can even use the fraud-on-the-market presumption of reliance. This interpretation is a misreading of Basic, which specifically states that consideration of proof rebutting a presumption of reliance 'is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate.' [FN41] Accordingly, a defense of lack of loss causation or non-reliance is a matter for trial and is not a basis for denial of class certification.

Oscar's rejection of a presumption of reliance unless loss causation is established improperly transforms class certification into a trial-like forum where plaintiffs are essentially required to prove the merits of their case. As acknowledged by numerous courts, '[i]n determining whether Plaintiffs have satisfied Rule 23(a), the court must refrain from considering the merits of substantive claims.' [FN42]

Instead, at the class certification stage, the requirements of Rule 23 should be construed liberally. [FN43] Plaintiffs are only required to present sufficient evidence to establish that loss causation can be proved on a classwide basis; they are not required to actually prove loss causation. [FN44] Although sometimes it may be necessary for courts 'to probe behind the pleadings before coming to rest on the certification question,' [FN45] the question upon a motion for class certification 'is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' [FN46] Contrary to this well-established precedent, Oscar focuses less on whether the requirements of Rule 23 can be met and, instead, turns class certification into a determination of whether loss causation can be proved.

Without directly addressing how an efficient market theory is related to proof of loss causation, the Fifth Circuit justified its ruling by stating that because 'the efficient market doctrine facilitates an extraordinary aggregation of claims' the court 'cannot ignore the in terrorem power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater showing of loss causation to sustain certification....' [FN47] However, simply because the Fifth Circuit may dislike the requirements for class certification or the fraud-on-the-market theory, it cannot ignore binding precedent. It does not have the 'authority to overrule the Supreme Court's decisions or to change the recognized elements of a Section 10(b) claim.' [FN48]

The Aftermath of 'Oscar'

Following Oscar, courts outside the Fifth Circuit have rejected the requirement of proving loss causation at the class certification stage. At least one district court in the Second Circuit has specifically acknowledged that Oscar's standard 'is limited to the Fifth Circuit.' [FN49] In Darquea v. Jarden Corp., defendants, relying on Oscar, argued that the plaintiffs could not take advantage of the fraud-on-the-market presumption of reliance because they did not show loss causation. [FN50] Declining to adopt Oscar's holding, the court held that '[a] Plaintiff in the Second Circuit may benefit from the fraud-on-the-market presumption of reliance at the certification stage based solely on a showing that they made purchases or sales in an efficient market, and need not show that they specifically relied on the allegedly fraudulent conduct....' [FN51] Similarly, in Wagner v. Barrick Gold Corp., the U.S. District Court for the Southern District of New York refused to follow Oscar's consideration of loss causation as a prerequisite for applying a presumption of reliance. [FN52] In Barrick Gold, it was enough that plaintiffs may be able to prove loss causation at a later stage. [FN53]

Other Courts

Other district courts have also rejected Oscar's holding. In In re Micron, for example, a district court in the Ninth Circuit held that loss causation is not 'a necessary predicate to application of the fraud-on-the-market doctrine.' [FN54] 'Instead,...reliance and loss causation [are] separate elements, subject to separate proof.' [FN55] Attempting to use the same argument that was used in Oscar, the defendants in In re Micron argued that the class should not be certified because plaintiffs failed to show loss causation. [FN56]

Rejecting the argument and certifying the class, the court stated that 'Oscar has not been considered or adopted by the Ninth Circuit [and] [i]t is unlikely that it would be adopted in this Circuit because it misreads Basic. ' [FN57]

The court stated that Basic simply requires 'plaintiffs, at the class certification stage, to show that the market was efficient' and prohibits defendants to rebut the presumption of reliance until after discovery. [FN58] Moreover, the court held that even if defendants were permitted to rebut a presumption of reliance prior to discovery, presenting other factors that may have caused a drop in stock price is not enough to 'sever the link' between a misrepresentation and the stock price. [FN59]

The court also dismissed defendants' argument that plaintiffs did not sufficiently show what caused the decline in Micron's stock price, noting that 'it is Micron that carries the burden here, not plaintiffs.' [FN60] A district court in the Third Circuit also refused to apply Oscar's holding in La. Mun. Police Emples. Ret. Sys. v. Dunphy. [FN61]

Defendants in Dunphy argued that plaintiffs failed to meet their burden of showing that common issues of reliance predominate because plaintiffs did not prove loss causation. [FN62] Finding that the 'common questions of law and fact regarding Defendants' potential liability predominate over any individual issues,' the court held that the 'Third Circuit has not taken such measures to 'tighten the requirements for plaintiffs seeking a presumption of reliance' similar to the Fifth Circuit.' [FN63]

Investors' Viewpoint

The disadvantage that Oscar's holding causes to investors is evidenced by the decisions of district courts in the Fifth Circuit that have followed Oscar's approach in requiring proof of loss causation at class certification. These district court decisions have led to premature dismissal of potentially meritorious claims, thereby leaving injured plaintiffs without possibility of recovery. [FN64]

For example, in Fener v. Belo Corp., plaintiffs sued defendant Belo Corp., a company that owns newspapers and other media, when the company's stock price dropped after defendants revealed that certain of its practices led to an overstatement in newspaper circulation. [FN65] Based on evidence presented by defendants, the court concluded that the decline was attributable to three separate causes; [FN66] however, only the circulation overstatement was related to the alleged fraudulent conduct. Plaintiffs argued that each cause in the decline was related to the circulation overstatement. [FN67]

Nevertheless, applying Oscar's requirement for proof of loss causation, the court held that plaintiffs failed to prove that the decline was caused by the disclosure of the overstatement and not other negative information released at the same time. [FN68] Although plaintiffs' expert witness provided evidence to show that the market reacted to defendants' disclosures, the court held that plaintiffs failed to provide the empirical evidence that targets the corrective disclosure. [FN69]

This outcome is not surprising, considering that Oscar never defined what empirical evidence was sufficient to prove loss causation at class certification. Consequently, the court dismissed plaintiffs' motion for class certification before a jury could decide on the merits of the case; specifically, whether the decline in stock price was caused by the three separate causes or simply one cause. Similarly in Ryan v. Flowserve Corp., the district court, following Oscar, denied class certification because plaintiffs 'failed to meet their burden of proving loss causation by a preponderance of the evidence.' [FN70]

In making this determination, the court provided a lengthy analysis of loss causation that considered evidence submitted by plaintiffs' and defendants' expert witnesses, [FN71] essentially turning class certification into a battle of the experts. Such considerations at class certification are not permitted, however. A 'court may not weigh evidence from Defendants' expert against evidence from Plaintiffs' expert in determining whether the Rule 23 requirements are satisfied.' [FN72]

Conclusion

The Fifth Circuit's decision in Oscar is a substantial departure from precedent. The decision imposes an unprecedented burden on plaintiffs to prove the merits of their case at the class certification stage, while at the same time it counters objectives of full disclosure established by the Exchange Act. As a result, Oscar's holding will make it increasingly difficult for injured plaintiffs to obtain relief in the Fifth Circuit. Perhaps because of the foregoing, other circuit courts have not followed in Oscar's footsteps and are unlikely to do so.

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FN1. Oscar Private Equity Investments v. Allegiance Telecom Inc., 487 F.3d 261 (5th Cir. 2007).

FN2. Id. at 269-70.

FN3. Basic Inc. v. Levinson, 485 U.S. 224 (1988).

FN4. Oscar, 487 F.3d at 272 (Dennis, J. dissent).

FN5. Fed R. Civ. P. 23(a); Fed R. Civ. P. 23(a) provides that '[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.'

FN6. Fed. R. Civ. P. 23(b).

FN7. Fed. R. Civ. P. 23(b)(3) provides that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FN8. Amchem Products Inc. v. Windsor, 521 U.S. 591, 623 (1997).

FN9. See Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113, 127 (S.D.N.Y. 2001).

FN10. Dura Pharms. Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (internal citations omitted).

FN11. Basic, 485 U.S. at 241-248.

FN12. Id. at 241.

FN13. Id. at 244-47.

FN14. Id. at 247.

FN15. Id. at 248, n. 27.

FN16. Wagner v. Barrick Gold Corp., 03 Civ. 4302 (RMB), 2008 U..S. Dist. LEXIS 15811, at * 24-*25(S.D.N.Y. Feb. 15, 2008) (citing Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., No. 05 Civ. 1898 (SAS), 2006 U.S. Dist. LEXIS 52991, at *5 (S.D.N.Y. Aug. 1, 2006)).

FN17. Wagner at *25 (citations omitted).

FN18. Basic, 485 U.S. at 248-49 (Court identified two ways in which the presumption of reliance may be rebutted: 1) 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' or 2) by showing that plaintiffs 'would have divested themselves of their [company] shares without relying on the integrity of the market.').

FN19. Id. at 242.

FN20. See, e.g., Darquea v. Jarden Corp., 06 Civ. 722 (CLB), 2008 U.S. Dist. LEXIS 17747, at *11 (S.D.N.Y. March 6, 2008); In re Micron Techs. Inc. Sec. Litig., 247 F.R.D. 627, 633 (D. Idaho 2007); In re Scientific-Atlanta Inc. Sec. Litig., Civil Action No. 1:01-CV-1950-RWS, 2007 U.S. Dist. LEXIS 66282, at * 54-*56 (N.D. Ga. Sept. 7, 2007); Cromer, 205 F.R.D. at 129-133.

FN21. Oscar, 487 F.3d at 265.

FN22. Id. at 263.

FN23. Id.

FN24. Id.

FN25. Id. at 262.

FN26. Id. at 266.

FN27. Id. at 270-71.

FN28. Id. at 265

FN29. Id. at 269.

FN30. Id. at 266.

FNNote 31. Id. at 265.

FNNote 32. Basic, 485 U.S. at 245.

FN33. Oscar, 487 F.3d at 264.

FN34. Basic, 485 U.S. at 230.

FN35. Id. at 231.

FN36. Oscar, 487 F.3d at 270.

FN37. Id. at 265.

FN38. See In re Nortel Networks Corp. Sec. Litig., Consol. Civil Action 01 Civ. 1855 (RMB), 2003 U.S. Dist. LEXIS 15702, at *5 (S.D.N.Y. Sept. 5, 2003).

FN39. Basic, 485 U.S. at 248.

FN40. Oscar, 487 F.3d at 265.

FN41. Basic, 485 U.S. at 249, n. 29.

FN42. Darquea, 2008 U.S. Dist. LEXIS 17747, at *5 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974)); In re Blech Sec. Litig., 187 F.R.D. 97, 104 (S.D.N.Y. 1999); see also, In re Scor Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 570 (S.D.N.Y. 2008) (in determining whether a class should be certified, 'a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement').

FN43. Darquea, 2008 U.S. Dist. LEXIS 17747, at *12 ('Because of the usefulness of class actions in addressing allegations of securities fraud, the class certification requirements of Rule 23 are to be construed liberally. ') (citing Gary Plastics Packaging Corp. v. Merrill Lynch Money Markets Inc., 903 F.2d 176, 179 (2d Cir. 1990)).

FN44. See Nursing Home Pension Fund v. Oracle Corp., No. C01-00988 MJJ, 2006 U.S. Dist. LEXIS 94470, at *39 n. 5 (N.D. Cal. Dec. 20, 2006).

FN45. Amchem, 521 U.S. at 634-635 (quoting General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982)); see also In re Micron Techs. Inc., 247 F.R.D. at 633 (courts 'must consider evidence which goes to the requirements of Rule 23 at the class certification stage even if the evidence may also relate to the underlying merits of the case.').

FN46. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974); see also, Cromer, 205 F.R.D. at 120.

FN47. Oscar, 487 F.3d at 267.

FN48. Id. at 276 (Dennis, J., dissenting) (citing Unger v. Amedisys, 401 F.3d 316, 322 n. 4 (5th Cir. 2005)).

FN49. Darquea, 2008 U.S. Dist. LEXIS 17747, at *11.

FN50. Id.

FN51. Id.

FN52. Wagner, 2008 U.S. Dist. Lexis 15811, at *21-22 ('There is 'no need to engage in the kind of factual analysis...that manifests the oddities of applying a rebuttable presumption of reliance in this case.") (citing Basic, 485 U.S. at 249 n. 29).

FN53. Id. at * 23-24 (citing In re Flag Telecom Holdings, Ltd. Sec. Litig., 245 F.R.D. 147, 167 (S.D.N.Y. 2007).

FN54. In re Micron Techs. Inc., 247 F.R.D. at 633.

FN55. Id. at 633-634.

FN56. Id. at 633.

FN57. Id. at 634.

FN58. Id.

FN59. Id.

FN60. Id. at 635.

FN61. La. Mun. Police Emples. Ret. Sys. v. Dunphy, Civil Action No. 03-CV-4372 (DMC), 2008 U.S. Dist. LEXIS 19616 (D.N.J. March 12, 2008).

FN62. Id. at *19.

FN63. Id. at *20.

FN64. See e.g. Fener v. Belo Corp., Civil action No. 3:04-CV-1836-D (SAF), 2008 U.S. Dist. LEXIS 26633 (N.D. Tex. April 2, 2008); In re Seitel Inc. Sec. Litig., 245 F.R.D. 263 (S.D. Tex. 2007) (while acknowledging that 'a class action would be a superior method for the fair and efficient adjudication,' the court nevertheless denied class certification holding that because plaintiff's expert did not establish the requisite loss causation beyond reasonable speculation, plaintiffs were not entitled to the presumption of reliance).

FN65. Fener, 2008 U.S. Dist. LEXIS 26633, at *5.

FN66. Id. at *10.

FN67. Id. at *8-*9.

FN68. Id. at *9-*10.

FN69. Id. at *17.

FN70. Ryan v. Flowserve Corp., 245 F.R.D. 560, 570 (N.D. Tex. 2007)

FN71. Ryan, 245 F.R.D. at 570 (finding 'the opinions of Plaintiffs' expert to be flawed and underwhelming in several aspects')

FN72. Thompson v. Clear Channel Communs. Inc. (In re Live Concert Antitrust Litig.), 247 F.R.D. 98, 111 (C.D. Cal. 2007).

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