AIG Staying Ahead of the Halliburton Co. v. Erica P. John Fund, Inc. Decision

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Corporate directors and officers, securities lawyers, and academic observers alike are at the edge of their seats eagerly awaiting the ruling by the United States Supreme Court (Supreme Court) in Halliburton Co. v. Erica P John Fund, Inc. (Halliburton), a securities fraud action that could have far-reaching implications for every company whose securities are publicly traded in the United States. Halliburton involves a direct challenge to the “fraud on the market” theory that allows plaintiffs to satisfy the reliance element of a 10b-5 action on a class-wide basis and thus allows for certification of a plaintiff class in such cases.

When the Supreme Court agreed to hear the Halliburton challenge in late 2013, it was viewed by some as an opportunity for the Supreme Court to bring some calm to the sea of securities litigation rising in past years with increased Securities and Exchange Commission investigations and enforcement actions, stand-alone shareholder derivative litigation, and Sarbanes-Oxley/Dodd-Frank whistleblower actions.

Following the Halliburton oral argument on March 5, 2014, many commentators have published speculative predictions of how the Supreme Court would most likely rule, ranging from the “so-called ‘middle ground’ alternative” to outright rejection or affirmation of “fraud on the market.” While no one has affirmatively placed their bet on what the official decision will look like, and there will be plenty of discussion once the decision is announced, one point is for certain—no matter what, the value added by primary D&O insurance policies will be extremely critical as securities litigation will remain a leading D&O loss driver.

AIG has worked closely with a number of the premier securities litigation legal firms and its broker partners in the United States since the Supreme Court agreed to hear Halliburton months ago. The intent was not to predict its outcome, but rather to consider a range of possible outcomes, and to consider what impact such outcomes might have on customers. At the 2014 AIG Financial Lines Panel Counsel Conference, more than sixty securities litigators from forty-five of the most prominent corporate law firms in the United States attended, and participated in, a wide-open discussion on “Halliburton and the D&O Market.”

Now is as important a time as ever for directors and officers to partner closely with an insurance carrier with the claims expertise and longevity in the market to weather the Halliburton decision on the horizon.
Based on this discussion, AIG offers the following insights for consideration.

The Halliburton ruling will necessarily fall somewhere on a continuum. The continuum will range from “outright rejection of class-wide reliance presumptions” (characterized by one participant in the “Halliburton and the D&O Market” discussion as “the nuclear option”) on one end, to “complete rejection of the challenge and, upholding the class-wide reliance presumption” (characterized as the “status quo option”) on the other, with everything between the two ends constituting a “middle ground.”

The “middle ground” is potentially very wide. At oral argument, the Supreme Court discussed the possibility of a “middle ground” resolution at some length, with some focus on the possible use of evidentiary hearings. This would perhaps involve the use of tools such as expert-developed event studies, to allow the Supreme Court to determine whether a company’s share price was impacted by an alleged disclosure, with “price impact” possibly triggering the presumption of class-wide reliance. But how might this actually work? If price impact will be the key to class certification, will plaintiffs be required to submit event study evidence to establish price impact in order to obtain the benefit of the presumption? Or will plaintiffs start out with the presumption, leaving defendants to submit event study evidence to rebut the presumption? Maybe some combination of the two or some other test? Or will the Supreme Court leave the details to the lower courts, as it occasionally does?

The real significance of Halliburton may only come into focus after it has been interpreted by lower courts. The Supreme Court’s ruling in Halliburton may seem clear and precise when it is handed down, but its true meaning and significance may only become clear after it has been interpreted by lower courts in future cases, maybe dozens of them. It is possible that different courts will interpret Halliburton differently in different cases, with results that could eventually result in the Supreme Court revisiting the issue again in the future.

Securities class action litigation will be more expensive to defend under almost any foreseeable ruling in Halliburton, for at least the near and intermediate future.

In almost any scenario, it would likely cost more to defend securities fraud class actions after Halliburton.

- Under the “nuclear option,” institutional and major individual investors would remain free to bring their own actions. This would eliminate the issue of class-wide reliance entirely, forcing defendants to litigate multiple cases, in multiple jurisdictions and state courts with state laws, all in addition to federal courts and the federal securities statutes.

- In the “middle ground,” defense expenses that currently might only be incurred much closer to trial (if the case is not settled by then), might routinely be incurred much earlier, possibly in the form of a mini-trial at the class certification stage. Putting aside whether this might be helpful or harmful to the defense on the merits, it seems clear that overall defense expenses would increase.

- If all remains “status quo,” such a ruling would be likely to embolden the plaintiffs’ bar, which may well ramp up their settlement demands, and force additional litigation in the wake of a plaintiff-friendly ruling, notwithstanding that defendants will have a compelling argument that such a ruling merely continues the current state of affairs.

The securities class action plaintiffs’ bar is not going away. When Congress enacted the Private Securities Litigation Reform Act of 1995 to bring institutional investors into the securities litigation arena, it was thought that such investors would use their own law firms, driving the existing plaintiffs’ bar into irrelevance. But as the principle of unintended consequences might dictate, many major institutional investors ended up retaining the traditional plaintiffs’ firms instead, ensuring that the plaintiffs’ firms remained as strong as ever. Over the years, in the face of further legislation as well as court rulings that made it harder to bring successful cases, the plaintiffs’ bar has continued to adapt and flourish. AIG does not expect this to change in the post-Halliburton environment.
Ahead of the Halliburton decision: Introducing the Event Study Endorsement

AIG is not waiting for the Supreme Court to announce its decision. Looking ahead, AIG believes that customers may benefit from obtaining an event study “sooner rather than later” if they are named as securities class action defendants. Effective immediately, all publicly traded AIG primary D&O policyholders are eligible to obtain the new Event Study endorsement at no cost, providing that the policy’s retention shall not apply to class certification event study expenses. As with all policy forms and endorsements, this endorsement contains defined terms that policyholders should review with their insurance advisors, but AIG believes that the Event Study endorsement brings meaningful value to customers—right now.

What Will Tomorrow Bring?
The interpretation of the Supreme Court’s ultimate decision will continue to change. That’s why AIG’s D&O underwriters and claims professionals continue to think ahead and work to arm its customers with the knowledge, products, and services to protect them against growing exposures such as Halliburton. Stay tuned as we await the Supreme Court’s decision—and continue to strive to develop new ways to provide value to customers so they can focus on driving their business forward backed by the expertise of AIG.

Mark Curley
Mark Curley is Global Head, Directors and Officers Claims at AIG, with responsibility for all D&O claim handling worldwide. Mr. Curley originally joined AIG in 1996 as a Complex Claim Director in AIG’s Middle Market Non-Profit Accounts D&O claims group, following seven years of legal practice focusing on commercial litigation in federal and state courts. After a period of employment by an insurance broker, Mr. Curley rejoined AIG as a Complex Claim Director in the National Accounts D&O claims group in 1999. Since then, Mr. Curley has held several increasingly responsible technical and management positions within AIG’s D&O claims organization including assuming management responsibility for all D&O claim handling units in the U.S. in 2008 and globally in 2011. Mr. Curley consults with AIG underwriting management worldwide with respect to policy language, endorsements, and interpretation, and he is commonly called upon by brokerage executives to help to bring about fair and successful resolution of claim and policy issues. Additionally, Mr. Curley has spoken on numerous panels, contributed to articles, given interviews, and conducted webcasts over the past several years on various subjects relating to D&O insurance and complex federal litigation. Mr. Curley is a graduate of Saint Joseph’s University (BS) and Rutgers Law School (JD), and is licensed to practice in the State of New Jersey (inactive status) as well as the Federal District of New Jersey. Prior to attending law school, Mr. Curley held a succession of management positions with a major manufacturing company in New Jersey.