

Random Thoughts of a Federal District Judge

*Remarks of Judge Shira A. Scheindlin**

I am very pleased to be here¹ but I am also very intimidated. I am intimidated for two reasons. One, judges are not used to having time limits. How in the world can I say all that I would like to say in reaction to now ten different presentations in ten minutes? That is beyond me. The other reason I am intimidated—and that’s where I am going to start—is that I am not an expert, and I am sitting in a room of experts. All the panelists that you’ve heard so far are experts in securities law. The first point I want to make to you is that I am a generalist judge. Every federal judge is a generalist judge. We do not come to this with a background in economics. You are presenting your case to someone who does not have a background in securities law and economics and these cases have very complicated issues. And the judge is entrusted, so to speak, with decisions that will result in hundreds of millions, if not billions of dollars in judgments, and all of that is a rather frightening thought. In light of this, I thought it was interesting that in *Halliburton Co. v. Erica P. John Fund (“Halliburton II”)*,² the Supreme Court justices said, “[O]h, how are we to figure this out? We’re just nine sort of elevated lawyers but we aren’t economists so we aren’t going to say whether *Basic, Inc. v. Levinson*³ was right or wrong or whether the efficient market theory was right or wrong but we are going to leave it to those 750 district judges who obviously did not rise as high in the judiciary as we did, who sit in all the states—Alaska, Idaho, South Carolina—who may get some of these cases only once in their entire career, unlike judges in the Southern District of New York, but those judges who get it once in their entire career may write a very important opinion and it could be wrong, but it becomes the law (at

* Judge Scheindlin is a Senior United States District Judge in the Southern District of New York. She was appointed to the bench in 1994 and became a Senior Judge in August 2011. She was a member of the Advisory Committee on Civil Rules from 1999–2006 and has taught at Brooklyn Law School and Cardozo Law School as an adjunct Professor of Law.

1. Loyola University Chicago School of Law Institute for Investor Protection Symposium “The New Landscape of Securities Fraud Class Actions,” held October 24, 2014.

2. 573 U.S. —, 134 S. Ct. 2398 (2014).

3. 485 U.S. 224 (1988).

least in that district), and we are trying to figure out if that is such a bad thing.”

Another important background point is that district court judges have a caseload of 250 or 300 cases, civil and criminal. The idea that somebody would have the nerve to submit 500 pages on a single motion—that is a judge who cannot manage his or her courtroom. Nobody submits 500 pages to me. I reject it. I send it back in the mail and say, “Resubmit this in a way that it is something I can read,” because otherwise you are just papering the record for the appellate court. I have very strict limits no matter how complex the case because I want to read it, I want to absorb it, and with 200, 300, or 400 cases, there are only so many hours in the day. That covers the preliminaries.

Let me tell you how many stop signs there are in litigation. We start with the motion to dismiss. The motion to dismiss is on steroids now in a way that it never was before because of *Ashcroft v. Iqbal*⁴ and *Bell Atlantic Corp. v. Twombly*.⁵ I know in the securities area we have the Private Securities Litigation Reform Act (“PSLRA”)⁶ and heightened pleading standards, which cause a lot of these cases to be terminated on motions to dismiss,⁷ and that dismissal is then affirmed in the appellate court. That means a lot of these cases end well before the class-certification stage. And then we get to class certification and we get the inevitable *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁸ challenges. Sometimes we think you know what, let’s avoid this whole problem and go right to summary judgment. There’s a real debate in a lot of my big cases about which should come first, because if defendants succeed on summary judgment, if plaintiffs can’t prove the elements, why in the world would I struggle with a class-certification motion? Class certification now often requires a hearing, and always has *Daubert* challenges. Because of this, sometimes summary judgment comes first. I am not so convinced anymore that class certification is the be all and end all. There are other motions now that may resolve a case.

I want to talk very briefly about the Seventh Amendment.⁹ I was

4. 556 U.S. 662 (2009).

5. 550 U.S. 554 (2007).

6. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

7. See generally John M. Wunderlich, *The Importance of the Prefiling Phase for Securities-Fraud Class Actions*, 45 LOY. U. CHI. L.J. 739 (2014) (contending that heightened pleading requirements in securities litigation has given the motion to dismiss almost the same power as the motion for summary judgment).

8. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (providing that trial judges are “gatekeepers” who must exclude evidence that is not reliable or relevant).

9. See U.S. CONST. amend. VII (providing a right to jury trials in civil cases).

sure that issue would come up during the presentations of the first ten speakers, but nobody said the words Seventh Amendment. This troubles me. The whole issue of judicial fact finding in every area of the law has become a bigger and bigger problem. It almost went to the Supreme Court this term; a certiorari petition on this issue filed in a criminal case—raising the issue of judicial fact finding—was recently denied.¹⁰ In securities law cases there are very few trials. Only one percent of civil cases go to trial,¹¹ but it seems that even fewer securities cases go to trial. Who’s deciding everything? Judges are deciding. And when are they deciding? Class-certification decisions, motions to dismiss, summary judgments: the three big stop signs. And if you think we’re saying, “Oh, there’s no material issues of fact, it’s a legal issue,” that’s not really so. We are finding facts from the first to the last. Particularly when you look at the Supreme Court guidance as to the issue to be litigated. Look at *Halliburton II*. We are now litigating whether or not there is a price impact and guess who is deciding that question? It’s the judge! It’s a three-day “hearing” with witnesses, with exhibits, and I am making the decision. Where in the world did the Seventh Amendment go? It has disappeared, particularly in securities cases. It all rests on me.

Now I have a few more random thoughts in no particular order, for which I apologize.

Someone mentioned presumptions. The presumption the plaintiffs get does not come automatically. You mentioned the presumption of innocence, but there is no comparison. A criminal defendant is entitled to the presumption of innocence; there’s no proof required, and everyone gets it. That is not true of the presumption of reliance. You have to prove several prerequisites. Plaintiffs don’t get a presumption as a matter of right. They’ve got to prove publicity, they’ve got to prove market efficiency.¹² You have to earn the presumption, and you may fail right there. Even if the plaintiff proves entitlement, the burden then shifts to the defendants to prove lack of price impact.¹³ Plaintiffs have to make a threshold showing to be entitled to the presumption, and

10. See *Jones v. United States*, 135 S. Ct. 8 (2014) (denying certiorari, with three Justices dissenting)

11. See, e.g., Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 36 (2006) (citing Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7–8) (noting that by 2004, jury trial disposition rates had fallen to less than one percent).

12. *Halliburton Co. v. Erica P. John Fund (Halliburton II)*, 573 U.S. —, 134 S. Ct. 2398, 2412 (2014).

13. *Id.* at 2413.

I thought *Halliburton II* laid that out very well.

I also want to talk about direct and indirect proof because that came up in the last panel. Very interesting! The Supreme Court said in *Halliburton II*, this is an indirect way of showing reliance but if you could capture direct evidence of price impact, you don't even need it!¹⁴ You wouldn't need the *Basic* presumption because the Court said that's a proxy, that's indirect. Why bother if you have the direct proof of price impact and you know you're going to win that? Get a good report on price impact and be done with it. This is supposed to be a proxy for proving what you've got to prove, which is price impact. By the way, someone should explain to me the difference between price impact and price distortion, which is beyond my expertise.

I want to talk for a minute about market efficiency/information efficiency. I think the *Cammer v. Bloom*¹⁵ factors are not really about market efficiency. It's really about how fast information is absorbed—when is information absorbed, how is it absorbed? That's what it's really about. Is the information out there? Who's getting it? When are they getting it? There was the example of a disclosure or an article that nobody sees. Then there's a show on 20/20 and everybody sees it, and the price drops. That's when the information was absorbed. That's the moment of impact. So I think it's more about information than this whole concept of market efficiency, and I do think *Halliburton II* downplays what used to be called the robust theory of market efficiency.

I wanted to talk briefly about the goals of litigation. There's deterrence, there's punishment, and there's compensation. Only the middle one, punishment, is jail. Frankly, these people do not want to go to jail, and they are going to jail now for really big frauds, and that's what they care about. The money part is the cost of doing business—it's trivial! You look at these judgments—even if they are 300 or 400 million dollars—for a major bank, look at these settlements we're getting now. The biggest settlement ever, nearly seventeen billion dollars,¹⁶ is still not a big ticket to the defendant! And yet some defendants with large settlements still report record profits. The notions of compensation and deterrence are minor points, frankly. I think that

14. *Id.* at 2417.

15. *See* *Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989) (listing factors for evaluating market efficiency).

16. Press Release, U.S. Dep't of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), available at <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>.

big banks are big institutions that expect a settlement, I'm sorry to say. They expect a settlement, they expect to pay, and they will pay. They'll pay on the eve of trial; I've seen it. I've been ready to go to trial, decided many motions in limine, then they settle. I know they are not anxious to take the verdict. The real punishment is when executives go to jail for nine years or more. When we talk about deterrence, compensation, and punishment, it is good for us to think about what happens in a civil case and what happens in a criminal case, and I assure you that these money judgments really are not terrifying to companies after all, nor are they really compensating shareholders. The lawyers do pretty well and we understand that.

As far as one phrase I heard, somebody said, "I hope that judges will struggle constructively." Yes, I intend to struggle constructively. And on that note, I probably used my ten minutes.

[Question] You raised an interesting thought in my mind as we struggle with what the burden is on the class certification motion? You struggled with it in the initial public offering ("IPO") case and you had it below the preponderance, and the Second Circuit said no, that's wrong. It always strikes me that maybe it would be a better spot, but right now we are in preponderance. On the other hand, you said, ok summary judgment, that's really where these issues come from. Which is to come first, isn't the burden on summary judgment "some evidence" and the burden on class certification "preponderance of the evidence"? As an evidentiary expert, could you enlighten me? Because it strikes me that and I've seen this in antitrust cases; you do summary judgment before the class certification. Maybe as securities lawyers we ought to be reversing the order?

[Answer] Summary judgment is not supposed to have a disputed issue of fact. That's the first premise. Theoretically, if you have any evidence that would raise a disputed issue of fact, summary judgment should not be granted. You only grant summary judgment when you have no evidence. What does no evidence mean? I think it means your experts failed. The expert has been rejected, so you lack any evidence and summary judgment can be granted. That's *Comcast Corp. v. Behrend*.¹⁷ But otherwise, I agree with you. If there really is some evidence, then you can survive summary judgment, because there is a disputed issue of fact.

I looked down at my list, by the way, and I did miss one thing I wanted to touch on ever so briefly and you had reminded me of it. It was a case I tried non-jury, which was not a class case, so it was an

17. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

individual. It was called *GAMCO Investors, Inc. v. Vivendi*.¹⁸ It involved a value investor. As an investor he was saying he took all these losses and the company didn't disclose what it was really doing. I held that this individual investor never relied on the market price anyway. He had his own methodology, his own way of doing things, he was a value guy, he said this is undervalued, this is going to become overvalued, and I'll make a lot of money. And I felt that he was not relying on these statements to affect the market price, the integrity of the market price, that wasn't his interest at all. That case went to verdict, but *Halliburton II* may undo my verdict in a sense, because Justice Roberts actually commented in a way, not on my particular case, but he said, everybody uses the market price as the lodestar so to speak, the benchmark, the reference point. Even the value investor who is really not relying on the current market price, decides that the stock is undervalued or overvalued compared to the market price.¹⁹ In essence, he says that, in the end, everyone relies on the market. Period. Everyone. Thank you.

18. *GAMCO Investors, Inc. v. Vivendi*, 917 F. Supp. 2d 246 (S.D.N.Y. 2013) (denying summary judgment to plaintiff based on lack of reliance).

19. *Halliburton II*, 134 S. Ct. at 2411.