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THE INTERRELATIONSHIP BETWEEN PRICE IMPACT AND LOSS CAUSATION AFTER *HALLIBURTON I & II*

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INTRODUCTION

In *Halliburton II*, the Supreme Court ruled that class certification in securities cases may be defeated by direct or indirect evidence that "an alleged misrepresentation did not actually affect the market price of the stock"—that is, that it did not cause any "price impact."[1] This Article addresses the connection between *Halliburton II*'s notion of price impact and the element of loss causation, an essential prerequisite to a private securities fraud claim.[2] The two concepts are obviously related: whereas loss causation requires proof that the revelation of a defendant's misrepresentation caused

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1. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417 (2014) [hereinafter *Halliburton II*].
2. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346 (2005).

the stock price to go down, price impact concerns how the issuance of the misrepresentation artificially caused the price to go up.

Intuitively, price impact and loss causation are the front- and back-end causal links between a misrepresentation and economic loss sustained by an investor. Some lower courts nevertheless have treated loss causation and price impact as distinct, non-overlapping categories.[3] This has allowed securities plaintiffs to proceed even when liability is predicated on a misrepresentation that did not—or, equivalently, has not been proven to—artificially inflate the stock price at all.[4] These cases raise an important doctrinal question: Can a defendant in a private securities action under federal law be held liable for a misrepresentation that purportedly causes artificial inflation to come *out* of a stock price without proof that the defendant's misconduct was responsible for the initial inflation of the stock price? In other words, can there be loss causation without price impact?

Although they did not directly resolve the question, the Supreme Court's recent decisions in *Halliburton II* and its predecessor, *Halliburton I*,[5] indicate that the doctrinal answer is the same as the intuitive one: because price impact is the obverse of loss causation, it is essential to proving that a defendant's fraud caused a plaintiff's economic loss.[6] *Halliburton I* confirmed that a plaintiff cannot prove loss causation without also showing that a fraudulent statement "affected the integrity of the market price."[7] *Halliburton II* established that any price impact inquiry must be conducted on a statement-by-statement basis, as is the case with other elements of a securities claim.[8] Taken together, these precedents teach that lower courts have been misguided in allowing securities claims predicated, at least in part, on misstatements that did not inflate the stock price.

Part I examines the relationship between loss causation and price impact, as explored in *Halliburton I*. That case established that loss causation requires proof that a defendant's misstatement artificially inflated its stock price. It nevertheless recognized that price impact and loss causation are not identical: rather, loss causation

3. *See infra* Part II.C.

4. *See infra* Part II.C.

5. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011) [hereinafter *Halliburton I*].

6. *See infra* Part I.B-I.C.

7. *Halliburton I*, 131 S. Ct. at 2186.

8. *See Halliburton II*, 134 S. Ct. 2398, 2415 (2014).

requires proof of price impact *and* a causal link between that price impact and the plaintiff's economic loss.

Part II describes how price impact should be proven in the context of loss causation. Our starting point is *Halliburton II*, which required statement-by-statement proof of price impact to prove reliance. Statutory and economic principles militate in favor of applying that statement-by-statement requirement to the loss-causation context as well. But unlike with class certification, in the context of loss causation at trial the plaintiff must discharge the burden of proving price impact. Part II concludes by briefly surveying recent efforts by courts to relax this loss-causation requirement where some of the alleged misstatements did not affect the defendant's stock price at all. Those efforts are inconsistent with both *Halliburton I* and *Halliburton II* and have the potential to improperly transform securities fraud claims into "broad insurance against market losses."[9]

I.
PRICE IMPACT AS THE OBVERSE OF LOSS CAUSATION

Under the Private Securities Litigation Reform Act (PSLRA), a private plaintiff must show that "the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages."[10] This provision codified the traditional elements of proximate causation and loss—i.e., loss causation.[11] To prove loss causation through the fraud-on-the-market theory, a plaintiff must "show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss."[12] That showing, however, is impossible if the statement did not first "affect[ ] the integrity of the market price"—that is, if the statement had no impact on the stock price.[13] As this part shows, price impact is thus an indispensable component of loss causation.

At first blush, this straightforward syllogism might appear to be at odds with *Halliburton I*, which held that putative class plaintiffs' failure to demonstrate loss causation at the class certification stage does not negate their ability to invoke *Basic*'s presumption of reli-

9. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005).

10. 15 U.S.C. § 78u-4(b)(4) (2012).

11. *See Dura*, 544 U.S. at 343–44, 346.

12. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011).

13. *Id.*

ance.[14] *Halliburton I* distinguished loss causation from price impact, observing that "loss causation is a familiar and distinct concept in securities law; it is not price impact."[15] Securities plaintiffs have seized on this statement to support their argument that price impact should not be considered as part of a loss-causation analysis. While superficially persuasive, however, that argument is wrong.

This article begins with a brief overview of price impact and loss causation. It then shows that *Dura* holds the key to understanding the relationship between the two concepts: namely that price impact is the obverse of loss causation. With that key in hand, we can see more clearly that price impact and loss causation are "distinct" simply because price impact *alone* cannot establish loss causation.

A. *Brief Sketch of Price Impact and Loss Causation*

Price impact and loss causation typically feature in the analysis of two discrete elements of a securities fraud claim. Price impact, which occurs when a fraudulent statement "actually affect[s]" the stock price, arises when class plaintiffs attempt to prove they relied on the integrity of the stock price in purchasing the stock.[16] Loss causation partakes of the traditional tort elements of proximate causation and economic loss.[17] Both concepts ultimately aim at the same central question: whether the plaintiff's economic loss can be attributed to the defendant's fraud. Price impact and reliance relate to whether a defendant's misrepresentation caused the plaintiff's *transaction*; loss causation pertains to whether the misrepresentation caused the plaintiff's economic *loss*.[18]

14. *Id.* at 2184–85 (discussing Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988)).

15. *Id.* at 2187.

16. *E.g.*, *Halliburton II*, 134 S. Ct. 2398, 2406 (2014).

17. *See* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343–44, 346 (2005).

18. *See Halliburton I*, 131 S. Ct. 2179, 2186 (2011). Other courts have drawn a similar distinction between reliance and loss causation. *See, e.g.*, FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1311 (11th Cir. 2011) ("While reliance focuses on the front-end causation question of whether the defendant's fraud induced or influenced the plaintiff's stock purchase, loss causation provides the bridge between reliance and actual damages.") (quotation marks and citation omitted); Emergent Capital Inv. v. Stonepath Grp., 343 F.3d 189, 197 (2d Cir. 2003) ("Like reliance, transaction causation refers to the causal link between the defendant's misconduct and the plaintiff's decision to buy or sell securities. . . . Loss causation, by contrast, is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff."); *accord* Lentell v. Merrill Lynch & Co., 396 F.3d 161, 172 (2d Cir. 2005) (quoting *Emergent Capital*, 343 F.3d at 197).

The concept of price impact first arose in *Basic Inc. v. Levinson*, where the Supreme Court first permitted securities fraud plaintiffs to prove reliance indirectly by satisfying certain preconditions to establish a class-wide, rebuttable presumption.[19] *Basic*'s premise was that stock purchasers often purchase stock on the assumption that the stock price reflects all material information about the stock. "Because most publicly available information is reflected in [the] market price," the Court reasoned, "an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[20] *Basic* held that plaintiffs may invoke the presumption of reliance if they demonstrate the preconditions of publicity, materiality, and market efficiency and traded the shares while the fraud was still on the market.[21] Defendants can rebut that presumption, however, with "[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."[22] One way to "sever the link" is to "show that the misrepresentation in fact did not lead to a distortion of price"—that is, to demonstrate a lack of price impact.[23]

Halliburton II subsequently confirmed that the concept of "price impact" was "*Basic*'s fundamental premise."[24] In that case, shareholders sued Halliburton for losses allegedly sustained from Halliburton's correction of misrepresentations regarding its revenue, its potential liability in asbestos litigation, and the potential benefits from a merger.[25] At class certification, the district court and court of appeals required the plaintiffs to prove "loss causation" in order to invoke *Basic*'s presumption of reliance, and Halliburton attempted to rebut that showing with evidence that there was no price impact.[26] The Supreme Court reversed in *Halliburton I*, concluding that plaintiffs need not show loss causation at the class certification stage.[27] The Court then remanded for consideration of

19. Basic Inc. v. Levinson, 485 U.S. 224, 246–47 (1988).

20. *Id.* at 247.

21. *Id.* at 248 n.27; *see also Halliburton I*, 131 S. Ct. at 2185–86.

22. *Basic*, 485 U.S. at 248.

23. *Id.* For additional examples of ways to rebut the *Basic* presumption of reliance, see GAMCO Invs., Inc. v. Vivendi, S.A., 927 F. Supp. 2d 88, 99–100 (S.D.N.Y. 2013), and *In re* Vivendi Universal, S.A. Sec. Litig., No. 02-cv-5571, 2015 WL 4758869 (S.D.N.Y. Aug. 11, 2015).

24. *Halliburton II*, 134 S. Ct. 2398, 2416 (2014) (quoting *Halliburton I*, 131 S. Ct. at 2186).

25. *Id.* at 2405–06.

26. *Halliburton I*, 131 S. Ct. at 2183-84.

27. *Id.* at 2186.

"any further arguments against class certification" that Halliburton had preserved.[28]

On remand, after Halliburton again tried to introduce evidence of lack of price impact, the Fifth Circuit affirmed class certification on the grounds that Halliburton could rebut the *Basic* presumption only indirectly by refuting one of its preconditions, not directly by showing there was no price impact.[29] The Supreme Court again reversed in *Halliburton II*, holding that price impact was "an essential precondition for any Rule 10b-5 class action," the absence of which could be shown through direct or indirect evidence.[30] Without price impact, there is "no grounding for any contention that [the] investor[ ] indirectly relied on [a] misrepresentation[ ] through [his] reliance on the integrity of the market price."[31] As a result, there is no reason to presume that the plaintiff's decision to purchase the stock could be attributed to the defendant's misrepresentation.[32]

The standard for proving loss causation in a securities fraud claim was established in *Dura Pharmaceuticals, Inc. v. Broudo*.[33] In *Dura*, the plaintiffs alleged that Dura's misrepresentations about a new asthmatic spray device had caused the plaintiffs to purchase Dura securities at "artificially inflated prices" and thereby caused damages.[34] After the district court dismissed the complaint for failure to adequately allege loss causation, the Ninth Circuit reversed, holding that an allegation that the price was artificially inflated at the time of purchase was sufficient to plead and prove loss causation.[35]

The Supreme Court reversed. Analogizing to common-law fraud claims, the Court held that a federal securities fraud plaintiff must "prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss."[36] An artificially inflated purchase price alone does not normally "constitute or proximately cause the relevant economic loss"

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28. *Id.* at 2187.

29. *Halliburton II*, 134 S. Ct. at 2406–07, 2414–16.

30. *Id.* at 2415–16.

31. *Id.* at 2414 (alterations in original) (quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1199 (2013)).

32. *See id.* at 2416.

33. 544 U.S. 336 (2005).

34. *Id.* at 339–40.

35. *Id.* at 340 (discussing Broudo v. Dura Pharms., Inc., 339 F.3d 933, 938 (9th Cir. 2003)).

36. *Id.* at 346. As the Court noted, this requirement was consistent with the statutory command that plaintiffs have "'the burden of proving' that the defen-

because an investor suffers no loss at the time of payment.[37] Rather, loss causation occurs only when the investor purchases the shares at an inflated price and *then* sees the stock price drop when the market learns of the fraud.[38]

Both price impact and loss causation thus have always concerned whether a plaintiff's loss can be attributed to a defendant's misrepresentation. As the next section shows, that common causal link is essential to the connection between price impact and loss causation.

B. *Connecting Price Impact with Loss Causation*

The Supreme Court first connected the concepts of price impact and loss causation in *Halliburton I*, noting that a plaintiff must show both that a "misrepresentation . . . affected the integrity of the market price" and also "caused a subsequent economic loss."[39] As the Court explained, a plaintiff can show loss causation only to the extent that fraud-induced inflation—as opposed to some other factor unrelated to the defendant's fraud—caused the plaintiff's losses.[40] *Halliburton I* revealed what *Dura* had left implicit: in the absence of initial price impact, a misrepresentation cannot cause a subsequent loss when that inflation is *removed* from the stock price.[41] In other words, if a supposedly true statement does not cause the price to go up, the revelation that the supposedly true statement was in fact untrue cannot be said to cause the price to go down.

This section examines *Dura* in light of *Halliburton I* in order to flesh out the relationship between price impact and loss causation. *Dura* made two key insights relevant to that relationship. The first was that the essence of economic loss in fraud-on-the-market claims is the removal of artificial inflation, specifically, from a stock price. The Court made clear that the securities laws do not "provide investors with broad insurance against market losses, but . . . protect them against those economic losses that misrepresentations actually

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dant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Id.* at 345–46 (quoting 15 U.S.C. § 78u-4(b)(4) (2000)).

37. *Id.* at 342.

38. *Id.* at 342–43.

39. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011) (discussing *Dura*, 544 U.S. at 342–43).

40. *Id.* (discussing *Dura*, 544 U.S. at 342–43).

41. *See id.* ("As we made clear in *Dura Pharmaceuticals*, the fact that a stock's 'price on the date of purchase was inflated because of [a] misrepresentation' does not necessarily mean that the misstatement is the cause of a later decline in value.") (quoting *Dura*, 544 U.S. at 342) (alteration in original).

cause."[42] And a misrepresentation causes subsequent losses when an investor purchases shares at a price inflated by the fraud and subsequently sells them at a lower price reflecting the truth.[43] *Dura* gave no indication that a misrepresentation could cause subsequent losses *without* having first inflated the stock price. And *Halliburton I* confirmed that if something other than artificial inflation had been "responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent."[44]

Dura's second insight was that an artificially inflated purchase price only "*sometimes* play[s] a role in bringing about a future loss."[45] Often it is not the revelation of the fraud but a "tangle of other factors"—such as "changed economic circumstances" or "new industry-specific or firm-specific facts, conditions, or other events"—that causes the price to decline.[46] For example, if on the same day the fraud is revealed, the entire stock market takes a nose-dive or the company announces a failed merger, then stock price declines on that day may well have been caused by those events, instead of (or perhaps in addition to) the revelation of the fraud. Even when the revelation of fraud does cause a subsequent loss, the Court added, "changed investor expectations" might diminish *how much* investors value the information that turned out to be fraudulent.[47] "Other things being equal," then, "the longer the time between the purchase and the sale . . . the more likely that other factors caused the loss."[48]

Dura thus treated price impact as a necessary but not sufficient component of loss causation.[49] Although a material misrepresentation initially causes artificial inflation in the stock price, it cannot cause economic loss until that inflation is removed from the stock

42. *Dura*, 544 U.S. at 345.

43. *Id.* at 342–43.

44. *Halliburton I*, 131 S. Ct. at 2186 (discussing *Dura*, 544 U.S. at 342–43).

45. *Dura*, 544 U.S. at 343.

46. *Id.* at 342–43.

47. *Id.* at 343. *Dura* is silent on what such changed investor expectations might be. But one can expect even fraudulent financial results to grow "stale" as *other* developments within a company—such as changes in executive personnel, increased profitability within other corporate divisions, or synergies achieved at scale—all make it less likely that a fraudulently concealed shortfall would result in default, bankruptcy, or other significant financial problems. Put differently, investors may value a one-time overstatement of profits by $0.2 billion far more significantly when overall annual revenue is only $1.0 billion than five years down the road when annual revenue is $10 billion.

48. *Id.*

49. *Id.* at 343 ("[An inflated purchase price] may prove to be a necessary condition of any such loss . . . . But, even if that is so, it is insufficient.").

price when the truth is revealed to the market. Consequently, loss causation requires proof that the removal of artificial inflation caused the stock to decline. If inflation—i.e., price impact—dissipates on its own over time, or if other factors cause the price decline, then no loss causation has been established. Both price impact and a causal link to the plaintiff's economic loss are therefore essential to proving loss causation: in order for the fraud to cause the price to drop, it first must have caused the price to rise.

One corollary to *Dura*'s conception of loss causation is that price impact should always be at least as great as loss causation. As *Dura* explained, initial price impact at best only "touches upon" a later economic loss because the natural trend is for artificial inflation to dissipate over time.[50] That means that the amount of inflation removed from the stock price when the truth comes out is at most only the same amount of inflation as entered the price when the fraudulent statement was made. Accordingly, totaling up residual increases in artificial inflation on days of misrepresentations can provide a helpful comparator for the amount of inflation that allegedly was removed on the back end: if the front-end inflation price impact totals are less than the back-end totals, then that means that the back-end measurements are—at least absent further explanation—inaccurate.

While *Dura* focused on the removal of artificial inflation, it did not necessarily foreclose other ways to prove loss causation that do not involve artificial inflation and hence price impact. But *Halliburton I* subsequently explained that if something other than an inflated purchase price caused a plaintiff's loss, then "a plaintiff would not be able to prove loss causation to that extent."[51] And because no artificial inflation can later be removed without first entering the stock price, price impact is essential to proving loss causation.

It is also unclear what those other ways of proving loss causation might look like in a fraud-on-the-market claim. Securities fraud claims are brought by shareholders who allege their stock lost value due to the defendant's fraud. Even in cases where a plaintiff directly relied on a fraudulent misrepresentation, the measure of the plaintiff's economic loss is the difference between the inflated and non-inflated value of the plaintiff's shares.[52] That measure of dam-

50. *Id.* at 343 ("Other things being equal, the longer the time between purchase and sale, . . . the more likely that other factors caused the loss.").

51. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011).

52. *See, e.g.*, *Dura*, 544 U.S. at 344 (describing "judicial consensus" that defendant is "liable to a relying purchaser 'for the loss' the purchaser sustains 'when the

ages is especially appropriate in a fraud-on-the-market case, where the essential premise of the claim is that the plaintiffs implicitly relied on a material misrepresentation that affected the market price by inflating the stock value.[53] In fraud-on-the-market claims, the inflated stock price is therefore an essential component of causation for both the transaction and, ultimately, the loss.

This reading of *Dura* is confirmed by the circuit split that the Supreme Court agreed to resolve in that case. Circuit courts had adopted one of two standards for showing loss causation. The Ninth Circuit—whose decision was reviewed and reversed in *Dura*—had held that price impact alone was sufficient to prove loss causation.[54] Meanwhile, the Second,[55] Third,[56] and Eleventh[57] Circuits—whose standard *Dura* adopted—had all held that loss causation requires price impact *and* a causal connection to subsequent loss. No circuit court had suggested, however, that a fraudulent statement could cause economic loss without first affecting the stock price.

Since *Dura*, a number of lower courts have recognized that price impact is an essential component of the loss-causation inquiry. The Seventh Circuit, for instance, has held that in a fraud-on-

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facts . . . become generally known' and 'as a result' share value 'depreciate[s].'") (quoting RESTATEMENT (SECOND) OF TORTS § 548A, cmt. b at 107 (AM. LAW INST. 1976)).

53. *See, e.g.*, Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 297 (3d Cir. 1991) (stating that the difference between the purchase price and the "true value" of the security at the time of the purchase is the "proper measure of damages to reflect the loss proximately caused by the defendant's deceit") (quoting Huddleston v. Herman & MacLean, 640 F.2d 534, 555 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983)).

54. Broudo v. Dura Pharms., Inc., 339 F.3d 933, 938 (9th Cir. 2003) ("[I]n a fraud-on-the-market case, plaintiffs establish loss causation if they have shown that the price *on the date of purchase* was inflated because of the misrepresentation.") (internal quotation marks and citation omitted), *rev'd*, 544 U.S. 336 (2005).

55. Emergent Capital Inv. Mgmt. v. Stonepath Grp., 343 F.3d 189, 198 (2d Cir. 2003) (emphasizing that a previous case "did not mean to suggest . . . that a purchase-time loss allegation *alone* could satisfy the loss causation pleading requirement" because the plaintiffs there also "specifically asserted a causal connection between the concealed information . . . and the ultimate failure of the venture").

56. Semerenko v. Cendant Corp., 223 F.3d 165, 185 (3d Cir. 2000) (following Eleventh Circuit rule). *Semerenko* found loss causation sufficiently alleged where the class alleged that "it purchased shares of ABI common stock at a price that was inflated due to the alleged misrepresentations, and that it suffered a loss when the truth was made known and the price of ABI common stock returned to its true value." *Id.*

57. Robbins v. Koger Props., Inc., 116 F.3d 1441, 1448 (11th Cir. 1997) (requiring "evidence that [the artificial] inflation was removed from the market price of [the] stock, [thereby] causing . . . a loss.").

the-market claim, "plaintiffs must show both that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception."[58] And the Second Circuit has held that defendants cannot be liable for statements that "at the time . . . did not affect share price, and thus did no damage."[59] These cases reflect *Dura*'s common-sense idea that for inflation to come out of a stock price, it first must have entered the stock price.[60]

C. *Distinguishing Price Impact from Loss Causation*

Whereas *Dura* established that price impact is a necessary component of loss causation, *Halliburton I* emphatically declared that loss causation "is not price impact."[61] As this section shows, there is no real tension between these two propositions: although the price-impact and loss-causation inquiries overlap, they are not identical precisely because price impact alone is insufficient to show loss causation.

The sole issue in *Halliburton I* was whether loss causation is a prerequisite to establishing *Basic*'s rebuttable presumption of reliance—a necessary condition for class certification.[62] The Fifth Circuit had required the plaintiff to prove loss causation; the Supreme Court explained, however, that although plaintiffs must prove a number of things in order to invoke the *Basic* presumption, loss

58. Ray v. Citigroup Global Markets, Inc., 482 F.3d 991, 995 (7th Cir. 2007).

59. *In re* Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 514 (2d Cir. 2010); *accord* Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 336 (5th Cir. 2010) ("By relying on a decline in price following a corrective disclosure as proof of causation, a plaintiff need prove that its loss resulted directly *because* of the correction to a prior misleading statement; otherwise there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with."), *vacated on other grounds by Halliburton I*, 131 S. Ct. 2179 (2011). *Cf.* DeMarco v. Robertson Stephens Inc., 318 F. Supp. 2d 110, 124 (S.D.N.Y. 2004) ("[T]he origins of loss causation reside precisely in that artificial price inflation.").

60. *E.g.*, FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1311 (11th Cir. 2011) ("[L]oss causation requires proof that the fraud-induced inflation that was baked into the plaintiff's purchase price was subsequently removed from the stock's price, thereby causing losses to the plaintiff."). *FindWhat*'s later holding that a statement can also cause harm by prolonging inflation is addressed *infra* Part II.C.

61. *Halliburton I*, 131 S. Ct. at 2187 (2011).

62. *Id.* at 2184 ("The courts below determined that EPJ Fund had to prove the separate element of loss causation in order to establish that reliance was capable of resolution on a common, classwide basis.").

causation is not one of them.[63] The Court therefore vacated the Fifth Circuit's decision and remanded for reconsideration of the class certification issue.[64]

In an attempt to avoid that result, the defendants argued that what the Fifth Circuit had called "loss causation" really was just "price impact" by another name.[65] It was in this context that the Court distinguished between loss causation and price impact. Rejecting the defendant's argument as a "wishful interpretation," the Court explained that the "Court of Appeals' repeated and explicit references to 'loss causation'" meant that it was requiring proof of loss causation, not price impact.[66] Whereas "[p]rice impact simply refers to the effect of a misrepresentation on a stock price," the Fifth Circuit had expressly discussed the "need for Plaintiff to [also] establish a *causal link* between the alleged falsehoods and its losses in order to invoke the fraud-on-the-market presumption."[67]

Halliburton I did not disturb the Fifth Circuit's holding that loss causation requires proof "that an alleged misstatement 'actually moved the market'"—i.e., price impact.[68] *Halliburton I* merely held that discussion of loss causation was premature at the class certification stage; there was not even a hint that the Fifth Circuit's loss-causation inquiry was erroneous. More fundamentally, the Court treated loss causation and price impact as distinct but overlapping categories. The real thrust of the Court's contrast was to distinguish

63. *Id.* at 2185 ("[I]n order to invoke *Basic*'s rebuttable presumption of reliance[,] . . . plaintiffs must demonstrate that the alleged misrepresentations were publicly known[,] . . . that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'") (quoting Basic Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988)).

64. *Id.* at 2187.

65. *Id.* at 2186–87.

66. *Id.* at 2187.

67. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 335 (5th Cir. 2010), *vacated on other grounds* 131 S. Ct. 2179 (2011). The Fifth Circuit stated: "[EPJ Fund] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses. . . . Thus, we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption." *See id.* at 334–35 (quoting Oscar Private Equity Invs. v. Allegiance Telecom. Inc., 487 F.3d 261, 265 (5th Cir. 2007)).

68. *Id.* at 335 (quoting Oscar Private Equity Invs., 487 F.3d at 265). *Archdiocese* required proof that plaintiff's "loss resulted directly because of the correction to a prior misleading statement" in order to show that "the original, allegedly false statement caused an inflation in the price to begin with." *Id.* at 336.

loss causation from price impact as a proxy for reliance.[69] Loss causation simply had nothing to do with whether or not a plaintiff had relied on the defendant's misrepresentation.[70] At the same time, the Court recognized that loss causation could be "consistent with a 'price impact' approach."[71] The main difference was that, in addition to requiring proof of artificial inflation, loss causation also requires proof that a misrepresentation "caused a subsequent economic loss."[72]

One might read *Halliburton I* as holding that price impact concerns only reliance and has nothing to do with loss causation at all. But the better reading, given that the elements of a Rule 10b-5 claim must be construed harmoniously,[73] is that price impact is relevant to both reliance and loss causation. *Halliburton I* recognized and *Halliburton II* expressly held that proof of price impact can presumptively establish reliance.[74] As both *Dura* and *Halliburton I* make clear, price impact is a necessary—though not sufficient—component of loss causation.[75] Nothing precludes the same evidence of price impact from applying to different elements of a plaintiff's claim.[76]

This should not surprise. Although reliance and loss causation are treated as separate elements of a securities fraud claim, they are closely related, and both are required to ensure a sufficient causal connection between wrongdoing and harm. Reliance is often re-

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69. In *Halliburton II*, the Court thus summarized *Halliburton I* as distinguishing between loss causation and *reliance*. 134 S. Ct. 2398, 2406 (2014).

70. *Halliburton I*, 131 S. Ct. at 2186 ("Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.").

71. *Id.* at 2187 (quotation omitted).

72. *Id.* at 2186; *see also Halliburton II*, 134 S. Ct. at 2406.

73. *See* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 160–61 (2008).

74. *Halliburton I*, 131 S. Ct. at 2186 ("Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that 'information is reflected in [the] market price' of the stock at the time of the relevant transaction.") (quoting *Basic*, 485 U.S. at 247) (alterations in original); *see Halliburton II*, 134 S. Ct. at 2414 ("In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse.").

75. *See supra* Part I.B–I.C.

76. *See, e.g.*, Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 432 & n.7 (5th Cir. 2013) ("[P]rice impact evidence does not fit neatly into any one fraud issue, but is probative of materiality, statement publicity, and market efficiency, all of which are relevant in establishing the presumption of fraud-on-the-market reliance. . . . [A] plaintiff cannot establish the element of loss causation without demonstrating a negative price impact resulting from the defendant's release of corrective information."), *vacated on other grounds*, 134 S. Ct. 2398 (2014).

ferred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation."[77] It requires an investor to prove a causal connection between a misstatement and an investment decision, just as loss causation requires a causal connection between a misstatement and economic loss.

That *Halliburton I* distinguishes price impact from loss causation thus does not undermine the conclusion that price impact is the obverse of loss causation. As we have seen, loss causation requires proof that a misrepresentation caused price inflation and that the truth later removed that inflation from the stock price. An immediate question arises, however: can a plaintiff make this showing for all misrepresentations simultaneously, or does each statement need to affect the stock price? Part II addresses this question and concludes that to show loss causation, a plaintiff must prove that each statement had an impact on the stock price.

II.
LOSS CAUSATION AND STATEMENT-BY-STATEMENT PROOF OF PRICE IMPACT

The PSLRA's loss-causation provision requires plaintiffs to "prov[e] that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover."[78] That showing is straightforward when there is one alleged misstatement: a plaintiff must show that the misstatement inflated the stock price and then, when corrected, caused a subsequent decline.[79] But what about when there are multiple alleged misstatements? Does the statute's required showing apply to each individual statement? More specifically, does loss causation require statement-by-statement proof of price impact?

In short, the answer is yes: *Halliburton II* established that price impact should be analyzed on a statement-by-statement basis.[80] And although *Halliburton II* dealt with price impact in the context of proving reliance, a statement-by-statement approach to loss causation would be appropriate in light of the statute, proof of other elements in a 10b-5 private right of action, and economic principles.

77. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341 (2005).

78. 15 U.S.C. § 78u-4(b)(4) (2012).

79. Ray v. Citigroup Global Markets, Inc., 482 F.3d 991, 995 (7th Cir. 2007).

80. *Halliburton II*, 134 S. Ct. 2398, 2417 (2014); *see also* IBEW Local 98 Pension Fund v. Best Buy Co., No. 14-3178, 2016 WL1425807, at *7 (8th Cir. Apr. 12, 2016).

A. Halliburton II *and Proof of Price Impact in the Reliance Context*

After *Halliburton I*, Halliburton again tried to introduce evidence that some of its statements had no price impact, this time to rebut the *Basic* presumption of reliance. *Halliburton II* subsequently allowed Halliburton to make that showing, holding that defendants may rebut the presumption of reliance at the class certification stage with direct evidence that "an alleged misrepresentation did not actually affect the market price of the stock."[81] Importantly, that holding also established that an absence of price impact can be shown on a statement-by-statement basis.

The dispute in *Halliburton II* was relatively narrow. All parties agreed that at the class certification stage, Halliburton could introduce evidence of lack of price impact in order to dispute the plaintiff's showing of market efficiency—one of the four prerequisites for indirectly invoking the *Basic* presumption of reliance.[82] What the parties disagreed over was whether that same evidence could also be used to rebut the presumption directly.[83] "[S]ee[ing] no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact," the Court held that defendants could also rebut the *Basic* presumption with direct evidence that a particular statement "did not actually affect the market price."[84] Because the Fifth Circuit had not given Halliburton the opportunity to make that showing, the Court remanded for further proceedings.[85]

Halliburton II envisioned that defendants could introduce price-impact evidence on a statement-by-statement basis. Indeed, the plaintiffs had attempted to prove market efficiency by submitting an event study that included one of the alleged misstatements, while Halliburton had submitted an event study showing that none of the statements at issue had affected Halliburton's stock price.[86]

81. *Halliburton II*, 134 S. Ct. at 2417.

82. *See id.* at 2415. The first three prerequisites for invoking the *Basic* presumption—publicity, materiality, and market efficiency—demonstrate price impact. *Id.* at 2414.

83. *Id.* at 2414.

84. *Id.* at 2417.

85. *Halliburton II*, 134 S. Ct. at 2417. Justice Thomas, joined by Justices Scalia and Alito, wrote a separate decision concurring in the judgment. *See id.* at 2417-27 (Thomas, J., concurring in the judgment). They would have overruled the *Basic* presumption of reliance entirely. *Id.* at 2418.

86. *Id.* at 2415 (majority opinion). An event study is a regression analysis that shows the likelihood that a specific variable—such as market conditions, fraud, or non-fraud causes—contributed to the rise or decline of a stock on a given day. Event studies are essential tools for securities fraud class actions, as day-by-day price

The Court also discussed an example where the defendant's event study measured six "discrete events"—including one of the specific misrepresentations alleged by the plaintiffs—and showed that none had any impact on the stock price.[87] It would be "bizarre," the Court reasoned, if despite conclusive proof that the plaintiffs could not have relied on the one misstatement, the court nevertheless certified the class on the theory that the market was efficient and hence the *Basic* presumption had indirectly been satisfied.[88]

Statement-by-statement proof of price impact is, moreover, consistent with the Court's rationale for permitting any direct evidence of price impact. As *Halliburton II* explained, *Basic*'s constituent requirements provide an "indirect proxy for price impact."[89] Although that indirect proxy is necessary in a class action to ensure that common issues predominate over individual issues, it does not preclude direct evidence of price impact when such evidence is available.[90] Accordingly, "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance" for that statement.[91]

Statement-by-statement proof of price impact also accords with *Basic* itself. The *Basic* presumption is premised on the notion that "the fraud ha[s] been transmitted through market price" and thereby implicitly relied on by share purchasers.[92] When a statement "does not affect market price"—that is, when there is no price impact—the statement is "immaterial information, by definition"

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inflation figures are necessary to determine the damages of thousands of share purchasers all of whom acquired their shares on different days and hence at potentially different levels of price inflation. Brief of Law Professors as Amici Curiae in Support of Petitioners at 25–28, *Halliburton II*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 60721, *24-32; Brief for Law Professors Robert Bartlett et al., as Amici Curiae in Support of Petitioners at 19–21, *Halliburton I*, 131 S. Ct. 2179 (2011) (No. 09-1403), 2011 WL 1229117, *26-33.

87. *Halliburton II*, 134 S. Ct. at 2415.

88. *Id.* This "bizarre" result likely would not occur if a defendant offered evidence of no price impact for only some, but not all, of a plaintiff's statements. In that case, class certification still might be appropriate based on the statements that did affect stock price; but a court should at least deny certification of a class based on the statements that did not.

89. *Id.*

90. *Id.* at 2415–16 (discussing Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988)).

91. *Halliburton II,* 134 S. Ct. at 2415–16 (quoting *Basic*, 485 U.S. at 248).

92. *Basic*, 485 U.S. at 248.

and thus is not incorporated into the market price.[93] For each statement that does not actually affect market price, there is no basis for applying *Basic*'s presumption of reliance. Individual investors may have subjectively relied on those statements, but *Basic* affords no opportunity for presuming that the entire class did so.

Under *Halliburton II*, defendants can rebut the *Basic* presumption with respect to individual statements by proving that specific statements did not actually affect the stock price. As the next section shows, *Halliburton II*'s statement-by-statement framework should also apply to loss causation with only slight modification.

B. Statement-By-Statement Proof of Loss Causation

Halliburton II's requirement of statement-by-statement proof should apply equally to the loss causation inquiry. Statutory and economic principles militate in favor of applying statement-by-statement analysis to loss causation. Unlike with proof of reliance at class certification, however, plaintiffs should bear the burden of proving price impact in the context of loss causation at trial.

The PSLRA requires a plaintiff to prove that "the act or omission of the defendant . . . caused the [plaintiff's] loss."[94] That provision on its face requires statement-by-statement proof of loss causation. The use of the singular more naturally refers to *each* act or omission rather than to the defendant's conduct as a whole. When referring to the entirety of a defendant's actions, the statute uses a different word: "conduct."[95] Because different words are presumed to have different meanings, Congress's use of the singular words "act" and "omission" should refer to each statement made by the defendant.[96]

This interpretation is confirmed by the statutory context, in which all other elements of 10b-5 liability must be proven for each

93. Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013).

94. 15 U.S.C. § 78u-4(b)(4) (2012).

95. *See, e.g.*, *id.* § 78u-4(f)(3)(C) ("In determining the percentage of responsibility under this paragraph, the trier of fact shall consider – (i) the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs; and (ii) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs."); *id.* § 78u-4(f)(10)(B) ("[R]eckless conduct by a covered person shall not be construed to constitute a knowing commission of a violation of the securities laws.").

96. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62–63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely . . . .' ") (citation omitted).

statement. The PSLRA expressly provides that both falsity[97] and scienter[98] require statement-by-statement proof. Materiality[99] and even who "makes" a statement[100] likewise must be shown on a statement-by-statement basis. And as discussed above, *Halliburton II* permits statement-by-statement proof of price impact with respect to rebutting the presumption of reliance.[101] Given this statutory regime, it would be aberrational for loss causation to receive different treatment. Such a reading would conflict with both the statutory structure and the "narrow dimensions" the Supreme Court has given the Section 10(b) cause of action.[102]

Economic reasons also warrant statement-by-statement proof of loss causation and hence price impact. In the first place, it is unclear how a statement might cause subsequent losses without first causing artificial inflation. That notion would directly contravene *Dura*'s and *Halliburton I*'s premise that loss causation in a fraud-on-the-market claim requires the removal of artificial inflation from the stock price.[103] It also would conflict with *Basic* and *Halliburton II*. If a statement does not affect stock price, then the class cannot

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97. 15 U.S.C. § 78u-4(b)(1) (requiring the complaint to "specify *each statement* alleged to have been misleading, [and] the reason or reasons why *the statement* is misleading.") (emphases added); *see* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1330 (2015) ("[W]hether an omission makes an expression of opinion misleading always depends on context.").

98. *See id.* § 78u-4(f)(10)(A)(i)(I) (defining a knowing violation as when a "covered person makes an untrue statement of a material fact, with actual knowledge that *the representation* is false . . . .") (emphasis added).

99. *TSC Industries, Inc. v. Northway, Inc.*, long ago established that materiality in Section 14(a) claims must be proven on a statement-by-statement basis. 426 U.S. 438, 451–63 (1976). *Amgen* recently recognized the same principle for Section 10(b) claims. *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013). There, the defendants challenged class certification, arguing that "where misrepresentations and omissions are not material, there is no basis for presuming classwide reliance on those misrepresentations and omissions." *Id.* at 1194. Although the Court found the defendants' argument better suited to the merits rather than class certification, it observed that "[b]ecause immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Id.* at 1195.

100. *See* Janus Capital Grp., Inc. v. First Derivatives Traders, 131 S. Ct. 2296, 2302 (2011) ("[T]he maker of *a statement* is the person or entity with ultimate authority over *the statement*, including its content and whether and how to communicate it.") (emphases added).

101. *Supra* Part II.A. *See Halliburton II*, 134 S. Ct. 2398, 2416–17 (2014).

102. Stoneridge Inv. Partners, v. Sci.-Atlanta, Inc., 552 U.S. 148, 160–62, 167 (2008).

103. *Supra* Part I.B. *See Halliburton I*, 131 S. Ct. 2179, 2186 (2011); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–43 (2005).

presumptively have relied on it, and if a statement does not in any sense cause the transaction, then it cannot cause any downstream losses resulting from that transaction.[104]

Moreover, statement-by-statement proof is already an economic necessity in fraud-on-the-market actions. In order to calculate damages for class members who trade in and out of the stock throughout a class period, class plaintiffs need to calculate daily inflation values. As part of that analysis, plaintiffs' experts can calculate the price impact of each alleged misstatement. Because those economic figures are needed anyway for a class action, statement-by-statement proof of loss causation should not create an onerous burden for the parties.

The price-impact inquiry for loss causation should nevertheless differ from that considered in *Halliburton II*. Unlike in *Halliburton II*, which gave defendants an opportunity to demonstrate a lack of price impact at class certification, plaintiffs should bear the burden of proving price impact at trial. After all, the statute expressly requires plaintiffs to demonstrate loss causation,[105] and plaintiffs normally bear the burden of proving all elements of their claim. And unlike in *Halliburton II*, which allowed plaintiffs to prove reliance indirectly using the *Basic* presumption, there is no presumption of loss causation. Plaintiffs therefore must prove loss causation, including price impact, directly.

To prove loss causation, a plaintiff must show that each misrepresentation "affected the integrity of the market price" and "*also* caused a subsequent economic loss."[106] If a plaintiff fails to make that showing for any statement, that statement is inactionable as a matter of law. To avoid this obligation, securities plaintiffs have increasingly asked courts to recognize a so-called "maintenance" theory. The next section briefly examines this development.

C. Emerging "Maintenance" Theories

Under *Halliburton I* and *Halliburton II*, loss causation requires proof that, *inter alia*, each alleged misrepresentation "affected the integrity of the market price."[107] Some lower courts, however, have held that a misstatement can affect the integrity of the market price

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104. *See In re* Vivendi Universal, S.A. Sec. Litig., 123 F. Supp. 3d 424, 430 (S.D.N.Y. 2015) ("The reliance and loss causation elements of a securities fraud claim are analogous to but-for and proximate causation, respectively.") (citing ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 106 (2d Cir. 2007)).

105. 15 U.S.C. § 78u-4(b)(4) (2012).

106. *Halliburton I*, 131 S. Ct. at 2186.

107. *Id.*

even if it does not increase artificial inflation.[108] Two strains of this "maintenance" theory have emerged—only one of which is consistent with *Halliburton I* and *II*.

In the first variant of "maintenance" theory, a misstatement is actionable if it prevents either the stock price or inflation from dropping more than it otherwise would have.[109] But there is nothing special or particularly problematic about this kind of "maintenance" theory: because the stock price (or inflation) would have otherwise dropped, the misstatement "affects" share price by preventing the price (or inflation) from dropping. The investor still has to prove the traditional elements of his or her claim.

A second strain of "maintenance" theory is more problematic, and cannot be reconciled with Supreme Court precedent. In this version, a misrepresentation can affect the stock price merely by "confirm[ing] existing information about a stock, rather than releas[ing] new and different information that might bring about a negative change in the stock's price."[110] Unlike in the first variant of "maintenance" theory, then, neither the stock price nor inflation rises after the misrepresentation. Courts have justified this version of maintenance theory on the grounds that pre-existing inflation would have dissipated if the company had simply spoken the truth,

108. *See, e.g.*, Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 418–19 (7th Cir. 2015); FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1314–16 (11th Cir. 2011); *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 561–63 (S.D.N.Y. 2011).

109. *See, e.g.*, *FindWhat*, 658 F.3d at 1315 (holding that defendants can be liable where a statement maintains inflation "by preventing preexisting inflation from dissipating from the stock price"); Schleicher v. Wendt, 618 F.3d 679, 683 (7th Cir. 2010) ("Likewise when an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made."); Swack v. Credit Suisse First Boston, 383 F. Supp. 2d 223, 240 (D. Mass. 2004) ("Defendants' conduct could have tempered a drop in price that would otherwise have occurred, or resulted in a greater increase than the stock would otherwise have enjoyed, absent the deceptive [statement].").

110. Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1256 (11th Cir. 2014). *See Glickenhaus*, 787 F.3d at 419 ("[W]hat the plaintiffs had to prove is that the defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful."); In re *Vivendi Universal*, 765 F. Supp. 2d at 561 ("[A] misstatement may cause inflation simply by *maintaining* existing market expectations, even if it does not actually cause the inflation in the stock price to increase on the day the statement is made.").

rather than made a "confirmatory" misstatement.[111] But that ignores the fact that often the defendant also could have chosen not to speak at all.[112] If it had remained silent, then the share price would have remained inflated (with perhaps gradual dissipation) until the market learned that its assumptions had been inaccurate. In no sense, then, does a "confirmatory" statement "cause" inflation to remain in the stock price.

This latter version of maintenance theory will, in many scenarios, be irreconcilable with *Dura*'s requirement that a statement "play a role in bringing about a future loss."[113] When a fraudulent statement merely "maintains" inflation, the price would have been inflated—and subsequent losses still would occur—irrespective of the statement. The statement thus would have played *no* role "in bringing about a future loss."[114] After all, any inflation that later comes out of the stock price would have entered the stock price not because of the fraudulent statement, but through some earlier (and potentially non-fraudulent) means. Under *Dura* and *Halliburton I*, that precludes a finding of loss causation.[115]

At least one court has defended the second type of "maintenance" theory on the grounds that requiring price impact for each statement "would make it harder for plaintiffs to prove loss causation when a company makes numerous similar misstatements over a long time period."[116] That is incorrect. Requiring that each statement affect the stock price would not necessarily bar or limit plaintiffs' recovery at all: it simply would require them to identify the fraudulent statements that actually affected the stock price. That is something that, in effect, class plaintiffs already do when they calculate share price inflation (hence damages) throughout the class pe-

111. *E.g.*, *Local 703*, 762 F.3d at 1256; *In re* Sci.-Atlanta, Inc. Sec. Litig., 754 F. Supp. 2d 1339, 1380 n.12 (N.D. Ga. 2010); *In re* Cooper Sec. Litig., 691 F. Supp. 2d 1105, 1116 (C.D. Cal. 2010).

112. *See Glickenhaus*, 787 F.3d at 417 n.4 ("This assumes, however, that the only alternative to a false statement is a true statement. If *no statement* was an alternative, then the model is much less accurate because it measures the effect of the truth, not the effect of silence.").

113. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 343 (2005).

114. *Id.*

115. *Halliburton I*, 131 S. Ct. 2179, 2186 (2011) ("If one of those factors [other than artificial inflation caused by the statement] were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent."); *Dura*, 544 U.S at 345 (holding that the securities laws "protect [investors] against those economic losses that misrepresentations *actually* cause") (emphasis added).

116. *In re* Vivendi Universal S.A. Sec. Litig., 765 F. Supp. 2d 512, 563 (S.D.N.Y. 2011).

riod.[117] Eliminating "maintenance" theory therefore would not "make it harder" for class plaintiffs to prevail; it merely would make it harder for them to prevail based on non-actionable statements.

There is another big problem with confirmatory statements that merely "maintain" price inflation without actually affecting stock price: they are irreconcilable with *Basic*'s presumption of reliance. Such statements add no new material information to the market, as the market has already incorporated the information into the stock price.[118] Because those confirmatory statements do not affect stock price, they cannot be material.[119] If they are not material, they cannot be incorporated into the integrity of the stock price.[120] Mere "confirmatory" statements thus cannot be presumptively relied upon by investors.

Halliburton I and *II* strongly undermine the kind of "maintenance" theory of loss causation that does not require statement-by-statement proof of price impact. That aspect of the theory is incompatible with the traditional understanding of the elements of loss causation and reliance. And by allowing plaintiffs to recover based on statements that did not actually cause their losses, courts adopting "maintenance" theory have run the risk of "provid[ing] investors with broad insurance against market losses" rather than protection "against those economic losses that misrepresentations actually cause."[121]

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117. *See supra* Part II.B.

118. *See, e.g.*, Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 665–66 (5th Cir. 2004) ("[C]onfirmatory information has already been digested by the market and will not cause a change in stock price. Because the presumption of reliance is based upon *actual movement* of the stock price, confirmatory information cannot be the basis for a fraud-on-the-market claim."). Note that this is not a categorical bar on confirmatory statements. Even a statement that confirms information already in the marketplace can have price impact if intervening events have cast doubt on, or caused the market to devalue, the original statement of that information. In those circumstances, however, a "confirmatory" statement reiterating that the original information was, in fact, correct, would likely introduce new artificial inflation into the stock—and would not be merely "maintaining" the stock price at all.

119. *See* Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013) ("[I]mmaterial information, by definition, does not affect market price.").

120. *E.g.*, *Halliburton II*, 134 S. Ct. 2398, 2413–14 (2014); Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988) (holding that if "the market price would not have been affected by [defendants'] misrepresentations, . . . the basis for finding that the fraud had been transmitted through market price would be gone").

121. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 345 (2005).

CONCLUSION

This Article has endeavored to begin unpacking the relationship between loss causation and price impact, an increasingly important area of securities fraud doctrine. *Halliburton I* established a fundamental, obverse relationship between the two concepts: before artificial inflation can come *out* of a stock price, it must first have *entered* the stock price because of the defendant's misrepresentation. And *Halliburton II* established that this relationship should play out on a statement-by-statement basis. Where a plaintiff cannot show that a specific statement actually affected the stock price, a court should dismiss that statement, even if a plaintiff claims that the statement merely "maintained" inflation.

Just as what goes up must come down, what goes down must at one point have gone up. And the civil plaintiff in a federal securities fraud action must tie it all to *each* challenged statement.