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Fifth Circuit Class Certification Update

Is the Fraud-on-the-Market Presumption Alive and Well in the Fifth Circuit? An Analysis of *Oscar Private Equity Investments vs. Allegiance Telecom, Inc.* and Its Effect On Subsequent Cases

Roger B. Greenberg

Roger B. Greenberg
Thane Tyler Sponsel III
Schwartz Junell Greenberg
& Oathout, LLP
Two Houston Center
909 Fannin, Suite 2700
Houston, Texas 77010

rgreenberg@schwartz-junell.com
713.752.0017

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FIFTH CIRCUIT CLASS CERTIFICATION UPDATE

Is the Fraud-on-the-Market Presumption Alive and Well in the Fifth Circuit?

An Analysis of *Oscar Private Equity Investments v. Allegiance Telecom, Inc.* And Its Effect on Subsequent Cases

By: Roger B. Greenberg & Thane Tyler Sponsel III

The Fifth Circuit's opinion in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.* is a key securities class action decision for both Plaintiff and Defense counsel. *Oscar* is unique to Fifth Circuit jurisprudence and its importance to securities litigators makes *Oscar* and subsequent reported cases warrant further analysis. The class action bar recognizes the Fifth Circuit's continued restriction of class certification; however not all courts agree on the issue of proof of loss causation at the class certification stage.

Class certification is authorized under Federal Rule of Civil Procedure ("FRCP") 23. An action may proceed as a class action only if the party seeking certification satisfies all the requirements of FRCP 23(a) and one of the requirements of FRCP 23(b). The party seeking certification has the burden of proof. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). Specifically, Rule 23(a) requires proof that:

- (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.

See FED. R. CIV. P. 23(a); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001).

FRCP 23(b) contains three possible requirements, only one of which must be satisfied. FRCP 23(b)(3) requires that "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The first requirement is usually referred to as the predominance requirement and the second as the superiority requirement.

Oscar focused on FRCP 23(b)(3)'s predominance requirement and its corresponding fraud-on-the-market presumption. *See Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 264 (5th Cir. 2007). *Oscar*'s scope is narrow, focusing only on half of the "fifth" requirement for class certification, but its holding has wide ranging effects. In order to better understand *Oscar*, a brief review of the predominance requirement and the Fifth Circuit's views regarding the same will be required.

The Predominance Requirement of FRCP 23(b)(3)

When a party institutes a class action which alleges, among other things, violations of Section 10(b), *see* Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b), and SEC Rule 10b-5, *see* 17 C.F.R. § 240.10b-5, that party will seek class certification under the requirements of FRCP 23(a) and (b)(3). Proof of FRCP 23(b)(3) is required when private parties are seeking monetary damages under the aforementioned securities law sections. *See e.g., Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). The court's inquiry into the predominance element for class certification purposes begins with a review of the elements of Section 10(b) and Rule 10b-5 claims. In order to prove a private securities fraud claim under 10(b) and 10b-5, plaintiffs must demonstrate, in connection with the purchase or sale of securities, (1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which they relied; and (5) that proximately caused their injuries. *See Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 661 (5th Cir. 2004). *Oscar's* focus is the reliance element. *Oscar*, 487 F.3d at 264. Further, the Fifth Circuit has opined that a district court must "perform sufficient analysis to determine that class members' fraud claims are not predicated on proving individual reliance." *Unger*, 401 F.3d at 321. Therefore, satisfying FRCP 23(b)(3)'s predominance requirement will depend on whether the plaintiffs can utilize the fraud-on-the-market theory of collective reliance. *See e.g., Unger*, 401 F.3d at 322. The fraud-on-the-market theory, determined by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), is a (rebuttable) presumption that each class member has satisfied the reliance element of their Section 10(b) and 10b-5 claims. *See Oscar*, 487 F.3d at 264.

In order to invoke the fraud-on-the-market presumption, plaintiffs in Section 10(b) and Rule 10b-5 cases must show that: (1) the defendant made public material misrepresentations; (2) the defendant's shares were traded in an efficient market; and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed. *See Greenberg*, 364 F.3d at 661 (citing *Basic*, 485 U.S. at 224, 108 S.Ct. 978). "The central premise of the [fraud-on-the-market] theory is that, in an efficient capital market, the market price reflects all public information; hence an investor who purchases a stock in such a market is harmed if the price reflects false information as a consequence of a material misrepresentation." *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 309 n.2 (5th Cir. 2005) (citing *Basic v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988)). The presumption of reliance is essential to class certification because without the presumption, individual issues of reliance will predominate and FRCP 23(b)(3) will not be satisfied. *See e.g., Bell*, 422 F.3d at 310 & n.2.

Once plaintiffs have established their entitlement to the fraud-on-the-market presumption of reliance, the same may be rebutted by the defendants. The presumption may be rebutted by "any showing that severs the link between the alleged misrepresentation and ... the price received (or paid) by the plaintiff." *Nathenson v. Zonagen*, 267 F.3d 400, 414 (5th Cir. 2001) (quoting *Basic*, 485 U.S. at 228, 108 S.Ct. 978). The Fifth Circuit has provided guidance as to how defendants can rebut the fraud-on-the-market presumption of reliance. Defendants can rebut the presumption by showing that: (1) the stock market price was not "actually affected" by the alleged fraud; (2) plaintiffs would have purchased the stock even with knowledge of the nondisclosure; or (3) plaintiffs actually knew the information that had not been publicly

disclosed. See *Fine v. Am. Solar King Corp.*, 919 F.2d 290, 299 (5th Cir. 1990). With this backdrop, we proceed to the Fifth Circuit’s particular fraud-on-the-market rules and eventually to *Oscar*.

Fraud-on-the-Market in the Fifth Circuit

The Fifth Circuit has observed that *Basic* “allows each of the circuits room to develop its own fraud-on-the-market rules.”¹ *Oscar*, 487 F.3d at 264 (citations omitted). The Fifth Circuit has explained what plaintiffs must prove in order to invoke the fraud-on-the-market presumption of reliance. In *Nathenson v. Zonagen*, 267 F.3d 400 (5th Cir. 2001), the Fifth Circuit held that plaintiffs could invoke the fraud-on-the-market presumption if they could show that a purported fraud actually affected the stock price. 267 F.3d at 414. The court stated that the plaintiffs could make this showing by proving either an increase in price after the release of false positive news or a decrease in stock price after a corrective disclosure. *Id.* at 418-19 (quotations omitted). Further, the court stated that confirmatory statements could not actually affect the stock price because the market would not double-count and react to the same information. *Id.* (quotations omitted). After *Nathenson*, in *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004), the Fifth Circuit expanded on its holding in *Nathenson*. In *Greenberg*, the Fifth Circuit held that when plaintiffs rely on a decline in stock price to invoke the fraud-on-the-market presumption, they must “show that the false statement causing the increase was related to the statement causing the decrease.” 364 F.3d at 665. Also, in *Greenberg*, the Fifth Circuit addressed what plaintiffs must do when related corrective disclosures are made in tandem with unrelated bad news. 364 F.3d at 665-66. The court held that plaintiffs must also prove that there is a “reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of the unrelated negative information.”² *Id.* at 665. The court emphasized that the related corrective disclosure must have played a significant role in the price drop. *Id.* at 667. Lastly, in *Oscar*, the Fifth Circuit used *Basic* to further restrict the availability of the fraud-on-the-market reliance presumption by requiring plaintiffs to establish loss causation

¹ The fraud-on-the-market presumption of reliance concerns the interpretation of a federal statute; therefore, the Supreme Court allowing each circuit “room” to develop its own rules *per force* must lead to conflicting law from circuit to circuit. In *Oscar*, the Fifth Circuit cited *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1117-18 (5th Cir. 1988), *vacated on other grounds sub. Nom. Fryar v. Abell*, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989), for this proposition. *Oscar*, 487 F.3d at 264. However, a review of *Abell* does not provide any citation to *Basic* for this proposition. *Abell*, 858 F.2d at 1120. Further, this quotation does not appear in *Basic*. Thus, from where does the Fifth Circuit derive this rule? Is it because the Supreme Court vacated *Abell* on other grounds? Probably not; it more likely comes from the Fifth Circuit’s reading of *Basic*. In *Basic*, the Supreme Court made two separate statements that might have led the Fifth Circuit to its rule. First, the Supreme Court stated that “[c]ommentators generally have applauded the adoption of one variation or another of the fraud-on-the-market theory.” *Basic*, 485 U.S. at 247. A subsequent court might conclude that this allows room to develop different variations of the fraud-on-the-market presumption. Second, in a footnote, the Supreme Court stated that “[b]y accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price.” *Id.* at 249 n.28. This footnote might also have led to the Fifth Circuit’s proposition. However, without an actual citation to *Basic* from the Fifth Circuit, it is unknown exactly where the Fifth Circuit derived its rule.

² In *Greenberg*, the Fifth Circuit used the term “reasonable likelihood” to define for courts and litigants the level of proof required; however, what is a “reasonable likelihood?” The *Greenberg* court did not specifically define “reasonable likelihood” but it did interchange this term with “more probable than not.” *Greenberg*, 364 F.3d at 666. Thus, “reasonable likelihood” appears to be a preponderance of the evidence standard.

in order to trigger the presumption at or before the class certification stage. *Oscar*, 487 F.3d at 265.

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

Oscar Private Equity Investments and others filed suit against Allegiance Telecom alleging violations of section 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. *Oscar*, 487 F.3d at 262. Allegiance was a national telecommunications provider based in Dallas, Texas which sold local telephone service, long distance, broadband access, web hosting, and telecom equipment with maintenance to small and medium sized businesses. *Id.* The plaintiffs alleged that Allegiance fraudulently misrepresented its line-installation count in the company's first three quarterly announcements of 2001, and that Allegiance's stock price dropped after it ultimately restated the count in the 4Q01 announcement. *Id.* at 263. The plaintiffs moved for class certification and relied on the fraud-on-the-market presumption for evidence of class-wide reliance. *Id.* The district judge, Barefoot Sanders, certified the class having found that the plaintiffs satisfied the requirements of FRCP 23. *Id.*

The Fifth Circuit vacated the district court's certification of the proposed class and remanded. *Oscar*, 487 F.3d 262. The panel consisted of Judges Jolly, Higginbotham and Dennis. *Id.* Judge Dennis dissented. *Id.* The panel (Judges Jolly and Higginbotham) was "persuaded that the class certified fails for want of any showing that the market reacted to the corrective disclosure." *Id.* The panel held that "loss causation must be established at the class certification stage by a preponderance of all admissible evidence."³ *Id.* at 269. This is the first holding of its kind. No other circuit has created such a difficult hurdle for plaintiffs to overcome at the class certification stage.

The court started its explanation of this new class certification hurdle by observing that *Basic* allows each circuit room to develop their own fraud-on-the market rules, and that it had, in prior decisions, used this room "to tighten the requirements for plaintiffs seeking a presumption of reliance." *Oscar*, 487 F.3d at 264-65. The court went on to state that the "power of the fraud-on-the-market doctrine is on display here" and that it could no longer "ignore the *in terrorem* power of certification." *Id.* at 267 (emphasis in original). The court was concerned with the fraud-on-the-market presumption's power to "facilitate[] an extraordinary aggregation of claims." *Id.* From this point, the court reviewed the revised Rule 23 and the advisory committee notes stating that class certification was no longer characterized as conditional; instead, a "court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *Id.* The court reasoned that "[t]hese subtle changes, as well as the less-subtle PSLRA, recognize that a district court's certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it." *Id.* Based on these "subtle changes", the court reiterated that Rule 23 "mandates a complete analysis of fraud-on-the-market indicators, [meaning] district courts must address and weigh factors both

³ Judge Dennis dissented from the panel's revision of *Basic*'s fraud-on-the-market presumption. "The majority's decision is, in effect, 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 mini-trials on the merits of cases at the class certification stage, and effectively overrules legitimately binding circuit precedents." *Oscar*, 487 F.2d at 272 (Dennis, J., dissenting).

for and against market efficiency.” *Id.* The Fifth Circuit explained that “[d]istrict courts often tread too lightly on Rule 23 requirements that overlap with the 10b-5 [and 10b] merits, out of a mistaken belief that merits questions may never be addressed at the class certification stage”, which it believed was a misreading of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), an early class certification decision by the Supreme Court. *Id.* at 268. Therefore, given this misreading, a “district court still must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits.” *Id.* Lastly, the Fifth Circuit concluded its explanation with the statement that because *Greenberg* held that loss causation was a fraud-on-the-market prerequisite, and because *Unger* mandated a complete analysis of fraud-on-the-market indicators at the class certification stage, loss causation must be established at the class certification stage by a preponderance of all admissible evidence. *Id.* at 268-69. Thus, the Fifth Circuit has moved from *Basic*’s rebuttable presumption to an affirmative proof “mini-trial” on loss causation at the class certification stage.

The Aftermath of Oscar

It is plainly evident that *Oscar* is an important case. Since the Fifth Circuit decision in May 2007, twenty-nine (29) cases and one hundred four (104) secondary sources and/or law review articles have cited it for various propositions. Fifteen (15) courts within the Fifth Circuit have cited *Oscar* and fourteen (14) courts outside of the Fifth Circuit have cited it. Of the 15 cases from the Fifth Circuit courts, six (6) have substantively discussed *Oscar*’s holding that loss causation must be established at the class certification stage by a preponderance of all admissible evidence. Of the 14 cases from outside the Fifth Circuit, eight (8) have substantively discussed *Oscar*’s holding. The following table provides an illustration of how *Oscar* has been treated in and out of the Fifth Circuit.

	<u>Date</u>	<u>Court</u>	<u>Motion</u>	<u>Oscar</u>	<u>Class Certification</u>
<u>5th Circuit</u>					
<i>In re Seitel, Inc. Sec. Litig.</i>	26-Jun-07	S.D. Tex.	Class Certification	Follows	Denied
<i>Ryan v. Flowserve Corp.</i>	13-Nov-07	N.D. Tex.	Class Certification	Follows	Denied
<i>Luskin v. Intervoice-Brite Inc.</i>	8-Jan-08	5th Circuit	Class Certification	Follows	Certification order vacated
<i>Fener v. Belo Corp.</i>	2-Apr-08	N.D. Tex.	Class Certification	Follows	Denied
<i>In re OCA, Inc. Sec. and Derivative Litig.</i>	17-Oct-08	E.D. La.	Class Certification	Follows	Granted
<i>Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.</i>	4-Nov-08	N.D. Tex.	Class Certification	Follows	Denied
<u>2nd Circuit</u>					
<i>Wagnor v. Barrick Gold Corp.</i>	15-Feb-08	S.D.N.Y.	Class Certification	Declined to Follow	Granted
<i>Darquea v. Jarden Corp.</i>	6-Mar-08	S.D.N.Y.	Class Certification	Declined to Follow	Granted
<i>In re Alstom SA Sec. Litig.</i>	26-Aug-08	S.D.N.Y.	Class Certification	Declined to Follow	Granted
<i>Lapin v. Goldman Sachs & Co.</i>	15-Sep-08	S.D.N.Y.	Class Certification	Declined to Follow	Granted
<u>6th Circuit</u>					
<i>Ross v. Abercrombie & Fitch Co.</i>	28-Aug-08	S.D. Ohio	Motion to Exclude	N/A	N/A
<u>9th Circuit</u>					
<i>In re Micron Technologies, Inc. Sec. Litig.</i>	19-Dec-07	D. Idaho	Class Certification	Declined to Follow	Granted
<i>In re Metropolitan Sec. Litig.</i>	25-Nov-08	E.D. Wash.	Class Certification	Declined to Follow	Granted

The Fifth Circuit and its district courts are the only courts following *Oscar*'s mandate that loss causation must be proved at the class certification stage. District courts from four other circuits have considered the *Oscar* decision, yet none have followed its reasoning. All but one of the courts following *Oscar* have denied certification and every court declining to follow *Oscar* has granted certification. However, the one case that follows *Oscar* and granted certification, to be discussed *infra*, is distinguishable and should not be considered as representative.

Fifth Circuit

In securities class action certification, *Oscar* places an exceedingly high burden of proof on plaintiffs seeking class certification. The following discussion of the six cases which substantively discuss *Oscar* for its loss causation holding are illustrative and illuminating.

In re Seitel, Inc. Sec. Litig., 245 F.R.D. 263 (S.D. Tex. 2007).

In *Seitel* (Judge Vanessa D. Gilmore), investors brought a securities class action against Seitel, its officers and directors, and Ernst & Young LLP alleging fraudulent accounting practices and false statements regarding the timing of revenue recognition. *In re Seitel, Inc. Sec. Litig.*, 245 F.R.D. 263, 265 (S.D. Tex. 2007). Violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 were alleged. Specifically, plaintiffs alleged that "Seitel and Ernst & Young materially misrepresented Seitel's results for the year ending December 31, 2000, by improperly recognizing revenues and thereby materially inflating Seitel's revenues and profits." *Id.* Subsequently, a lead plaintiff was appointed and the instant class certification motion was brought. *Id.* at 267. Plaintiffs sought certification under Rule 23(a) and 23(b)(3), requiring analysis by the district court following the Fifth Circuit's mandate on loss causation. *Id.* at 268. The district court first determined whether the plaintiffs satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy. The court heard arguments, received evidence, and determined that Rule 23(a) was satisfied. *Id.* at 268-273.

The district court turned its attention to Rule 23(b)(3). The plaintiffs submitted evidence that the defendants made material public misrepresentations, plaintiffs had traded shares between the time the representations were made and the time the truth was revealed, and Seitel's shares were traded in an efficient market. *Seitel*, 245 F.R.D. at 274-75. All three elements seemingly satisfied, plaintiffs argued they were entitled to the fraud-on-the-market presumption of reliance. *Id.* at 275. The defendants replied that "[p]laintiffs must demonstrate not only all three aforementioned elements, but also that E&Y's alleged misrepresentations caused actual movement in Seitel's stock price," *i.e.* loss causation. *Id.* (emphasis in original). The district court agreed with defendants that *Oscar* required the plaintiffs to prove loss causation at the class certification stage by a preponderance of all admissible evidence in order to trigger the fraud-on-the-market presumption. *Id.* at 275-76. The court heard all the evidence, stating that "*Oscar*'s edict is unassailable" and thus, *Oscar* foreclosed all of the plaintiffs' arguments. *Id.* at 278.

Accordingly, the court denied class certification. *Id.* The *Seitel* court was the first court in the Fifth Circuit to consider and cite *Oscar*.

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

Flowserve manufactures pumps, seals, and valves and provides a variety of flow management services. *Ryan v. Flowserve Corp.*, 245 F.R.D. 560, 563 (N.D. Tex. 2007). Flowserve's financial and legal problems began in 2000 when it "went on a massive acquisition binge more than doubling its size but saddling itself with immense debt." *Id.* (quotations omitted). In 2003, investors filed a securities class action against Flowserve, two officers and/or directors, and eventually Pricewaterhouse Coopers, Banc of America Securities LLC and Credit Suisse First Boston LLC. *Id.* at 566. Plaintiffs brought suit under Section 10(b) and 20(a) of the 1934 Act, Rule 10b-5 and Section 11 and 15 of the 1933 Act. *Id.* at 566-67. "The essence of the case against the Flowserve Defendants [was] that they concealed key information from the investing public through misrepresentations and omissions." *Id.* at 566. Subsequently, the plaintiffs moved to certify a class against the defendants. *Id.* at 567.

Plaintiffs sought class certification under Rule 23(a) and 23(b)(3). *Flowserve*, 245 F.R.D. at 567. Unlike *Seitel*, Judge Jane J. Boyle did not consider Rule 23(a), turning directly to Rule 23(b)(3) stating the court "begins and ends its Rule 23 discussion with the predominance issue." *Id.* The plaintiffs presented evidence that the "Flowserve stock traded in an efficient market and that the alleged material falsehoods, none of which are non-confirmatory, actually affected the Flowserve stock." *Id.* at 269 Further, the plaintiffs relied on "precipitous stock price drops of 37% on July 22, 2002 and 38.8% on September 27, 2002 to show the fraud actually affected the stock price." *Id.* The defendants countered that some of the statements were confirmatory and therefore non-actionable; some of the statements were non-confirmatory but had a positive effect on the stock and no damages; and some of the statements were non-confirmatory but neither related to the corrective disclosures nor played a substantial role in causing the acute price drops. *Id.* at 570. Reviewing the evidence before it, the court held that the plaintiffs had failed to meet their burden to prove loss causation by a preponderance of the evidence. *Id.* Specifically, the court stated that the "[p]laintiffs stumble in showing the alleged fraud actually affected the market at several hurdles: (1) relying, in part, on non-actionable confirmatory statements; (2) failing to show loss after a positive increase; (3) not adequately demonstrating the relation between the alleged fraud and the alleged corrective disclosures; and (4) not showing that any related corrective disclosure did and could have played a significant role in precipitating the stock price drops." *Id.* The plaintiffs had presented expert opinion, event studies, Flowserve memoranda, emails and deposition testimony in support; however, the court held this evidence insufficient to show the fraud actually affected the stock price and the court denied certification. *Id.*

Luskin v. Intervoice-Brite Inc., 261 F. App'x. 697, 2008 WL 104273 (5th Cir. Jan. 8, 2008)

Luskin (Judges Jones, Stewart and Clement) was the first opportunity the Fifth Circuit had to consider its reasoning in *Oscar*. In *Luskin*, shareholders filed a securities class action

against Intervoice-Brite and its officers alleging that the defendants committed securities fraud by “making false and misleading statements concerning Intervoice’s August 1999 merger, its fourth quarter of 2000 and fiscal year 2001 earnings and revenue projections, and its fiscal year 2000 year-end earnings and revenue results.” *Luskin v. Intervoice-Brite Inc.*, 261 F. App’x. 697, 2008 WL 104273, *1 (5th Cir. Jan. 8, 2008). The district judge (Judge Ed Kinkeade) found that the plaintiffs had satisfied all of Rule 23’s requirements, including predominance, and refused to hear defendants’ evidence to rebut the presumption, stating that “an examination of the presumption at the class certification stage would be premature and improperly delve into the actual merits of Plaintiffs’ claims.” *Id.* at *2. Shortly thereafter the Fifth Circuit issued its *Oscar* decision; the defendants in *Luskin* therefore sought interlocutory appeal. *Id.* at *1. The Fifth Circuit applied *Oscar*’s holding that the plaintiffs must “establish loss causation in order to trigger the fraud-on-the-market presumption.” *Id.* at *3 (quotations omitted).

On appeal, the plaintiffs attempted to distinguish *Oscar* on its facts. *Luskin*, 2008 WL 104273, at *4. *Oscar* involved multiple negative disclosures and in a footnote, the *Oscar* court had stated that “we address here only the simultaneous disclosure of multiple negatives, not all of which are alleged culpable.” *Id.* (quotations omitted). Therefore, the *Luskin* plaintiffs argued that *Oscar* should be “limited on its facts to situations involving multiple negative disclosures” and because “the present case does not involve multiple disclosures, ...*Oscar* does not apply and the class certification should stand.” *Id.* The Fifth Circuit disagreed, pointedly stating that the *Oscar* decision does not support such a narrow reading and “[t]here is no reason why the concerns stated in *Oscar* do not equally apply to cases in which only one negative disclosure is at issue.” *Id.* Thus, the Fifth Circuit vacated the certification order, remanding to the district court to “examine whether the Plaintiffs have adequately demonstrated loss causation ...” *Id.* at *5.

Fener v. Belo Corp., 560 F. Supp. 2d 502 (N.D. Tex. 2008)

In *Fener* (Judge Stanley Fitzwater), the plaintiffs brought a securities fraud class action against Belo Corporation and its officers alleging that the corporation reported artificially inflated financial results based on overstated circulation and advertising revenue of its newspaper subsidiary, the Dallas Morning News. *Fener v. Belo Corp.*, 513 F. Supp. 2d 733, 736 (N.D. Tex. 2007). Belo is a media company that owns newspapers, television stations, cable news channels and websites. *Id.* at 737. On August 5, 2004, Belo made several announcements concerning circulation that would eventually form the basis of this lawsuit. *Id.* “On August 5, 2004, Belo announced that DMN’s reported daily circulation was overstated by 1.5% and Sunday circulation was overstated by 5%.” *Id.* Further, it “admitted that for the six-month period ending September 30, 2004, total circulation would decline approximately 5% daily and 11.5% Sunday, compared with figures reported in September 2003.” *Id.* Also, defendant announced that it was conducting an internal investigation which had disclosed practices and procedures that led to an overstatement in circulation. *Id.* The plaintiffs filed suit leading to the instant class certification motion before the court.

As in *Flowserve*, the district court only considered Rule 23(b)(3)’s issue of predominance and the fraud-on-the-market presumption. *Fener v. Belo Corp.* 560 F.Supp.2d 502, 503 (N.D. Tex. 2008). The plaintiffs maintained that loss causation could be established by the evidence of

an August 6, 2004 decline in Belo's stock price following the company's previous day announcement of circulation declines stemming from circulation overstatements. *Id.* at 504. Plaintiffs offered an expert in support of loss causation and argued that the multiple items of news were "all directly related to the announcement of the circulation overstatement scheme." *Id.* at 505 (quotations omitted). Defendants offered a rebuttal expert who testified that the "August 5 announcement attributed overall circulation decline to three separate sources, only one of which is related to the alleged fraud." *Id.* at 504. The court agreed with the defendants' expert that there were three separate news items in the August 5th announcement. *Id.* at 505. Therefore, following *Oscar*, the court stated that the plaintiffs were required to prove that it was more probable than not that the negative statement related to the circulation overstatement scheme, and not other unrelated negative statements, that was the cause of the significant stock price decline. *Id.* at 505-06. After considering the evidence, the court denied certification because the plaintiffs had failed to prove loss causation or to "offer some empirically-based showing that the corrective disclosure was more than just present at the scene." *Id.* at 507 (quoting *Oscar*, 487 F.3d at 271).

In re OCA, Inc. Sec. & Derivative Litig., No. 05-2165, 2008 WL 4681369 (E.D. La. Oct. 17, 2008)

In re OCA (Judge Sarah S. Vance) is the only case which has substantively discussed *Oscar* and granted certification. OCA provides business services to orthodontic and pediatric dental practices throughout the United States. *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2008 WL 4681369, * 1 (E.D. La. Oct. 17, 2008). Plaintiffs filed suit under Sections 10(b) and 20(a) of the 1934 Act and under Rule 10b-5. *Id.* Plaintiffs alleged that "over the remainder of 2004 and the early part of 2005, defendants made a series of false statements concerning OCA's quarterly financial results and its future prospects." *Id.* After proceeding for several years and conducting discovery, the parties mediated and reached a tentative settlement agreement. *Id.* at *1-2. Plaintiffs then moved for approval of the settlement and certification of a settlement class under Rule 23(a) and (b)(3). *Id.* at *2 and *6. The plaintiffs proceeded by presenting affidavit evidence that OCA's stock price decline was related to OCA's corrective disclosures regarding past accounting errors. *Id.* at *10. The district judge followed *Oscar* and granted certification of the settlement class, finding that the plaintiffs had made a sufficient showing of loss causation to trigger the presumption of reliance. *Id.* at *9-10. Thus, *In re OCA* appears to be a "win" for Fifth Circuit plaintiffs. Realistically, this is not the case, as the *In re OCA* defendants "provided no evidence to the contrary, and the Court [had] no evidence of any other unrelated negative information that could have caused the decline in stock price." *Id.* at *10. The outcome may have been otherwise without the tentative settlement agreement and if the defendants had been required to present evidence.

Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M, 2008 WL 4791492 (N.D. Tex. Nov. 4, 2008)

Halliburton (Judge Barbara M.G. Lynn) is another first of its kind case which substantively discusses *Oscar*. The plaintiffs filed suit against Halliburton alleging

misrepresentations with respect to three issues: “(1) the expense of asbestos litigation; (2) changes to the accounting methodology used by Halliburton and their effect on earnings; and (3) the benefits of Halliburton’s merger with Dresser Industries.” *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2008 WL 4791492, *1 (N.D. Tex. Nov. 4, 2008). The sole issue before the court was whether plaintiffs had proved loss causation. *Id.* The plaintiffs and defendants agreed that all of Rule 23(a) requirements were satisfied and the court found the same independently. *Id.* The district court discussed, followed and applied *Oscar* to the evidence presented, holding that the plaintiffs had failed to establish loss causation in accordance with *Oscar*’s mandates. *Id.* at *1-21. *Halliburton*’s importance arises from three separate statements by the court. Before the court considered the evidence for and against loss causation, it noted that *Oscar*’s “approach to loss causation imposes an exceedingly high burden on Plaintiffs at an early stage of the litigation ...” *Id.* at *2. The court continued that it was “bound to follow the Fifth Circuit’s precedent, but notes that the bar is now extremely high for all plaintiffs seeking class certification in securities litigation.” *Id.* The court reiterated its legal conclusions that “[e]ven though the Court finds all other elements required for class certification under Rule 23 have been met in this case, it is unable to certify the class because of Plaintiffs’ failure to meet this stringent loss causation requirement.” *Id.* at *21.

The *Halliburton* court is the first district court to substantively discuss *Oscar* and expressly acknowledge the “exceedingly high,” “stringent” burden that *Oscar* places on plaintiffs at the certification stage. This is not a disagreement with the Fifth Circuit; it is an acknowledgement of *Oscar*’s mandate.

Second Circuit

Courts from the Second Circuit have substantively opined on *Oscar* in four instances. In each case *Oscar* was interjected into the discussion by the defendants and in each case the court rejected *Oscar*.

Wagner v. Barrick Gold Corp., 251 F.R.D. 112 (S.D.N.Y. 2008)

In *Wagner* (Judge Richard M. Berman), the plaintiffs brought a class action against Barrick Gold Corporation and its officers and directors for violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5. *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 114 (S.D.N.Y. 2008). Plaintiffs alleged that the defendants issued false and misleading statements. *Id.* The plaintiffs moved for class certification claiming that all of Rule 23(a)’s requirements and 23(b)(3) had been met. Defendants opposed on several grounds, one of which was that individual issues of reliance would predominate. *Id.* at 115. The court proceeded through each of the four requirements of Rule 23(a), finding each one satisfied. *Id.* at 115-18.

The defendants premised their argument on the *Oscar* decision that plaintiffs were not entitled to the fraud-on-the-market presumption because they had failed to prove loss causation and to show that Barrick stock was traded in an efficient market. *Wagner*, 251 F.R.D. at 118. The district judge noted that the Second Circuit had not addressed the issue of whether loss

causation must be established at the certification stage to trigger the fraud-on-the-market presumption, and that courts within the circuit had previously certified classes without such a finding. *Id.* The court opined that invoking the fraud-on-the-market presumption without finding loss causation appeared “consistent with the United States Supreme Court’s decision in *Basic, Inc. v. Levinson*, 485 U.S. 2224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988).” *Id.* The court made reference to a recent Idaho district court case which stated that “[i]t is unlikely that [*Oscar*] would be adopted in this Circuit because it misreads *Basic*.” *Id.* (quotations omitted) (citing *In re Micron Techs., Inc. Sec. Litig.*, No. 06 Civ. 85-S, 2007 WL 4553749, at *5-6 (D. Idaho Dec. 19, 2007)). Thus, the first Second Circuit district court to consider *Oscar* rejected it. Certification granted. *Id.* at 121.

Darquea v. Jarden Corp., No. 06 Civ. 722(CLB), 2008 WL 622811 (S.D.N.Y. Mar. 6, 2008)

In *Darquea* (Judge Charles L. Brieant), the plaintiffs sued Jarden Corporation and others alleging that defendants made materially false and misleading statements concerning the financial impact of Jarden’s acquisition of a privately-held company, The Holmes Group. *Darquea v. Jarden Corp.*, No. 06 Civ. 722(CLB), 2008 WL 622811, *1 (S.D.N.Y. Mar. 6, 2008). Plaintiffs claimed that these misrepresentations “caused Jarden’s stock price to artificially inflate over the six-month Class Period.” *Id.* The plaintiffs purchased shares at the inflated prices and suffered damages due to the drop in stock price that occurred once the fraud was revealed. *Id.* The plaintiffs moved for class certification. *Id.* Defendants replied with several arguments one of which was that the plaintiffs could not invoke to fraud-on-the-market presumption because they had not proven loss causation as required by *Oscar*. *Id.* The court found that all of Rule 23(a)’s requirements were satisfied and turned its attention to Rule 23(b)(3). *Id.* at 2-3.

In opposition to Rule 23(b)(3), the defendants specifically argued that the plaintiffs could not avail themselves of the fraud-on-the-market presumption because they could not prove loss causation. *Darquea*, 2008 WL 622811, at *4. The defendants relied solely on the Fifth Circuit’s standard laid out in *Oscar*. *Id.* The court disagreed, ruling that the *Oscar* standard is “limited to the Fifth Circuit.” *Id.* The court reiterated the standard in the Second Circuit that plaintiffs “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, as reliance-an element of a 10(b) claims-is presumed.” *Id.* The court reasoned that “[b]ecause of the usefulness of class actions in addressing allegations of securities fraud, the class certification requirements of Rule 23 are to be construed liberally.” *Id.* Further, “Rule 23(b)(3) does not require that all questions of law or fact be common; it only requires that the common questions predominate over individual questions.” *Id.* at 5. Here the complaint alleged that defendants engaged in a scheme to release material misrepresentations and omit important investor information, resulting in artificially inflated prices; therefore, such action constituted a common course of conduct meaning common questions of law or fact would predominate. *Id.* The court rejected *Oscar*’s high burden and granted certification. *Id.*

Alstom is a French company with operations world wide, including the United States. *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 273 (S.D.N.Y. 2008). Plaintiffs brought a securities fraud class action against Alstom, its subsidiaries and some of its officers. *Id.* Plaintiffs alleged a common course of wrongful conduct wherein defendants allegedly artificially inflated the price of Alstom's securities by making materially false and misleading statements relating to: (1) the demand and revenue earned from Alstom's sale of cruise ships; and (2) the profitability of ATI. *Id.* The plaintiffs then moved for class certification under Rule 23(a) and (b)(3). *Id.* at 274. The district court (Judge Victor Marrero) reviewed several of the Second Circuit's rules regarding Rule 23 class certification. "The Second Circuit has directed courts to adopt a liberal interpretation of Rule 23 in order to maximize the benefits to private parties and, in cases such as this one involving alleged manipulation of public markets, to maximize the benefits to the public provided by class actions." *Id.* at 274-75. The court noted further that "if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Id.* at 275 (citations omitted). Like *Darquea*, the court here found that all of Rule 23(a)'s requirements were satisfied and turned its attention to Rule 23(b)(3). *Id.* at 275-278.

To establish Rule 23(b)(3), the plaintiffs relied on the fraud-on-the-market presumption. *Alstom*, 253 F.R.D. at 279. According to the Second Circuit, in order to establish the presumption, the plaintiffs must make "some showing that Defendants' alleged misstatements and omissions forming the basis of Plaintiffs' claims were public material misrepresentations about a stock traded on an open and developed securities market." *Id.* (citations omitted) (quotations omitted). The court reviewed the evidence and held that the plaintiffs had made the requisite showing to establish the presumption. *Id.* at 279-80. The defendants, like the *Darquea* defendants, argued that the plaintiffs could not avail themselves of the presumption because they had not proven loss causation. *Id.* at 280. As in *Darquea*, the defendants relied on *Oscar* for support of their contention. *Id.* Specifically, the defendants asserted that "any decline in the price of Alstom's securities immediately subsequent to the Corrective Disclosures was not statistically significant, and therefore, Plaintiffs cannot establish Loss Causation." *Id.* The court rejected *Oscar* and defendants' reliance thereon, stating that loss causation "relates to the merits of Plaintiffs' case and Defendants have not sufficiently established how Loss Causation is related to any necessary element of Rule 23." *Id.* The court cited *Darquea* for the proposition that, at the certification stage, "plaintiffs need to show only that they made purchases or sales in an efficient market, and need not show that they specifically relied on the allegedly fraudulent conduct." *Id.* (quotations omitted). Further, the court accepted *Wagner's* holding that "certifying a class despite a lack of evidence of loss causation appears consistent with the United States Supreme Court's decision in *Basic*." *Id.* at 280-81. Lastly, as with the *Wagner* court, the district court held that "[e]ven if Plaintiffs were required to establish loss causation at the class certification stage, they have sufficiently done so in this case." *Id.* at 281.

Lapin v. Goldman Sachs & Co., No. 04 Civ. 2236(RJS), 2008 WL 4222850 (S.D.N.Y. Sept. 15, 2008)

Plaintiff bought a securities class action against Goldman Sachs & Co. and Goldman Sachs Group, Inc. pursuant to Section 10(b) of the 1934 Act and Rule 10b-5. *Lapin v. Goldman Sachs & Co.*, No. 04 Civ. 2236(RJS), 2008 WL 4222850, *1 (S.D.N.Y. Sept. 15, 2008). Plaintiff alleged that defendants “defrauded class members by making materially false misstatements and omissions in public statements relating to improper conflicts of interest that existed between [defendants’] research and investment banking departments.” *Id.* The plaintiff moved for class certification under Rule 23(a) and (b)(3). *Id.* Defendants opposed on three grounds, one of which was that Rule 23(b)(3) was “not satisfied because Plaintiff has failed to prove loss causation at this stage.” *Id.* Like *Darquea* and *Alstom*, the defendants relied on *Oscar*, urging Judge Richard J. Sullivan to follow the Fifth Circuit, and like its sister Second Circuit District Courts, the court rejected *Oscar*. *Id.* at *14-16. Three Second Circuit District Courts, *Darquea*, *Wagner* and *Alstom*, had expressly addressed *Oscar* and “all [had] rejected the notion that a showing of loss causation is a requirement at the class certification stage.” *Id.* at *15. Also, the court noted that other circuits have agreed that loss causation need not be proven at the class certification stage, citing in agreement the Sixth Circuit case of *Ross v. Abercrombie & Fitch Co.* (discussed below) for the proposition that no court outside the Fifth Circuit had followed *Oscar* and the Ninth Circuit case of *In re Micron Tech., Inc. Sec. Litig.* (discussed below) for the proposition that *Oscar* is a misreading of *Basic*. *Id.* “Nothing in *Basic* or any Second Circuit precedent requires that Plaintiff prove loss causation by a preponderance of the evidence in order to invoke the *Basic* presumption and satisfy the requirements of Rule 23.” *Id.* at *16. Accordingly, the court granted class certification. *Id.* at *18.

Sixth Circuit

Ross v. Abercrombie & Fitch Co., No. 2:05-cv-0819, 2008 WL 4059873 (S.D. Ohio Aug. 26, 2008).

Ross (Magistrate Judge Terence P. Kemp) is set in a different posture procedurally. Before the court was defendants’ motion to exclude improper evidence and to quash subpoena and document requests. *Ross v. Abercrombie & Fitch Co.*, No. 2:05-cv-0819, 2008 WL 4059873, *1 (S.D. Ohio Aug. 26, 2008). Defendants’ motion posed the questions of “whether plaintiffs have the affirmative burden of showing, as part of the class certification process, that there is a causal relationship between the securities law violations they allege in [the] case and the drop in the price of Abercrombie & Fitch stock about which they complain which goes beyond showing that the stock was traded in an efficient market.” *Id.* This issue arose when the defendants filed their opposition to plaintiffs’ class certification. *Id.* In the opposition, the defendants attached an expert report that opined that the plaintiffs had not provided any economic evidence of loss causation. *Id.* Upon learning of the defendants’ expert report, the plaintiffs propounded discovery seeking the expert’s deposition, documents and offering a rebuttal expert. *Id.* The defendants filed the instant motion to exclude and argued that plaintiffs had no right to conduct more discovery on any issue relating to class certification as the

discovery cutoff date had passed. *Id.* The court stated that the motion raised two issues: (1) whether the plaintiffs had the burden of proving loss causation at the class certification stage; and (2) if so, did the plaintiffs have notice of the loss causation issue. *Id.* The defendants relied on *Oscar* for their assertion that loss causation must be proved at the class certification stage. *Id.* at *2.

The court started its analysis within the Sixth Circuit that loss causation was an element of the plaintiffs' cause of action, not a factor listed in Rule 23. *Ross*, 2008 WL 4059873, at *2. Further, the Court of Appeals has plainly stated that courts should not consider the merits of the case when deciding if a class should be certified. *Id.* (citing *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1201 (6th Cir. 1974) (holding that "when determining the maintainability of a class action, the district court must confine itself to the requirements of Rule 23 and not assess the likelihood of success on the merits.")). Against this backdrop, the court analyzed *Oscar* and the court's summary is instructive:

The court first noted that the plaintiffs' theory of recovery, fraud on the market, permits a trial court to presume that each class member has satisfied the reliance element of their 10b-5 claim. Without this presumption, questions of individual reliance would predominate, and the proposed class would fail. Thus, even at the class certification stage, a merits issue like loss causation can and should be considered as long as that issue overlaps with one of the Rule 23 prerequisites. In that court's view, there was an overlap between the Rule 23 issue, namely whether questions of individual reliance dominated issues common to all class members, and the loss causation issue, and the latter was therefore a proper subject of the class certification proceedings. The court did not directly place the burden of raising the issue on the plaintiffs, but did hold that loss causation must be established at the class certification stage by a preponderance of all admissible evidence.

Id. (quotations omitted).

Beginning its own analysis, the district court recognized that *Oscar* was not unanimous. *Ross*, 2008 WL 4059873, at *3. The dissenting judge in *Oscar*, Judge Dennis, "argued that the majority erred both in its analysis of loss causation in the context of a fraud on the market theory of causation and in requiring proof of loss causation at the class certification stage." *Id.* Also, the court observed that at least two subsequent district courts had agreed with the dissent. *Id.* (citing *In re Micron Tech., Inc. Sec. Litig.*, 247 F.R.D. 627 (D.Idaho 2007) (holding that in a fraud on the market case, plaintiff's burden at the class certification stage is only to demonstrate that the shares were traded in an efficient market); *Darquea v. Jarden Corp.*, 2008 WL 622811 (S.D.N.Y. March 6, 2008) (holding that the only showing which must be made at the class certification stage is the purchase of shares in an efficient market, and that even if defendants argue that the presumption of reliance upon the market will be rebutted by evidence that the named plaintiff would have purchased the stock in any event, that defense is not really material to any issue under Rule 23)). Based on the foregoing, the court opined "[n]o other Court of Appeals, and no district court outside the Fifth Circuit, appears to have followed *Oscar*." *Id.* The court stated that it was "persuaded by its review of the law that *Oscar* does not represent an

obvious application of the principle (which is, of itself, relatively well-accepted) that when Rule 23 and merits issues overlap, the court may (and perhaps must) consider the overlapping merits issues at the class certification stage.” *Id.* Lastly, the court opined that “*Oscar* certainly stretches the contours of that rule in a way in which is somewhat unique to the Fifth Circuit due to the way in which that circuit has defined loss causation in the context of a fraud on the market case.” *Id.*

Based on the fact that no other district court within the Sixth Circuit (or any other save the Fifth Circuit) had adopted *Oscar*, the court held that the plaintiffs did not have notice that loss causation would be an issue at the certification stage. *Ross*, 2008 WL 4059873, at *3. Therefore, the court denied the defendants’ motion to exclude. *Id.* at *5. As far as *Oscar* was concerned, the court reserved its ruling on whether to accept or reject *Oscar*, finding that it would be a more efficient use of judicial resources to wait until the plaintiffs had conducted their discovery into the issue. *Id.* *Ross* is the only Sixth Circuit case to substantively consider *Oscar*, with the district court declining to accept or reject *Oscar*.

Ninth Circuit

In re Micron Tech., Inc. Sec. Litig., 247 F.R.D. 627 (D. Idaho 2007)

The *Micron* district court (Judge B. Lynn Winmill) was the first court outside of the Fifth Circuit to substantively consider *Oscar*. In *Micron*, the shareholders filed a Section 10(b) and Rule 10b-5 class action alleging that they were injured by Micron’s participation in an illegal price-fixing conspiracy. *In re Micron Tech., Inc. Sec. Litig.*, 247 F.R.D. 627, 630 (D. Idaho 2007). Micron produces Dynamic Random Access Memory (DRAM) chips for use in computers, and it was alleged that Micron’s price-fixing scheme was designed to inflate its stock price, since DRAM prices closely tracked the stock price. *Id.* Micron officers issued false statements that attributed high DRAM prices to market forces when they knew that it was the illegal price-fixing that increased the DRAM prices. *Id.* A Department of Justice investigation was initiated and eventually this class action was filed. *Id.* at 631. The case was pending, with the plaintiffs seeking class certification under Rule 23(a) and (b)(3). *Id.* at 631-32. The court reviewed the four requirements of Rule 23(a), finding all satisfied. *Id.* at 632. As to Rule 23(b)(3), the plaintiffs invoked the fraud-on-the-market presumption of reliance. *Id.* Micron opposed, arguing that the plaintiffs had failed to prove loss causation, meaning the presumption was not available. *Id.* at 634. Micron relied on *Oscar* for the proposition that the plaintiffs must prove loss causation to be entitled to class certification. *Id.* In response, the plaintiffs asserted that Micron was inviting the court to examine the merits, an inquiry that is expressly forbidden by a well-established line of cases, including *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The court acknowledged that the plaintiffs were correct to a point, “[a] district court should not assess any aspect of the merits unrelated to a Rule 23 requirement.” *Id.* at 633 (quotations omitted). However, a court “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.” *Id.* (quotations omitted).

The district court started its *Oscar* analysis with the statement 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*.” *In re Micron*, 247 F.R.D. at 634. According to the court, the *Oscar* decision relied on “*Basic*’s holding that the presumption of reliance may be rebutted by any showing that severs the link between the alleged misrepresentation and ... the price received (or paid) by the plaintiff.” *Id.* (quotations omitted). “This includes a showing that the market price would not have been affected by the alleged misrepresentations.” *Id.* (quotations omitted). The district court surmised that it was from these statements that the *Oscar* court concluded “that in a class certification proceeding, defendants can challenge the application of the fraud-on-the-market doctrine by showing that the market price was not affected by the misrepresentations.” *Id.* “In other words, *Oscar* reads *Basic* to require a rigorous examination of loss causation at the class certification stage.” *Id.* Based on the above, the district court stated that *Oscar* misread *Basic* and ignored a crucial footnote. *Id.* “In the midst of its discussion of the defendant’s burden on rebuttal to show that the market price was not affected by the misrepresentation, the *Basic* decision drops a footnote stating that proof of this sort is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate.” *Id.* According to the district court, an accurate reading of *Basic* only placed the requirement on the plaintiffs, at the class certification stage, to show that the market was efficient. *Id.* The court acknowledged that it was required to rigorously examine market efficiency evidence before finding an entitlement to the presumption and that the defendants were entitled to rebut the presumption; however, rebuttal “is appropriate for resolution only after discovery” and not at the certification stage. *Id.* Therefore, the court rejected *Oscar* and its reasoning but not before stating that “[e]ven if Micron’s rebuttal evidence is considered, it would not satisfy their burden.” *Id.* Having found all of Rule 23’s requirements satisfied, the court granted class certification.

In re Metropolitan Sec. Litig., No. CV-04-25-FVS, 2008 WL 5102303 (E.D. Wash. Nov. 25, 2008)

In re Metropolitan (Judge Fred Van Sickle) involved different securities law claims than those alleged in *Oscar*. The plaintiffs here brought a securities class action against Metropolitan and others for violations of Section 11. *In re Metropolitan Sec. Litig.*, No. CV-04-25-FVS, 2008 WL 5102303, at *2 (E.D.Wash. Nov. 25, 2008). *Oscar* involved Section 10(b) and Rule 10b-5 claims, not Section 11. *Id.* at *3. Before the court was plaintiffs’ motion for class certification under Rule 23(a) and (b)(3). *Id.* at *1. The defendants did not challenge the plaintiffs’ ability to establish the Rule 23(a) requirements; therefore, the court found them satisfied. *Id.* However, the defendants challenged Rule 23(b)(3) on the grounds that they were asserting loss causation as a defense to the Section 11 claim and this defense precluded class certification. *Id.* at *2. The court started its analysis by noting that neither the defendants nor it had found a Section 11 case “in which a court [had] ruled that the existence of a loss causation defense precludes certification under Rule 23(b)(3).” *Id.* The only case the defendants cited in support was *Oscar*, which as stated, involved only Section 10(b) and Rule 10b-5 claims. *Id.* at *3.

Indulging the defendants, the court proceeded to briefly analyze *Oscar*, first noting that the requirements set forth in *Oscar* were controversial and that district courts outside of the Fifth

Circuit had greeted them with skepticism. *In re Metropolitan*, 2008 WL 5102303, at *3. The “Fifth Circuit has developed strict requirements for investors who seek to invoke the *Basic* presumption in order to obtain certification of a (b)(3) class in a 10b-5 action.” *Id.* (citations omitted). Further, the “Ninth Circuit [had] yet to consider, much less approve, *Oscar*’s rationale and holding.” *Id.* This ended the brief analysis because the court could not get past the fact that plaintiffs alleging Section 11 claims did not have to “qualify for the *Basic* presumption in order to demonstrated predominance under Rule 23(b)(3).” *Id.* Hence, *Oscar* had limited application and provided little or no guidance to the issue currently before the court. *Id.* Therefore, the court certified the class given that “the existence of a loss causation defense is not, by itself, sufficient to preclude certification of a (b)(3) class in a Section 11 action.” *Id.*

Tenth Circuit

In re Nature’s Sunshine Prod. Inc. Sec. Litig., 251 F.R.D. 656 (D. Utah 2008)

In *In re Nature*, plaintiffs brought claims under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 against Nature’s Sunshine Products, Inc. and others. *In re Nature’s Sunshine Prod. Inc. Sec. Litig.*, 251 F.R.D. 656, 657 (D.Utah 2008). Plaintiffs sought class certification under Rule 23(a) and (b)(3). *Id.* at 657–61. The district court (Judge Ted Stewart) found the requirements of Rule 23(a) satisfied. *Id.* For Rule 23(b)(3), the plaintiffs put on evidence of an efficient market and the court found that plaintiffs were entitled to use the fraud-on-the-market presumption of reliance. *Id.* at 665. Like most defendants since *Oscar* was decided, the defendants opposed on the grounds that plaintiffs had not proven loss causation, thereby making the presumption unavailable to them. *Id.* Defendants argued that the plaintiffs must prove loss causation at the certification stage according to *Oscar*. *Id.* The district court declined to adopt *Oscar* and require a showing of loss causation at the class certification stage. *Id.*

The court laid out several reasons why it declined to adopt and would not require such a showing. First, other courts outside the Fifth Circuit had refused to follow *Oscar* because it “eviscerates *Basic*’s fraud-on-the-market presumption ... by requiring mini-trials on the merits of cases at the class certification stage ...” *Id.* (quotations omitted). Second, the Ninth and Second Circuits refused to adopt *Oscar* because it misread *Basic*. *Id.* Third, no Tenth Circuit case, no other Court of Appeals and no other district court outside of the Fifth Circuit had followed *Oscar*. *Id.* Lastly, *Oscar* was “in conflict with Supreme Court and Tenth Circuit precedent which warn against determining the merits at the class certification stage.” *Id.* Based on these reasons, the district court declined to adopt *Oscar*. *Id.* Thus, having found the requirements of Rule 23(b)(3) satisfied, the court certified the class. *Id.* at 666.

What Have We learned?

Several insights can be drawn from the above cases. *Oscar* places an “exceedingly high” burden on the plaintiffs at the certification stage, and defendants, outside as well as within the Fifth Circuit, cite *Oscar* in support of denying class certification. One defendant even cited

Oscar in support of a motion to exclude. Outside the Fifth Circuit, *Oscar* does not seem to help defendants. The district courts rejecting *Oscar* have given a myriad of reasons such as it requires mini-trials on the merits, Rule 23 should be liberally interpreted, it's inconsistent with *Eisen*, it eviscerates *Basic*'s presumption, and it misreads *Basic*. However, the persuasion of the *Oscar* decision may spawn roots outside the Fifth Circuit. While district courts in the Second, Sixth (somewhat), Ninth and Tenth Circuits have all rejected *Oscar*, not a single Court of Appeals outside of the Fifth Circuit has directly opined on *Oscar*'s evisceration of *Basic*'s presumption.⁴

In recent years it seems that the Supreme Court has granted certiorari in a greater number of securities cases. However, since *Oscar* was decided, the Supreme Court has only granted certiorari in two major cases. See *Tellabs, Inc. v. Makor Issues & Rights, LTD*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008). *Tellabs* concerned the pleading requirements for scienter, see *Tellabs*, 551 U.S. 308, 127 S.Ct. at 2504, and *Stoneridge* concerned scheme liability and who could be liable as primary actors under Section 10(b). See *Stoneridge*, 128 S.Ct. at 766. The Supreme Court has yet to be given the opportunity to opine on *Oscar*'s holding that loss causation must be proven at the class certification stage in order to invoke the fraud-on-the-market presumption.

END

⁴ No Court of Appeals has directly opined on *Oscar*'s central holding, but two have cited it for different propositions. The Second Circuit cited *Oscar* in *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474 (2nd Cir. 2008). *In re Salomon* concerned the issuance of materially misleading analysts reports and one issue on appeal was whether the defendants should be given an opportunity to rebut the fraud-on-the-market presumption. *In re Salomon*, 544 F.3d at 476, 485. The Second Circuit cited *Oscar* for the proposition that it is error for a trial court to not allow defendants to rebut the fraud-on-the-market presumption at the class certification stage. *Id.* at 485. The Second Circuit did not opine as to whether the defendants were required to prove loss causation at the class certification stage. *Id.* The Third Circuit cited *Oscar* in *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689, 2008 WL 5411562 (3rd Cir. Jan. 16, 2009). *In re Hydrogen Peroxide* concerned a price-fixing conspiracy in violation of antitrust laws. *In re Hydrogen Peroxide*, 2008 WL 5411562 at *1. Here, the Court cited *Oscar* for two unremarkable propositions that class certification bestows leverage upon plaintiffs and a district court must give full and independent weight to each Rule 23 requirement. *Id.* at 8, 10. It is also important to note that *Oscar* was a Section 10(b) and SEC Rule 10b-5 case, not an antitrust case.