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HEADNOTES

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Crain Lewis LLP—Keeping the Dream Alive

BY ALICIA HERNANDEZ

Everyone has a story—the client in the waiting room, the attorney that will help her, the judge on the case. Their stories weave together to affect each other in ways we sometimes can never predict.

The Dallas Volunteer Attorney Program (DVAP) has a story. Its story is over 32-years-old—as old as many of the young lawyers practicing in Dallas today, and older than the "baby" lawyers who are infusing our profession with the optimism of their youth.

A part of most Dallas lawyers' stories is the Dallas Volunteer Attorney Program, its legal clinics across the city, and the clients who darken their doorsteps with their sad stories but also brighten their attorneys' worlds with the hope that they can bring change.

For most attorneys volunteering in our profession today, participating in pro bono in Dallas is a part of who they are. Most lawyers have donated their time, their money, or both to DVAP at some point in their careers. And most have likely referred a client or two in DVAP's direction as well.

And, like so many others, DVAP had its humble beginnings in the dreams of a few who just wanted to help. The story has been told many times, but it bears repeating, especially for the newest members of our legal community who may not have heard it before, but also for the rest of us who just like to reminisce. One of the best renditions of the story was printed in Headnotes two years ago on the 30th anniversary of the Dallas Volunteer Attorney Program by **Will Pryor**, one of the young lawyers who, in 1982, along with the late **Judge Merrill Hartman** and **Chris Reed-Brown**, started the first legal clinic that would become DVAP.

Rob Crain and Chris Lewis

The concept was simple—that they would just do a simple, good turn. It was the kind of good turn that they as lawyers could do—just give a little legal advice to people who could not afford to pay for it—and what happened next is something they never expected. Mr. Pryor says it best, so I quote from his 2012 *Headnotes* article entitled DVAP Celebrates 30 Years: The Inky Blue Water:

"We seriously thought that all we were going to do was show up at this neighborhood center every Tuesday night with notepads and dispense legal advice. We never thought about whether we would actually take cases. There was no "after this clinic we'll start another one in East Dallas, then another one in West Dallas and we'll get "awards." There will be articles written and videos made, law firms will start to compete over which one is providing the most pro bono services, and bar associations all over the country will try to copy what we are doing but none will ever be as successful. And thousands and thousands of poor people will receive help and thousands of lawyers, judges, paralegals and court reporters will experience something really meaningful, and . . ."

And, since then, the impact of that good turn has turned countless lives upside down in a good way from the lawyers who love pro bono because it reminds them why they became lawyers to the clients who desperately needed someone's help. Attorneys have done everything from saving clients' homes to saving their children. And the stories of the thousands of pro bono lawyers and clients who have worked together over the years have woven their histories together

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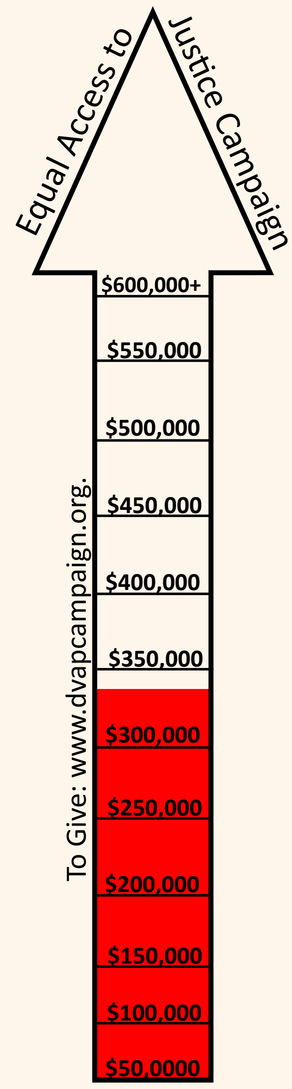

Focus | *Business Litigation*

Halliburton's Impact on Class Action Securities Litigation

BY MICHELLE HARTMANN AND MASON PARHAM

In the context of a Rule 10b-5 securities class action, a necessary condition is that plaintiffs **relied** upon the issuer's alleged misrepresentation. But since the Supreme Court's 1988 decision in *Basic v. Levinson*, plaintiffs in these cases have been able to invoke the "fraud on the market" theory to indirectly satisfy this reliance requirement. Pursuant to the theory, the price of the relevant security is presumed to have been changed by the alleged misrepresentation. This presumption is triggered if (1) the alleged misrepresentation was publicly known, (2) that it was material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded in the stock between the time the misrepresentation was made and when the truth was revealed. With the exception of materiality, plaintiffs must demonstrate satisfaction of these elements *before* class certification, but proving reliance indirectly through the fraud on the market theory has generally not been a significant roadblock to class certification for plaintiffs.

Last term, the Supreme Court confronted whether to overturn the fraud on the market theory. In *Halliburton Co. v. Erica P. John Fund, Inc.*, the Court preserved the theory. However, it unanimously reversed the Fifth Circuit in another important respect, holding that defendants can rebut at the class certification stage the presumption of reliance by showing that the alleged misrepresentations had no impact on the price of the security. The decision stops short of any great innovations in Rule 10b-5 cases, but it provides defendants with powerful avenues of defense in these cases. Important for purposes of this article, it also is likely to spur an increased use of "event studies" by defendants at the class certification stage.

At issue in *Halliburton* was whether a defendant could rebut the presumption of reliance at the class certification stage by showing that the alleged misrepresentation did not affect the market price of the stock—meaning there was no "price impact." The Fifth Circuit held that such a showing was unnecessary to the predominance inquiry and therefore inappropriate at the certification stage. The Supreme Court disagreed, concluding:

Price impact is . . . an essential precondition for any Rule 10b–5 class action.

…

Nor is there any dispute that defendants may introduce price impact evidence at the class certification stage, so long as it is for the purpose of countering a plaintiff's showing of market efficiency, rather than directly rebutting the presumption….After all, plaintiffs themselves can and do introduce evidence of the existence of price impact in connection with "event studies."

So what is an event study and how can defendants effectively utilize it to defeat class certification? An "event study" is a form of regressive analysis used to show the effect of a specific event on the price of a stock. An economist uses stock return data to prepare a statistical model to determine whether a particular event is associated with a price decline when other market factors are taken into account. The difference between what the stock's price would have been absent the misrepresentation (the predicted return) and what it actually was (the actual return) shows the extent of the event's impact on the price of the stock. There are numerous reasons for stock movement. In practice, event studies are complicated—particularly when, as is usually the case, multiple misrepresentations are in play and publication of the alleged misrepresentations is made through multiple sources on different dates. Nonetheless, having the ability to present this type of expert testimony *before* a class is certified is a powerful tool for defendants.

In response to *Halliburton*, we can anticipate the introduction of significant inquiry and dispute at the class certification stage regarding price impact, including through event studies. From a pleading perspective, we also can expect for plaintiffs to creatively plead Rule 10b-5 cases to allege the misleading statement as an omission, rather than an affirmative misrepresentation, because the plaintiffs rely on a different presumption in omission cases. Finally, from a D&O perspective, most insurers are claiming there will not be a noticeable decrease in D&O rates, at least not initially. That said, event studies are expensive, and one thing certain to accompany aggressively contested class certification proceedings is significantly higher front-end litigation costs. At least one insurer has taken *Halliburton* as an opportunity to offer a new endorsement. Within days of *Halliburton*, AIG announced an "event study endorsement" that ensures D&O policyholders will have immediate access to funds for class certification event studies with a zero dollar retention. So, for now, it is not a bad time to be an economist. **HN**

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Inside

Stay Alert to Avoid Liability for Data Breaches

BY RICHARD BLUNK AND JESSE SHUMWAY

Stories about corporate data breaches and the growth of identity theft, particularly in the retail sector, appear all too frequently in today's media. These crimes place both in-house and outside counsel under increased pressure to design and implement safeguards against liability. Texas adopted the Identity Theft Enforcement and Protection Act in 2005, but the statute has been amended frequently since then, including a substantial expansion in 2013.

The Texas statute requires businesses to implement and maintain "reasonable procedures, including taking any appropriate corrective action," to protect against unlawful use or disclosure of "Sensitive Personal Information" (or SPI) collected or maintained in the course of business. SPI is generally defined as a person's name in combination with his or her social security number, driver's license number, financial account information, or health care information, if not encrypted. The statute imposes a few more specific requirements, such as destruction of SPI using specific methods, as well as notification to affected consumers in the event of a data breach that involves SPI.

The notification requirement was amended in 2013, and its current scope is controversial and unclear. The requirement now applies to two categories of data hosts: (1) a "person who conducts business in this state and owns or licenses computerized data that includes" SPI; and (2) a "person," no matter where located, who "maintains," but does not own, SPI. A business that falls into the first category must notify any individual as quickly as possible whose SPI is "reasonably believed" to have been compromised., A business that falls into the second category must immediately notify the information's "owner or license holder" of such a breach. Neither of these two categories is limited to breaches involving Texas residents.

Unfortunately, there is still no reported case law providing guidance on the reach of these two categories or the circumstances under which notification is required. Nor does the statute's legislative history provide any direction. Therefore, companies are left for now to interpret the law's nebulous wording—"maintains," "reasonable procedures," "appropriate corrective action," etc.—for themselves. For example, data centers that provide managed services appear to fall into the second category, and thus would seem to incur notification obligations under the statute even if they do not know whether any of the computerized data they "maintain" contains SPI. Also, whether companies that simply provide rack space actually "maintain" data is an open question.

The statute's expanded notification requirements have given rise to constitutional concerns. Critics charge that the law adopts the minority approach and has an impermissible extra-territorial reach. This is so because owners and licensees of SPI related to individuals that reside in other states may be required to provide notification even if not required to do so by the law of the state of the individuals' residence. Moreover, any company that "maintains" SPI is subject to the Texas statute, no matter where the company is located, where the "owner" of the information is located, or where the breach occurred. Texas courts have yet to address whether Texas law or the law of an affected individual's state of residency have any preemptive effect on each other, let alone whether the Texas statute's extra-territorial reach is constitutional.

Until Texas courts provide some concrete guidance, the considerable size of statutory penalties—$2,000 to $50,000 for each violation—warrants great caution. Companies that store SPI should implement a comprehensive plan to comply with the law. Such a comprehensive plan should perhaps include the following general steps: (1) adopt and implement a notification plan that satisfies Texas law, but also be prepared to provide notification in accordance with the laws of all 50 states; (2) limit the ability of company employees to store SPI on flash drives or transmit it via email; (3) require encryption of all data that may include SPI, and sharply limit the distribution of encryption keys; (4) for companies that "maintain" data that may include SPI, include a provision in all hosting contracts requiring their clients to comply with all data-breach laws and to notify them of any applicable breach; and (5) purchase appropriate cybersecurity insurance. **HN**

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