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How Will Halliburton Affect Product Liability Cases?

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Law360, New York (April 07, 2014, 6:06 PM ET) -- The forthcoming decision of the U.S. Supreme Court in Halliburton Co. v. Erica P. John Fund Inc. has received a great deal of attention because of its possible effect on securities fraud class actions. Commentators have speculated on the viability of such class actions if the high court pares back, or even eliminates entirely, a rebuttable presumption of reliance based on a fraud-on-the-market theory.

However, little or no attention has been given to possible ramifications of the decision in the context of products liability or mass tort cases. The purpose of this article is to sketch the history of a fraud on the market presumption in products cases and to consider the post-Halliburton future of such a theory.

Subsequent to the Supreme Court's 1988 decision in Basic Inc. v. Levinson recognizing a fraud on the market theory in securities cases, plaintiffs sought to extend the theory by analogy to a variety of other kinds of cases. The principal purpose was to avoid the need to prove reliance on an individual basis, making it easier to certify a class.

Governmental entities also relied on fraud-on-the market theories to assert aggregate claims not brought as class actions. These efforts had occasional success, but most courts declined to extend a presumption of reliance based on fraud-on-the-market theory to claims of personal injury or property damage.

The reluctance to extend fraud on the market theory is grounded both in doctrine and policy. The requirement of proof of individual reliance by each plaintiff claiming to have been injured in his person or property by a fraudulent misrepresentation or omission is long-established black letter law. The requirement of justifiable detrimental reliance is consistent with other limitations, such as pleading with particularity and scienter requirements, imposing limitations on a potentially unbounded tort that in most jurisdictions can provide the basis for punitive damages.

The creation of a rebuttable presumption of reliance in securities fraud cases was a special case premised on the hypothesis that securities are traded in an efficient market in which all public information, including misleading statements, is taken into account in the pricing of a security.[1]

Whatever the continuing viability of this rationale may be in the securities fraud context, the "market" or "markets" for consumer or industrial products that may cause personal injury or property damage have little in common with the market model posited in Basic v. Levinson. People may buy or use products for many different reasons and subjective preferences play an important role.

Consumers or industrial users have many potential sources of information of varying quality. Markets for products may involve multiple layers and complexities of decision-making. One such example of complexity is the intermediate role of physicians prescribing particular pharmaceuticals for use by patients. Differences in time periods and ways in which injury may occur create additional complexity. For example, the realm of products liability/mass torts law spans the gamut from products or substances that cause multiple distinct harms to individuals to a single mass disaster injuring many at the same time. Likewise, products liability/mass tort law must be able to address both immediate harms and harms that manifest over the course of many years, such as latent diseases from long-term exposure. In short, the model on which fraud-on-the-market theory is based is ill-suited for the range of potential fraud claims in products cases.

Nonetheless, plaintiffs continued to advocate theories sounding in fraud that could be satisfied by common, rather than individual, proof of causation in cases arising from alleged harm from products. These theories usually have been presented in the form of claims for economic loss, often, but not exclusively, by third-party payors. Although many of these claims have alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act, some have been based on allegations of common law fraud.[2]

Plaintiffs advancing these theories of common proof, and courts accepting them, avoid the use of the term fraud-on-the-market because of the rejection of that theory in its pure form by most courts outside the context of federal securities law actions. For example, in one case involving off-label marketing of a pharmaceutical, the court stated that it was not applying a fraud-on-the-market theory.[3] Instead, the court relied on an expert's aggregate statistical model, disregarded the testimony of individual physicians as to their reasons for prescribing the drug as unreliable, and affirmed a plaintiff's verdict because the manufacturer's scheme "relied on the expectation that physicians would base their prescribing decisions in part of Pfizer's fraudulent marketing."[4]

It is difficult to see any significant difference between this result and one where there is a presumption, in theory a rebuttable presumption, of third-party reliance by prescribing physicians. In contrast, the appellate court in another off-label pharmaceutical marketing case reversed where a class had been certified "on the theory that plaintiffs could use generalized proof to show that [a particular drug] was overpriced as a result of [defendant's misrepresentations]."[5]

Although of potentially great significance in securities fraud class actions, the decision in Halliburton seems unlikely to affect the use of presumptions of reliance in products cases for several reasons.

First, if the Supreme Court restricts the availability of the theory in federal securities actions, state courts inclined to do so would remain free to apply a presumption of reliance — or not — in cases brought under that state's common law of fraud. Second, plaintiffs may prefer in any event to proceed under a state consumer fraud statute, if one is available, that does not require reliance, rather than bringing a common law fraud action even with a presumption of reliance that could be rebutted. Third, plaintiffs may continue to follow the path of a de facto presumed reliance approach described in the prior paragraph. Although this path has had mixed results, plaintiffs may believe it has a greater chance of success than an explicit fraud on the market theory. Finally, even if Basic is reaffirmed, it seems unlikely that the holding or any rationale based on an efficient market hypothesis would make its extension by analogy to products cases any more persuasive than it is now.

[1] Basic Inc. v. Levinson, 485 U.S. 224, 241 50 (1988).
[2] See, e.g., In re Rezulin Products Liability Litigation, 524 F. Supp. 2d 436, 441 (S.D.N.Y. 2007) (applying Louisiana law).
[3] In re Neurontin Marketing and Sales Practices Litigation, 712 F.3d 21, 36 n.9 (1st Cir. 2013).
[4] 712 F.3d at 45-47.
[5] UFCW Local 1776 v. Eli Lilly and Co., 620 F. 3d 121, 132 (2d Cir. 2010).

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