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Amgen eases securities fraud plaintiffs' burden at class certification, but the dissent invites challenges to the long-standing "fraud-on-the-market" theory

By Michael R. Karnuth

In *Amgen v. Connecticut Retirement Plans and Trust Funds* the U.S. Supreme Court held that securities fraud plaintiffs raising §10(b) Exchange Act claims[1] are not required to prove materiality at the class certification stage and defendants, at that stage, cannot introduce evidence to rebut the "fraud-on-the-market" theory's presumption of reliance.[2] The 6 to 3 decision's significance lies in both its majority and dissenting opinions. Recognizing the importance of private securities fraud actions, the majority's decision protects investors from having to prematurely prove §10(b)'s "materiality" element before discovery is completed; allowing plaintiffs to defer this fact intensive assessment until either summary judgment or trial.[3] The majority also protects against having to engage in similar factual assessments of defendants' rebuttals to plaintiffs' reliance on the fraud-on-the-market presumption.[4] On the flip side, the four dissenting and concurring Justices indicated an interest in revisiting the fraud-on-the-market theory, first adopted by the Supreme Court 25-years ago in *Basic v. Levinson,*[5] to test its viability in today's securities markets.[6]

This article briefly describes the issues addressed in *Amgen* and then provides a brief history of the fraud-on-the-market theory as applied in securities fraud cases. The article then discusses (i) the *Amgen* majority's analysis of the fraud-on-the-market theory in ruling that materiality, as well as other §10(b) elements, are decisions on the merits that should be deferred until after the class certification stage and (ii) the dissents' and concurrence's concern with whether the theory should still be applied in today's marketplace. I conclude by explaining why I believe that the majority's decision was sound and should extend beyond the securities fraud context, and why the concurrence's and dissents' concerns with market efficiency and the fraud-on-the-market theory's continued viability is unwarranted.

1. The Issues Raised in *Amgen*

Amgen involved "the interaction between the federal securities-fraud law[']s [materiality requirement] and Rule 23[(b)(3)]'s [predominance] requirement[] for class certification."[7] Amgen, a biotechnology company, was sued along with several of its officers by investors who purchased its common stock after Amgen issued allegedly material misrepresentations "regarding the safety, efficacy, and marketing of two of its flagship drugs."[8] Amgen investors alleged that these misstatements "artificially inflated the price of Amgen's stock at the time" they purchased the company's shares and that "[w]hen the truth came to light, … Amgen's stock price declined, resulting in financial losses to those who purchased the stock at the inflated price."[9]

The District Court granted plaintiffs' motion to certify a class action under Rule 23(b)(3) on behalf of all investors who purchased Amgen stock between the date of the first alleged misrepresentation and the date of the last alleged corrective disclosure.[10] The Ninth Circuit Court of Appeals affirmed.[11] The U.S. Supreme Court granted Amgen's petition for certiorari to resolve a conflict among the Courts of Appeals over whether district courts must require plaintiffs to prove, and must allow defendants to present evidence rebutting, the element of materiality before certifying a class action under §10(b) and Rule 10b-5.[12]

The fraud-on-the-market theory arose as an issue in assessing whether plaintiff needed to prove materiality at class certification because the defendants argued that the Court's recent decision in *Erica P. John Fund, Inc. v. Halliburton Co.* held that predicates to the theory must be demonstrated before the theory's presumption can be invoked. *13* Because materiality is one of the theory's predicates, the Court evaluated whether that particular predicate needed to be proven before the presumption could be invoked.[14]

2. Brief History of the Fraud-on-the-Market Presumption

The fraud-on-the market theory relies on the "efficient market hypothesis," which presumes that the price of a security traded in an efficient market will reflect all publicly available information about a company.[15] This presumption is accepted because "certain well developed markets are efficient processors of public information" and "[i]n such markets, the market price of shares will reflect all publicly available information."[16] Accordingly, a buyer of the security is presumed to have relied on all public information (whether true

or false, and whether the buyer actually read the information) in purchasing the security.[17]

If a security market's efficiency is challenged at the class certification stage, it is the plaintiff's burden to prove the market's efficiency in order to trigger the presumption.[18] An inability to show the existence of an efficient market may result in the plaintiff not being able to show that the false statements were absorbed into the market and affected the security price. That, in turn, results in the investors not receiving the benefit of the presumption, resulting in individual issues of reliance predominating over common issues and defeating class certification.[19] Consequently, each investor trading in a security on an inefficient market would be left with only their individual claim in which he/she must show direct reliance on the company's alleged false statements in order to prevail on the merits.[20]

The fraud-on-the-market theory was widely accepted by most federal circuit courts and district courts prior to its adoption in the U.S. Supreme Court's 1988 decision in *Basic v. Levinson*.[21] Although *Basic* was a 4 to 2 decision, with three Justice's abstaining,[22] the doctrine's application has found wide acceptance since *Basic*, and was recently embraced by the Court in *Halliburton*, where a unanimous Court decided that another §10(b) element, loss causation, did not have to be established at the class certification stage in order to invoke *Basic*'s presumption.[23]

3. Proof of Materiality is Not Required and Rebutting *Basic*'s Presumption is Not Allowed at the Class Certification Stage

Amgen held that plaintiffs must ultimately prove materiality to prevail on the merits of a §10(b) claim but "that such proof is not a prerequisite to class certification."[24] Acknowledging that materiality is one of the predicates to invoke the fraud-on-the-market presumption and that *Halliburton* required other predicates be proven to invoke the presumption -- including that the "the stock traded in an efficient market" and that the "alleged misrepresentations were publicly known" -- the Court identified important distinctions between the foregoing predicates and materiality.[25] First, the Court found that materiality's objectiveness, involving the significance of a misrepresented fact to a reasonable investor, makes proof susceptible to evidence common to the class.[26] Next, the Court found that failure to prove materiality -- an essential element to a §10(b) claim, unlike the other predicates -- would not result in individual questions predominating because failure of proof "would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate."[27] In contrast, failure of proof on the other predicates, such as market efficiency, would result in investors still having the right to bring individual claims, but with the requirement that direct reliance be shown.[28]

Turning to Amgen's proffered rebuttal evidence, the Court noted that it comprised of information to show that the alleged misstatements "were immaterial."[29] Recognizing it as a back-door attempt to reassert its previous argument, the Court rejected it and stated: "just as plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, … a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class."[30] Thus, the Court held that "reserv[ing] consideration of Amgen's rebuttal evidence for summary judgment or trial" is also appropriate.[31]

Finally, although the Court did not specify the plaintiffs' burden on the issue of materiality at the class certification stage, it appears that plaintiffs need only "plausibly plead that … alleged misrepresentations and misleading omissions materially affected … [the] stock price."[32] The *Amgen* plaintiffs appeared to have satisfied this much lower threshold.

4. The Dissents' and Concurrence's Possible Interest in Revisiting the Fraud-on-the-Market Theory

Noting the defendants' concession that Amgen's stock traded in an efficient market, thereby automatically triggering the benefit of the fraud-on-the-market presumption, the majority concluded that this case did not provide a good vehicle to address the merits of the efficient market theory.[33] Nonetheless, despite the lack of a dispute, the concurring and dissenting Justices indicated an interest in revisiting the merits of *Basic*'s presumption in the future.[34]

As grounds for its view that *Basic*'s presumption may no longer be valid, the concurring and dissenting Justices offered only brief comments, stating that "more recent evidence suggests that the presumption may rest on a faulty economic premise" and that "market efficiency" may "operate[] differently depending on the information at issue."[35] Neither the concurrence nor the dissent, however, acknowledged the body of law developed over the past 25-years, grounded in economic literature, evaluating whether a market is efficient enough to apply the fraud-on-the-market presumption.[36]

5. Conclusions

Amgen addressed hotly debated issues which divided the lower courts, involving *Basic*'s materiality and rebuttable presumption rulings in the context of class certification, and provided a well-reasoned decision as shown by its approval from both sides of the Court's philosophical divide. Consistent with its recent unanimous decision in *Halliburton*, which held that another §10(b) essential element, loss causation, need not be proven at class certification, the Court cogently explained why it was a misreading to interpret *Halliburton* as calling for different treatment of the materiality element.[37] Further, the Court's reconciliation of its holding with *Basic* effectively disposed of the dissents' arguments and adhered to the limited purpose of Rule 23(b)(3)'s inquiry—deciding class issues "[a]t an early practicable time" and not delving into merits questions when it is unnecessary to rule on whether a class should be certified.[38]

The Court also adeptly counterbalanced Amgen's and the dissents' policy arguments, finding that the "substantial pressure" that a class action may exert on a defendant to settle and the "judicial economy" that may be achieved by disposing of cases early on the merits, were alone not reasons to impose "precertification proof of materiality."[39] The issue of "settlement pressure" existed in all §10(b) elements and the Court already found that the elements of loss causation and false statements were not required to be proven at class certification.[40] Additionally, the Court noted that Congress amended the securities laws to address perceived abuses by making it difficult for non-meritorious cases to survive motions to dismiss and, during the law's amendment process, rejected calls to abandon the fraud-on-the-market theory.[41]

In rejecting Amgen's judicial economy argument, the Court found that Amgen's position would actually "waste judicial resources" by "necessitat[ing] a mini-trial on the issue of materiality at the class certification stage," likely requiring the costly process to be repeated at summary judgment and/or trial as either a class case or as individual cases if

the class is not certified because non-named class members are not bound by class certification denials.[42] Amgen's position also overlooked the class device's even-handed benefit of binding both sides (all class members and defendants) to a particular decision if the class is certified before a decision on the merits.[43] Making securities fraud cases more difficult or impossible to certify would also contravene the remedial purpose of the securities laws[44] and extinguish the substantial benefits that "Congress, the Executive Branch, and th[e] Court … have recognized" from "meritorious private actions" in enforcing the "antifraud securities laws."[45]

Given that *Amgen* broadly reigns in merits inquiries at class certification—to only those issues where the merits must be determined to decide specific class issues—*Amgen*'s importance should extend beyond the securities fraud context. Indeed, the majority cited to its recent non-securities law decision in *Wal-Mart Stores, Inc. v. Dukes*, in an apparent attempt to limit that holding; stating: "[a]lthough we have cautioned that a court's class-certification analysis must be 'rigorous' and may entail some overlap with the merits of the plaintiff's underlying claim,' Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[46] Justice Thomas' dissent confirms *Amgen*'s extension beyond securities cases, in his observation that the majority departs from *Dukes*' holding.[47]

Finally, while defendants will likely accept the concurring and dissenting Justices' invitation to challenge the premise of the fraud-on-the-market theory, it is difficult to imagine that the Court will jettison a doctrine that has been widely-accepted by academia and judicially applied for over 25-years.[48] More importantly, abandoning the theory and requiring investors to allege direct reliance would severely damage the operation of financial markets and investors. Leaving investors with only individual claims to pursue would, indeed, chill investor participation in securities markets because of the increased investment risk if collective recourse from frauds is not available and the prohibitive costs in bringing individual cases, resulting in the markets becoming much less efficient (which ironically is the very concern the dissenters raise). *Basic* correctly recognized that the theory's presumption is "supported by common sense and probability" and that "empirical studies … tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information."[49] Moreover, the factors courts apply to assess a particular security's efficiency is sufficient for determining whether false statements were reflected in a security's price and should not be discarded merely because a market is not found to be perfectly efficient at all times; indeed, no market is, nor ever has been found, perfectly efficient.[50] A wholesale dismantling of *Basic*'s fraud-on-the-market presumption is, thus, unwarranted. ■

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1. Section 10(b) of the Securities Exchange Act of 1934 states, in relevant part: "It shall be unlawful for any person … – To use or employ, in connection with the purchase or sale of any security registered on a national exchange or any security not so registered, … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. §78j(b). In accordance with its authority, the Securities and Exchange Commission promulgated Rule 10b-5(b), stating in relevant part: "It shall be unlawful for any person … (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading …." 17 C.F.R. §240.10b-5(b).

2. *Amgen Inc. et al. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. --, -- S.Ct. – (2013) (slip op., at 24).

3. *Id.* at 13-14, 21-22.

4. *Id.* at 26. Although defendants may challenge the efficiency of a market at class certification, if the court finds the market efficient defendants cannot raise other challenges at class certification to rebut the presumption.

5. *Basic Inc. et al. v. Levinson et al.*, 485 U.S. 224, 245-47 (1988) ("Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. … [Thus,] an investor's reliance on any public material misrepresentations … may be presumed for purposes of a Rule 10b-5 action.").

6. *Amgen*, Justice Alito's concurrence at 1; Justice Thomas's dissent at 4 n.4 (joined by Justices Kennedy and Scalia).

7. *Amgen* at 3 (The issues in *Amgen* did not involve Rule 23(a)'s requirements of numerosity, commonality, typicality or adequacy of representation, or Rule 23(b)(3)'s requirement of superiority. The case also did not address §10(b)'s other elements, such as (1) a false statement or omission (2) made in connection with the purchase or sale of a security (3) scienter (4) economic loss, and (5) loss causation. Further, *Amgen* only addressed the presumption afforded securities plaintiffs when a company issues false statements (i.e., the fraud-on-the-market presumption) and did not address the presumption applied to omissions, set forth in the Court's holding in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972) (in cases "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.")).

8. *Id.* at 6.

9. *Id.*

10. *Id.* at 7.

11. *Id.*

12. *Id.* at 8.

13. *Erica P. John Fund, Inc. v. Halliburton Co.*, -- U.S. --, 131 S.Ct. 2179, 2185 (2011).

14. *Amgen* at 9 (noting that "materiality is not only an element of the Rule 10b-5 cause of action, it is also an essential predicate to the fraud-on-the-market theory").

15. *See, e.g.*, *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1309-10 (11th Cir. 2011) ("Fraud-on-the-market claims derive from the so-called efficient market hypothesis, which provides, in the words of the Supreme Court, that 'in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.'") (citing *Basic*, 485 U.S. at 241 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160 (3d Cir. 1986))).

16. *Amgen* at 4-5 (citing *Basic*, 485 U.S. at 246) (further explaining that "[f]ew investors in such markets, if any, can consistently achieve above-market returns by trading based on publicly available information alone, for if such above-market returns were readily attainable, it would mean that market prices were not efficiently incorporating the full supply of public information.") (citing R. Brealey, S. Myers, & F. Allen, Principles of Corporate Finance 330 (10th ed. 2011).

17. *Amgen* at 1, 5 ("If a market is generally efficient in incorporating publicly available information into a security's market price, it is reasonable to presume that a particular public, material misrepresentation will be reflected in the security's price.").

18. *Id.* at 1, 6-7, 14 n.6 (noting that the Court did not need to determine the efficiency of the market in which Amgen's stock traded because Amgen conceded that the market was efficient and also did not contest the public character of the allegedly fraudulent statements). Consideration of the factors courts use to determine whether a market is efficient is very briefly touched on in §§4 & 5, *infra*; wherein I also address the concurring and dissenting Justices' concerns about the fraud-on-the-market theory's continued viability. A thorough analysis of court decisions evaluating whether a

specific security market is efficient is outside the scope of this Article.

19. Rule 23(b)(3) requires, among other things, that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. Pro. 23(b)(3). Requiring each investor to prove that they directly relied on a company's false statements is one example of an individual issue that likely would predominate and result in the denial of class certification.

20. *Amgen* at 4; *Halliburton*, 131 S.Ct. at 2185.

21. *Basic*, 495 U.S. at 247; *see also Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 361 and fns.11, 12 & 13 (5th Cir. 1987) ("The fraud on the market theory has been adopted, in some form, by every Circuit considering it. It has been favorably received by many scholars. The Securities and Exchange Commission accepts the efficient market hypothesis, which underlies the fraud on the market theory.") (collecting cases and other authority).

22. *Basic*, 485 U.S. at 250 (then Chief Justice Rehnquist, Justice Scalia and Justice Kennedy took no part in the decision; and Justice White, joined by Justice O'Connor, dissented); *see also Amgen* at 4 n1 ("Part IV of Justice Blackmun's opinion in *Basic* – the part endorsing the fraud-on-the-market theory – was joined by Justices Brennan, Marshall, and Stevens. Together, these Justices composed a majority of the quorum of six Justices who participated in the case.") (citing 28 U.S.C. §1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").

23. *Halliburton*, 131 S.Ct. at 2185-86 (vacating and remanding the Fifth Circuit's decision requiring investors "to establish loss causation at the certification stage to trigger the fraud-on-the-market presumption.")

24. *Amgen* at 2.

25. *Id.* at 10-11, 16-17 ("[W]here the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption. … The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action, but the initiating plaintiff's claim would remain live; it would not be 'dead on arrival.'"); *Halliburton*, 131 S. Ct. at 2185 ("It is common ground, for example that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), 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.").

26. *Id.* at 2, 11.

27. *Id.* at 2-3 ("As to materiality, therefore, the class is entirely cohesive: it will prevail or fail in unison."); *Id.* at 17 ("While the failure of common classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class.").

28. *Id.* at 10-11, 16-17.

29. *Id.* at 24-25.

30. *Id.*

31. *Id* at 26.

32. *Id.* at 2; *cf.* Thomas, J. dissent at 17-18; *see also Matrixx Initiatives, Inc. v. Siracusano*, -- U.S. --, 131 S.Ct. 1309, 1322 n. 12 (2011) ("to survive a motion to dismiss, respondents need only allege 'enough facts to state a claim to relief that is plausible on its face.'") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

33. *Amgen* at 6-7, 14 n. 6.

34. *Id.* at Alito, J., concurring at 1; and at Thomas, J. dissenting, at 4 n. 4.

35. *Id.* (citing Langevoort, *Basic* at Twenty: Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 17, 175-76).

36. *Cammer v. Bloom*, 711 F. Supp. 1264 (D. N.J. 1989), is recognized as the seminal decision in applying five factors to determine whether a securities market is efficient. *See, e.g.*, *Wilkof v. Caraco Pharm. Lab., Ltd.*, 280 F.R.D. 332, 342-43 (E.D. Mich. 2012) ("the seminal decision on market efficiency is *Cammer*"); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 4 (1st Cir. 2005) ("the five widely-accepted market-efficiency factors set forth in *Cammer v. Bloom*"). *Cammer*'s progeny have developed additional factors for courts to consider in making the market efficiency determination. *See, e.g.*, *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 633-35 n. 14 & 16 (3d Cir. 2010), *abrogated by Amgen* solely on the court allowing rebuttals at class certification stage (identifying the five *Cammer* factors and other factors courts consider in evaluating market efficiency, including "(1) the average weekly trading volume; (2) the number of security analysts following and reporting on the security; (3) the extent to which market makers traded the security; (4) the issuer's eligibility to file an SEC registration Form S-3; … (5) the cause-and-effect relationship between material disclosures and changes in the security's price[;(6)] the company's market capitalization; … [(7)] the size of the public float for the security[; (8)] the ability to short sell the security; [(9)] the level of autocorrelation[; and (10)] whether the security is listed "on a major exchange such as the NYSE or the NASDAQ.") (citing *Cammer*, 711 F. Supp. at 1286-87; *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001); *In re PolyMedica Corp. Sec Litig.*, 453 F. Supp. 2d 260, 273, 276-77 (D. Mass. 2006)). *Cf. Miller v. Thane Intern., Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010) ("The absence of *Cammer* efficiency does not mean that prices are unreliable.").

37. *Amgen* at 19. Notably, the Court also recognized that *Basic* held that another essential §10(b) element – the falsity or misleading nature of the alleged misstatements or omissions – need not be proven at class certification. *Id.* (citing *Basic*, 485 U.S. at 242).

38. *Id.* at 3 (refusing Amgen's and dissenters' request to "put the cart before the horse" and "first establish that [plaintiffs] will win the fray."); at 12-13 n.5 (pointing to Justice Thomas' dissent as failing to explain how a plaintiff class's failure to prove an essential element of its claim will result in individual questions predominating over common ones); at 22-23 (pointing to Justice Scalia's dissent as inventing a rule from *Basic* that does not comport with that Court's decision); *see also* Rule 23(c)(1)(A) ("*Time to Issue*. "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

39. *Id.* at 18-22.

40. *Id.*

41. *Id.* at 19-20 (citing the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which recognized the public policy importance of "private securities-fraud litigation" including "deterring wrongdoing and providing restitution to defrauded investors," but also that such lawsuits have been subject to abuse, which Congress addressed by imposing "heightened pleading requirements," limits on "recoverable damages and attorneys fees," providing a safe-harbor for forward looking statements, restrictions on the selection of lead plaintiffs, mandating sanctions for frivolous litigation and authorizing a stay of discovery pending resolution of any motions to dismiss," citing 15 U.S.C. §78u-4; and also citing the Securities Litigation Uniform Standards Act of 1988 ("SLUSA"), which curtailed the ability to evade the PSLRA's limitations by bringing class actions under state law rather than federal law, citing 15 U.S.C. §78bb(f)(1)).

42. *Id.* at 21 (citing *Smith v. Bayer*, 131 S. Ct. 2368, 2372 (2011) ("Neither a proposed, nor a rejected, class action may bind nonparties.").

43. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 415 (1975) ("if the action results in a judgment on the merits, the decision will bind all members found at the time of certification to be members of the class.")

44. *See, e.g.*, *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002) ("We have explained that [§10(b)] should be construed not technically and restrictively, but flexibly to effectuate its remedial purpose.") (citations omitted).

45. *Amgen* at 21-22.

46. *Id.* at 9 (citing *Wal-Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S. Ct. 2541, 2551-52 n.6 (2011) (decertifying nationwide class of Wal-Mart employees alleging sex discrimination). Notably, the majority cited *Dukes* to quote favorably to the decision in *Eisen v. Carlisles & Jacquelin*, 417 U.S. 156, 177 (1974), which *Dukes*' 5 to 4 majority criticized, and which held that a district court has no authority to conduct a preliminary inquiry into the merits of a suit at class certification unless it is necessary to determine the propriety of certification. *Id.*

47. *Amgen at* Thomas, J. dissenting, at 10. Also of note, this part of the decision was not joined by Justice Scalia, the author of *Dukes*.

48. *See, e.g.*, *Cammer*, 711 F. Supp. at 1280 n. 25 (citing Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J Fin. 383 (1970); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 508 (1st Cir. 2005) (affirming application of the *Cammer* factors); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 204 n. 11 (2d Cir. 2008) (accepting use of the *Cammer* factors as an "analytical tool" for determining market efficiency); *In re DVI*, 639 F.3d at 633-35 n. 14 & 16 (citing *Cammer* and other factors favorably); *Gariety v. Grant Thorton, LLP* (368 F.3d 356, 368 (4th Cir. 2004) (citing the *Cammer* factors favorably); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (affirming application of *Cammer* and *Krogman* factors); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) ("securities traded in

national secondary markets such as the New York Stock Exchange … are well suited for application of the fraud on the market theory"); *Schleicher v. Wendt*, 618 F.3d 679, 682 (7th Cir. 2010); *Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999) (citing *Cammer* with approval).

49. *Basic*, 485 U.S. at 246-47 n. 24 (citing, e.g., Fischel, Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. Law. 1, 4, n.9 (1982); and Dennis, Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix, 25 Wm. & Mary L. Rev. 373, 374-81, and n.1 (1984)). To explain the "common sense" point the Court raised, the Court stated: "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Id.*

50. *See, e.g.*, *In re Resource America Sec. Litig.*, 202 F.R.D. 177, 190 (E.D. Pa. 2001) ("[A]n efficient market cannot be perfectly efficient.") (citing Richard Booth, Essay, *The Efficient Market Portfolio Theory, and the Downward Sloping Demand Hypothesis*, 68 N.Y.U. L. Rev. 1187, 1195 (1993); Louis Loss & Joel Seligman, *Securities Regulation* 181 n. 41 (3d ed. 1992); and Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ.Rev. 393, 405 (1980)).