



## Sixth Circuit Supplies Tools Securities-Fraud Defendants Can Deploy at Class-Certification Stage

by Cory L. Andrews

The class-action device is a powerful one. By aggregating numerous plaintiffs' losses, it has the potential to generate large recoveries. In the securities law context, the Supreme Court and Congress have recognized that class actions carry a high potential for abuse, including "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers."<sup>1</sup> Left unchecked, those tactics impose significant and systemic harms affecting "the entire U.S. economy."<sup>2</sup> Despite legislative reforms imposing procedural and substantive constraints on securities class actions,<sup>3</sup> filings continue to proliferate.<sup>4</sup> The question of class certification remains a crucial inflection point in such cases. After all, as Justice Kavanaugh recently noted, the certification of a class may "coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial."<sup>5</sup>

Against that backdrop, the U.S. Court of Appeals for the Sixth Circuit recently issued a decision addressing two major issues that often arise in securities class actions.<sup>6</sup> In a comprehensive opinion by Judge Danny J. Boggs for a unanimous panel, the Sixth Circuit declined to dilute the presumption of reliance the Supreme Court blessed in *Affiliated Ute Citizens of Utah v. United States*<sup>7</sup> for securities-fraud cases that primarily allege omissions. The Sixth Circuit also reaffirmed that district courts must conduct a "rigorous analysis" of plaintiffs' damages methodologies.<sup>8</sup> Taken together, these holdings will supply important tools that securities class-action defendants can deploy at the class-certification stage.

### Background: The *Affiliated Ute* and Basic Presumptions of Reliance

To recover damages for securities fraud under section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, private plaintiffs must establish several elements, including that they relied on a material misrepresentation or omission.<sup>9</sup> And to certify a damages class action under

<sup>1</sup> *Tellabs, Inc. v. Makor Issues & Rs., Ltd.*, 551 U.S. 308, 320 (2007) (citation modified) (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)).

<sup>2</sup> H.R. Conf. Rep. No. 104-369, at 31.

<sup>3</sup> *Tellabs*, 551 U.S. at 320 (discussing the Private Securities Litigation Reform Act of 1995).

<sup>4</sup> See Cornerstone, *Securities Class Action Filings: 2025 Midyear Assessment* 4 (2025), <https://www.cornerstone.com/wp-content/uploads/2025/07/Securities-Class-Action-Filings-2025-Midyear-Assessment.pdf> (reporting that in the first half of 2025, plaintiffs filed 114 new securities class actions).

<sup>5</sup> *Lab. Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333 (2025) (Kavanaugh, J., dissenting).

<sup>6</sup> *In re FirstEnergy Corp. Sec. Litig.*, 149 F.4th 587 (6th Cir. 2025).

<sup>7</sup> 406 U.S. 128 (1972).

<sup>8</sup> 149 F.4th at 623.

<sup>9</sup> See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014).

Federal Rule of Civil Procedure 23(b)(3), plaintiffs must show that common questions of law and fact predominate over individualized issues. The reliance element can thus pose an obstacle for would-be class-action plaintiffs in securities cases, as offering individualized proof of each class member’s actual reliance could swamp common issues. But the Supreme Court has recognized certain presumptions that, when applicable, allow reliance to be treated as something that can rise or fall on a classwide basis.

First, in *Affiliated Ute*, the Supreme Court announced a presumption of reliance available in cases “involving primarily a failure to disclose,” given the difficulties associated with proving a negative.<sup>10</sup>

Second, in *Basic Inc. v. Levinson*,<sup>11</sup> the Supreme Court articulated a distinct—and more demanding—presumption of reliance, known as the “fraud-on-the-market” theory, for cases involving material misrepresentations to the public. In such cases, courts will presume reliance on the “integrity of the market price” if plaintiffs can show “(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed.”<sup>12</sup> This presumption is far more difficult for plaintiffs to access than the *Affiliated Ute* presumption, and even when it applies, defendants can rebut it by showing that the misrepresentation did not affect the stock price.<sup>13</sup>

### **Background: The *FirstEnergy* Securities Litigation and Appeal**

The securities litigation involving FirstEnergy, an Akron-based electric utility, arose from a major public corruption scandal in Ohio. In July 2020, Ohio’s then-House Speaker and others were charged with accepting bribes from FirstEnergy in exchange for facilitating legislation that subsidized FirstEnergy’s nuclear plants and included other measures benefiting the company.<sup>14</sup> The indictment implicated FirstEnergy in making illegal political contributions, and following the disclosure of those allegations, FirstEnergy’s stock price dropped.

As is typical when a public company’s stock falls after a negative event affecting the company becomes publicly known,<sup>15</sup> several plaintiffs filed class action suits alleging securities fraud. The operative complaint alleged that FirstEnergy had misled its shareholders about the nature of its political activities in the years leading up to 2020, including by failing to disclose its lobbying campaign, falsely representing that it complied with lobbying laws, giving false assurances about the effectiveness of its internal controls, and failing to disclose the legal, financial, and reputational risks of its political strategy.<sup>16</sup> The complaint pleaded counts under both the Exchange Act and the Securities Act of 1933, a law that governs the initial issuance of securities. After the district court granted class certification, the Sixth Circuit granted interlocutory appeal under Federal Rule of Civil Procedure 23(f), limited to the claims under the Exchange Act.<sup>17</sup>

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<sup>10</sup> 406 U.S. at 153-54.

<sup>11</sup> 485 U.S. 224 (1988).

<sup>12</sup> *Halliburton*, 573 U.S. at 268.

<sup>13</sup> See *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 119 (2021).

<sup>14</sup> See *FirstEnergy*, 149 F.4th at 597-99.

<sup>15</sup> See, e.g., Elisa Mendoza & Jeffrey Lubitz, *Event-Driven Securities Litigation: The New Driver in Class Action Growth*, Institutional Shareholder Services 2-3 (Dec. 2020), <https://www.issgovernance.com/file/publications/ISS-SCAS-Event-Driven-Securities-Litigation.pdf>.

<sup>16</sup> See *FirstEnergy*, 149 F.4th at 600.

<sup>17</sup> *Id.* at 601.

## **Holding 1: The Sixth Circuit Tightens the *Affiliated Ute* Presumption**

The main question before the Sixth Circuit was whether, as the district court concluded, the operative *FirstEnergy* complaint was “primarily” based on omissions such that the *Affiliated Ute* presumption applies. Finding that the district court abused its discretion in applying *Affiliated Ute*, the Sixth Circuit announced a comprehensive framework for evaluating when “mixed” cases—those alleging both misrepresentations and omissions—trigger the *Affiliated Ute* presumption.<sup>18</sup>

In framing the issue, the Sixth Circuit understood the *Affiliated Ute* presumption as a limited one, to be “narrowly viewed in the context of the severe evidentiary burden of proving reliance on something that was never said,” given the “the difficulty of proving reliance on a speculative negative.”<sup>19</sup> The court then explored the fuzzy conceptual boundary among affirmative misrepresentations, “half-truths,” and omissions, noting that “[e]very misrepresentation ‘omits’ some part of the truth.”<sup>20</sup> If plaintiffs could readily transform a misrepresentation case into an omission case by shifting the focus to what the alleged misrepresentation concealed, they could easily evade the “decades of precedent that have come after *Basic*,” which “carefully crafted and refined *Basic*’s prerequisites, logic, and mechanics of presumption rebuttal against the backdrop of misrepresentations.”<sup>21</sup> The Sixth Circuit clarified that “[b]oth half-truths and generic, aspirational corporate statements” should be treated as misrepresentations inconsistent with the *Affiliated Ute* presumption.<sup>22</sup>

Considering all this, the Sixth Circuit instructed district courts to employ the *Affiliated Ute* presumption in a mixed case if, and only if, *none* of the following four factors is present: “(1) the omissions are only the inverse of the misrepresentations, or the only omissions are the truth that is misrepresented; (2) reliance is practically possible to prove by pointing to a misrepresentation and connecting it to the injury; (3) the preponderance and primary thrust of the claims involve misrepresentations made by the defendant(s); or (4) the alleged omissions have no standalone impact apart from any alleged misrepresentations.”<sup>23</sup> And that four-factor test is to be applied to each claim or “grouping” of factual allegations. Applying that inquiry to the complaint before it, the Sixth Circuit concluded that each of the disqualifying factors was present, so the case was “all about misrepresentations.”<sup>24</sup> Accordingly, it returned the case to the district court to consider the class-certification motion under the *Basic* framework.<sup>25</sup>

## **Holding 2: The Sixth Circuit Reinforces The Need For A “Rigorous Analysis” Of Damages Models**

The Sixth Circuit also took up the district court’s treatment of damages issues at class certification. The Supreme Court has made clear that before certifying a damages class, a district court must conduct a “rigorous analysis” of whether alleged “damages are susceptible of measurement across the entire class.”<sup>26</sup> Without that analysis, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”<sup>27</sup>

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<sup>18</sup> *Id.* at 602.

<sup>19</sup> *Id.* at 603, 607.

<sup>20</sup> *Id.* at 609.

<sup>21</sup> *Id.* at 610.

<sup>22</sup> *Id.* at 603.

<sup>23</sup> *Id.* at 610.

<sup>24</sup> *Id.* at 618.

<sup>25</sup> *Id.* at 620.

<sup>26</sup> *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013).

<sup>27</sup> *Id.* at 34.

In *FirstEnergy*, the district court addressed plaintiffs' proposed damages model only for their Securities Act claims.<sup>28</sup> After concluding that the model satisfied predominance, the district court assumed that the "same reasons" supported a predominance finding for damages on the Exchange Act claims. But that was error, as the Sixth Circuit recognized, because the "Securities Act and the Exchange Act calculate damages entirely differently."<sup>29</sup> Whereas the Securities Act contains a statutory damages formula, the Exchange Act lacks one but—unlike the Securities Act—requires actual proof of loss causation. By ignoring those salient differences, the Sixth Circuit concluded, the district court failed to undertake the requisite "rigorous analysis."<sup>30</sup> The appeals court thus remanded for the district court to reconsider whether the alleged Exchange Act damages were susceptible of classwide determination.<sup>31</sup>

### Conclusion and Looking Ahead

In cabining the *Affiliated Ute* presumption to cases that are primarily—and genuinely—omissions-based, the Sixth Circuit appropriately closed off a path that plaintiffs might otherwise use to obtain "a presumption of reliance solely by virtue of crafty pleading and claim design."<sup>32</sup> In doing so, the Sixth Circuit stands in good company; other courts of appeals have likewise closed off attempts to expand that presumption in mixed cases.<sup>33</sup> The Sixth Circuit's approach also follows readily from the Supreme Court's recent decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, which explored the relationship between "half-truths" and omissions, and held that the former are a species of affirmative misrepresentations.<sup>34</sup>

Any expansion of the *Affiliated Ute* presumption would be hard to reconcile with the Supreme Court's recent attention to cases applying the *Basic* framework. In that context, the Supreme Court has approved a reticulated sequence of presumptions and rebuttals,<sup>35</sup> which would have little force if plaintiffs could evade the framework simply by pleading the same case differently.

Although the Sixth Circuit did not question the viability of the *Affiliated Ute* presumption as far as it goes, there is reason to doubt that presumption's continued vitality, as developments in the law have seriously eroded its foundations. *Affiliated Ute*'s underpinnings as a class-action presumption were shaky to begin with—*Affiliated Ute* was not itself a class action case, and its facts were highly unusual, involving an "affirmative duty ... to disclose" on the part of bankers who stood in a fiduciary relationship with members of the Ute tribe.<sup>36</sup> In *Basic*, the Supreme Court noted the *Affiliated Ute* presumption in passing, but left unclear what role it should continue to play in relation to the more demanding requirements of the fraud-on-the-market theory.<sup>37</sup> And in *Macquarie*, which never mentioned *Affiliated Ute*, the Court held that "pure omission" claims are not actionable in private

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<sup>28</sup> 149 F.4th at 601.

<sup>29</sup> *Id.* at 621.

<sup>30</sup> *Id.* at 622.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 610.

<sup>33</sup> See *Waggoner v. Barclays PLC*, 875 F.3d 79, 85 (2d Cir. 2017); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 193-94 (3d Cir. 2001); *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 384 (5th Cir. 2007); *Vervaecke v. Chiles, Heider & Co.*, 578 F.2d 713, 717 (8th Cir. 1978); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2 F.4th 1199, 1204 (9th Cir. 2021); *Joseph v. Wiles*, 223 F.3d 1155, 1162-63 (10th Cir. 2000); *Cavalier Carpets, Inc. v. Caylor*, 746 F.2d 749, 756 (11th Cir. 1984); *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 219-21 (D.C. Cir. 2010).

<sup>34</sup> 601 U.S. 257, 263-64 (2024).

<sup>35</sup> See, e.g., *Goldman*, 594 U.S. at 118-19.

<sup>36</sup> 406 U.S. at 153.

<sup>37</sup> See 485 U.S. at 245.

securities fraud actions, full stop.<sup>38</sup> So the category of cases in which *Affiliated Ute* may still have some bite—those involving “primarily a failure to disclose” but not “pure omissions”—is likely to be slim at best. But that comports with common sense; there is no good reason why class action plaintiffs should have a smooth path to certification against a company that merely failed to disclose a material fact, while being subjected to the rigors of *Basic* if that same company affirmatively misrepresented the truth.

The Sixth Circuit decision also reinforces that companies should respond with care when faced with sprawling securities-fraud complaints involving dozens of alleged misstatements and omissions, corresponding to multiple causes of action. As the court recognized, the proper class-certification analysis requires careful consideration of each grouping of allegations, in relation to each legal theory. Defendants should thus carefully parse through each allegation in the pleading at a granular level to ensure that supposed “omissions” are not disguised misrepresentations or half-truths. And plaintiffs’ damages models should likewise be pressure tested on a claim-by-claim basis, to confirm that they comply with the rigor *Comcast* demands.

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<sup>38</sup> 601 U.S. at 266.