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Investor Class Cert. Win Offers Post-Goldman Insight

By **John Browne and Adam Hollander** (December 10, 2021, 5:17 PM EST)

On Dec. 8, U.S. District Judge Paul A. Crotty of the U.S. District Court for the Southern District of New York **granted** class certification in In re: Goldman Sachs Group Inc. Securities Litigation, the more than 10-year-old securities class action accusing The Goldman Sachs Group Inc. of hiding conflicts of interest that harmed its clients, including behind-the-scenes dealings with a hedge fund run by John Paulson.


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This is the third time the district court has certified the same class. The case has been to the U.S. Court of Appeals for the Second Circuit three times and in June of this year was the subject of a highly anticipated U.S. Supreme Court decision clarifying and reaffirming the standards for class certification in securities fraud class actions.


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When the Supreme Court granted the defendants' petition for certiorari on Dec. 11, 2020, it was big news. Various groups, including law professors and former U.S. Securities and Exchange Commission officials, filed briefs contending that the Second Circuit's decision contravened existing Supreme Court precedent, would encourage unwarranted securities class action litigation, and that the Supreme Court's upcoming decision could alter the landscape of securities class actions.

When the Supreme Court issued its decision in June, multiple defense firms issued client alerts calling it a win for defendants and predicting that it would make it substantially more difficult for plaintiffs to obtain class certification.

The district court's Dec. 8 decision was a highly anticipated early look at how trial courts would interpret the new guidance from the Supreme Court. The primary question was whether district courts would be willing to deny class certification in instances where the plaintiffs relied on exceedingly generic statements of the kind at issue in Goldman.

From a practitioner's point of view, there remained the important question of whether the new standards would alter the types of expert and other evidence that must be developed and submitted by the parties at the class certification stage.

Contrary to the dire predictions of some, the district court's decision made clear that the new rules applicable post-Goldman are best summarized by Pete Townshend's famous lyrics: "Meet the new boss, same as the old boss."

Despite the case's extensive procedural history, it did not materially change the standards governing class certification, which the vast majority of securities fraud class actions readily meet. Nor, as discussed below, did it change the types of evidence applicable to class certification determinations in securities fraud cases.

The issue in Goldman was whether the defendants could rebut the fraud-on-the-market presumption by coming forward with sufficient "evidence that an alleged misrepresentation did not actually affect the market price of the stock," i.e., there was no price impact.[1]

The plaintiffs alleged that "Goldman duped its investors into believing Goldman was aligned with their interests, and indeed had robust institutional systems to manage and mitigate conflicts of interest, while the company was in fact actively betting against the success of its investors' positions."[2]

Goldman contended in response that statements such as "our clients' interests always come first," and "we have extensive procedures and controls that are designed to identify and address conflicts of interest" were meaningless to investors and that such generic statements could not possibly have had any impact on Goldman's stock price. The defendants supported their argument by noting that Goldman's stock price did not rise when these statements were first made.

The plaintiffs conceded that Goldman's stock price did not rise in direct response to the allegedly false statements, but contended that Goldman used the statements to maintain an artificially high stock price that would have plummeted if the truth about Goldman's extensive conflicts of interest had been revealed.

As the plaintiffs noted, at the end of the class period there were multiple disclosures revealing Goldman's widespread conflicts of interest, and those disclosures caused Goldman's stock price to decline significantly. The district court characterized this as the inflation-maintenance, rather than the inflation-introducing, category of actionable misstatements.[3]

These issues had been examined at length in multiple opinions in the district court and the Second Circuit over the past six years. The district court initially certified the class in 2015 and the defendants appealed to the Second Circuit, which reversed and remanded for an evidentiary hearing.

The district court held the evidentiary hearing and again certified the class in 2018. The Second Circuit affirmed this decision in 2020, but the Supreme Court took up the issue and in June vacated the grant of class certification and remanded to the Second Circuit for further proceedings.

The Supreme Court's decision confirmed that the defendants bore the burden of demonstrating at class certification that there was no price impact, but instructed that "[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory."[4]

The court further wrote that an inference of price impact starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure. Finally, the Supreme Court stressed that courts should be "aided by a good dose of common sense" when considering price impact.[5]

Following the Supreme Court's decision, it was at first unclear how courts would go about considering the generic nature of misstatements would affect the class certification in the Goldman case. The Second Circuit declined to weigh in, and instead remanded to the district court for a third time.

The immediate issue was whether the district court would conduct another evidentiary hearing or ask for additional expert reports or other evidence in reconsidering its class certification decision. Notably, the district court decided that the record was sufficient and "did not invite the parties to supplement the substantial evidentiary record already in place" from the prior two class certification hearings.[6]

This was important from the point of view of securities practitioners because it meant that the Supreme Court's decision did not alter the types of evidence — largely expert reports from economists and statistical evidence of price movements — that for more than a decade have been standard fare in securities class actions.

Applying a healthy dose of common sense to the already existent record, the district court rejected each of the defendants' arguments. Most importantly, the district court rebuffed the defendants' primary argument that the practice of issuing statements of this kind is itself so generic as to nullify any price impact.[7]

Exercising "the common sense the Supreme Court has urged," the district court questioned why Goldman would have repeatedly made the statements in the first place "were they incapable of influencing (including by maintaining) a company's stock price."[8]

As the district court noted, when "the evidence and common sense speak as one," it is "difficult to imagine that Goldman's shareholders would have been indifferent had Goldman disclosed" its conflicts of interests and failures to protect against them, as the defendants had repeatedly represented.[9]

The district court also rejected the defendants' arguments that the alleged disclosures of the truth failed to sufficiently match the allegedly false statements. Although the corrective disclosures were somewhat more detailed and narrow in scope than the corresponding alleged misstatements, they implicated the same conflicts of interest at the core of the plaintiffs' claims.

In reaching this conclusion, the district court cited the settled rule that "there is no requirement that the corrective disclosure take a particular form or be of a particular quality, such that it be a mirror image" of the misstatements.[10]

So what does it all mean? After a yearslong odyssey through the appellate courts and the highest court in the land, after thousands of pages of legal briefs and arguments, the old adage proves true once again: The more things change, the more they stay the same.

For all the noise surrounding the Supreme Court's Goldman decision, it proved largely to be a tempest in a teapot. It merely reinforced well-established standards governing class certification in the securities fraud context and confirmed that when a healthy dose of common sense is applied, most securities class actions easily meet the requirements of class certification. It did not even change the type of evidence that must be developed.

Perhaps, however, this is not the end of the story. After now certifying the class three times, it is clear that the district court believes the case should go forward to trial. But it is equally clear that the defendants are going to fight this case to the bitter end. We can expect in the coming weeks to see the defendants seek permission from the Second Circuit to pursue a third interlocutory appeal under Rule 23(f) and bring these issues, once again, into the appellate courts.

It remains to be seen whether the Second Circuit has seen enough or if it will wish to take these issues up again and determine if the district court properly applied the standards announced in Goldman.

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Disclosure: The firm — but not the authors of this article — co-authored an amicus brief on this case at the Supreme Court level. Neither the firm nor the authors are involved with the current case.

[1] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 284 (2014).

[2] Goldman Sachs Slip Op. at 2.

[3] Id.

[4] Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc., 141 S. Ct. 1951, 1961 (2021).

[5] Id. at 1960.

[6] Id. at 5, n.3.

[7] Id. at 22.

[8] Id. at 24.

[9] Id. at 21.

[10] Id.