A CORPORATION'S SECURITIES LITIGATION GAMBIT: FEE-SHIFTING PROVISIONS THAT DEFEND AGAINST FRAUD-ON-THE-MARKET

INTRODUCTION

A major issue in today's corporate landscape is the growth of shareholder litigation. The typical types of claims brought by shareholders are derivative claims and class action claims. Specifically, derivative claims aimed at merger transactions were filed in over 90% of corporate mergers and acquisitions valued at $100 million since 2010.[1] As for securities class action claims—the topic of this comment—there have been an average of 191 filings per year since 1997.[2] Of the 166 securities class action claims in 2013, 84% involved Rule 10b-5 claims.[3] Claims alleging a violation of Section 10(b) of the Securities and Exchange Act of 1934 contend that the company made fraudulent misstatements or omissions that violate federal securities laws.[4] The ability to bring class action suits has its foundation in both statutory regimes and common law principles.[5] These class action suits typically involve extremely high costs for the defendant corporation.[6] As with any high cost debate, there are arguments on both sides that deserve merit. On one hand, shareholders have a right to hold those liable for fraud accountable for their actions and to seek relief.[7] On the

1. Lisa A. Rickard, *Delaware Flirts with Encouraging Shareholder Lawsuits*, WALL ST. J. (Nov. 14, 2014), http://www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328.

2. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS—2013 YEAR IN REVIEW 1 (2014), *available at* https://www.cornerstone.com/GetAttachment/d88bd527-25b5-4c54-8d40-2b13da0d0779/Securities-Class-Action-Filings-2013-Year-in-Review.pdf. While there has been a decline in the number of filings in recent years, there was an increase in the number of filings from 2012 to 2013. *Id.*

3. *Id.* at 1, 7.

4. 15 U.S.C. § 78j(b) (2012).

5. *Class Action: An Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/class_action (last visited Apr. 3, 2015).

6. *See infra* notes 38–39 and accompanying text.

7. SEC. EXCH. COMM'N, HOW CAN INVESTORS GET MONEY BACK IN A FRAUD CASE INVOLVING A VIOLATION OF THE FEDERAL SECURITIES LAWS?, http://www.sec.gov/answers

other hand, there is a strong argument that many of the claims brought by these class actions are frivolous and ultimately do not provide any meaningful relief to shareholders.[8]

Sometimes chess players employ a strategy called a gambit in their opening move. The idea behind a gambit is that a player will strategically sacrifice one of his pieces, typically a pawn, hoping to gain an advantage later on in the match. This comment proposes that, in light of recent decisions by the Supreme Court of the United States and the Delaware Supreme Court, corporations can effectively protect themselves by adopting fee-shifting provisions (the corporation's gambit)[9] into either the corporation's articles of incorporation or bylaws. Fee-shifting provisions would allow for a more streamlined landscape of securities fraud litigation by deterring frivolous or meritless suits. Both parties will benefit by saving corporations significant amounts of litigation costs, which ultimately will have the effect of increasing, or at least maintaining, the shareholder's investment.[10] Furthermore, due to the nature of discovery involved in these suits, fee-shifting will provide a more accurate figure of the compensation paid to successful plaintiffs.

The foundation for the argument proposed by this comment has only recently surfaced, but support can be found in similar corporate contracting doctrines and furthered by practical policy concerns.[11] A major difficulty in analyzing securities class action suits is that a majority of them are disposed of before trial, rather than going to trial on the merits.[12] This ultimately leads to a huge

/recoverfunds.htm (last visited Apr. 3, 2015).

8. *See infra* Part III; U.S. CHAMBER INST. FOR LEGAL REFORM, ECONOMIC CONSEQUENCES: THE REAL COSTS OF U.S. SECURITIES CLASS ACTION LITIGATION 5–6 (Feb. 2014).

9. The corporation's sacrifice is explained as a double-edged sword due to the potential effects on discovery at the class certification stage. *See infra* Part I.C.

10. Investing in stock is not risk free. The risk analysis of stock investing is outside the scope of this article. The point here is that if corporations are not burdened by heavy litigation costs, presumably the corporation will be able to invest those savings in other areas, which would hopefully add value to the company and ultimately increase the value of the shareholder's stock. *See infra* Part I.C.

11. *See infra* Part II.B.i (identifying the corporate contract doctrine); Part II.C (identifying policy concerns related to federal preemption).

12. From 2006 to 2010, 40% of securities class action suits settled, 32% were dismissed with prejudice, 11% were voluntarily dropped, leaving only 18% of cases moving forward. Michael Klausner, Jason Hegland & Matthew Goforth, *When Are Securities Class Actions Dismissed, When Do They Settle, and For How Much? An Update*, 26 PROF.

windfall for plaintiffs' attorneys because the defendant corporations pay the plaintiffs' attorneys' fees.[13] Since the corporation is the defendant, the shareholders are essentially draining capital from the corporation they have invested in, which presents a circular problem.

The Supreme Court created a modified reliance element for 10b-5 securities class action suits deemed the "fraud-on-the-market" presumption in *Basic Inc. v. Levinson*.[14] However, in 2014, the Supreme Court allowed defendant corporations to rebut this presumption at the class certification stage.[15] The next issue courts will have to face is determining the amount and type of evidence that will be required to rebut this presumption. While certain factors and "event studies" have been proffered, it does not require a large leap in logic to believe that courts will require stronger and more substantial evidence to rebut the presumption.[16] As a consequence, this will increase the cost for defendant corporations to gather and prepare this rebuttal evidence, and the excessive cost of litigation is already a major point of contention regarding securities litigation.

By enforcing fee-shifting clauses for 10b-5 securities class action suits based on a fraud-on-the-market theory of reliance, the playing field will be more balanced on both sides. It will deter frivolous suits because plaintiffs will need stronger claims in order to survive the heightened presumption rebuttal from the defendant, or the plaintiffs will incur the defendant's litigation costs. Due to heightened pleading requirements for 10b-5 claims, the inability to be certified as a class can be viewed as bringing a frivolous claim. This is because the evidence used to establish class-wide reliance is also the foundation for succeeding on a 10b-5 class action claim.[17] Essentially, if the plaintiffs lack the evidence to win at trial, they should not attempt to bring a suit in

LIABILITY UNDERWRITING SOC'Y J. 1 fig. 1 (photo. reprint 2013) (2013), *available at* http://securities.stanford.edu/academic-articles/20130101-when-securities-class-actions-dismissed-when-settle-for-how-much.pdf.

13. Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, FORBES (Dec. 11, 2013), http://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing/.

14. 485 U.S. 224 (1988); *see infra* Part I.A.

15. *See infra* Part I.A.

16. *See infra* Part I.C.

17. *See Basic*, 485 U.S. at 247.

hopes of settling before trial (before or during the class certification stage). At this point, should the case be dismissed, the corporation should not be liable for paying the plaintiffs' attorneys' fees. By shifting fees to the plaintiffs if they do not prevail (to a certain extent),[18] plaintiffs will need to put their money where their mouths are. On the other hand, with the increased discovery requirements, both parties and the court will be more aware of the actual fraud and damage that took place, if any, which will ultimately lead to a more definitive compensation figure for the fraudulent acts.

Part I discusses the current landscape of securities class action litigation. It explains how and why the suits are initiated and discusses the outcome of *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*).[19] Part II discusses the framework for the proposition of this comment. It provides a brief history of significant cases and incorporates several recent cases that have opened the door to the possibility of implementing fee-shifting clauses. It concludes with a comparison to other contractual provisions currently being implemented by corporations and also analyzes fee-shifting provisions under federal preemption. Part III explains why implementing fee-shifting provisions solves many of the key concerns raised by *Halliburton II*. Part IV discusses several implications and possible future actions that are readily recognizable regarding fee-shifting provisions.

I. CURRENT LANDSCAPE OF SHAREHOLDER SECURITIES LITIGATION

While plaintiffs can bring suits alleging various violations of securities laws,[20] the scope of this comment is focused on claims alleging a 10b-5 violation. Further limiting the scope of this comment, the proposed solution is aimed at affecting class action securities claims in which the plaintiffs are attempting class certification based on a "fraud-on-the-market" ("FOM") presumption of reliance. The development of the fraud-on-the-market theory of

18. *See infra* Part III.
19. 573 U.S. __, 134 S. Ct. 2398 (2014); *see infra* Part I.
20. Such other claims deal with mergers and acquisitions, Chinese Reverse Mergers, and violations of other sections of federal and state securities laws. *See* CORNERSTONE RESEARCH, *supra* note 2, at 7 fig. 6 (listing numerous kinds of allegations).

reliance and its effect on securities litigation are the subjects of this part. It explains the current debate on the impact of the presumption and concludes with an analysis of the recent Supreme Court decision in *Halliburton II*.

A. *Section 10(b) and Fraud-on-the-Market Presumption of Reliance*

The Securities and Exchange Act of 1934 ("'34 Act") created the Securities and Exchange Commission ("SEC") to help enforce a newly enacted regime of federal securities laws.[21] Under the authority of section 10(b) of the '34 Act, the SEC issued Rule 10b-5 ("10b-5"), an anti-fraud provision that covered both the purchase and sale of securities.[22] While there is no express private right of action contained in the statutes or rules, the Supreme Court has recognized an implied private right of action for 10b-5 violations since 1946.[23]

One of the elements that plaintiffs must prove in order to recover damages under 10b-5 claims is reliance,[24] which is the most relevant element to this comment. Essentially, plaintiffs must prove that the defendant made a material misrepresentation or omission on which the plaintiff relied in deciding to purchase or sell securities.[25] Proof of reliance is fundamental to the court's analysis because it "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[26] The Supreme Court, in *Basic Inc. v. Levinson* ("*Basic*"), recognized that requiring individual proof of direct reliance from every

21. Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 LOY. U. CHI. L.J. 669, 681 (2014). A year prior to the enactment of the '34 Act, the Securities Act of 1933 was enacted, requiring full disclosure of initial securities distributions. *Id.* at 670, 680–81.

22. General Rules and Regulations, Securities Exchange Act of 1934, 240 C.F.R. § 240.10b-5 (2014); *see* Ramirez, *supra* note 21, at 681–82.

23. *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). In 2007, Justice Ginsburg, writing for the majority in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, began the opinion by stating, "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." 551 U.S. 308, 313 (2007).

24. *Halliburton II*, 573 U.S. at __, 134 S. Ct. at 2407 (citing Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. __, __, 133 S. Ct. 1184, 1191–92 (2013)).

25. *Id.*

26. Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988).

class plaintiff would run afoul of federal procedure for class certification.[27] This prompted the Court to adopt the FOM presumption of reliance for class plaintiffs.[28] The presumption rests on the rationale that a company's stock price that is traded on well-developed markets[29] reflects all available public information including material misrepresentations.[30] Thus, it can be said that the material misrepresentation has defrauded the market and an investor's reliance may be presumed when he or she buys or sells stock at the market price.[31]

In order for a plaintiff to assert the FOM presumption, a plaintiff must 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."[32] The Court in *Basic* expressly held that a defendant may rebut the presumption by showing that the misrepresentation had no effect on the stock's price or the investor would have bought or sold the stock despite knowledge of the misrepresentation.[33] However, until a recent decision by the Supreme Court in 2014, defendants attempting to rebut the presumption could not offer such evidence until trial.[34] By allowing a presumption of reliance, *Basic* ushered in an era of private securities fraud litigation that grew so rapidly it required legislative action.[35]

27. *Id.* at 242. Class certification is not proper when individual questions of law or fact predominate over questions of law or fact common to the class. FED. R. CIV. P. 23(b)(3).

28. *Basic*, 485 U.S. at 245–46.

29. *Id*. A common example would be the S&P 500. FOM incorporates the "efficient market hypothesis," a topic that is outside the scope of this comment. It is worth noting that whether markets are efficient or not is currently debated and further supported by empirical data. *See generally* Bradford Cornell & James C. Rutten, *Market Efficiency, Crashes, and Securities Litigation*, 81 TUL. L. REV. 443 (2006) (proposing a standard for efficiency and weighing that standard against others).

30. *Basic*, 485 U.S. at 246–47.

31. *Id.*

32. *Halliburton II*, 573 U.S. __, __, 134 S. Ct. 2398, 2408 (2014).

33. *Basic*, 485 U.S. at 248.

34. *Halliburton II*, 573 U.S. at __, 134 S. Ct. at 2416.

35. *See* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152–53 ("Tens of billions of dollars have changed hands in settlements of 10b-5 lawsuits in the last twenty years as a result of *Basic*.").

B. *Abuse and Settlement Dilemma*

After the Supreme Court's decision in *Basic*, the number of class action suits using the FOM presumption "rose dramatically."[36] This growth in alleged violations was not without problems. A major concern was the "race to the courthouse" to file these suits based on speculative bases.[37] Furthermore, once a class was certified or survived a motion to dismiss, the defendant corporation typically settled well before trial due to the expected high cost of litigation.[38] An obvious reason for such swift settlement is apparent—it is typically cheaper to settle such claims than to incur the high cost of litigation.[39]

Upon recognizing the potential for abuse, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA")[40] with the intention of filtering out meritless claims by requiring higher pleading standards.[41] Unfortunately, the PSLRA, at least from an empirical perspective, has not accomplished its goal. The U.S. Chamber Institute for Legal Reform stated in a report on securities class actions that "[s]ince enactment of the PSLRA, 4,226 federal securities class actions have been filed . . . and over 40% of corporations listed on major U.S. stock exchanges have been targeted by a securities class action law suit."[42] The report further stated that only fourteen of those resulted in trial verdicts, while the others were settled or dismissed.[43] In 1998, Congress made a second attempt at reforming securities litigation by enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").[44]

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36. *Id.* at 153; *see also* Jill E. Fisch, *The Trouble with* Basic*: Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895, 896 (2013).

37. Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1011–12 (1996) [hereinafter *Rebalancing Litigation Risks*].

38. *See id.* at 1012.

39. Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921.

40. *Id.* at 914; *see* Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

41. Perino, *supra* note 39, at 914.

42. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 5.

43. *Id.*

44. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.); Cecilia A. Glass, *Sword or Shield? Setting Limits on SLUSA's Ever-Growing Reach*, 63 DUKE L.J. 1337, 1338 (2014).

The purpose of this act was to prevent circumvention of the recently created PSLRA by requiring plaintiffs alleging 10b-5 claims to file in federal court.[45] But as the data above shows, 10b-5 claims are still being filed, and more importantly, settling before trial.[46]

While the potential for abuse and the settlement dilemma are still apparent in modern litigation, defendant corporations were recently given a significant helping hand in rebutting the FOM presumption. However, the use of this helping hand is likely to come at a significant cost for the corporation.

C. *The Supreme Court Upholds FOM, but Provides Uncertain Modification*

In 2014, the Supreme Court decided *Halliburton II*, holding that defendants are allowed to offer proof against the FOM presumption at class certification.[47] The Court was tasked with deciding whether to overturn or modify *Basic*.[48] Erica P. John Fund, Inc. ("EPJ") alleged that Halliburton Co. ("Halliburton") made a series of misrepresentations regarding the company's future dealings in an effort to inflate the company's stock price.[49] EPJ asserted that, in response to Halliburton's subsequent corrective disclosures, the company's stock price dropped, thus causing harm to its shareholders.[50] EPJ then invoked the *Basic* presumption and moved to be certified as a class comprised of all of the investors who purchased stock during the period of inflation.[51] The case made it to the Supreme Court twice. The first time around, the Supreme Court held that class action plaintiffs alleging securities fraud need not prove loss causation at the class certification stage in order to invoke *Basic*'s presumption.[52] On remand, Halliburton

45. 15 U.S.C. § 77p (2012); *see Halliburton II*, 573 U.S. __, __, 134 S. Ct. 2398, 2426 (2014).

46. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 5.

47. 573 U.S. at __, 134 S. Ct. at 2417. "*Basic*'s presumption" and the "FOM presumption" are interchangeable terms.

48. *Class Actions—Presumption of Reliance Under SEC Rule 10b-5*—Halliburton Co. v. Erica P. John Fund, Inc., 128 HARV. L. REV. 291, 291 (2014).

49. *Halliburton II*, 573 U.S. at __, 134 S. Ct. at 2405.

50. *Id.* at __, 134 S. Ct. at 2405–06.

51. *Id.* at __, 134 S. Ct. at 2406.

52. *Id.* at __, 134 S. Ct. at 2406–07.

argued that the evidence it previously introduced to disprove loss causation also disproved that the misrepresentations had an impact on the stock price.[53] Halliburton contended that without any price impact, the investors would have to prove individual reliance on the misrepresentations and thus class certification was improper under the Federal Rules of Civil Procedure ("FRCP") Rule 23(b)(3).[54] By not considering Halliburton's argument, the district court certified the class, and the Fifth Circuit affirmed, stating that while Halliburton's price impact evidence could be used at trial to rebut the presumption, it could not be used at class certification.[55] Thus, the case appeared before the Supreme Court for the second time—this time to address whether price impact evidence could be introduced at the class certification stage to rebut *Basic*'s FOM presumption.[56]

The Supreme Court ultimately decided not to overturn *Basic*,[57] but the Court did find that it was proper for defendants to introduce "price impact" evidence at the class certification stage to rebut *Basic*'s FOM presumption.[58] The Court distinguished its decision from another recent case in which the Court held that securities class action plaintiffs do not need to prove materiality at class certification.[59] The Court found "price impact" fundamental to *Basic*'s presumption since the presumption assumes that in efficient markets a stock's price reflects all public information, including misrepresentations.[60] "Price impact" necessarily affects class certification under Rule 23(b)(3) because "if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification.

53. *Id.* at __, 134 S. Ct. at 2406.

54. *Id.*

55. *Id.* at __, 134 S. Ct. at 2406–07.

56. *Id.* at __, 134 S. Ct. at 2407. The Court also accepted the case to reconsider *Basic*'s presumption itself. *Id.*

57. *Id.* Halliburton contended that *Basic* should be overruled on several grounds. Specifically, Halliburton argued that *Basic*'s presumption: (1) conflicted with Congress's intent in enacting the '34 Act; (2) relied on the markets being efficient which had been empirically disproven; (3) eliminated the reliance element for 10b-5 claims and altered the burden of proof under Rule 23 class certification; and (4) implicated policy concerns regarding the amount of meritless claims, costs on shareholders, and unnecessary use of judicial resources. *Id.* at __, 134 S. Ct. at 2408–13.

58. *Id.* at __, 134 S. Ct. at 2417.

59. *Id.* at __, 134 S. Ct. at 2416–17; *see* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. __, __, 133 S. Ct. 1184, 1202 (2013).

60. *Halliburton II*, 573 U.S. at __, 134 S. Ct. at 2416.

Without proof of those prerequisites, the fraud-on-the-market theory underlying the presumption completely collapses, rendering class certification inappropriate."[61] So now defendants may introduce either direct or indirect evidence showing lack of price impact at class certification.[62] Indirect evidence would tend to show that the misrepresentation was publicly known or that the market was inefficient, as opposed to direct evidence such as reports showing the stock price did not change between the time when the misrepresentation was made and the time period after corrective statements were made.[63]

At the time of this writing, the effects of *Halliburton II* have not fully come to light, but plenty of scholars and lawyers have offered commentary on the Court's decision, revealing a mixed view of the results. Some say the decision was a win for plaintiffs, while others believe the opposite, and still others even say the decision will not have any effect.[64] The remainder of this section deals with the implications regarding the decision in *Halliburton II*. These implications set forth the problem this comment seeks to resolve.

Some commentators believe that if *Halliburton II* appears to make plaintiffs' case an uphill battle, plaintiffs' lawyers will simply find other avenues to bring such claims.[65] One such avenue would be to assert the misrepresentations as omissions to invoke the presumption of reliance from *Affiliated Ute Citizens of Utah v. United States*[66] Depending on the facts of the case, other

61. *Id.*

62. *Id.* at __, 134 S. Ct. at 2417.

63. *Id.* at __, 134 S. Ct. at 2415–16.

64. *See e.g.*, Alison Frankel, *SCOTUS* Halliburton *Ruling Could Backfire for Securities Defendants*, REUTERS (June 23, 2014), *available at* http://blogs.reuters.com/alison-frankel/2014/06/23/scotus-halliburton-ruling-could-backfire-for-securities-defendants/ (discussing the benefits and burdens for both plaintiffs and defendants); Douglas W. Greene, *First Take on* Halliburton II*: The Price-Impact Rule May Not Have Much Practical Impact*, D&O DISCOURSE (June 24, 2014), http://www.dandodiscourse.com/2014/06/24/first-take-on-halliburton-ii-the-price-impact-rule-may-not-have-much-practical-impact/.

65. Greene, *supra* note 64.

66. *Id*. The presumption of reliance for omissions created under *Affiliated Ute Citizens of Utah v. United States* may be invoked only if there is proof of fraudulent course of business in violation of 10b-(5)(a) or (c). But the omissions must have made affirmative statements false or misleading. Claire Loebs Davis, Halliburton: *Is the Fix as Basic as Alleging Omissions Under* Affiliated Ute? *Or Is That Too Cute?*, D&O DISCOURSE (Jan. 28, 2014), http://www.dandodiscourse.com/2014/01/28/halliburton-is-the-fix-as-basic-as-alleging-omissions-under-affiliated-ute-or-is-that-too-cute/; *see* Affiliated Ute Citizens of Utah v. United

such avenues could be to allege violations of sections 11 or 12 of the '34 Act.[67] The takeaway from these commentators is that *Halliburton II* did not signal the end of securities class actions.

Halliburton II fixed one of the problems with *Basic*'s presumption. The Court in *Basic* expressly stated that the presumption of reliance was rebuttable.[68] Nevertheless, many commentators, and even several Justices, reason that the presumption was irrebuttable in practice.[69] According to an amicus brief filed in *Halliburton II*, defendants in FOM cases rarely attempted to rebut, and even when they were successful, the outcome only removed a few members from the class.[70] After *Halliburton II*, defendants have a stronger incentive to rebut the presumption at the class certification stage. The issue now becomes a question of what amount or type of "price impact" evidence will be sufficient to rebut *Basic*'s presumption. The Supreme Court acknowledged use of "event studies," which include regression analysis, that look at price impact for each individual misrepresentation since plaintiffs typically use such evidence to show the existence of price impact.[71] Now defendants are able to strip away the presumption regarding any misrepresentations they can prove had no impact on the stock's price.[72] This renders certification inappropriate under Rule 23(b)(3) as to the specific misrepresentation because plaintiffs would be required to prove actual reliance.[73] The use of event studies, some commentators believe, will turn into a "battle of the

States, 406 U.S. 128, 153 (1972).

67. N.Y. CITY BAR ASS'N COMM. ON SEC. LITIG., REPORT ON THE POSSIBLE IMPACT OF HALLIBURTON II ON SECURITIES CLASS ACTION LITIGATION 80 (May 28, 2014).

68. Basic Inc. v. Levinson, 485 U.S. 224, 249–50 (1988).

69. *See, e.g.*, *Halliburton II*, 573 U.S. __, __, 134 S. Ct. 2398, 2424 (Thomas, J., concurring); Brief for Former SEC Commissioners and Officials and Law Professors as Amici Curiae Supporting Petitioners at 24, *Halliburton II*, 573 U.S. __, 134 S. Ct. 2398 (2014) (No. 13-317) [hereinafter Brief for Former SEC Commissioners and Officials and Law Professors].

70. Brief for Former SEC Commissioners and Officials and Law Professors, *supra* note 69, at 22–26 (comparing the attempt of rebuttal to a game of Whack-a-Mole).

71. *Halliburton II*, 573 U.S. at __, 134 S. Ct. at 2415. If the study lacked a showing of price impact regarding the specific misrepresentation at issue, the presumption has no foundation to rest upon, even if the plaintiff's "event study" showed that the market was efficient. *See id.*

72. Aaron M. Streett & Shane Pennington, Basic *Instinct: The Supreme Court Confronts the Fraud-on-the-Market Theory*, 46 SEC. REG. & L. REP. (BNA) at 1883, 1886 (Sept. 29, 2014).

73. *Id.*

experts."[74] Both parties will presumably introduce event studies as direct evidence of price impact or the lack thereof. A problem arises when experts come to different conclusions because there are numerous statistical tools and models that can be used to produce event studies.[75] This will lead to *Daubert* challenges regarding expert methodologies.[76]

One thing seems certain regarding the use of event studies—the cost of bringing and defending a securities class action claim will increase. In regards to the price impact ruling of *Halliburton II*, Roberta Karmel stated, "It is unlikely this will make 10b-5 cases less expensive, and may even prove inimical to the defeat of class actions, since it may allow plaintiffs additional discovery in class certification battles."[77] Other attorneys predict that plaintiffs will incur higher costs to get past class certification, and the costs of defending such cases will certainly increase.[78] The effects of an increase in upfront costs seem to only favor plaintiffs. If plaintiffs defeat price impact defenses at the class certification stage, they are in a far more favorable position in post-certification settlement negotiations.[79] Furthermore, once defendants oppose class certification based on price impact, plaintiffs most certainly will make discovery demands on the basis of those defenses.[80] Again, this will potentially make the plaintiffs' cases stronger, or strengthen their settlement position, depending on what information is handed over.[81] So even though defendants are now able to rebut *Basic*'s presumption at the class certification

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74. *Id.*

75. Mark A. Perry & Jonathan C. Dickey, *Eight Propositions Regarding the Scope of* Halliburton II, 46 SEC. REG. & L. REP. (BNA) at 1403, 1406 (July 21, 2014).

76. *Id*. *Daubert* challenges require courts to determine the reliability and relevance of expert testimony. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594–95 (1993). For an in-depth analysis of *Daubert* challenges pertaining to financial experts, see PRICEWATERHOUSECOOPER, *DAUBERT* CHALLENGES TO FINANCIAL EXPERTS: A YEARLY STUDY OF TRENDS AND OUTCOMES 1 (Apr. 2014), http://www.pwc.com/en_US/us/forensic-services/publications/assets/daubert-study-2013.pdf.

77. Roberta S. Karmel, *Attacked Again,* Basic *Survives*, 46 SEC. REG. & L. REP. (BNA) at 1347, 1350 (July 14, 2014); *see also* M. Todd Henderson & Adam C. Pritchard, *Halliburton Will Raise Cost of Securities Class Actions*, LAW360 (July 2, 2014), https://www.law360.com/articles/552839/halliburton-will-raise-cost-of-securities-class-actions.

78. *See, e.g.*, Greene, *supra* note 64.

79. Frankel, *supra* note 64.

80. *Id.*

81. *See id.*

stage, the possible economic consequences of such defenses will factor into a defendant's decision to fight the claim or settle.

The last issue of this section is the problem of circularity in shareholder class action suits. The problem does not stem from *Halliburton II*, but rather from the nature of shareholder class action suits. The problem of circularity increases the costs of litigation implicated by *Halliburton II* and further exacerbates the expense problem. Circularity arises because in shareholder class action suits, the issuer of the stock (i.e., the defendant corporation) pays the damages, either directly or through directors and officers ("D&O") insurance.[82] The consequence is that the shareholders themselves are the ones who ultimately bear the cost of such payments.[83] The problem gets more intricate when the shareholder class differs from current shareholders.[84] Additionally, since most cases settle, the damages paid are simply a transfer of wealth between investors, with attorneys getting a significant cut.[85] This again leads back to the "race to the courthouse" issue discussed above, since plaintiffs' attorneys are motivated to get their share of the action as early and often as possible.[86] Empirical analysis tends to show that shareholder wealth is actually destroyed due to class action litigation.[87] Most importantly in this context, after *Halliburton II*, the costs of litigation are going to increase without providing any meaningful benefit to shareholders because shareholders ultimately bear the costs. As to this implication, M. Todd Henderson succinctly states, "Securities class actions are a costly form of insurance against fraud, and investors are the ones ultimately footing the bill. Only the lawyers, and now, the economists, are enriched."[88]

The FOM presumption provides for class-wide reliance and promotes private enforcement against securities fraud. Since the

82. Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 WIS. L. REV. 333, 337.

83. *Id.* For a brief explanation of the effects on shareholders, see U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 5–6.

84. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1556–62 (2006).

85. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 5–6.

86. *See id.* at 5. A more detailed analysis of the circularity problem is outside the scope of this comment.

87. *See id.* at 6.

88. Henderson & Pritchard, *supra* note 77.

presumption's creation in *Basic*, securities class action litigation has been voluminous.[89] Several negative effects of the presumption eventually required legislative action and judicial modification. In *Halliburton II*, the Supreme Court denied overturning *Basic* but did make a modification that would presumably help defendants.[90] However, the implications of rebutting the presumption at class certification may in fact leave such litigation with the same problems, or make them worse. With *Basic* here to stay, corporations should seek better ways to protect themselves from such litigation, which in turn will ultimately protect shareholder wealth.

II. FEE-SHIFTING PROVISIONS TAKE THE SPOTLIGHT

This section looks at the contractual relationship between corporations and shareholders under the corporation's articles of incorporation and bylaws. Specifically, it focuses on fee-shifting provisions, which transfer litigation and attorneys fees from a corporate defendant to shareholder plaintiffs under certain circumstances. First, this section will discuss the recent Delaware Supreme Court case, *ATP Tour, Inc. v. Deutscher Tennis Bund*,[91] which has sparked a debate on the implementation of fee-shifting provisions that attempt to govern litigation. This section then compares fee-shifting provisions with other contractual provisions affecting litigation currently being used by corporations. The section concludes with the necessary analysis of federal preemption, as this comment proposes to apply private contractual agreements to federal 10b-5 claims.

A. ATP Tour, Inc.

ATP Tour, Inc. ("ATP") is a membership corporation, incorporated in Delaware, that operates a men's professional tennis tour.[92] In 2006, ATP's board of directors amended the bylaws by adopting a provision that held members liable for the corpora-

89. Langevoort, *supra* note 35, at 153.

90. *See* Henderson & Pritchard, *supra* note 77.

91. 91 A.3d 554 (Del. 2014).

92. *Id.* at 555. A membership corporation is another term for a closely held corporation or "non-stock" corporation.

tion's "litigation costs" in any claim brought by the members against the corporation if the members lost at trial.[93] In 2007, the board of directors changed the tour format, and several members brought suit against ATP and other members in federal court, alleging federal antitrust claims and Delaware fiduciary duty claims.[94] The district court held in favor of the defendants on all claims, at which point ATP moved to implement its fee-shifting bylaw under Rule 54 of the FRCP.[95] The district court denied ATP's motion, stating that federal law preempts contractual agreements when dealing with antitrust claims.[96] On appeal, the United States Court of Appeals for the Third Circuit decided that the bylaw needed to be found enforceable under Delaware law before any issues of preemption could be determined.[97] On remand, the district court found that the bylaw's enforceability should be answered by the Delaware Supreme Court and certified four questions of law.[98] The Delaware Supreme Court found the fee-shifting bylaw facially valid, but the holding was limited to non-stock Delaware corporations.[99] The Delaware Supreme Court further stated that "[w]hether the specific ATP fee-shifting bylaw is enforceable, however, depends on the manner in which it was

93. *Id.* at 556. The amended bylaw reads as follows:

> (a) In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial assistance to or has a direct financial interest in any Claim against the League or any member or Owner (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim.

Id.

94. *Id.* at 556.

95. *Id.*; *see* FED. R. CIV. P. 54.

96. *ATP Tour*, 91 A.3d at 556.

97. *Id.* at 556–57.

98. *Id.* at 557.

99. *Id.* at 555, 558.

adopted and the circumstances under which it was invoked. Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose."[100]

Immediately after this decision, the Delaware legislature, urged on by the state plaintiffs' bar,[101] attempted to pass a law expressly prohibiting fee-shifting provisions in a stock corporation's articles or bylaws.[102] However, in response to protests and requests from business groups and corporations, the legislature tabled the bill to further study the matter.[103] Currently, the Delaware legislature has not enacted any laws regarding fee-shifting.[104] Any future action will presumably have an effect on the analysis and arguments of this comment. While the holding in *ATP Tour* is clearly limited to Delaware non-stock corporations, the remainder of this section discusses the holding's possible application to stock corporations.[105]

The primary purpose of fee-shifting provisions is to impose a "loser pays" rule[106] different from the American Rule followed by Delaware courts, which typically requires parties to pay their own litigation costs.[107] After the holding in *ATP Tour*, multiple Delaware corporations adopted such fee-shifting bylaws, and other companies have included fee-shifting provisions in their arti-

100. *Id.* at 558.

101. Stephen Bainbridge, *Delaware's Decision: Viewing Fee Shifting Bylaws Through a Public Choice Lens*, PROFESSORBAINBRIDGE.COM (Nov. 18, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/11/delawares-decision-viewing-fee-shifting-bylaws-through-a-public-choice-lens.html [hereinafter Bainbridge, *Public Choice Lens*].

102. Rickard, *supra* note 1.

103. *Id.*

104. At the time of this writing, the Delaware legislature had tabled the discussion of fee-shifting clauses. *See* Jonathan Starkey, *Fee-Shifting Bylaw Bill Tabled Until 2015*, DELAWAREONLINE (June 19, 2014), http://www.delawareonline.com/story/money/business/2014/06/19/delaware-general-assembly-tables-legal-fee-shifting-bylaw-bill/ 10946611/.

105. For purposes of this comment, further use of the term "corporation" refers to "stock corporations." This comment specifically identifies any discussion of "non-stock corporations."

106. Stephen Bainbridge, *The Case for Allowing Fee Shifting Bylaws as a Privately Ordered Solution to the Shareholder Litigation Epidemic*, PROFESSORBAINBRIDGE.COM (Nov. 17, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholder-litigat.html [hereinafter Bainbridge, *Privately Ordered Solution*].

107. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014). Fee-shifting closely resembles the English Rule, which requires the losing party to cover the winning party's litigation costs. *See* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 329 (2013).

cles as they prepare for initial public offerings ("IPOs").[108] There are similarities between the motives for adopting fee-shifting provisions and the arguments that ultimately led the Supreme Court to modify *Basic*'s presumption. Before comparing the relationship and analyzing how fee-shifting can help solve some of the implications from *Halliburton II*, it would be helpful to lay a foundation for the application of fee-shifting provisions.

B. *Building a Foundation for a Strategic Defense*

The purpose of this section is to compare fee-shifting provisions with corporate contract provisions that affect litigation between a corporation and its shareholders. Corporate bylaws and articles are generally viewed as contractual relationships between the corporation and its shareholders.[109] As such, state corporation laws, specifically those in Delaware, generally allow broad discretion on how corporations choose to operate.[110] The two corporate contract provisions discussed below are forum-selection clauses and arbitration clauses. These provisions help lay a foundation for fee-shifting provisions because of their method of adoption, the reasons behind their adoption, and their enforceability in cases brought in federal court. This section concludes with a federal preemption analysis, which naturally flows from the comparison of the other corporate contract provisions.

1. Relationship to Forum-Selection Clauses

Forum-selection clauses in a corporation's articles or bylaws require claims against the corporation to be brought in specific states and courts. Initially, such forum-selection provisions were not necessary since the internal affairs doctrine applied to corpo-

108. John C. Coffee, Jr., *Fee Shifting Bylaw and Charter Provisions: Can They Apply in Federal Court?—The Case for Preemption* 1 (Columbia Law Sch. Ctr. for Law and Econ. Studies, Working Paper No. 498, 2014) [hereinafter Coffee, *The Case for Preemption*], *available at* http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2508973. The difference between a bylaw adopted by the board of directors and a provision contained in a corporation's articles will be discussed in Part II.B to provide context.

109. *See ATP Tour*, 91 A.3d at 558.

110. Donald F. Parsons, Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts*: *Their Rise to Preeminence*, 17 BUS. L. TODAY 21, 23 (Mar.–Apr. 2008). The reason for pointing out Delaware is because the majority of Fortune 500 corporations choose to incorporate in the state. *Id.* at 22.

rations.[111] The internal affairs doctrine states that the laws of the state of incorporation are to apply when a corporation is sued.[112] Before 2002, the doctrine was also thought to provide exclusive jurisdiction to courts in the state of incorporation.[113] In response to a drastic increase in challenges to merger transactions, which were being filed outside the state of incorporation and often in multiple jurisdictions, corporations adopted forum-selection clauses providing for exclusive jurisdiction in the state of incorporation, this typically being Delaware.[114] In 2010, the Delaware Chancery Court endorsed forum-selection clauses contained within a corporation's articles.[115] Such clauses were challenged in Delaware courts, but were ultimately upheld.[116] The Supreme Court of the United States confronted forum-selection clauses in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*.[117] The Court stated that "a proper application of [28 U.S.C.] § 1404(a) requires that a forum-selection clause be 'given controlling weight in all but the most exceptional cases.'"[118] In *Atlantic Marine*, the Court also laid out the framework for federal courts to use in analyzing forum-selection disputes.[119]

Delaware courts take the view that articles of incorporation and bylaws are contracts between the corporation and current and future shareholders.[120] However, while both are viewed as contracts, their methods of alteration differ. Companies adopt articles of incorporation at the time of incorporation, and amendments can be made by action of the board of directors and subse-

111. Verity Winship, Shareholder Litigation by Contract 15 (Mar. 6, 2015) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575668.

112. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. g (1971).

113. Winship, *supra* note 111, at 15–16.

114. *Id.* at 16.

115. *In re* Revlon, Inc. S'holders' Litig., 990 A.2d 940, 960 & n.8 (Del. Ch. 2010).

116. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956–57 (Del. Ch. 2013) (holding that forum-selection clauses unilaterally adopted by the board of directors were facially valid); City of Providence v. First Citizens Bancshares, Inc., 99 A.3d 229, 242 (Del. Ch. 2014) (holding that a Delaware corporation can choose a forum other than Delaware in a forum-selection clause).

117. 571 U.S. __, __, 134 S. Ct. 568, 575 (2013).

118. *Id.* at __, 134 S. Ct. at 579 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988)) (Kennedy, J., concurring).

119. *Id.* at __, 134 S. Ct. at 575.

120. Winship, *supra* note 111, at 12.

quent approval by a majority of the shareholders.[121] In contrast, the board of directors or shareholders can adopt, amend, or repeal bylaws unilaterally.[122] Despite this unilateral nature of bylaws, Delaware courts treat them as contracts because shareholders agree to governance by the board of directors when they invest in the corporation.[123]

Thus, courts analyzing the facial validity of forum-selection clauses differ depending on whether they are contained in the articles or bylaws. Typically clauses contained in the articles are facially valid since shareholder approval is required,[124] or in the case of adoption prior to the IPO, shareholders simply do not have to invest in that company.[125] As for the facial validity of clauses contained in bylaws, Delaware corporate law provides broad language on what bylaws may control, including the internal affairs of the corporation.[126] Under *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, forum-selection bylaws govern the "internal affairs" of the corporation and thus are facially valid.[127] Additionally, the Delaware Chancery Court recognized that Delaware and federal law "respect[] and enforce[] forum-selection clauses."[128] In determining the enforceability of bylaws, courts look at the text, purpose, and adoption of the bylaw to make sure it was not adopted for an improper purpose.[129]

The relationship between forum-selection clauses and fee-shifting clauses rests on the motive, method of adoption, and the

121. *Id.* at 11.

122. *Id.*

123. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013).

124. Winship, *supra* note 111 at 10, 28–30.

125. The SEC's registration requirements include disclosure of certain charter provisions. *See* Coffee, *The Case for Preemption*, *supra* note 108, at 8–9. Companies are incentivized to disclose forum selection clauses because it will provide greater enforceability in court. *See* Paul Scrivano & Noah Kornblith, *Exclusive Forum Bylaws: Further Consideration Recommended*, O'MELVENY & MYERS LLP (Mar. 17, 2014), http://www.omm.com/exclusive-forum-bylaws-further-consideration-recommended-03-11-2014/.

126. DEL. CODE ANN. tit. 8, § 109(b) (2015) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.").

127. *Boilermakers*, 73 A.3d at 939.

128. *Id.*

129. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971); Winship, *supra* note 111, at 30.

contractual relationship between shareholders and the corporation. The purpose of forum-selection clauses is to consolidate multi-jurisdictional claims, which consequently lowers the net cost of such litigation.[130] The motive behind fee-shifting clauses, while slightly different, has the same net effect of lowering litigation costs for corporate defendants.[131] Fee-shifting clauses have and will be adopted in the same manner as forum-selection clauses; this is why the Delaware Supreme Court in *ATP Tour* held that the fee-shifting provisions were facially valid.[132] Fee-shifting clauses, which seek to allocate "risk among parties in intracorporate litigation" govern the internal affairs of the corporation.[133] Forum-selection clauses simply affect the procedure of litigation, and in no way affect the rights of shareholders to file claims against the corporation. However, under the theory that bylaws are contracts, should this allow corporations to essentially limit a shareholder's ability to file claims?

2. Relationship to Arbitration Clauses

Arbitration clauses can be seen as a cousin to forum-selection clauses since such clauses require parties to resolve problems outside of the public court system.[134] One important distinction regarding arbitration clauses is the legislative support of the Federal Arbitration Act ("FAA"), which favors arbitration.[135] Several decisions of the Supreme Court of the United States have limited the ability of courts to invalidate such clauses. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court stated, "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[136] In *American Express Co. v. Italian Colors Restaurant*, the Court held that, under the FAA, a court cannot invalidate a contractual

130. Winship, *supra* note 111, at 16.

131. *Id.* at 52–53.

132. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 559–60 (Del. 2014).

133. *ATP Tour*, 91 A.3d at 558.

134. *See* Winship, *supra* note 111, at 19. Compare this to forum selection clauses, which also "oust[]" the otherwise default court from jurisdiction. *Id.* at 13.

135. Federal Arbitration Act, 9 U.S.C. § 2 (1925) ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable.").

136. 563 U.S. __, __, 131 S. Ct. 1740, 1748 (2011) (quoting Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478 (1989)).

waiver of class arbitration, because "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[137] In discussing a conflict between the arbitration clause and federal antitrust laws, the Court held that antitrust laws did not guarantee an "affordable" procedure to vindicate claims.[138] In fact, arbitration clauses can be enforced for claims alleging violations of federal securities laws.[139] While the FAA explicitly supports arbitration clauses, Verity Winship points out that these cases "can be understood as part of a movement towards a permissive attitude to private ordering of procedure."[140]

In applying the Court's analysis of arbitration clauses to fee-shifting clauses, we can establish an indirect relationship. While the FAA supports arbitration clauses, the PSLRA indirectly supports fee-shifting clauses.[141] The purpose of Congress enacting the PSLRA was to cure abusive practices plaguing securities class actions.[142] The PSLRA imposes sanctions for frivolous litigation by including a presumption in favor of awarding attorneys' fees for violations of FRCP Rule 11.[143] Before the PSLRA, such awards were entirely at the court's discretion.[144] Now the courts are required to make a finding regarding compliance with FRCP Rule 11; if the court finds non-compliance, mandatory sanctions are to be imposed.[145] By making these sanctions mandatory with a presumption of attorneys' fees and costs, Congress has essentially enacted legislation supporting fee-shifting. Analyzing a fee-shifting clause under *Italian Colors*, fee-shifting clauses adopted either in a corporation's articles or bylaws are contracts.[146] Furthermore, fee-shifting clauses do not eliminate a shareholder's

137. 570 U.S. __, __, 133 S. Ct. 2304, 2311 (2013).

138. *Id.* at 2309.

139. *Cf.* Goldberg v. Bear, Sterns & Co., 912 F.2d 1418, 1420 (11th Cir. 1990) (per curiam) (affirming the lower court's decision that federal securities claims were not included in the parties' arbitration agreement, implying that, had they been, the securities claims would have been subject to arbitration as well).

140. Winship, *supra* note 111, at 14.

141. *Goldberg*, 912 F.2d at 1420; *Rebalancing Litigation Risks*, *supra* note 37, at 1009.

142. *Rebalancing Litigation Risks*, supra note 37, at 1009–13.

143. 15 U.S.C. § 78u-4(c) (2012).

144. *See Rebalancing Litigation Risks*, *supra* note 37, at 1016.

145. *Id.*

146. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. __, __, 133 S. Ct. 2304, 2311 (2013).

right to pursue 10b-5 claims even though pursuit might prove costly to the plaintiffs.[147] Thus, fee-shifting clauses can be viewed as a contractual enforcement of these mandatory sanctions when plaintiffs fail to be certified as a class due to lack of price impact. By failing to prove—or through a defendants' sufficient rebuttal of—price impact, we can deduce that the plaintiffs have violated FRCP Rule 11(b) since plaintiffs' "claims, defenses, [or] other legal contentions" are not "warranted by existing law."[148]

By limiting fee-shifting clauses to 10b-5 class actions, we are able to find legislative support under the PSLRA's mandatory sanctions. Further, just like arbitration clauses, fee-shifting clauses do not eliminate a plaintiff's right to bring 10b-5 claims. Thus, fee-shifting clauses appear to fall in line with judicial analysis of arbitration clauses. By looking at the validity and enforcement of forum-selection and arbitration clauses, it is apparent that courts are willing to allow private contractual changes to be made to litigation procedure.

C. *Issue with Federal Preemption*

One potential problem with fee-shifting clauses as they relate to 10b-5 claims is that federal courts may find that federal securities laws preempt enforcement of the clauses. In fact, the district court in *ATP Tour* made such a statement.[149] This section looks at the possible preemption issue from both sides.[150] Some commentators believe there is a strong argument for preemption in securities class actions due to Congressional enactments and the FRCP.[151] However, with proper constraints on fee-shifting clauses, there is the potential to side-step preemption and fall in line with the policy goals underlying such actions taken by Congress. Furthermore, a case can be made that limited fee-shifting clauses do

147. *Rebalancing Litigation Risks*, *supra* note 37, at 1032.

148. FED. R. CIV. P. 11(b)(2). Plaintiffs and plaintiff's attorneys are aware of the heightened pleading standards required in the PLSRA and that bringing a claim that is insufficient to pass, or is easily rebutted at, the class certification stage can be viewed as bringing a speculative claim. *Rebalancing Litigation Risks*, *supra* note 37, at 1039. As with speculative claims, plaintiffs presume that the defendants are more likely to settle rather than attempt to defend the allegations. *See id.* at 1015.

149. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 556 (Del. 2014).

150. A decision on the enforceability of the fee-shifting bylaw in *ATP Tour* has not yet been handed down. *Id.* at 560.

151. *See, e.g.*, *Rebalancing Litigation Risks*, *supra* note 37, at 1047.

in fact comply with the PSLRA and FRCP, in the same fashion as forum-selection and arbitration clauses.

John C. Coffee, Jr., a prominent scholar on corporate law matters, suggests that there is a strong case for preemption in securities litigation.[152] His analysis starts by looking at precedent that shows federal courts' resistance to enforcing state law penalties aimed at deterring frivolous litigation.[153] In *Burlington Northern Railroad Co. v. Woods*, the defendant moved to have the tort action removed from state court to federal court, where the defendant lost and subsequently appealed.[154] The court of appeals affirmed the district court's decision and also granted the plaintiffs' motion to enforce an Alabama statute imposing a mandatory 10% penalty for frivolous appeals.[155] The Supreme Court of the United States refused to enforce the Alabama state statute based on its decision in *Hanna v. Plumer*, stating that Federal Rules of Appellate Procedure already provide courts with the discretionary power to impose a penalty for frivolous appeals.[156] Furthermore, the Court highlighted the conflict between state law and federal rules, primarily being that the state law was mandatory and the federal rules were discretionary.[157] Coffee states that this same conflict arises between mandatory fee-shifting bylaws and discretionary penalties for violations of FRCP Rule 11(b) under the PSLRA.[158]

However, Coffee also notes that other federal cases have applied state law requirements that have the same effect as fee-shifting bylaws.[159] In *Cohen v. Beneficial Industrial Loan Corp.*, the Supreme Court upheld a New Jersey law requiring shareholder plaintiffs to post a security bond for the payment of the defendant's reasonable litigation expenses should the plaintiff be

152. Coffee, *The Case for Preemption*, *supra* note 108, at 8.

153. *Id.* at 3.

154. 480 U.S. 1, 2 (1987).

155. *Id.* at 2–3. The 10% penalty is calculated as 10% of the judgment. *Id*. at 3.

156. *Id.* at 6–8.

157. *Id.* at 8.

158. Coffee, *The Case for Preemption*, *supra* note 108, at 4; *see* FED. R. CIV. P. 11 (allowing discretionary sanction for violations of Rule 11(b)). Coffee uses the term "discretionary" because it is the court's prerogative to issue sanctions based on the *court's analysis* of whether FRCP Rule 11(b) has been violated. *See* 15 U.S.C. § 78-u4(c)(2) (2012); Coffee, *The Case for Preemption*, *supra* note 108, at 4.

159. Coffee, *The Case for Preemption*, *supra* note 108, at 4.

unsuccessful.[160] The Court reasoned that the state law was not purely procedural nor did it conflict with the FRCP.[161] While the state law required a bond upfront, it still had the same effect as fee-shifting because the defendant would receive the bond if the plaintiffs were unsuccessful.[162] The main difference between the bond requirement and a fee-shifting clause would be the timing of putting up the money.[163] Coffee distinguishes *Cohen* from 10b-5 claims on the grounds that: (1) Delaware has no substantive law implementing fee-shifting; and (2) the holding from *Cohen* applies solely to derivative actions.[164] In contrast, 10b-5 class actions must be brought in federal court, which has exclusive subject matter jurisdiction over such claims.[165]

But the fact still remains that bylaws are viewed as contracts under Delaware law, which can modify the American Rule typically used by Delaware courts.[166] This leads back to an analysis under *Atlantic Marine*. Coffee notes that under *Atlantic Marine*, fee-shifting provisions need to be consistent with FRCP Rules 54(d)(2) and 23(h), which deal with notice and hearing requirements.[167] It would not be a daunting task for corporate lawyers to include language that complied with these rules, as they are not restrictive.[168] Furthermore, Coffee argues that broad, one-sided fee-shifting conflicts with the policies enacted by Congress through the PSLRA.[169] Specifically, the PSLRA provides a "presumption" in favor of fee-shifting if the court finds a violation of FRCP Rule 11(b).[170] The same conflict arose in *Burlington Railroad*, with the Court pointing out the mandatory-versus-discretionary language of the bylaws and PSLRA.[171] This is why,

160. 337 U.S. 541, 543, 557 (1949).

161. *Id.* at 555–56.

162. *Id.* at 544–45, 555.

163. *Compare id.* at 545 (requiring a bond to be posted prior to the case), *with* Coffee, *The Case for Preemption*, *supra* note 108, at 6 (noting that fee-shifting requires payment of expenses after the case is complete).

164. Coffee, *The Case for Preemption*, *supra* note 108, at 12 n.13.

165. *Id.*

166. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014); Coffee, *The Case for Preemption*, *supra* note 108, at 4.

167. Coffee, *The Case for Preemption*, *supra* note 108, at 5.

168. *See id.* at 5–6 (explaining that FRCP Rules 54(d)(2) and 23(h) create minimal restrictions).

169. *Id.* at 7–8.

170. *Id.* at 8; *see* 15 U.S.C. § 78-u4(c) (2012).

171. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7 (1987).

as discussed in the next section, fee-shifting clauses, properly limited to FOM cases, should be upheld under *Atlantic Marine*.

Forum-selection and arbitration clauses select "a decision maker and a set of rules, but do not change existing court procedure."[172] The motives, method of adoption, and contractual relationship between fee-shifting and forum-selection are almost identical. The relationship between fee-shifting and arbitration clauses is a little more indirect, in that there is federal law supporting enforcement of arbitration clauses.[173] One issue that remains unresolved is whether federal courts will enforce fee-shifting clauses. The remainder of this comment applies all the implications and analyses previously discussed to fee-shifting clauses specifically tailored to class action 10b-5 claims invoking the FOM presumption of reliance. This application shows how and why federal courts should enforce fee-shifting clauses that are limited to the FOM presumption of reliance.

III. THE GAMBIT LEVELS THE PLAYING FIELD FOR FRAUD-ON-THE-MARKET

The purpose of this section is to explain how and why fee-shifting provisions will solve the implications of *Halliburton II*, discussed in Part I. The section looks at how tailored fee-shifting clauses fit into the federal statutory scheme and case analysis described in Part II. The discussion then looks at *Halliburton II*'s potential effects on securities class action litigation. The section concludes on the endgame of implementing fee-shifting provisions and why such results are beneficial to both shareholders and corporations.

This comment is strictly limited to 10b-5 class actions invoking *Basic*'s FOM presumption of reliance.[174] The reason behind applying fee-shifting clauses to this specific type of claim is so that such clauses will hold up under judicial analysis, as previously

172. Winship, *supra* note 111, at 19.

173. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2012).

174. *See* Basic Inc. v. Levinson, 485 U.S. 224, 250 (1988). As already mentioned, a discussion of the potential effects of broad, sweeping fee-shifting clauses, covering numerous types of potential claims, is outside the scope of this comment. For a more detailed discussion on the broader scope of fee-shifting, see Winship, *supra* note 111, at 27–28; Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1 (2015).

discussed.[175] The solution presented by this comment seeks to maintain *Basic*'s presumption, while at the same time giving corporate defendants an economic opportunity to rebut the presumption. Fee-shifting clauses will prompt defendants not to seek early settlement because it is more cost effective, and instead to rebut the presumption. This will ultimately lead to a narrowing of the issues in such claims and will also weed out frivolous cases by requiring plaintiffs to file suits with sufficient merits.[176] Furthermore, such limited fee-shifting clauses will help the circularity problem since cases will be less likely to settle and the shareholders will not be merely transferring wealth from one pocket to another. The ultimate goal is the reduction in the number of such claims, which have been empirically shown to destroy shareholder wealth.[177]

IV. LIMITED SCOPE AND ENFORCEABILITY OF FEE-SHIFTING PROVISIONS

Much of the commentary on fee-shifting clauses discusses their use in terms of broad sweeping language and the consequences of such provisions.[178] Many of these arguments are why this comment suggests fee-shifting clauses be narrowly tailored to the class certification stage of 10b-5 class actions invoking *Basic*'s presumption of reliance. Corporate attorneys who draft fee-shifting provisions as proposed here will have to make sure the scope of these fee-shifting clauses specifically relate to such claims. The primary reason for sufficiently limiting the scope of fee-shifting clauses is so that they will stand up to judicial scrutiny and will provide a stronger case against preemption.

As previously discussed, the PSLRA added language to the '34 Act that creates a presumption of fee-shifting if the court finds a violation of FRCP Rule 11(b).[179] A conflict arises because the language provided by the PSLRA allows for two-way fee-shifting, while fee-shifting clauses would impose a mandatory one-way

175. *See supra* Part II.B.

176. These consequences of fee-shifting clauses fall in line with the policy reasons for Congress enacting the PSLRA. *See supra* Part I.B.

177. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 4.

178. *See, e.g.*, Winship, *supra* note 111, at 5.

179. Coffee, *The Case for Preemption*, *supra* note 108, at 7–8*; see* 15 U.S.C. § 78-u4(c) (2012).

shifting of fees.[180] As pointed out by Coffee, mandatory one-sided fee-shifting is more punitive than a discretionary decision by the courts.[181] This conflict seems readily resolved in relation to 10b-5 claims invoking *Basic*'s presumption. The PSLRA already has a presumption of fee-shifting for bad faith cases violating FRCP Rule 11(b).[182] If the plaintiff class cannot make it past certification due to price impact, this inherently leads us to believe that the shareholders acted in bad faith in bringing the suit in the first place, at least as a class action suit.[183] Remember: price impact is a foundation for invoking *Basic*'s presumption.[184] Without price impact, plaintiffs cannot be certified as a class under the FOM presumption of reliance.[185] If the plaintiffs' allegations have merits, at least enough to prove price impact, then surely they would pass certification. But, if there were a lack of price impact then the mandatory sanctions of the PSLRA would be invoked due to a violation of FRCP Rule 11(b)(3).[186]

The FRCP already provides rules for the transfer and dismissal of cases, and forum-selection clauses represent the "private ordering" of such rules.[187] In enacting the FAA, Congress provided explicit support for enforcement of arbitration clauses.[188] The PSLRA sets out rules for mandatory sanctions calling for fee-shifting, and fee-shifting clauses would be set out, as discussed in this comment, to specifically enforce the rules already provided.[189] In analyzing fee-shifting clauses under *Atlantic Marine*, because fee-shifting clauses would only require specific enforcement of rules already laid out by the PSLRA, such clauses should be enforceable. The fact that fee-shifting clauses would be one-sided

180. Coffee, *The Case for Preemption*, *supra* note 108, at 8.

181. *Id.*

182. *See In re* Star Gas Sec. Litig., 745 F. Supp. 2d 26, 38–40 (D. Conn. 2010) (imposing fee-shifting on plaintiffs for filing frivolous securities fraud claims).

183. *See Halliburton II*, 573 U.S. __, __, 134 S. Ct. 2398, 2416 (2014); *see also supra* Part I.C.

184. *Halliburton II*, 573 U.S. at __, 134 S. Ct. at 2416.

185. *See id.* at __, 134 S. Ct. at 2415.

186. FED. R. CIV. P. 11(b)(3) (requiring that "the factual contentions [made to the court] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery"); *see, e.g.*, *In re Star Gas Sec. Litig.*, 745 F. Supp. 2d at 36–37.

187. FED. R. CIV. P. 12(b)(2)–(3); Winship, *supra* note 111, at 13.

188. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2012).

189. *See supra* Part II.B.

(mandatory shifting of fees from defendant corporation to plaintiff shareholders) does not indicate that the clause conflicts with the PSLRA.[190] The one-sided fee-shifting clause and the two-way mandatory sanctions of the PSLRA are not mutually exclusive. Furthermore, simply making fee-shifting mandatory on one party would not exclude the court from finding that a defendant violated FRCP Rule 11(b), and therefore requiring a defendant corporation to pay the plaintiffs' attorneys' fees.

Lastly, the language of such fee-shifting clauses should—and will likely have to—contain language regarding claims against the clause itself. It only seems fair to not enforce fee-shifting clauses in claims alleging wrongdoing in the adoption of fee-shifting clauses. Presumably, these claims will be derivative actions alleging a breach of duty by the board of directors who unilaterally adopted a fee-shifting bylaw. But since, as recommended above, the scope of a fee-shifting clause is limited to only 10b-5 class actions, this should not be an issue in the first place.[191]

Proper limitations on the scope of fee-shifting clauses should allow such clauses to withstand judicial analysis similar to that which was applied to forum-selection and arbitration clauses. This is because there are readily apparent relationships between fee-shifting, forum-selection, and arbitration clauses.[192] Thus, it can be deduced that fee-shifting clauses applicable only to 10b-5 class actions are supported by Congress and logically do not create any dissonance with federal securities laws. The analysis of fee-shifting clauses does not end here, however. The effects of fee-shifting will not only impact the wallets of parties involved in 10b-5 class actions, but will also affect certain stages of litigation.

A. *Effects on Litigation*

One of the main implications of *Halliburton II* is that the decision will ultimately lead to a "battle of the experts" as both sides

190. One-sided fee-shifting would enforce the *mandatory* sanctions of the PSLRA on the plaintiffs if they violated FRCP Rule 11(b) by insufficiently proving price impact, the *foundation* of FOM reliance.

191. The scope of the fee-shifting clause will not cover breach of duty claims.

192. *See supra* Part II.B (discussing the similarities between an arbitration clause and a fee-shifting clause).

vie over price impact.[193] After *Halliburton II*, defendants in 10b-5 class actions can rebut *Basic*'s FOM presumption of reliance at the class certification stage by proving lack of price impact.[194] At the time of this writing, there is not yet sufficient data to determine whether *Halliburton II* will in fact cause more defendants to attempt to rebut *Basic*'s FOM presumption of reliance, instead of taking the more cost effective route of settlement. Allowing corporations to enforce fee-shifting clauses, however, will help incentivize corporations to attempt to rebut *Basic*'s FOM presumption.

As noted earlier, any attempts to rebut *Basic*'s presumption by the defendant will necessarily increase the costs of litigation earlier in the litigation process.[195] As such, plaintiffs will also increase the use of experts in anticipation of a defendant's attempts to rebut plaintiffs' FOM reliance.[196] Furthermore, since price impact "event studies" look at each individual misrepresentation, the amount of time experts will spend creating these event studies will likely increase as well.[197] While the increase of costs can be understood as a necessary evil resulting from *Halliburton II*, the data and analysis presented by the experts will also shed more light on the validity of plaintiffs' allegations. Presumably, the conclusions from the event studies conducted by the defendants' experts will influence the defendants' choice to push forward with litigation or settle.

If the event studies conducted by the defendants' experts tend to show a lack of price impact, the defendants will attempt to rebut the FOM presumption at the class certification stage.[198] Additionally, the defendants' expectation of recouping litigation costs associated with rebutting price impact will further sway defendants against settlement. At this point, the plaintiffs will offer their event studies showing price impact. Since both sides are now presenting analyses of each misrepresentation, the court will

193. *See supra* Part I.C. Plaintiffs will attempt to prove price impact either indirectly or directly, and defendants will attempt to directly prove a lack of price impact.

194. *Halliburton II*, 573 U.S. __, __, 134 S. Ct. 2398, 2417 (2014).

195. *See supra* Part I.C.

196. *See* Streett & Pennington, *supra* note 72, at 4 (predicting that the class certification stage will become a battle of the experts).

197. *See id.* This is assuming that the plaintiff class alleges that the corporation made multiple misrepresentations.

198. *See supra* notes 56–63 and accompanying text.

be able to consider much more evidence in determining whether to certify the class.

However, if the event studies conducted by the defendants' experts tend to show there was in fact price impact, and the plaintiffs are successfully certified as a class, defendants will be faced with a double-edged sword. One edge will push defendants to settle, since a settlement award will be less than the damages awarded by a court. The other edge of the sword acts as a bargaining chip for plaintiffs. If defendants do not offer any evidence rebutting price impact, this naturally leads to the assumption that there was some amount of price impact, in which case the plaintiff class will have more leverage in settlement negotiations. It is important to point out that this edge of the sword does not solve the circularity problem with securities class action settlements.[199] However, plaintiffs will now be less willing to settle, as their chances of prevailing on the claim seem more probable.

Assuming the plaintiffs use this leverage to obtain a higher settlement amount based on event studies produced by the plaintiffs' experts, a judge can simply compare the size of the price impact with the settlement amount.[200] However, the high frequency of settlement has been identified as one of the major issues concerning securities class actions due to inadequate compensation.[201] The problem of inadequate settlement awards is one of the major factors that show class action litigation destroys shareholder wealth.[202] It is important to note that class action settlements require judicial approval.[203] However, the problem is that judges typically do not have enough evidence in front of them to decide whether a particular amount is fair.[204] A detailed explanation of the settlement analysis is outside the scope of this comment,[205] but typically the analysis "amount[s] to asking only whether the relief does rough justice to the claim."[206] The incen-

199. *See supra* Part I.C.

200. If the settlement award is too low, the judge will also be able to use the event studies to ascertain an equitable settlement award.

201. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 5–6.

202. *See id.* at 6. Plaintiff's attorneys usually take a substantial percentage of any settlement award before distributions are paid to the plaintiff class. *Id.* at 5.

203. Griffith, *supra* note 174, at 19.

204. *See id*. at 20.

205. For a more thorough analysis, see generally *id.* at 19–25.

206. *Id.* at 20.

tive to rebut price impact provided by fee-shifting clauses will provide judges with the necessary evidence to better assess settlement agreements. Judges will be able to review the event studies from both parties, and will have to reconcile any differences between the amounts of impact on the price. Ultimately, judges will be provided more with insight into the merits of the claim.

B. *Endgame*

The purpose of fee-shifting clauses proposed by this comment is to solve major problems currently affecting securities litigation. The potential burden on plaintiffs will incentivize plaintiffs to bring stronger cases, supported by better evidence. If plaintiffs bring weak claims, defendants would now be incentivized to rebut price impact, and, if successful, could recover litigation costs associated with doing so. By incentivizing defendants to rebut price impact and guaranteeing recoupment of litigation costs if successful, the circularity problem is diminished.[207] The problem will not completely vanish, but the incentives of fee-shifting clauses will reduce the number of settlements currently fueling the problem of circularity.

Fee-shifting clauses are intended to deter frivolous and meritless claims. One obvious consequence of a fee-shifting clause is that it puts plaintiffs in the situation that corporations currently face: paying the fees of both sides.[208] This potential burden on plaintiffs will act as a deterrent. A fee-shifting clause will force plaintiffs to bring claims that they know or reasonably believe will survive class certification, to avoid paying the defendants' attorneys' fees.[209] While deterrence is the main purpose of fee-shifting clauses, the limited scope of the clauses proposed by this comment will not completely eliminate securities class action suits; the potential burden on plaintiffs will simply weed out speculative claims. The effects of fee-shifting clauses could even potentially benefit the plaintiffs. One potential benefit is that the

207. *See supra* Part III.

208. Bainbridge, *Privately Ordered Solution*, *supra* note 106.

209. *See* Greene, *supra* note 64; Liz Hoffman, *Shareholder Suits May Prove Costly: Ruling Upholds Bylaw Requiring Loser to Pay Winner's Legal Fees*, WALL ST. J. (May 18, 2014), http://www.wsj.com/articles/SB10001424052702304908304579565850165670972.

plaintiff class is more likely to succeed at trial on the merits since class certification will require stronger proof of price impact.[210]

By requiring plaintiffs who cannot make it past the class certification state to pay the corporation's attorneys' fees, the circularity problem is diminished. As noted previously, the problem of circularity arises because shareholders receive any settlement amount from a defendant corporation.[211] Since shareholders are the investors in a corporation, any amount paid by the corporation decreases the value of the corporation.[212] If a defendant is able to prove a lack of price impact and the court decides not to certify the class, this is the end of the class action suit. At this point, assuming a district court applies the American Rule, the shareholders will still see a decrease in the value of their investment in the corporation. This is because the corporation incurred substantial litigation costs. While under the American Rule, the plaintiff class will have to pay their own litigation costs, so the costs to the corporation are not doubled.[213] However, by adopting a fee-shifting clause, defendants would be able to recover their litigation costs and thus restore shareholder value.

Several possible outcomes are likely to occur if a corporation can stop a claim at the certification stage. One outcome is that the parties will enter into settlement agreements favoring the corporation.[214] This assumes the settlement agreement will not require the corporation to pay the plaintiffs' attorneys' fees. The other outcome is that the corporation will move to recover fees according to its fee-shifting clause. Again, the corporation will not be paying the plaintiffs' attorneys' fees. Because corporations will not have to incur the plaintiffs' attorneys' fees, and will recover their litigation costs, shareholder value is restored. The effect of

210. *See* Frankel, *supra* note 64.

211. *See supra* note 82 and accompanying text.

212. *See supra* note 83 and accompanying text. This is assuming the shareholders of the plaintiff class remain shareholders of the corporation from the beginning of the class period through the payment of the settlement. As noted earlier, shareholder wealth can further decline if the shareholders of the plaintiff class differ from the current shareholders. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 42, at 6.

213. Griffith, *supra* note 174, at 6.

214. A settlement favoring the corporation can take on numerous forms. For example, the settlement agreement could require the corporation to pay nothing. At the very least corporations will likely push for an agreement that does not require them to pay the plaintiff's attorneys' fees. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 19 (noting that on average, plaintiffs' attorneys' fees were 18% of the settlement).

fee-shifting clauses does impose a heavy burden on plaintiffs if they are unable to certify as class. However, this heavy burden seems necessary due to the ineffectiveness of current deterrence methods.[215]

It is worth mentioning that the problem of circularity is not resolved by fee-shifting clauses if the defendant is not able to defeat class certification. In addressing this concern, fee-shifting clauses will also deter corporations from settlement in cases based on speculative allegations since they will have a higher probability of rebutting price impact. As noted earlier, the problems with current settlement agreements are the root of the circularity problem and inadequate consideration.[216] As more cases move on to trial, the awarding of attorneys' fees is left to the courts. This is because the scope of the fee-shifting clauses proposed by this comment does not cover decisions reached on the merits. The type of fee-shifting clauses proposed here will only require plaintiffs to reimburse the defendant if they fail to certify as a class.

Corporations that adopt such clauses clearly seek to deter frivolous securities litigation. By adopting a fee-shifting clause, corporations will set up a defensive strategy that provides several benefits. First, the amount of claims brought against the corporation will decrease. This is because speculative claims are less likely to be brought as plaintiffs consider the potential burden of a fee-shifting clause. Second, even if claims are brought, defendants are now incentivized to rebut price impact. If successful, the defendants will recover their litigation costs and the shareholders' investments will be restored.

V. IMPLICATIONS OF FEE-SHIFTING PROVISIONS

The adoption of fee-shifting clauses tailored to 10b-5 class actions will cause a substantial change in current securities litigation. The purpose of this section is to identify several apparent implications for corporations adopting fee-shifting clauses. While the scope of this comment is limited to 10b-5 class actions, the commentary on the future of fee-shifting clauses has primarily focused on broad fee-shifting clauses. However, any action taken

215. *See* Bainbridge, *Privately Ordered Solution*, *supra* note 106.

216. *See supra* notes 82–88 and accompanying text.

against the adoption of broad fee-shifting clauses could necessarily impact the more limited fee-shifting clauses proposed here. The most apparent implication is that fee-shifting will be at the forefront of future legislative action. The analysis of this section looks at the extreme ends of the spectrum for legislative action; either full support of or outright bans on fee-shifting clauses. The analysis first looks at state legislative action. The section concludes with an analysis of congressional action and SEC regulation.

There is a high probability that state legislatures will enact legislation regarding fee-shifting clauses. Again, the focus here is on Delaware. In fact, such action was already seen in the wake of the *ATP Tour* decision.[217] On one end of the spectrum, if Delaware embraces fee-shifting clauses, there will be a flood of corporations adopting such fee-shifting bylaws.[218] It is also likely that every new IPO will include some type of fee-shifting clause in the corporation's articles.[219] Furthermore, with Delaware's predominance in corporate law, other states could potentially follow in Delaware's steps.[220] At first, this will lead to a flood of litigation over the adoption of fee-shifting clauses.[221] This flood will not easily be tamed since broad fee-shifting clauses will cover numerous actions, and courts will have to make decisions on a case-by-case basis.[222]

On the other end of the spectrum, if Delaware bans the use of fee-shifting clauses outright, the state runs the risk of losing its competitive edge as the predominant state of incorporation.[223] In fact, Oklahoma has already adopted a fee-shifting bill requiring the losing party in derivative suits to pay the prevailing party's

217. *See supra* notes 101–04 and accompanying text. At the time of this writing, the Delaware legislature had tabled discussions of fee-shifting clauses until early 2015. *See* Rickard, *supra* note 1.

218. *See* Coffee, *The Case for Preemption*, *supra* note 108, at 1. There are already a growing number of companies adopting such bylaws, and support from the Delaware legislature will give the go-ahead to any corporations currently on the fence about fee-shifting bylaws. *Id.*

219. *See id.*

220. *Id.* at 2.

221. Claims will likely be brought as a breach of duty by the board of directors. *See* Jeff C. Dodd & James Edward Maloney, *Delaware Supreme Court Finds Fee-Shifting Bylaw Permissible*, ANDREWSKURTH (May 15, 2014), http://www.andrewskurth.com/assets/pdf/article_1074.pdf.

222. Presumably courts will apply the *ATP Tour* analysis. *See supra* Part II.A.

223. *See* Coffee, *The Case for Preemption*, *supra* note 108, at 2.

reasonable litigation costs including attorneys' fees.[224] Oklahoma has taken a significant step regarding fee-shifting, as the bill applies to every derivative action in the state.[225] This is a substantial departure from a corporation's deliberate choice of adopting fee-shifting clauses. One major consequence of companies deciding to incorporate in other states would be a severe negative impact on a major source of revenue for Delaware.[226] Thus, it is likely that Delaware will take some form of action regarding fee-shifting clauses.

Since action taken on the extreme ends of the spectrum will inherently lead to extreme consequences, it is more likely that Delaware will modify or limit the use of fee-shifting clauses. While the support of broadly written fee-shifting clauses could cause a serious chill on securities litigation, it will also lead to more litigation regarding the scope of the fee-shifting clauses.[227] However, if Delaware severely restricts fee-shifting clauses, it will almost certainly lead to companies choosing to incorporate in other states. Regardless, the bottom line is that it is unlikely that the Delaware legislature will leave the topic untouched.

Since the use of fee-shifting clauses in 10b-5 claims will be addressed in federal courts, action taken by Congress or the SEC will also have a significant impact. The difference between the analysis of congressional action and that of state action primarily deals with the ineffectiveness of deterrence by the PSLRA and SLUSA.[228] This ineffectiveness has led to a decline in the reputation and competitiveness of the United States' capital markets and business environment.[229] Domestic and foreign companies view the U.S. business environment as litigious.[230] This view has

224. Kevin LaCroix, *Oklahoma Legislature Adopts Derivative Litigation Fee-Shifting Provision*, D&O DIARY (Sept. 25, 2014), http://www.dandodiary.com/2014/09/articles/corporate-governance/oklahoma-legislature-adopts-derivative-litigation-fee-shifting-provision/. LaCroix points out that the Oklahoma bill is much narrower than the fee-shifting bylaw approved by the Delaware Supreme Court. *Id.*

225. *Id.*

226. The revenue generated by incorporation fees and franchise taxes has the ability to comprise 30% of Delaware's budget. Delaware lawyers have a substantial influence over the state legislature. *See* Bainbridge, *Public Choice Lens*, *supra* note 101.

227. *See* Coffee, *The Case for Preemption*, *supra* note 108, at 2; *see also supra* Part IV.

228. *See supra* text accompanying notes 39–49, 139–45.

229. Bainbridge, *Privately Ordered Solution*, *supra* note 106.

230. *Id.* (citing Stephen J. Choi, *Assessing the Cost of Regulatory Protections: Evidence on the Decision to Sell Securities Outside the United States* 4 (Yale Law & Econ., Research

prompted many foreign companies to move back overseas and also creates a strong incentive for foreign companies to remain overseas.[231] These notions, coupled with the empirical data showing that the current system of securities litigation ultimately leads to the destruction of shareholder wealth,[232] should provide plenty of motivation for Congress to seriously consider reform.

Again, measures taken on the extreme ends of the spectrum will likely cause more harm than good. For example, a complete ban on fee-shifting clauses will, at a minimum, allow current problems to continue.[233] An action in full support of broad fee-shifting clauses as related to securities litigation, on the other hand, has the potential to severely limit securities class actions, which provide valuable anti-fraud regulation.[234]

These implications and concerns should signal to the SEC that the future of fee-shifting clauses should be given serious consideration. While testifying to the SEC Investor Advisory Committee, Coffee laid out four potential actions that the SEC could take against fee-shifting clauses.[235] First, the SEC, as amicus curiae, could assert federal preemption in cases with no FRCP Rule 11 violation.[236] Second, the SEC could refuse to accelerate registration statements of companies with a fee-shifting clause in their articles or bylaws.[237] Third, the SEC could require companies to acknowledge in their registration forms that fee-shifting clauses conflict with federal securities laws.[238] Lastly, the SEC could require IPOs to disclose fee-shifting clauses as a major "risk factor."[239] In discussing these potential actions, Coffee also provides

Paper No. 253, Mar. 21, 2001), *available at* http://ssrn.com/abstract=267506).

231. *See id.* (citing MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 75, 77 (2007); Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, *in* GLOBAL CAPITAL MARKETS & THE U.S. SECURITIES LAWS 2009: STRATEGIES FOR THE CHANGING REGULATORY ENVIRONMENT 1243, 1253–54 (Practicing Law Inst. 2009)).

232. *See id.*; U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 5–6.

233. *See supra* note 223 and accompanying text (describing the possible effects of a complete ban in Delaware).

234. *See* Bainbridge, *Privately Ordered Solution*, *supra* note 106 (describing how current securities litigation deters fraud).

235. Coffee, *The Case for Preemption*, *supra* note 108, at 8–9.

236. *Id.* at 8.

237. *Id.*

238. *Id.* at 9.

239. *Id.*

insight into their shortcomings. One example, relating to requiring disclosures, is that investors will be unable to assess any decrease in the value of a company's stock if it contains a fee-shifting clause, because they will not know the probability of corporate insiders breaching their fiduciary duties.[240] In light of Coffee's testimony, the SEC could also take this opportunity to try and fix current problems with securities litigation. Once again, an effective solution by the SEC will attempt to find a happy medium between the extreme ends of the spectrum. It will likely be in the SEC's best interest to get out in front of the imminent confrontation of fee-shifting clauses. Establishing control early in the debate will help avoid landing on either of the extreme ends of the spectrum.

The enforceability of fee-shifting clauses has the ability to make substantial changes to securities class action litigation. The implications of these clauses have fueled a strong debate on their appropriateness in the corporate world.[241] Legislative action seems imminent as more and more corporations are starting to adopt fee-shifting clauses into their articles or bylaws.[242] However, there is not a simple yes or no answer as to whether fee-shifting clauses should be allowed. Legislatures and regulatory agencies will need to take into consideration the potential consequences of their actions. Ideally, as this comment suggests, legislatures and the SEC will be able to find a happy medium that allows for fee-shifting clauses in limited situations, which will be a step towards solving the current problems of securities litigation.

CONCLUSION

This comment lays out a framework that should allow corporations to strategically defend themselves against frivolous and meritless 10b-5 class action suits invoking *Basic*'s FOM presumption of reliance. After *Halliburton II*, corporate defendants are able to rebut a plaintiffs' FOM presumption of reliance at the class certification stage by offering evidence that the corporation's misrepresentations did not cause a price impact on the corpora-

240. *Id.* at 9.

241. *See supra* notes 101–04 and accompanying text (explaining the debate currently facing Delaware legislature regarding whether or not to prohibit fee-shifting clauses).

242. *See* Coffee, *The Case for Preemption*, *supra* note 108, at 1.

tion's stock.[243] In theory, this should inspire defendant corporations to attempt to rebut the presumption. This theory stands in contrast to empirical analysis showing that most of these claims, pre-*Halliburton II*, settled.[244] Furthermore, other studies show that these settlements typically destroy shareholder wealth.[245] By allowing corporations to adopt fee-shifting clauses, narrowly tailored to 10b-5 class actions invoking *Basic*'s FOM presumption of reliance, defendant corporations will be sufficiently incentivized to rebut the presumption when the plaintiffs' price impact claims are speculative. Since plaintiffs will need to be prepared to defend against defendants' rebuttal of price impact, plaintiffs should be aware of the strength of their argument. A speculative set of facts alleging price impact will not establish class-wide reliance, which is the foundation for 10b-5 class action claims. If plaintiffs are unable to establish the foundation of their claim, with evidence they knew beforehand, the courts should view such claims as frivolous and in violation of FRCP Rule 11. The PSLRA already presumes in favor of awarding attorneys fees for violations of FRCP Rule 11, and fee-shifting clauses simply seek to enforce that presumption.

By analyzing fee-shifting clauses under both forum-selection clauses and arbitration clauses currently used in corporate articles and bylaws, one can see a foundation for the adoption and enforceability of fee-shifting clauses. The primary purpose of fee-shifting clauses is to help cure glaring defects in the current securities litigation regime. First, fee-shifting clauses will help deter frivolous or meritless claims by placing a potentially heavy burden on the plaintiffs. Second, fee-shifting clauses, in some situations, will help cure the circularity problem with shareholder litigation by actually restoring shareholder wealth. Fee-shifting clauses, as proposed by this comment, will not put an end to class action securities litigation, since plaintiffs with merit-based cases should and will make it past the class certification stage. Furthermore, corporations do make a sacrifice by adopting fee-shifting clauses. The incentives to rebut a FOM presumption can sometimes leave the corporation wielding a double-edged sword. There have yet to be any decisions from the courts regarding the

243. *Halliburton II*, 573 U.S. __, __, 134 S. Ct. 2398, 2417 (2014).

244. *See supra* notes 77–81 and accompanying text.

245. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 8, at 4.

enforceability of fee-shifting clauses. This leaves the door open to both legislative action and federal preemption. Some type of legislative or regulatory action is imminent, as the stakes are set high for both sides of the debate. However, the limited scope of the fee-shifting clauses proposed in this comment strike a happy medium that will help cure the current problems of 10b-5 class action litigation.

Steven W. Lippman *

* J.D. Candidate 2016, University of Richmond School of Law. B.B.A., 2012, James Madison University. I am forever grateful for the love and support from my parents and my grandmother, Irene Lippman. I would like to thank the editors and staff of the *University of Richmond Law Review* for their hard work in making this publication possible.