



Goldman Sachs logo displayed on an Apple Card credit card. Photo: Diego M. Radzinski/ALM

ANALYSIS

A Look Back at 'Goldman Sachs': How Price Impact Is Changing Securities Class Actions

"Courts have started to apply the 'Goldman' framework in the context of class certification," said Sullivan & Cromwell co-chair Robert Giuffra, who represented the bank in the case the Second Circuit decided a little more than a year ago. "And so it's becoming the new thing in securities litigation, at least in the context of event-driven litigation."

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🕒 5 minute read

Securities Litigation



By Ellen Bardash

It's been 14 months since the Second Circuit Court of Appeals laid the groundwork for defendants to raise price-impact defenses in securities litigation in *Arkansas Teacher Retirement System v. Goldman Sachs Group Inc.* In recent talks with securities litigators, I've asked how many cases they are seeing that cite the *Goldman Sachs* case.

The answer I've heard across the board is that when it comes to event-driven securities litigation that makes it to the class certification stage, just about everyone on the defense side cites *Goldman Sachs*.

The defense has become prevalent in cases where plaintiffs claim a company issued a statement, some sort of harmful event occurred, then the stock price fell further than it allegedly would have if the company hadn't downplayed the risks it discussed in that earlier statement.

The *Goldman Sachs* decision laid out the framework for determining whether there's a substantial enough link between statements alleged to falsely inflate stock prices and later statements correcting the earlier ones. The Supreme Court weighed in with its thoughts back in 2021 before sending the case back to the Second Circuit, which went on to

decertify the class. Several district courts have since decertified classes based on the *Goldman* framework.

"Through the *Goldman* case, the Supreme Court directed that lower courts assess at class certification, number one, whether statements are too generic to have price impact and, number two, whether there's a mismatch between the allegedly misleading statement and the purported corrective disclosure," said **Sullivan & Cromwell** co-chair **Robert Giuffra**, who has represented Goldman Sachs in the case. "Courts have started to apply the *Goldman* framework in the context of class certification. And so it's becoming the new thing in securities litigation, at least in the context of event-driven litigation."

District Courts Weigh In

Since the Second Circuit's denial of class certification was released, at least three federal courts have done the same for securities class actions, two of which did so within days of one another at the end of September.

In March, U.S. District Judge J. Paul Oetken in the Southern District of New York decertified a class in a case against Canadian mining company Kirkland Lake Gold, finding some statements challenged in the case were generic and others didn't match up with corrective disclosures.

On Sept. 27, U.S. District Judge Trevor N. McFadden in Washington, D.C. determined that the defendants had successfully shown a tweet from a Bed Bath & Beyond investor couldn't be linked to that investor's subsequent stock dump and a drop in share value.

Three days later, another class was decertified in the Eastern District of Michigan, with Judge Thomas L. Ludington writing that expert testimony showed analysts hadn't ascribed a Rocket Companies Inc. stock drop to statements about how much the mortgage lender might be affected by rising interest rates.

"Defendants will rely on the *Goldman* framework if they have a basis for doing it," Giuffra said. "It's like anything else: if a defense is successful, other lawyers are going to try to apply it. These defenses tend to build on themselves."

Class Certification Still Often Granted

Kessler Topaz Meltzer & Check partner **Andrew Zivitz** said the number of price impact challenges spiked after the Supreme Court decision and further increased after the Second Circuit's ruling, but that the *Goldman* defense has been far from a class certification silver bullet. It's the latest way defendants have tried to get class certification denied, he said, but it's not the first to become a pattern.

"We expected, in light of that decision, that there would be more price impact challenges, but we also knew that the facts of [*Arkansas Teacher Retirement System*] were distinguishable given the genericness of the statements given in *ATRS*," Zivitz said. "I would say we're seeing more challenges, but not any sort of sea change of results."

For the most part, according to Zivitz, a *Goldman* defense being raised hasn't radically changed how plaintiffs counsel handles the class certification stage, and the large majority of price impact challenges are still being defeated.

What's Changing?

While a *Goldman* defense fits within the existing class certification phase and doesn't create an extra stage of litigation, attorneys have observed some shifts it's caused in the securities litigation process.

Likely the biggest shift on that front is the need for more experts to testify in support of each side's argument. Having those witnesses testify has at times resulted in holding hearings in a stage that's historically often been decided on papers alone.

"In litigating over price impact, lawyers on both sides are loading up on experts," Giuffra said. "It becomes a battle of the experts where the experts will come in and debate whether a particular statement had a price impact or not."

One perhaps unintentional consequence, according to Zivitz, is that price-related arguments that would normally be brought up later in a case are brought into the class certification conversation.

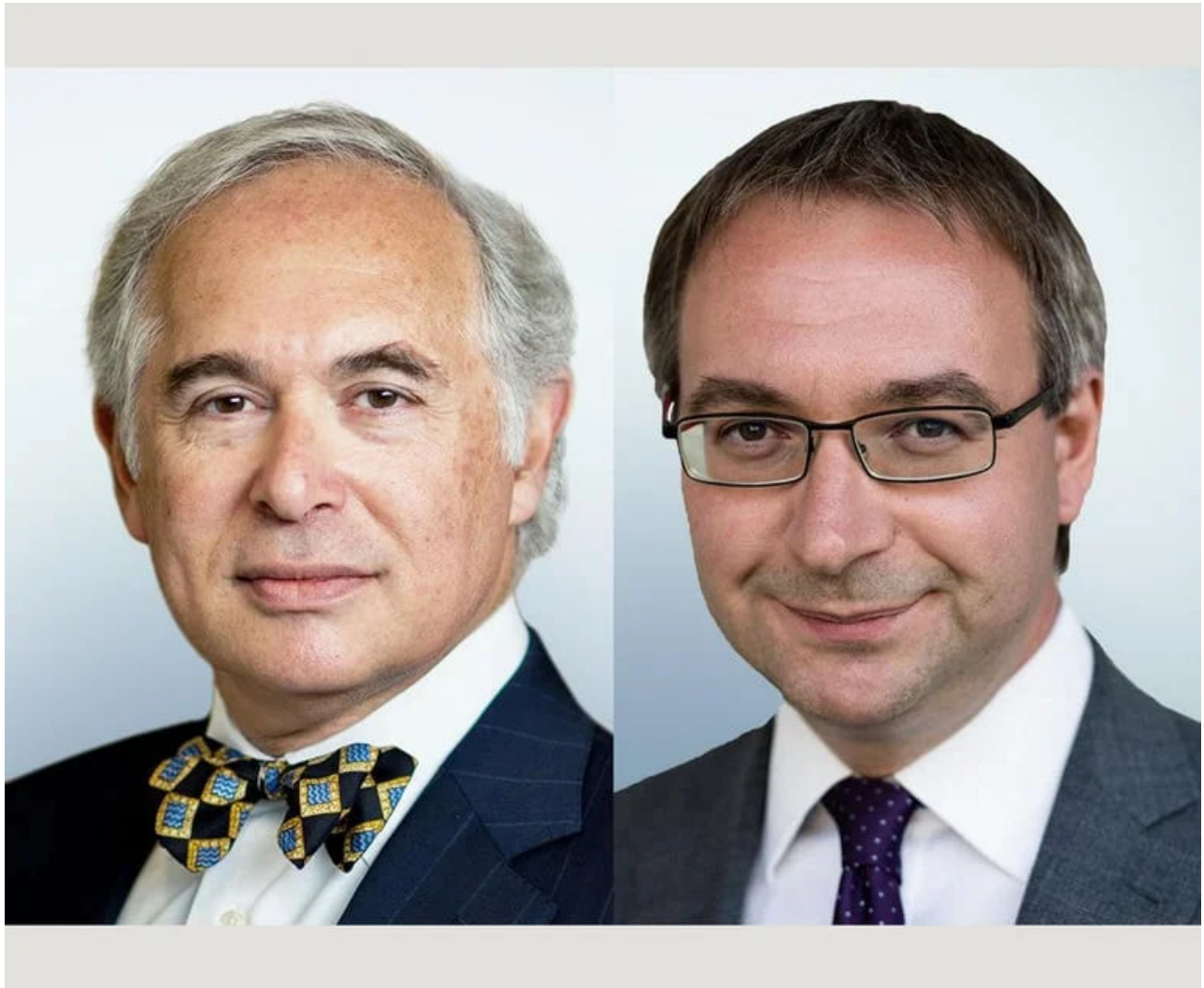
"[Defendants] effectively are required to challenge loss causation at the class certification stage," Zivitz said. "Our position is that that undermines the ability to challenge loss causation at summary judgment. Arguments that we've historically seen later in the case are now pushed up into the class certification stage."

Boies Schiller Flexner partner Nili Moghaddam, who called the Second Circuit's decision a hard-fought and just victory for securities class action defendants, said she's looking forward to seeing if *Goldman Sachs* might have an effect in the other direction: on materiality arguments at the motion to dismiss stage.

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