Paul,
Weiss

Client Memorandum

August 19, 2025

Sixth Circuit Raises the Bar for Class Certification in Federal Securities Fraud Cases

On August 13, 2025, the Sixth Circuit issued a unanimous opinion in *Owens* v. *FirstEnergy Corp.*, No. 23-3940 (6th Cir. Aug. 13, 2025) ("FirstEnergy") with significant ramifications for establishing reliance in securities fraud cases and analyzing damages models at the class certification stage. In *FirstEnergy*, the Sixth Circuit limited the applicability of the powerful *Affiliated Ute* presumption of reliance to cases *primarily* based on omissions—not to those involving a mix of omissions and misrepresentations—and set forth a rigorous two-step analysis to determine the rare instance in which the presumption applies. The Sixth Circuit separately emphasized that district courts must conduct a "rigorous," claim-by-claim analysis to determine whether plaintiffs' proposed damages models can be applied on a class-wide basis as required under the federal rules and Supreme Court precedent. Both aspects of the opinion provide strong arguments that securities fraud defendants can deploy at the class certification stage.

Background

Reliance and Damages at the Class Certification Phase

To certify a class action, plaintiffs must show that there are common questions of law and fact that affect all class members, and that those common questions "predominate" over issues affecting individual members.

<u>Reliance</u>. The Supreme Court has recognized that requiring proof of individualized reliance from every putative class member in a securities fraud suit would effectively prevent securities fraud plaintiffs from proceeding under a class action because individual questions of reliance would predominate. Accordingly, the Supreme Court has established two different reliance presumptions in securities class actions. In *Affiliated Ute Citizens of Utah* v. *United States*, the Court held that plaintiffs do not need to prove reliance when their case is based on material omissions. Due to the unique difficulty of showing reliance on something that was never said, the Court permitted plaintiffs in cases "involving primarily a failure to disclose" to establish reliance merely by showing that "the facts withheld" were material. 406 U.S. 128 (1972). By contrast, in *Basic Inc.* v. *Levinson*, the Supreme Court held that in cases involving "public material misrepresentations"—as opposed to "omissions"—plaintiffs are entitled to a rebuttable presumption of reliance "on the integrity of the market price" so long as the stock trades in an efficient market and certain other factors are present. 458 U.S. 224 (1988). Defendants in such cases may rebut the presumption by showing, among other things, that the alleged misrepresentations did not impact the issuer's share price. Accordingly, a threshold question at the class certification stage in securities fraud cases is whether plaintiffs' claims are properly characterized as based on omissions—in which case the stronger *Affiliated Ute* presumption applies—or as misrepresentations—in which case the rebuttable presumption under *Basic* applies.

<u>Damages</u>. To certify a class action, plaintiffs must also show that damages are capable of measurement across the entire class, otherwise questions of individual damages calculations will overwhelm the litigation and distract from issues that are common to the class. In *Comcast Corp.* v. *Behrend*, the Supreme Court held that when certifying a class, district courts must conduct a

© 2025 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

"rigorous analysis" to determine whether the method proposed by plaintiffs to calculate damages is susceptible to class-wide treatment and consistent with their theory of liability. 569 U.S. 27 (2013).

History of the Dispute

In *FirstEnergy*, plaintiffs—a putative class of investors—alleged that FirstEnergy violated the Exchange Act of 1934 and Securities Act of 1933 by misleading investors about the company's political activities. The complaint focused on a series of alleged omissions and misrepresentations, including that FirstEnergy did not disclose a lobbying campaign in Ohio, falsely represented that it complied with state and federal lobbying laws, and failed to adequately disclose the risks of engaging in political activities. The United States District Court for the Southern District of Ohio granted plaintiffs' motion for class certification, holding that the mixture of alleged omissions and misrepresentations was entitled to the *Affiliated Ute* presumption of reliance. The district court also held, with little discussion, that the plaintiffs' damages analysis was susceptible to class-wide measurement, applying the same analysis to plaintiffs' non-fraud Securities Act claims and fraud-based Exchange Act claims.

The Sixth Circuit's Decision

The Sixth Circuit reversed the district court on both counts.

On reliance, the Sixth Circuit held that the *Affiliated Ute* presumption does not apply in "mixed cases" where both misstatements and omissions are alleged. The appellate court created a two-step framework for assessing whether the *Affiliated Ute* or the *Basic* presumption of reliance applies:

First, courts must "classify each claim or group of claims as alleging either an omission or a misrepresentation." Notably, the Sixth Circuit held that "half-truths and generic, aspirational corporate statements are misrepresentations," not omissions.

Second, courts must "characterize whether the overall case is primarily based on omissions or on misrepresentations." This requires assessing four factors, namely, whether: "(1) the alleged omissions are only the inverse of the misrepresentations, i.e., the only omissions are the truth that is misrepresented; (2) reliance is in fact possible to prove by pointing to an alleged misrepresentation and connecting it to an injury; (3) the preponderance and primary thrust of the claims involve alleged misrepresentations made by the defendant(s); and (4) the alleged omissions have no standalone impact apart from any alleged misrepresentations." Under this new test, the *Affiliated Ute* presumption will apply only if none of those factors are present; otherwise, the rebuttable *Basic* presumption applies.

Because plaintiffs in *FirstEnergy* focused their arguments on "statements that FirstEnergy *did* make," the investors' claims were not primarily based on omissions and therefore, the *Affiliated Ute* presumption did not apply. Instead, the Sixth Circuit held that the case was "all about misrepresentations," observing that the *Basic* presumption is more appropriate when allegations focus on "half-truths."

On damages, the Sixth Circuit held that the district court failed to "rigorous[ly] analy[ze]" the investors' damages methodology under *Comcast*, because it assessed only whether the proposed damages model appropriately calculated damages under the Securities Act and it did not conduct that same analysis for the Exchange Act claims. Because "the Securities Act and Exchange Act calculate damages entirely differently," the Sixth Circuit held that "a rigorous analysis of the Exchange Act claims demanded much more from the district court than its cursory reference to the analysis of the Securities Act claims." As the Sixth Circuit explained, while the Securities Act provides a statutory formula for calculating damages that may apply uniformly across a class, the Exchange Act presents a "vastly different world" whose text both lacks a damages-calculation formula and explicitly requires proof of loss causation.

Implications

Defendants opposing class certification in securities fraud lawsuits should consider whether they can use the *First Energy* decision and the Sixth Circuit's reasoning to bolster their defense:

Narrowing the *Affiliated Ute* Presumption: The Sixth Circuit joins a growing consensus among federal appellate courts in holding that the *Affiliated Ute* presumption is "strong medicine" reserved for cases truly centered on omissions. Plaintiffs cannot invoke this presumption simply by characterizing misleading statements as "half-truths" or by artful pleading that combines omissions with misrepresentations. Courts must rigorously analyze the nature of the alleged misconduct—and every alleged misstatement and omission—to determine the appropriate presumption of reliance. This raises the question, unanswered by the Sixth Circuit, of how *Affiliated Ute* can be reconciled with the Supreme Court's decision last year in *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 144 S. Ct. 885 (2024), which we previously discussed here. The Court in *Macquarie* held that "pure omission" claims are not actionable under Rule 10b-5(b), meaning that plaintiffs claiming an "omission" of a material fact

under Rule 10b-5(b) must show that the omission rendered statements made by the defendant misleading. We anticipate that future cases may address how, in light of *Macquarie*, *Affiliated Ute* can possibly have any application at all if pure omission claims are both exceedingly rarely pleaded and disallowed under Rule 10b-5(b).

Heightened Scrutiny of Damages Models: The Sixth Circuit cautioned district courts against rubberstamping damages models at the class certification stage, and instead reiterated the Supreme Court's guidance in *Comcast* that courts must conduct a "rigorous analysis" of whether damages are susceptible to class-wide measurement. The appellate court also clarified that plaintiffs must propose different damages models for Securities Act and Exchange Act claims, and that courts must assess the adequacy of such damages models separately.

Strategic Considerations for Defendants: Issuers and their officers facing securities fraud class actions should carefully assess whether the alleged misconduct is truly omission-based or, as is often the case, primarily involves misrepresentations or half-truths. Defendants should also scrutinize plaintiffs' damages models at the class certification stage and be prepared to challenge any failure to meet the rigorous standards set forth in *Comcast*.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Alison R. Benedon
+1-212-373-2009
abenedon@paulweiss.com

Susanna M. Buergel
+1-212-373-3553
sbuergel@paulweiss.com

Kristina A. Bunting
+1-212-373-3503
kbunting@paulweiss.com

Geoffrey R. Chepiga
+1-212-373-3421
gchepiga@paulweiss.com

Andrew J. Ehrlich
+1-212-373-3166
aehrlich@paulweiss.com

David P. Friedman
+1-212-373-3935
dfriedman@paulweiss.com

Joshua Hill Jr.
+1-628-432-5123
jhill@paulweiss.com

Daniel J. Kramer
+1-212-373-3020
dkramer@paulweiss.com

Gregory F. Laufer
+1-212-373-3441
glaufer@paulweiss.com

Audra J. Soloway
+1-212-373-3289
asoloway@paulweiss.com

Daniel S. Sinnreich
+1-212-373-2540
dsinnreich@paulweiss.com

Associates Emily M. Miller and Angela M. Seeger contributed to this Client Memorandum.