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## LIMITATIONS OF THE “TRUTH ON THE MARKET” DEFENSE: RECENT APPELLATE DECISIONS

*Adjudication of the “truth on the market” defense in securities fraud cases was traditionally reserved for trial on a full evidentiary record. However, in the wake of the Supreme Court’s 2021 Goldman Sachs decision, corporate defendants have pressed the district courts to entertain truth on the market arguments at the class certification stage as a means to “sever the link” between the alleged misrepresentations and the stock drops following disclosure of the fraud. This article explores the limitations of the truth on the market defense as illustrated by recent decisions from the Third and Ninth Circuits.*

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Historically, “truth on the market” — the argument that the allegedly concealed facts in a securities fraud were known to the public prior to the alleged “corrective disclosure” of the fraud — was a matter for trial. When Section 10(b) defendants raised the defense in opposition to class certification, courts would routinely punt on the issue, declaring it a merits question to be decided on a full record.

This changed with the Supreme Court’s decision in *Goldman Sachs v. Arkansas Teacher’s Retirement System*, holding that a district court may need to make factual findings as to a truth on the market defense — even if it implicates the merits of the case. Since *Goldman*, defendants have tried to breathe new life into the defense.<sup>1</sup> In addition to arguing a “mismatch” between the misrepresentation and the corrective disclosure — which *Goldman* explains makes it less

likely that the disclosure “actually corrected” the misrepresentation<sup>2</sup> — defendants are now more prone to argue truth on the market at class certification. Frequently, the analysis involves a detailed assessment of analyst commentary, media reports, stock price movements, expert testimony, and other evidence that sheds light on the question of what information was publicly known prior to the alleged disclosure of the fraud.

Notwithstanding the post-*Goldman* vibrancy of truth on the market challenges at the class certification stage, two recent decisions by the Third and Ninth Circuits underscore the limitations of the defense. These decisions illuminate the difficulties defendants face in proving that the allegedly concealed “truth” was “conveyed to the public with a degree of intensity and credibility” — whether by analysts, the press, or the

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<sup>1</sup> *Goldman Sachs Grp. v. Ark. Teacher Ret. Sys.*, 594 U.S. 113 (2021).

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<sup>2</sup> *Id.* at 123.

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