16-1914-cv

United States Court of Appeals
for the
Second Circuit

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII, NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE EVIDENCE SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES

JAMES A. FELDMAN
5335 Wisconsin Avenue, N.W.,
Suite 440
Washington, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

JEFFREY W. GOLAN
(JWGOLAN8350)
BARRACK, RODOS & BACINE
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600
jgolan@barrack.com

Counsel for Amici Curiae Evidence Scholars

PETER KALTMAN, individually and on behalf of all others similarly situated, DIMENSIONAL EMERGING MARKETS VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC., on behalf of its series Emerging Markets Core Equity Portfolio, Emerging Markets Social Core Equity Portfolio and T.A. World ex U.S. Core Equity Portfolio, DFA INVESTMENT TRUST COMPANY, on behalf of its series The Emerging Markets Series, DFA AUSTRIA LIMITED, solely in its capacity as responsible entity for the Dimensional Emerging Markets Trust, DFA International Core Equity Fund and DFA International Vector Equity Fund by Dimensional Fund Advisors Canada ULC solely in its capacity as Trustee, DIMENSIONAL FUNDS PLC, on behalf of its subfund Emerging Markets Value Fund, DIMENSIONAL FUNDS ICVC, on behalf of its sub-fund Emerging Markets Core Equity Fund, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST, TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS FUND, ABERDEEN GLOBAL EQUITY FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, each a series of Aberdeen Funds, ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE INTERNATIONAL FUND, ABERDEEN CANADA FUNDS EAFE PLUS EQUITY FUND AND ABERDEEN CANADA FUNDS GLOBAL EQUITY FUND, each a series of Aberdeen Canada Funds, ABERDEEN EAFE PLUS ETHICAL FUND, ABERDEEN EAFE PLUS FUND, ABERDEEN EAFE PLUS SRI FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN FULLY HEDGED INTERNATIONAL EQUITIES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, ABERDEEN GLOBAL EMERGING MARKETS EQUITY FUND, ABERDEEN GLOBAL ETHICAL WORLD EQUITY FUND, ABERDEEN GLOBAL RESPONSIBLE WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD EQUITY DIVIDEND FUND, ABERDEEN GLOBAL WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD RESOURCES EQUITY FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN ETHICAL WORLD EQUITY FUND, ABERDEEN MULTI-ASSET FUND, ABERDEEN WORLD EQUITY FUND, ABERDEEN LATIN AMERICA EQUITY FUND, INC., AAAID EQUITY PORTFOLIO, ALBERTA TEACHERS RETIREMENT FUND, AON HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQ-

UITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST/ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF HOUNSLOW SUPPERANNUATION FUND, MACKENZIE UNIVERSAL SUSTAINABLE OPPORTUNITIES CLASS, MARSHFIELD CLINIC, MOTHER THERESA CARE AND MISSION TRUST, MOTHER THERESA CARE AND MISSION TRUST, MTR CORPORATION LIMITED RETIREMENT SCHEME, MYRIA ASSET MANAGEMENT EMERGENCE, NATIONAL PENSION SERVICE, NPS TRUST ACTIVE 14, OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, WASHINGTON STATE INVESTMENT BOARD, ABERDEEN LATIN AMERICAN INCOME FUND LIMITED, ABERDEEN GLOBAL EX JAPAN PENSION FUND PPIT, FS INTERNATIONAL EQUITY MOTHER FUND, NN INVESTMENT PARTNERS B.V., acting in the capacity of management company of the mutual fund NN Global Equity Fund and in the capacity of management company of the mutual fund NN Institutioneel Dividend Aandelen Fonds, NN INVESTMENT PARTNERS LUXEMBOURG S.A., acting in the capacity of management company SICAV and its Sub-Funds and NN (L) SICAV, for and on behalf of NN (L) Emerging Markets High Dividend, NN (L) FIRST, AURA CAPITAL LTD., WGI EMERGING MARKETS FUND, LLC, BILL AND MELINDA GATES FOUNDATION TRUST, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, LOUIS KENNEDY, individually and on behalf of all others similarly situated, KEN NGO, individually
and on behalf of all others similarly situated, JONATHAN MESSING, individually and on behalf of all others similarly situated, CITY OF PROVIDENCE, individually and on behalf of all others similarly situated, UNION ASSET MANAGEMENT HOLDING AG,

Plaintiffs,

– v. –

PETROLEO BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., MERRIL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V., PETROBRAS AMERICA INC., CITIGROUP GLOBAL MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P.MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK, BANCO BRADESCO BBI S.A.,

Defendants-Appellants,

JOSE SERGIO GABRIELLI, SILVIO SINEDINO PINHEIRO, PAULO ROBERTO COSTA, JOSE CARLOS COSENZA, RENATO DE SOUZA DUQUE, GUILLHERME DE OLIVEIRA ESTRELLA, JOSE MIRANDA

FORMIGL FILHO, MARIA DAS GRACAS SILVA FOSTER, ALMIR GUILHERME BARBASSA, MARIANGELA MOINTEIRO TIZATTO, JOSUE CHRISTIANO GOME DA SILVA, DANIEL LIMA DE OLIVEIRA, JOSE RAIMUNDO BRANDA PEREIRA, SERVIO TULIO DA ROSA TINOCO, PAULO JOSE ALVES, GUSTAVO TARDIN BARBOSA, ALEXANDRE QUINTAO FERNANDES, MARCOS ANTONIO ZACARIAS, CORNELIS FRANCISCUS JOZE LOOMAN, JP MORGAN SECURITIES LLC, PRICEWATERHOUSECOOPERS AUDITORES INDEPENDENTES,

Defendants.

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INTEREST OF AMICI CURIAE

Amici curiae teach, research, and write about the law of evidence.[1] Amici share the view that principles of the law of evidence dictate that, once plaintiffs have satisfied their burden of triggering the presumption of reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the burden of persuasion shifts to the defendants to rebut that presumption by a preponderance of the evidence.

In alphabetical order, amici are: [2]

Daniel Blinka, Professor of Law, Marquette University School of Law

Kenneth S. Broun, Henry Brandis Professor of Law Emeritus, University of North Carolina School of Law

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[1] No counsel for a party authored this brief in whole or in part, and no one other than amici curiae or their counsel contributed money to fund the preparation or submission of this brief. Counsel for all defendants except the Underwriter Defendants (Defendants-Appellants BB Securities Ltd., Citigroup Global Markets Inc., J.P. Morgan Securities LLC, Itau BBA USA Securities, Inc., Morgan Stanley & Co. LLC, HSBC Securities (USA) Inc., MUFG Securities Americas Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Standard Chartered Bank, Bank of China (Hong Kong) Limited, Banco Bradesco BBI S.A., Banca IMI S.p.A., and Scotia Capital (USA) Inc.) and PwC Brazil have consented to the filing of this amici brief. The Underwriter Defendants and PwC Brazil have taken no position on consent to filing this brief because the issues addressed in this brief are not relevant to the claims against them, which do not arise under Section 10(b) of the Securities Exchange Act of 1934.

[2] Institutional affiliations are provided for identification purposes only. This brief does not purport to present the institutional views, if any, of the named law schools.

I. Bennett Capers, Stanley A. August Professor of Law, Brooklyn Law School

Daniel J. Capra, Reed Professor of Law, Fordham Law School

Ronald L. Carlson, Fuller E. Callaway Chair of Law Emeritus, University of Georgia School of Law

Mirjan R. Damaska, Sterling Emeritus Professor of Law, Yale Law School

George Fisher, Judge John Crown Professor of Law, Stanford University School of Law

Michael Graham, Dean's Distinguished Scholar for the Profession, University of Miami School of Law

Michael J. Hutter, Professor of Law, Albany Law School

Edward Imwinkelried, Edward L. Barrett, Jr. Professor of Law Emeritus, University of California Davis School of Law

Laird Kirkpatrick, Louis Harkey Mayo Research Professor of Law, The George Washington University Law School

Frederic I. Lederer, Chancellor Professor of Law, William and Mary University School of Law

Graham C. Lilly, Armistead M. Dobie Professor of Law Emeritus, University of Virginia School of Law

Michael M. Martin, Distinguished Professor of Law, Fordham University School of Law

Liesa Richter, Thomas P. Hester Presidential Professor of Law, University of Oklahoma School of Law

Stephen A. Saltzburg, Wallace and Beverley Woodbury University Professor of Law, The George Washington University Law School

SUMMARY OF ARGUMENT

Congress has never comprehensively itemized all federal presumptions and sought to determine whether each imposes a production or a persuasion burden. Congress has, however, at times itself decided which burden ought to be associated with a presumption.[3] At other times, it has left to federal courts the decision whether to create a presumption in furtherance of statutory policy and, if so, the determination of which rebuttal burden should accompany the presumption. In determining the burden associated with a presumption, courts carefully examine congressional intent to determine how to allocate the burden of production and persuasion to further the will of Congress in the associated statute. Thus, although the Rule 301 default is that a presumption shifts the burden of production and not of persuasion, the rule itself recognizes that it applies only "unless a federal statute or these rules provide otherwise." Fed. R. Evid. 301. When necessary to promote congressional intent, the Supreme Court and lower federal courts have accordingly often departed from the Rule 301 default.

With respect to the presumption of reliance under the securities laws, as recognized in *Basic* and reaffirmed in subsequent cases, the congressional

[3] *See, e.g.*, *Gurary v. Nu-Tech Bio-Med, Inc.*, 303 F.3d 212 (2d Cir. 2002) (applying 15 U.S.C. § 78u-4(c)(3)(A), which shifts the burden of persuasion to a lawyer defending an allegation of vexatious pleading).

policy requires shifting the burden of persuasion once rebuttal evidence has been introduced. *Basic* and *Halliburton v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"[4]), recognize that such an allocation of the burden of persuasion is necessary to further Congress's purpose underlying the securities laws: to give investors reasonable protection when they buy and sell securities. The opinions for the Court in both cases make that allocation clear. Moreover, the *Basic* presumption is triggered only on a very substantial showing by plaintiffs, much greater than is required by many other presumptions. The burden on rebuttal should therefore be more substantial as well. The Court's reference in *Basic* to the Advisory Committee note on the original version of Rule 301, which required a substantial rebuttal burden, supports the conclusion that a substantial rebuttal burden is required here. Most lower federal courts have adopted the rule that defendants must rebut the presumption by a preponderance of the evidence.

I. RULE 301 AUTHORIZES COURTS TO SHIFT THE BURDEN OF PERSUASION TO REBUT A PRESUMPTION WHERE NECESSARY TO EFFECTUATE CONGRESSIONAL INTENT

Federal Rule of Evidence 301 provides:

In a civil case, unless a federal statute or these rules provide

[4] *Halliburton I* was the Court's earlier decision in *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011).

> otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

The rule accordingly sets forth a default rule, subject to a qualification. The default rule is that a presumption shifts the burden of production, but not the burden of persuasion, to the party against whom a presumption is directed. The qualification, however, is that the default applies only "unless a federal statute . . . provide[s] otherwise." The Supreme Court, this Court, and the other lower federal courts have frequently and consistently ruled that the burden of persuasion, as well as the burden of production, may thus be shifted when required by the terms or policy of a statute. As a leading treatise explains, "Rule 301 contains exempting language . . . that permits courts to accord to statutory presumptions (and to court-made presumptions implementing statutes) an effect other than the one prescribed by Rule 301" in order to implement "statutory policy." Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* (4th ed. 2013), at 441 ("Mueller & Kirkpatrick").

A. The Supreme Court Has Recognized the Need to Shift Burdens of Persuasion to Effectuate the Intent of Congress or to Implement Judicially Created Legal Doctrines

The Supreme Court has frequently shifted the burden of persuasion in cases dealing with statutory or judicially created presumptions when necessary to carry out the intent of Congress (or to advance the equivalent policies in areas of the law like admiralty that are developed principally by the federal judiciary). In those cases, the Rule 301 allocation is inapplicable, because the presumptions at issue "embody strong policy preferences that are inadequately served if only the burden of production is affected." Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence: Practice Under the Rules* 131 (4th ed. 2012).[5]

1. *Employment-Discrimination Burden*. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the plurality held that once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by "*proving* that it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45 (emphasis added). The plurality emphasized that "[t]his balance of burdens is the direct result of Title VII's balance of rights." *Id*. at 245. Justice White and Justice O'Connor, each separately con-

[5] When the policy of a statute so requires, the Court has also departed from the ordinary "preponderance of the evidence" standard to require that rebuttal be proven by "clear and convincing evidence." *See, e.g., Microsoft Corp. v. i4i Ltd. P'ship,* 564 U.S. 91, 95 (2011).

curring in the judgment, agreed with that allocation.[6]

2. ***Discrimination in Grand-Jury Selection***. In *Castaneda v. Partida*, 430 U.S. 482 (1977), the Court held that a party's evidence of a prima facie case of discrimination in the selection of state grand jurors created a presumption of intentional discrimination that the State failed to rebut. The Court explained that, in light of that presumption, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by *showing* that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id*. at 495 (quoting *Alexander v. La.*, 405 U.S. 625, 602 (1972) (emphasis added)). The Court thus required the State, if it wanted to rebut the presumption, to bear the burden of proving nondiscrimination—to "show[]" nondiscrimination—not merely to offer some evidence on that point.

3. ***Disability Claims***. In *Mullins Coal Co. of Virginia v. Dir., Office of Workers' Comp. Programs, U. S. Dep't of Labor*, 484 U.S. 135 (1987), the Court addressed whether a claimant's production of a single item of evi-

[6] *See* 490 U.S. at 259-60 (White, J., concurring in the judgment) (defendant must "prove by a preponderance of the evidence that it would have reached the same decision in the absence of the unlawful motive") (internal quotation marks omitted); *id*. at 261 (O'Connor, J., concurring in the judgment) ("I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision.")

dence of black-lung disease was sufficient to entitle the claimant to the "interim presumption" of eligibility for disability benefits under the black-lung benefits program. *Id.* at 146. The Court reasoned that it was sufficient, but added that "[i]f the presumption is nonetheless invoked, the employer can still try to *disprove* total disability or causality." *Id.* at 150 (emphasis added). The Court thus shifted the burden of persuasion by requiring the employer to disprove the presumed fact, not merely to introduce evidence on that point.

4. *Labor-Management Dispute*. In *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-78 (1990), the Court examined a presumption that "[u]pon certification by the NLRB as the exclusive bargaining agent for a unit of employees, a union enjoys an irrebuttable presumption of majority support for one year," but "[a]fter the first year, the presumption continues but is rebuttable." The Court held that "[t]he employer bears the burden of rebutting that presumption, after the certification year, either by *showing* that the union in fact lacks majority support or by *demonstrating* a sufficient objective basis for doubting the union's majority status." *Id.* at 787 (emphasis added). Here, too, the Court required the employer to prove its case, not simply to offer evidence on the presumed fact. *See also NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297(9th Cir. 1978) (holding that Rule 301 does not affect the rule that the employer bears the burden of persuasion to rebut

the presumption of majority support).

5. *Presumption that Government Officials Do Their Duty*. Both before and after the adoption of Rule 301, the Supreme Court has not only shifted burdens of persuasion in support of presumptions that embody important statutory and other policies, but also on occasion required the rebuttal to satisfy a higher standard than proof by a preponderance of the evidence. One example is the presumption that government officials are presumed to do their duty. *See*, *e.g.*, *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'"); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

6. *Other Nonfactual Presumptions*. The Court has adopted the same approach with respect to presumptions used in interpreting statutes. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), involved the presumption that a federal statutory right is enforceable under 42 U.S.C. § 1983. In that case, however, the Court explained that "[t]he defendant may defeat this presumption by *demonstrating* that Congress did not intend that

remedy for a newly created right." *Id*. at 120 (emphasis added). The Court ultimately held that the defendant municipality had in fact defeated the presumption by demonstrating that permitting the Section 1983 remedy would "distort" the federal statutory right at issue in the case. *Id*. at 127.

Similarly, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), involved the rebuttable presumption that the doctrine of equitable tolling exists in suits brought against the United States under statutes waiving sovereign immunity. *See id.* at 1630-31. The Court held, however, that the presumption could be defeated if the government could "*establish*, through evidence relating to a particular statute of limitations, that Congress opted to forbid equitable tolling." *Id.* at 1631 (emphasis added). In other words, the presumption shifted the burden of persuasion to rebut the judicially created presumption to the government.

B. This Court and Other Lower Federal Courts Have Also Held Rule 301 Inapplicable to Presumptions That Are Entitled to Greater Deference than That Rule Provides

This court and other lower federal courts have similarly held that Rule 301 is inapplicable to judicially or congressionally created presumptions when Rule 301 is inconsistent with Congressional policy or judicially creat-

ed rules.[7]

Most notably, this Court shifted the burden of persuasion to rebut a presumption in a setting closely analogous to this case. In *DuPont v. Brady*, 828 F.2d 75 (2d Cir. 1987), which was a non-class Rule 10b-5 case, the court first recognized that, if a Rule 10b-5 plaintiff alleging nondisclosure proves materiality, "reliance will be presumed." *Id*. at 78. Once the presumption is triggered, the court held, "a defendant can avoid liability for nondisclosure of material information *by proving by a preponderance of the evidence* that disclosure of that information would not have altered the plaintiff's investment decision." *Id*. (emphasis added). The court reached that conclusion because the policies of the securities laws required it: "burdening plaintiffs with having to prove the generally indeterminable fact of what would have happened but for the omission would reduce the protection against fraud afforded by Section 10(b)." *Id*.

[7] Defendants (at Br. 34) cite this Court's use of Rule 301 in a Lanham Act case in *ITC Ltd. v. Punchgini, Inc.* 482 F.3d 135 (2d Cir. 2007). In *ITC*, the Court held that the defendant bore the burden of production, not persuasion, once the presumption of abandonment of the mark applied. But the Court did not suggest, and the parties did not apparently argue, that there was any reason to depart from the default of Rule 301 in that case. *ITC* thus stands at most for the uncontroversial proposition that Rule 301's default frequently applies; it does not suggest that the default must be applied in this case.

In *City of Bos. v. SS. Texaco Tex.*, 773 F.2d 1396, 1398 (1st Cir. 1985), the court rejected the argument that Rule 301 reversed the settled, judicially created rule that "when a vessel under its own power collides with an anchored vessel or a navigational structure, the burden of proving absence of fault or *vis major* rests on the pilot vessel." Similarly, the Ninth Circuit in *Hood v. Knappton Corp.,* 986 F.2d 329 (9th Cir. 1993), held that, despite Rule 301, the presumption "shifts to the drifting vessel the burden of production *and the burden of proof, or persuasion*." *Id.* at 331 (emphasis added). *See also Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 503 (5th Cir. 1994) ("presumption operates to shift the burden of producing evidence *and* the burden of persuasion onto the moving vessel" (emphasis added)); Mueller & Kirkpatrick, *supra*, at 444 (observing that some federal presumptions have "arisen out of federal substantive doctrines that exist as matters of federal common law and not statute" and "[h]ere too courts sometimes conclude that Rule 301 does not apply").[8]

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[8] As the court explained in *James v. River Parishes Co.*, 686 F.2d 1129, 1133 (5th Cir. 1982):

> Here, of course, we neither create nor modify a presumption, but merely apply a rule that long antedated adoption of the Federal Rules of Evidence. In doing so, we act in conformity [with] the traditional responsibility of the federal courts to enunciate and develop the substantive principles of admiralty and maritime law. The allocation of burdens we apply today have been fashioned by the federal courts under the authority of

Plough, Inc. v. Mason & Dixon Lines, 630 F.2d 468 (6th Cir. 1980), involved a statutory presumption, based on former 49 U.S.C. § 20(11) (1976), that a "carrier's delivery of damaged goods which were in good condition when it received them created a presumption of negligence." *Id.* at 471. The court held that once the presumption is triggered, "the burden . . . shifts to the carrier." *Id.* The court held that "Rule 301 does not affect the burden of proof" in such cases, and that the burden that shifts to the carrier "is more than a burden of going forward with the evidence. It is a true burden of proof in the sense of the risk of nonpersuasion." *Id*. at 472. *See also Anastasato v. Comm.*, 794 F.2d 884, 887 (3d Cir. 1986) (holding that IRS deficiency determination is entitled to a presumption of correctness, as a result of which "the burden of production as well as the ultimate burden of persuasion is placed on the taxpayer" to rebut the presumption).[9]

II. THE DEFENDANT HAS THE BURDEN OF PERSUASION TO REBUT THE *BASIC* PRESUMPTION

Once triggered, the *Basic* presumption can be rebutted, but the oppo-

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Article III of the Constitution. In addition to the factors we have discussed that make this allocation of burdens logical, we would be reluctant to hold that the adoption of the Rules of Evidence altered such a principle.

[9] For other examples of courts giving stronger effect to a presumption than permitted under the Rule 301 default, see Mueller & Kirkpatrick, at 440-44; *Weinstein's Evidence* § 301.20 et seq.

nent of the presumption bears the burden of persuasion to do so. That conclusion follows from the Supreme Court's teachings on the presumption and the Court's recognition that allocating that burden of rebuttal is necessary to effectuate Congress's policies in the securities laws. The presumption therefore falls outside Rule 301's default rule. That allocation of the burden of persuasion also follows from the nature of the *Basic* presumption: the plaintiff must meet a heavy burden to trigger the presumption, and the party attempting to do so should not be able to rebut it based on a minimal showing. Most lower courts, including most district courts in this Circuit, have so concluded.

A. The Supreme Court Has Required the Party Rebutting the *Basic* Presumption to Bear the Burden of Persuasion

The Supreme Court in *Basic* first recognized the presumption of reliance based on the fraud-on-the-market theory. In *Halliburton II* the Court reaffirmed the presumption. Both cases establish that the presumption is indeed rebuttable, but the defendant has the burden to persuade the trier of fact that it has been rebutted.

In *Basic*, the Court observed that the modern securities market is not based on face-to-face transactions but rather on transactions intermediated by the pricing mechanism of the market. *See* 485 U.S. at 244. "Requiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if

omitted material information had been disclosed, or if the misrepresentation had not been made, would place an unnecessarily unrealistic burden on the Rule 10b-5 plaintiff who has traded in an impersonal market." *Id*. at 245. That in turn would allow dishonest and fraudulent practices to thrive, thereby disserving the "[u]nderlying …legislative philosophy" of the 1934 Securities Exchange Act: "'There cannot be honest markets without honest publicity.'" *Id*. at 230 (quoting H.R. Rep. No. 1388, 73d Cong., 2d Sess. 11 (1934)).

In light of those considerations, the Court in *Basic* adopted the presumption of reliance based on the fraud-on-the-market theory. The Court held that the presumption is "supported by common sense and probability." 485 U.S. at 245. The Court also held that it is "consistent with, and, by facilitating Rule 10b-5 litigation, *supports, the congressional policy embodied in the 1934 Act*." *Id.* (emphasis added). For that reason, it falls outside Rule 301's default.

The Court in *Basic* also described the burden on a defendant to rebut the presumption: "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Id*. at 248. The statutory policies of the Securities Ex-

change Act would not be vindicated if the presumption could be eliminated by a defendant's mere introduction of evidence sufficient to create a factual issue on the question of reliance. Instead, in accordance with congressional policy, the Court demanded that the defendant "show[]," i.e., establish by a preponderance of the evidence, that the premises of the fraud-on-the-market theory are inapplicable in the particular case.

That was exactly the position that plaintiffs had argued in *Basic*. They argued that adopting the presumption would not "preclude defendants *from establishing* that the fraud on the market doctrine should not apply because the false or misleading public statements did not artificially inflate or deflate the prices at which securities were bought or sold. Those are issues for the trier of fact." Resp. Br. 48, 1987 WL 881063 at *48 (emphasis added). Thus, the argument made to the Court was that the presumption of reliance and shifting the burden of persuasion together furthered Congressional intent. [10] That is the argument that the *Basic* Court accepted.

The Court's reference in *Basic* to the Advisory Committee Note to Rule 301 buttresses that conclusion. The Court referred to the Note when it

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[10] *See also* Br. of Joseph Harris, *et. al.*, as Amici Curiae 1987 WL 881073 at *16 (presumption applies "*subject to the* defendant *proving* that the misrepresentations were not material" or other rebuttal facts) (emphasis added) (quoting *Lipton v. Documation, Inc.*, 734 F.2d 740, 748 (11th Cir. 1984)).

stated that "[a]rising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties" and cited, *inter alia*, "Fed. Rule Evid. 301 and Advisory Committee Notes." 485 U.S. at 245.

The reference to the Advisory Committee's Note to Rule 301 was not accidental. The cited Note was written to accompany the version of Rule 301 that the Supreme Court approved in 1972.[11] The Note was unusually comprehensive and made clear that the Court was approving an approach to presumptions that shifted the burden of persuasion to a party against whom a presumption operated. The Note stated:

> The so-called "bursting bubble" theory, under which a presumption vanishes upon introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, *is rejected* as according presumptions too "slight and evanescent" an effect. Morgan and Maguire [Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 913 (1937)].

[11] That version of the Rule provided: "In all cases not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Mueller & Kirkpatrick, at § 3:1.

Advisory Committee Note to Rule 301, 28 U.S.C. A. (emphasis added).[12]

Congress ultimately adopted a different version of Rule 301 in 1975, which included the current default rule that a presumption shifts only the burden of production, not the burden of persuasion. The Court's citation in *Basic* to the Advisory Committee Note that accompanied the original rule, however, further emphasizes the Court's understanding that the burden of persuasion on rebutting the *Basic* presumption rests with the defendant.

Further, *Basic*'s use of the word "any" in the phrase "any showing" simply means that there are a number of different facts that could be proven to "sever[] the link" between the alleged misrepresentation and the presumed fact of reliance.[13] But whichever factual approach the defendant takes, it must "show[]" that the link is severed. The evidence must be persuasive to do so, and as lower courts have consistently found (as discussed *infra*), that requires at least a preponderance of the evidence. Indeed, one example the Court provided in *Basic* made exactly this point. The Court noted that "if

[12] We include the entirety of the Advisory Committee Note in an Appendix to this Brief.

[13] *See* 485 U.S. at 248-49 (giving examples of rebuttal such as a showing that news of the truth had "credibly entered the market and dissipated the effects of the misstatements," or a showing that the plaintiffs "would have divested themselves of their . . . shares without relying on the integrity of the market").

[the defendants] could *show* that the 'market makers' were privy to the truth and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken." *See Basic*, 485 U.S. at 248 (emphasis added). If their evidence was insufficient to "show" that fact, the presumption would remain.

Halliburton II reaffirmed the *Basic* presumption, along with its allocation of the burden of proof. The Court in *Halliburton II* repeated *Basic*'s "any showing" standard for rebuttal, which imposes the burden of persuasion on the defendant. *See Halliburton*, 134 S. Ct. at 2415. It also restated that standard in its own words: "We also held, however, [in *Basic*] that a defendant could rebut this presumption in a number of ways, including by *showing* that the alleged misrepresentation did not actually affect the stock's price—that is, that the misrepresentation had no 'price impact.'" *Id*. at 2405. (emphasis added). *Halliburton II* thus made clear that defendants must do more than offer evidence; they must actually show—i.e., prove—no price impact.

The Court's summary of its holding in *Halliburton II* further reinforced that conclusion:

> While *Basic* allows plaintiffs to establish [reliance] indirectly, it does not require courts to ignore a defendant's direct, *more sa-*

> *lient* evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply.

Id. at 2416 (emphasis added). The defendant bears the burden of persuasion, because the defendant's rebuttal evidence must be "more salient" than that introduced by the plaintiff. Mere introduction of some probative evidence—evidence that is equally or less salient than the plaintiff's—would be insufficient.[14]

B. Most Lower Federal Courts Have Also Placed the Burden on Defendants to Rebut the Fraud-on-the-Market Presumption by a Preponderance of the Evidence

Federal courts of appeals and district courts, including many in this Circuit, have also recognized that defendants bear the burden of persuasion in rebutting the *Basic* presumption.

1. ***The Fifth and Ninth Circuits' Jury Instructions***. The jury instructions on fraud-on-the-market liability in both the Fifth and Ninth Circuits shift the burden of persuasion on rebuttal to defendants. The Fifth Cir-

[14] Justice Ginsburg's concurring opinion, joined by Justices Breyer and Sotomayor, also supports that conclusion. She noted that "the Court recognizes that it is incumbent upon the defendant to *show* the absence of price impact" and the Court's standard, "therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Id*. at 2417 (emphasis added).

cuit instruction states:

> If you find that Defendant [name] made an omission or failed to disclose a material fact, you must presume that Plaintiff [name] relied on the omission or failure to disclose. Defendant [name] may rebut, or overcome, this presumption if [he/she] *proves, by a preponderance of the evidence*, that Plaintiff's [name]'s decision would not have been affected even if Defendant [name] had disclosed the omitted facts.

Pattern Jury Instructions §7.1, at 75 (5th Cir. 2014) (emphasis added).

The Ninth Circuit instruction is to the same effect:

> If you find that the plaintiff has proved by a preponderance of the evidence that (1) an active, open market for the [security] [securities] existed and (2) investors reasonably relied on that market as an accurate reflection of the current market value of the [security] [securities], you may find that the plaintiff has proved that [he] [she] [it] relied on the defendant's statements.
>
> If, however, the defendant *proves by a preponderance of the evidence* that (1) the plaintiff did not actually rely on the integrity of the market or (2) the alleged misrepresentation or omission did not affect the market price of the security, then the defend-

> ant has rebutted any presumption that the plaintiff relied on the market. In that event, the plaintiff must then prove that [he] [she] [it] justifiably relied directly on the alleged misrepresentation or omission.

Ninth Circuit Manual of Jury Instructions: Civil § 18.5, at 422 (2007) (emphasis added).

2. ***District Courts in this Circuit***. Most district courts in this Circuit, including the court in the instant case, have correctly read *Basic* to mean that defendants are required to rebut the presumption—in this case, to prove the absence of price impact—by a preponderance of the evidence. *See, e.g., Pa. Ave. Funds v. Inyx Inc.,* 2011 U.S. Dist. Lexis 72999, at *24 (S.D.N.Y. July 5, 2011) ("defendants bear the burden of rebutting the presumption by a preponderance of the evidence"); *In re Moody's Corp. Sec. Litig.,* 274 F.R.D. 480, 490 (S.D.N.Y. 2011) ("Defendants bear the burden of rebutting the presumption by a preponderance of the evidence" and "Plaintiffs have the opportunity to rebut the rebuttal."); *In re Sadia,* 269 F.R.D. 298, 316 (S.D.N.Y. 2010) (defendants "failed to … prov[e] by a preponderance of the evidence that there would have been *no* impact on price as a result of the failure to disclose information") (emphasis in original); *Fogarazzo v. Lehman Bros.,* 263 F.R.D. 90, 106 (S.D.N.Y. 2005) ("defendants have failed to rebut the

fraud on the market presumption by the preponderance of the evidence on the basis that the analyst reports at issue lacked material information").

3. *Courts in Other Circuits*. Other courts of appeals and district courts have consistently held that defendants have the burden of persuasion once plaintiffs have met the stringent criteria for the fraud-on-the-market presumption. For example, on remand from the Supreme Court in *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251 (N.D. Tex. 2015), the district court held that "both the burden of production and the burden of persuasion are properly placed on Halliburton" to rebut the presumption. *Id.* at 260. The court held that allowing a rebuttal to be effective on the introduction of lesser evidence would render the fraud-on-the-market presumption useless. The court concluded that "the Supreme Court would not have modified the fraud-on-the-market presumption so substantially without explicitly saying so." *Id.*

The Eleventh Circuit and other district courts have agreed. *See*, *e.g.*, *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.,* 762 F.3d 1248, 1252 (11th Cir. 2014) ("*Halliburton II* by no means holds that in every case in which evidence is presented, the presumption will always be defeated."); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Prudential Fin., Inc.,* No. 12-5275, 2015 WL 5097883, at *12 (D.N.J. Aug. 31,

2015) (to rebut the fraud-on-the-market presumption, "defendant bears the burden to prove a lack of price impact through direct evidence" and "[m]erely pointing to other potential causes for a stock price change following a corrective disclosure is therefore not enough to rebut the *Basic* presumption"); *Aranaz v. Catalyst Pharm. Partners Inc.,* 302 F.R.D. 657, 670 (S.D. Fla. 2014) ("the presumption of price impact may be rebutted at the class certification stage by directly showing an absence of price impact" and "defendant may refute the presumption of reliance by rebutting either constituent presumption by a preponderance of the evidence.")[15]

[15] In *IBEW Local 98 Pension Fund v. Best Buy Co*., 818 F.3d 775 (8th Cir. 2016), the Eighth Circuit stated that after the plaintiffs established the predicates for the *Basic* presumption, the "defendants had the burden *to come forward* with evidence showing a lack of price impact," and cited Rule 301. *Id.* at 782 (emphasis added). It does not appear, however, that there was any dispute about the burden of persuasion in the case. Moreover, the court's ultimate holding was that the defendants' "overwhelming evidence of no 'front-end' price impact rebutted the *Basic* presumption" and plaintiffs "presented no contrary evidence of price impact." *Id*. at 782. In that situation, any allocation of the burden of persuasion was of no consequence.

C. The Nature of the *Basic* Presumption Makes Clear that Defendants Bear the Burden of Persuasion on Rebuttal

The *Basic* presumption requires plaintiffs to make a much greater showing than do presumptions governed by Rule 301's allocation of the burden of persuasion. That too supports placing a correspondingly higher burden on the defendant to rebut the presumption.

1. The typical presumption requires little of a party seeking to rely on it and little of a party seeking to rebut it. For example, a party seeking to rely on the presumption that a properly addressed envelope that was mailed also was received by the addressee need only offer testimony by someone that the letter was properly addressed and mailed. The rebuttal evidence can simply be the other party's statement "I did not get it." *See*, *e.g.*, *Lupyan v. Corinthian Colls., Inc.*, 761 F.3d 314, 320–22 (3d Cir. 2014); *cf. Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991) (presumption of unconstitutionality triggered by mere allegation that search was conducted without warrant, which shifts only burden of production to opposing party).

The evidentiary burden of rebuttal in such cases is often described as evidence that would be sufficient to overcome a directed verdict. *See*, *e.g.*, *Sinatra v. Heckler*, 566 F. Supp. 1354, 1359–60 (E.D.N.Y. 1983) ("In order to rebut the presumption that notice of reconsideration is received five days after it is dated, claimant must adduce evidence that would be sufficient to

overcome a directed verdict."). Any evidence that a trier of fact *could* believe is ordinarily sufficient to overcome a directed verdict, because on a motion for a directed verdict, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). That means that the burden of rebutting presumptions governed by Rule 301's default rule is extraordinarily weak.

a. The burden on plaintiffs to trigger the fraud-on-the-market presumption of reliance is far more demanding. To trigger the *Basic* presumption, plaintiffs must demonstrate by a preponderance of the evidence three separate, substantial factors: (1) that the alleged misrepresentations were publicly known, (2) that the stock traded in an efficient market, and (3) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed. *See Halliburton II*, 134 S. Ct. at 2408.[16] Under *Basic* and *Halliburton II*, when plaintiffs prove all three of those factors, the policies that gave rise to the presumption are all present: the presumption is consistent with congressional policy, supported by com-

[16] A fourth component of the *Basic* presumption, that the alleged misrepresentations were material, does not need to be proved at class certification, but must be proved at the merits stage. *See Halliburton II*, 134 S. Ct. at 2408, 2412; *Amgen Inc. v. Conn., Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

mon sense and probability, consistent with empirical studies, and favored by commentators. *See Basic*, 485 U.S. at 245-47; *Halliburton*, 134 S. Ct. at 2411-13.

b. Those three factors may in fact understate plaintiffs' burden. Lower courts have held that plaintiffs do not get the benefit of the reliance presumption unless and until they provide a substantial showing of an efficient market by review of five or more different factors. For example, in *Cammer v. Bloom*, 711 F. Supp. 1264, 1283–87 (D.N.J. 1989), the court enumerated five factors that are frequently used to determine whether a market is efficient: (1) the average weekly trading volume; (2) the number of analysts who follow the stock; (3) the existence of market makers and arbitrageurs; (4) the ability of the company to file Securities and Exchange Commission Form S-3; and (5) evidence of share price response to unexpected news.[17]

This Circuit endorsed, but did not require the use of, the *Cammer* factors in *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 205 n.11 (2d Cir. 2008). The First, Third, Fourth, and Fifth

[17] In *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001), the court added three additional factors: (1) investors tend to be more interested in companies with higher market capitalizations, thus leading to more efficiency; (2) a small bid-ask spread indicates that trading in the stock is inexpensive, suggesting efficiency; and (3) if substantial portions of shares are held by insiders, the price is less likely to reflect only the total of all public information.

Circuits have taken similar approaches. *See Bowe v. PolyMedica (In re PolyMedica Corp. Sec. Litig.),* 432 F.3d 1, 18 (1st Cir. 2005) (holding that *Cammer* factors are relevant but not dispositive); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634 n.16 (3d Cir. 2011) (*Cammer* factors may be instructive); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004) (relying on *Cammer* factors); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (suggesting eight factors in non-exhaustive list including five *Cammer* factors).

c. Moreover, the Supreme Court suggested in *Halliburton II* that plaintiffs may want to use event studies to make the necessary showing of market efficiency, though it declined to require them. *See* 134 S. Ct. at 2415. And plaintiffs do in fact frequently find it necessary to introduce event studies, as they did in *Halliburton II* itself. *Id*. Lower courts have required such studies to satisfy the requirements of Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993). *See*, *e.g.*, *Carpenters Pension Tr. Fund of St. Louis v. Barclays Public Ltd.*, 310 F.R.D. 69, 86 (S.D.N.Y. 2015).

d. Plaintiffs seeking to invoke the *Basic* presumption must thus bear a much heavier burden before getting the benefit of the presumption than a party typically must bear before benefiting from a legal presumption. Given

that substantial showing, it is inconceivable that plaintiffs would lose all benefit of the presumption simply because a defendant offered "some" rebuttal evidence. The Eleventh Circuit recognized this in *Regions Fin.*, 762 F.3d at 1252 ("*Halliburton II* by no means holds that in every case in which evidence is presented, the presumption will always be defeated."). To deprive plaintiffs of the presumption in cases in which the defendant has not truly rebutted it would be to require plaintiffs to push a boulder up a mountain, only to allow the defendants to touch the boulder to push it back down.

CONCLUSION

The defendants bear the burden of persuasion to rebut the *Basic* presumption. Assigning a lesser burden to defendants would undercut the policies embodied in the securities laws and would be inconsistent with decisions of the Supreme Court.

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Respectfully submitted.

James A. Feldman
5335 Wisconsin Ave., N.W.
Suite 440
Washington, D.C. 20015
(202)730-1267
wexfeld@gmail.com

Jeffrey W. Golan (jwgolan8350)
Barrack, Rodos & Bacine
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600
jgolan@barrack.com

Of Counsel:

James J. Sabella
Grant & Eisenhofer P.A.
485 Lexington Avenue
New York, NY 10017
646-722-8520

Daniel S. Sommers
Cohen Milstein Sellers & Toll PLLC
1100 New York Ave., N.W.
Fifth Floor

Washington, DC 20005
202-408-4600

Laurence Rosen
The Rosen Law Firm
275 Madison Avenue, 34th Floor
New York, NY 10016
866-767-3653

APPENDIX

ORIGINAL ADVISORY COMMITTEE NOTE TO FED. R. EVID. 301

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959).

The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. Morgan and Maguire, *supra*, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910), the court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (1929), the court overturned a Georgia statute making railroads

liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specific acts of negligence by defendant. The jury was instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for the plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson.* The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1920 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases is laid at rest by *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959). The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defend-

ant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." 359 U.S. at 443, 79 S. Ct. at 925.

In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446, 79 S. Ct. at 927.

The rational connection requirement survives in criminal cases, *Tot v. United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry v. Ramsey*, 277 U.S. 88, 48 S. Ct. 443, 72 L. Ed. 796 (1928). In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was *prima facie* evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.* at 94, 48 S. Ct. at 444. Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States v. Gainey*, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965), but not that Romano should have known that his presence at a still could convict him of possessing it, *United States v. Romano*, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965).

In his dissent in *Gainey*, Mr. Justice Black put it more artistically:

> It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called "possession" and "carrying on an illegal distillery business" but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry v. Ramsey*, 277 U.S. 88, 48 S. Ct. 443, 72 L. Ed. 796. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner v. Donnan*, 285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888, and many other cases.

380 U.S. at 84 n.12, 85 S. Ct. at 766.

And the majority opinion in *Romano* agreed with him:

> It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter.

382 U.S. at 144, 86 S. Ct. at 284.

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,620 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified for printed briefs in pamphlet format by Local Rule 32.1(a)(2), and complies with the type style requirements of Fed. R. Civ. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2007, in 14-point Century font.

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s/ Jeffrey W. Golan

Jeffrey W. Golan (JWGOLAN8350)
BARRACK, RODOS & BACINE
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Tel: 215-963-0600
jgolan@barrack.com