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Supreme Court Won't Hear Barclays Dark Pool Cert Appeal

By **Dunstan Prial**

Law360 (April 30, 2018, 5:31 PM EDT) -- The Supreme Court on Monday denied Barclays PLC's appeal of a Second Circuit ruling that upheld class certification for a group of investors in a suit over fraud allegations tied to Barclays' dark pool trading platform, keeping in place a decision that Barclays' attorneys have argued substantially lowered the burden of proof for plaintiffs in securities fraud cases.



The Supreme Court will not hear an appeal over fraud allegations tied to Barclays' dark pool trading platform. (AP)

In denying Barclays' petition for certiorari, the justices let stand the Second Circuit's **finding in November** saying that plaintiffs in securities class actions can make fraud claims against large, publicly traded companies without offering "direct evidence" that the company's stock price moved due to misstatements made by the company.

"We are very pleased that the Supreme Court denied defendants' petition, leaving firmly in place the Second Circuit's precedential rulings regarding the necessity of utilizing event studies to prove market efficiency as well as the burden of proof required to rebut the presumption of reliance, both of which were highly favorable to investors," the shareholders' attorney Jeremy A. Lieberman of Pomerantz LLP told Law360 on Monday. "Today's denial was a victory for both Barclays investors and class action plaintiffs throughout the circuit."

A Barclays attorney didn't immediately respond to a request for comment on Monday and a spokesman for the bank declined to comment.

The case now returns to a New York federal court, where the class was originally certified for judgment motions and trial.

In February, Barclays told the high court justices that the appeals court's ruling should be reviewed because it "marks a 'pivotal point' in which the Second Circuit has created a class certification regime that is 'far easier' for plaintiffs."

The British bank argued that the Second Circuit erroneously ruled that class action defendants

seeking to rebut plaintiffs' allegations tied to the standard legal presumption that companies' misstatements impact their stock prices must do so by "a preponderance of the evidence." Barclays said that places a heavier burden of proof on defendants.

A Second Circuit panel affirmed a New York federal judge's decision to grant class certification, with the appeals court judges agreeing with the lower court's finding that direct evidence of price impact is not always necessary to demonstrate market efficiency to invoke the so-called Basic presumption, and that it was not required in this case. The Supreme Court ruled in *Basic Inc. v. Levinson* that shareholders seeking class action status in securities fraud cases can invoke the "fraud on the market" presumption of reliance, which allows investors to show that they were collectively impacted by a company's misstatements that impacted the company's stock price.

The Second Circuit panel also upheld the lower court's ruling saying that defendants seeking to rebut the Basic presumption must do so by "a preponderance of the evidence, which the defendants-appellants in this case failed to do," according to the appeals court's ruling.

Barclays argued in its Supreme Court petition that the Second Circuit's decision allows plaintiffs to invoke the Basic presumption with "little more than proof that the defendant's stock traded on a national exchange."

In addition to arguing that the investors hadn't shown that any alleged misstatements made by Barclays actually contributed to inflating the price of the bank's shares, Barclays lawyers also claimed that shareholders failed to show that damages could be calculated on classwide bases. But the Second Circuit panel disagreed on both counts, shooting down the bank's arguments that its alleged misstatements and omissions regarding the safety of its dark pools had no "statistically significant" impact on the price of the London-based Barclays' American depository shares, which trade like regular stocks on U.S. markets.

The appeals panel affirmed the certification of a class of investors who say Barclays' shares fell in the wake of a July 2015 announcement of a New York state investigation revealing Barclays had allegedly committed fraud through a number of public assertions that the bank was policing its dark pool platform to prevent stock manipulation by high-frequency traders.

The investors filed suit shortly after Barclays' stock fell more than 7 percent on the day after New York Attorney General Eric Schneiderman announced his fraud suit.

The investors, led by Joseph Waggoner, sued Barclays, alleging that the misstatements and omissions regarding the bank's dark pool, known as Liquidity Cross or LX, helped artificially inflate the price of the bank's shares, according to the shareholders' suit. Barclays, according to the suit, made frequent public statements saying it took a number of measured precautions against abuses by high-frequency traders in its dark pool.

In January 2016, Barclays agreed **to pay \$70 million** to settle charges by Schneiderman and the U.S. Securities and Exchange Commission related to operation of its dark pool.

The shareholders are represented by Jeremy A. Lieberman, Emma Gilmore, Tamar A. Weinrib, Patrick V. Dahlstrom and Joshua B. Silverman of Pomerantz LLP.

Barclays is represented by Jeffrey T. Scott, Matthew A. Schwartz, Andrew H. Reynard and Brent J. McIntosh of Sullivan & Cromwell LLP.

The case is *Barclays PLC et al., v. Joseph Waggoner et al.*, case number 17-1209, in the U.S. Supreme Court.

--Editing by Stephen Berg.