Significance and the Materiality Tautology.pdf

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I. Introduction

The lack of a bright line test for materiality in securities fraud actions is not new. It now appears that perhaps the most likely opportunity for a bright line standard came and went with the Supreme Court's Matrixx decision. Commentators on the consequences to the business of securities fraud class actions have moved on to Halliburton and Amgen. Yet, for those of us concerned with the general understanding of materiality in private 10b-5 actions, Matrixx has reminded us of a terrible fog.

Putting aside for now the narrower discussions of materiality as a class certification issue, and materiality as a function of fraud on the market reliance and causality, Matrixx has left us with a fundamental void in defining materiality. The terrible fog is the very definition of materiality.

Materiality is a lynchpin element in a private cause of action brought for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 (the “'34 Act” or “Exchange Act”) and Rule 10b-5 promulgated thereunder by the U.S. Securities and Exchange Commission (the “Commission” or “SEC”). Whether
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information disclosed, misrepresented or withheld is material goes to the crux of the policy behind Section 10(b) and Rule 10b-5. That policy generally is to promote fair and efficient, fully informed markets in which the public can make investment decisions. Rule 10b-5 was promulgated pursuant to the grant of authority given to the SEC by Congress in Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)). “By that Act Congress proposed to prevent inequitable and unfair practices and to insure fairness in securities transactions generally, whether conducted face-to-face, over the counter, or on exchanges.”

If material information is misrepresented to the marketplace or is traded on by a select few without being disclosed, the policy will not be met.

A major source of redress for violations of Rule 10b-5 is, of course, the implied private right of action. Private actions under Rule 10b-5 are often brought as class actions, and, if so, are subject to the provisions of the Private Securities Litigation Reform Act of 1995, as amended (the “PSLRA”) requiring pleading with particularity—a higher standard intended to reduce frivolous claims.

exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”.

7. I will refer principally to Rule 10b-5 and sometimes to Rule 10b-5 or Section 10(b) interchangeably, but it should be understood that this Rule invokes Section 10(b) more generally. See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2012).


14. See Joseph De Simone, Matthew D. Ingber & Evan A. Creutz, Practitioner Note: Asher to Asher and Dust to Dust: the Demise of the PSLRA Safe Harbor?, 1 N.Y.U. J.L. & Bus. 799 (2005); see also Cox & Thomas, supra note 12, at 855–65 (examining the role of institutional investors in both prosecuting securities class actions and filing claims in class settlements post-PSLRA); In re Suprema Specialties, Inc., Sec. Litig., 438 F.3d 256, 276 n.8 (3d Cir. 2006) (“The purpose of the heightened pleading requirements contained in the PSLRA is to restrict abuses in securities class-action litigation.”); Greebel v. FTP Software, 194 F.3d 185, 191 (1st Cir. 1999) (“The
To prevail in a private action for securities fraud under Rule 10b-5, a plaintiff must successfully show that: (1) a defendant made a material misrepresentation or omission, (2) that the defendant acted with scienter,\(^ {15}\) (3) a connection exists between the misrepresentation or omission and the purchase or sale of a security, (4) the plaintiff relied on the misrepresentation or omission,\(^ {16}\) (5) the plaintiff consequently suffered economic loss, and (6) the defendant’s material misrepresentation or omission caused an economic loss to the plaintiff (“loss causation”).\(^ {17}\)

Our concern, at a time when our Supreme Court remains interested in Rule 10b-5, is with the crucial material element, and, more particularly, with recent decisions regarding the usage and meaning of “significance” in finding materiality.\(^ {18}\)

## II. Significance and Materiality

Determining materiality involves “a mixed question of law and fact.”\(^ {19}\) Under Basic v. Levinson,\(^ {20}\) a decision maker must disclose information where “a substantial likelihood that the disclosure of the [would be] omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”\(^ {21}\)

This article addresses the usage and meaning of forms of “significance” and their, or its, linkage to the determination of materiality in deciding whether to disclose is tied to disclosure and liability under Rule 10b-5.\(^ {22}\) Moreover, it explores whether the usage and meaning of forms of “significance” existing in precedent and determinative of decision making on materiality, have been altered in view of the enactment of the PSLRA in 1995 marked a bipartisan effort to curb abuse in private securities lawsuits, particularly the filing of strike suits.”); In re Elec. Data Sys. Corp., 298 F. Supp. 2d 544, 556 (E.D. Tex. 2004).


18. Through emphasizing precedent in private actions, this analysis also draws upon instructive discussions of materiality in criminal and civil cases.


21. Id. at 231–32.

22. See infra Parts II.A, B.
Supreme Court’s recent Matrixx decision. Is significance (or has it become) simply synonymous with materiality in the context of disclosure decisions under Rule 10b-5? If not, how is it distinguished? Is its usage simply a consequence of the occasional inadequacy of language?

So too, the very vantage point from which we view materiality, and perhaps significance, and what constitutes each, lies at the heart of Rule 10b-5 actions and securities law policy generally. In deciding whether and exactly how much to disclose, materiality, and perhaps significance, may be determined ex ante, but it can only be verified as correctly made ex post facto, and then it is fraught with bias and unfairness. The very phrasing and tense of the guiding language from Basic (“would have been”) captures this ex post retrospection to the ex ante decision and encapsulates the difficulty of judging that decision fairly. Therefore, our look at significance and materiality requires us to grapple with the ex ante versus ex post problem inherent in finding materiality.

Moreover, because the role of materiality is also essential in Basic’s finding that the element of reliance may be assumed in causation with the adoption of the fraud-on-the-market theory and because the ex post factor is also palpable in that analysis, we consider the ex ante versus ex post problem with materiality in applying the fraud-on-the-market theory and the closely allied efficient capital markets hypothesis.

**A. Forms of “Significant”**

1. Basic, TSC, and Mills

The Supreme Court’s landmark decision on materiality under Rule 10b-5, Basic v. Levinson, pertained to pre-merger negotiations and the determination of when information about such negotiations constitutes material information necessary to be disclosed under the “significantly” altering the “total mix” of information standard. While the Court sought to resolve a split in the circuits over the relatively narrow issue of pre-merger talks, Basic subsequently became the primary

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26. See id. at 241–47.

27. Id. at 232–33.
word on materiality for Rule 10b-5 situations generally, importing the standard from disputes in the section 14 proxy context.\textsuperscript{28}

\textit{TSC Industries, Inc. v. Northway, Inc.},\textsuperscript{29} the predecessor to \textit{Basic}, provided the Court in \textit{Basic} with case law on materiality in the proxy voting rights context that helped flesh out Rule 10b-5.\textsuperscript{30}

\textit{The question of materiality, it is universally agreed, is an objective one, involving the \textit{significance} of an omitted or misrepresented fact to a reasonable investor. Variations in the formulation of a general test of materiality occur in the articulation of just how \textit{significant} a fact must be or, put another way, how certain it must be that the fact would affect a reasonable investor’s judgment.}\textsuperscript{31}

\textit{TSC} thus appears to treat significance as, at least in part, a definition, if not an actual synonym, of materiality, and requires judgment of decisions as to the certainty that information will impact reasonable investors’ decisions.\textsuperscript{32} That the \textit{TSC} Court addressed Section 14(a)\textsuperscript{33} and Rule 14a-9\textsuperscript{34} does not distinguish the weight of the discussion as it is the most heavily relied upon precedent in \textit{Basic}.\textsuperscript{35} The \textit{Basic} Court drew from \textit{TSC}, “[a]s we clarify today, materiality depends on the \textit{significance} the reasonable investor would place on the withheld or misrepresented information.”\textsuperscript{36}

\begin{footnotesize}

\begin{enumerate}


\item 426 U.S. 438 (1976).


\item \textit{TSC Indus.}, 426 U.S. at 445 (emphasis added).


\item 17 C.F.R. § 240.14a-9 (2011).

\item See Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (“We now expressly adopt the \textit{TSC Industries} standard of materiality for the § 10(b) and Rule 10b-5 context.”).

\item \textit{Id.} at 240 (emphasis added).

\end{enumerate}

\end{footnotesize}
It is instructive to look carefully at the language from TSC because of its continued reach. While the language focuses on materiality in the context of proxy voting under Section 14, its rationale was directly adopted to the Section 10 and Rule 10b-5 context and has remained there ever since. Yet, we can understand the seminal materiality language better still if we consider the main resource for TSC—the earlier Section 14 decision, Mills v. Electric Auto-Lite Co.

Mills set out clear policy motivation for the materiality standard it applied:

_Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management’s control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect._

In rejecting a lower court standard of materiality turning on what information a reasonable investor “might consider important,” TSC further cautioned that:

_Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good. The potential liability for a Rule 14a-9 violation can be great indeed, and if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management’s fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking._

Justice Marshall explained,

_The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor. Variations in the formulation of a general test of materiality occur in the articulation of just how significant a fact must be_

39. _TSC Indus._, 426 U.S. at 448 (citing Mills, 396 U.S. at 385).
40. _Id._ at 448–49 (emphasis added); _id._ at 445 (rejecting Court of Appeals standard that material facts include “facts which a reasonable investor might consider important”).
or, put another way, how certain it must be that the fact would affect a reasonable investor’s judgment.\textsuperscript{41}

In perhaps the most influential passage in TSC, again referring heavily to Mills, Marshall wrote,

\begin{quote}
An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills’ general description of materiality as a requirement that “the defect have a significant propensity to affect the voting process.” It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.\textsuperscript{42}
\end{quote}

This language transitions to a much more consistent use of significant and forms of significant in place of important—a usage that at least some courts have subsequently closely adhered to—even if modified to the nuanced usage and the facts of subsequent circuit court cases.\textsuperscript{43}

The Basic court recognized the bright-line possibility and explicitly rejected it.\textsuperscript{44} A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the securities acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific

\textsuperscript{41.} Id. at 445 (emphasis added).

\textsuperscript{42.} Id. at 449 (emphasis added).

\textsuperscript{43.} See Sec. Exch. Comm’n v. Phan, 500 F.3d 895, 908 (9th Cir. 2007) (“The antifraud provisions’ materiality element is satisfied only if there is ‘a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ’total mix’ of information available.” (quoting TSC Indus., 426 U.S. at 449)); see also In re Donald J. Trump Casino Sec. Litig.–Taj Mahal Litig., 7 F.3d 357, 369 (3d Cir. 1993) (“The Supreme Court in TSC Indus., Inc. v. Northway, Inc. . . ., defined materiality within the proxy-solicitation context of § 14(a) of the 1934 Act. Subsequently the Court expressly made the TSC standard applicable in actions under § 10 and Rule 105-b . . ., and we have made it applicable as well in claims under §§ 11 and 12(2) of the 1933 Act . . ..” (internal citations omitted)).

\textsuperscript{44.} Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988).
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finding such as materiality, must necessarily be overinclusive or underinclusive.\(^{45}\)

In addressing the split between the Second Circuit’s probability magnitude test and the Sixth Circuit’s agreement in principle approach, the Supreme Court left us with the circularity of its significance language.\(^{46}\)

2. General Usage

In general usage outside of the legal context, “material” is defined, in part, as “having significance or relevance;” “of serious or substantial import; significant, important, of consequence.”\(^{47}\) In general usage within a legal context, “material” is defined as “significant or influential.”\(^{48}\) “Significant” is similarly defined as “sufficiently great or important to be worthy of attention; noteworthy; consequential, influential.”\(^{49}\) So it is reasonable to consider material and significant to be synonyms in general usage.

3. Circuit Court Usage

In the circuit court decisions discussed, infra, as in the Supreme Court’s Matrixx, courts continued to use Basic as the precedent for deriving a materiality definition and substantiated it by either explicitly or implicitly citing TSC, and even Mills.\(^{50}\)

Certain uses of significant by the circuit courts are nearly synonymous with material’s general usage, but do not illuminate any clear standard of materiality.\(^{51}\) Some uses applied by the circuit courts in key decisions on Rule 10b-5 appear, on their face, to be summarily tautological.\(^{52}\) Other uses are more nuanced, or pertain more specifically to fact contexts of the 10b-5 cases.\(^{53}\) To fully comprehend the meaning of significant qua material, we need to look more closely at these courts’ usage.

45. Id.
46. Id. at 240.
48. Id.
49. Id.
50. See infra notes 54–116 and accompanying text.
52. See, e.g., In re Aetna Sec. Litig., 617 F.3d 272, 283–85 (3d Cir. 2010); Ley v. Visteon Corp., 543 F.3d 801, 809 (6th Cir. 2008).
53. See, e.g., Hill, 638 F.3d at 57; Miss. Pub. Emps. Ret. Sys., 649 F.3d at 20–21; Castellano, 257 F.3d at 181–82.
In *Hill v. Gozani*, the First Circuit anticipated *Matrixx* by emphasizing that material information need not be disclosed in all circumstances—even where certain facts “demonstrate a *significant* probability that the noted risks would materialize and that the effect of those risks on the company’s future would be *significant*.” In *Hill*, where certain information about the use of fraudulent neurology codes and the Medicare 10% rule was not enough to indicate “near certainty of ruin” and even where the company had made prior public mention of a risk of non-reimbursement by third party payers, the First Circuit found no duty to disclose or further expound such information. The court looked to the *TSC* materiality standard. While the court referred to the information at issue as “not insignificant” and “material,” the court’s decision turned on the lack of certainty that the information not disclosed in a press release would translate into “failure or . . . comprehensive cover-up.” This usage of significant may apply a higher threshold finding of materiality than indicated in the *Matrixx* decision. The First Circuit’s use of significant is directed at describing the degree of the impact of certain information, not necessarily the importance of certain information to investors. Moreover, the court’s interpretation of an actionable standard of materiality appears to require absolute certainty of significance, rather than a lesser likelihood—harking back to the language in *TSC*.

The use of material has also been addressed in the context of the close link between scienter and materiality among the elements of securities fraud. In *Mississippi Public Employees’ Retirement System v. Boston Scientific Corp.*, the First Circuit applied *Matrixx*’s holding, reiterating the *Basic* standard in rejecting a bright line standard that would, in essence, translate statistical significance into materiality. While the First Circuit did not equate materiality with scienter, it pointed to the close relationship with materiality, noting, “knowingly omitting material information is probative, although not determinative, of materiality.” Exploring the alleged material misstatements and omissions that might have inferred scienter, the court did not find that the defendant had “recklessly created a *significant* risk” that would have required the defendant company to issue a recall.

54. 638 F.3d 40 (1st Cir. 2011).
55. Id. at 57 (emphasis added).
56. Id. at 59.
57. Id. at 57.
58. Id. at 59 (emphasis added).
59. See *Hill v. Gozani*, 651 F.3d 151, 152–53 (1st Cir. 2011) (denying rehearing en banc in light of the *Matrixx* decision and reiterating the prior holding).
60. See *Hill*, 638 F.3d at 59.
61. 649 F.3d 5 (1st Cir. 2011).
62. Id. at 20–21.
63. Id. at 20 (quoting Miss. Pub. Emps.’ Ret. Sys. v. Boston Scientific Corp. (BSC I), 523 F.3d 75, 87 (1st Cir. 2008)).
of its affected products. The First Circuit apparently saw in Matrixx broad discretion in finding materiality other than as statistical significance, and employed a usage of significance rather more generally characterized as an amount.

The Second Circuit’s earlier adherence to the bright line statistical significance standard on materiality in Carter-Wallace, was clearly repudiated in Matrixx. In Carter-Wallace I, the Second Circuit found that the issuer’s failure to disclose deaths relating to the drug it manufactured was not a Rule 10b-5 violation as the information “did not become materially misleading until Carter-Wallace had information that [the drug] had caused a statistically significant number of . . . deaths.” The Second Circuit reiterated this conclusion in a subsequent Carter-Wallace decision.

In Castellano v. Young & Rubicam, Inc., the Second Circuit applied the Basic and TSC materiality test focusing on ‘probability—magnitude.’ Here, the Second Circuit considered the materiality of merger discussions based upon the probability that the merger would occur; “[u]nder the materiality test set out in Basic, the potential significance of a merger is considered in light of the likelihood that it will occur.” This usage of significance is akin to probability.

In In re Aetna Securities Litigation, the Third Circuit applied the materiality standard from Basic and TSC (“significantly altering the total mix”) and, yet gave no further shrift to significance in its application after citing the standard. The court’s analysis in determining the materiality of alleged forward looking statements about “disciplined pricing” was centered on the vagueness of the pricing claim in not finding materiality. The court’s usage of significant was simply to recite and apply the standard.

In SEC v. Snyder, an unpublished decision, the Fifth Circuit found that a “jury was entitled to find that the prediction of significant shortfalls in the second quarter was information that a reasonable investor would have found important.” This

64. Id. at 21 (emphasis added).
66. 150 F.3d 153 (2d Cir. 1998).
67. Id. at 157 (emphasis added).
69. 257 F.3d 171 (2d Cir. 2001).
70. Id. at 185 (relying on Sec. & Exch. Comm’n v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).
71. Id. at 181 (emphasis added).
72. 617 F.3d 272 (3d Cir. 2011).
73. Id. at 283–85.
74. Id. at 283–84.
75. Id. at 283–85.
76. 292 F. App’x 391 (5th Cir. 2008).
77. Id. at 404.
usage of significant involved in the court’s application of the materiality standard once again appears to indicate degree, or amount. It also shows a linkage between significant and important found in the language of Basic and TSC.

In Ley v. Visteon Corp., the Sixth Circuit applied the Basic and TSC derived materiality standard to an allegation that a spin-off of Ford failed to disclose material information about its derivation from Ford and its dependent contractual relations with Ford. Applying the standard, the court opined: “[g]iven that the disclosures Plaintiffs propose are merely interpretations drawn from the facts presented in the prospectuses [of the spin-off], and do not actually provide new information, they would not have ‘significantly altered the ‘total mix’ of the information already presented in the prospectuses.’” This usage simply cited the standard and summarily made a conclusion in accordance with it. Such usage appears to be definitional or even synonymous.

In the unpublished case Saxe v. Dlusky, the Sixth Circuit applied the same materiality analysis in facts involving a privately negotiated transaction. The court found, “[b]ased on the professional licenses required to offer professional services . . . , [the defendant] did not make a material misrepresentation to [the plaintiff in stating his opinion] about the significance of her lack of professional licenses.” The court looked to Helwig v. Vencor, Inc., applied Basic, and discussed the narrow instances where opinion can be actionable under materiality standards of 10(b)—where stated opinion is not believed by its speaker and is “not factually well-grounded.” Here, the application of significance looks to be a direct implementation of the TSC derived materiality standard and significant looks to be interchangeable with material.

The Sixth Circuit’s City of Monroe Employees Retirement System v. Bridgestone Corp. includes ample application of the Basic/TSC standard on materiality principally via Helwig and applies it to facts surrounding a declaration of no impairment of Bridgestone assets in an annual report. Here, the Sixth Circuit interchanged its use of significant with important: “[w]e conclude—at a

78. Id.
79. 543 F.3d 801 (6th Cir. 2011).
80. Id. at 808–09.
81. Id. at 809 (emphasis added).
82. Id. at 808–09.
83. See id.
84. 268 F. App’x 438 (6th Cir. 2008).
85. Id. at 439.
86. Id. at 442 (emphasis added).
87. 251 F.3d 540 (6th Cir. 2001).
88. Saxe, 268 F. App’x at 441.
89. 399 F.3d 651 (6th Cir. 2005).
90. Id. at 679.
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minimum—that the probability or reasonable possibility of Firestone’s brand name experiencing a significant asset impairment was not information ‘so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of [its] unimportance.”

The Eighth Circuit addressed the materiality issue in NECA-IBEW Pension Fund v. Hutchinson Technology, Inc., finding that vague statements could not be relied upon by reasonable investors:

Some statements are so vague and such obvious hyperbole that no reasonable investor would rely upon them. The role of the materiality requirement is not to attribute to investors a childlike simplicity but rather to determine whether a reasonable investor would have considered the omitted information significant at the time . . . soft, puffing statements generally lack materiality because the market price of a share is not inflated by vague statements predicting growth. No reasonable investor would rely on these statements, and they are certainly not specific enough to perpetrate a fraud on the market.

Here, the usage of some form of significant and material appear virtually interchangeable or synonymous.

In United States v. Reyes, the Ninth Circuit, though in a criminal case and not a private action, applied the materiality standard from Basic and TSC to facts regarding the misstatement of earnings. The court wrote:

Taking into account the cumulative testimony of the witnesses regarding the materiality of the Company’s misstatement of its earnings, coupled with the information in the Company’s financial statements and SEC filings, and viewing the evidence in the light most favorable to the Government, a rational jury could find that Brocade’s significantly overstated net income and underreported losses were material to investors.

This usage describes the degree of inaccuracy of certain information in a manner difficult to distinguish from the synonymous use of material itself.

91. Id. at 679–80 (emphasis added) (citing Helwig v. Vencor, Inc., 251 F.3d 540, 563 (6th Cir. 2001)).
92. 536 F.3d 952 (8th Cir. 2008).
93. Id. at 960–61(emphasis added) (internal quotations omitted) (citing Parnes v. Gateway 2000, Inc., 122 F.3d 539, 547 (8th Cir. 1997)).
94. 660 F.3d 454 (9th Cir. 2011).
95. Id. at 469. I discuss cases other than private actions where court usage of significant in determining materiality is directly on point with the same issue in private actions.
96. Id. at 470 (emphasis added) (citing Berson v. Applied Signal Tech., 527 F.3d 982, 985 (9th Cir. 2008)).
In SEC v. Global Express Capital Real Estate Investment Fund, the Ninth Circuit applied Basic and TSC, referencing the need to find that an “omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder.” The court stated that, “misstatements and omissions created the false impression that Global Capital was profitable, an impression that would have assumed significance in the deliberations of any reasonable investor.” Here, the usage is a direct application of the materiality standard derived though Basic from TSC; yet, the linkage between significance and material is apparently a fact based conclusion; the addition of “actual” indicating factual verification or conclusion.

In Rockies Fund, Inc., the D.C. Circuit applied the Basic/TSC materiality language, and employed significant in looking at the misclassification of funds and allegedly improper valuation. The court almost summarily opined that the overvaluation of a fund’s largest asset “would have been significant information for potential Fund investors.” This usage appears to be conclusory on facts and synonymous with materiality.

The circuit courts, thus, have used forms of significance in determining materiality both before and after Matrixx in a range of ways or meanings. We are faced, in some instances, with a near tautological use of significance as a definition of material; as a synonym of material; as “actual significance” (apparently meeting an at least implied fact-based standard); as importance (definitional and also at least nearly synonymous); as degree or amount and even near certainty or probability; and, finally, as the recently rejected standard of meeting a statistical threshold, “statistical significance,” all stemming from the TSC language derived through Basic.

97. 289 F. App’x 183 (9th Cir. 2008).
98. Id. at 186 (emphasis added) (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).
99. Id. at 187 (emphasis added).
100. See id. at 186.
102. Id. at 1096–97.
103. Id. at 1097 (emphasis added). Similar direct/quoted usage is found in Benzon v. Morgan Stanley Distrubs., 420 F.3d 598 (6th Cir. 2005).
104. See, e.g., Ley v. Visteon Corp., 543 F.3d 801, 809 (6th Cir. 2011).
106. See, e.g., Sec. Exch. Comm’n v. Global Express Capital Real Estate Inv. Fund, 289 F. App’x 183, 186 (9th Cir. 2008).
108. See, e.g., Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 185 (2d Cir. 2001).
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4. Other Recent U.S. Supreme Court Usage

Albeit in a distinguishable context, the Supreme Court recently looked at the interplay of significant and material in considering the application of the Exchange Act to a foreign listed foreign corporation.\footnote{Robert Morrison v. National Australia Bank Ltd., 130 S. Ct. 2886 (2010).} In \textit{Robert Morrison v. National Australia Bank Ltd.},\footnote{Id. at 2869.} the Supreme Court affirmed the dismissal of a Section 10(b) based complaint regarding shares of a foreign corporation traded on a foreign exchange, finding that the Exchange Act did not apply to extraterritorial transactions.\footnote{Id. at 2883.} In its discussion, the Court considered applying a test of whether “acts of material importance” performed in the United States ‘\textit{significantly contributed}’ to [the] result [of losses to US investors abroad].\footnote{Id. at 2879 (emphasis added).} The Court also considered the “\textit{significant and material conduct}” test providing that violation of 10(b) be found “when the fraud involved significant conduct in the United States that is material to the fraud’s success.”\footnote{Id. at 2886 (emphasis added).} In his majority opinion, Justice Scalia not only found no textual support for the latter test and no reason to apply the prior test, but also that the focus of the deception at the heart of the fraud (in the instant case, Florida) did not determine the application of the Exchange Act.\footnote{Id. at 2884.} Yet, the Court’s very consideration of these tests again supports the near synonymous usage of significant and material in the consideration of Section 10(b) violations.\footnote{See Elizabeth Cosenza, \textit{Paradise Lost: § 10(b) after Morrison v. National Australia Bank}, 11 CHI. J. INT’L L. 343, 386 (2011) (“The correct standard for the transnational application of § 10(b) is the one proposed by then-Solicitor General Elena Kagan in the Government’s amicus brief to the Supreme Court. Under that standard, a transnational securities fraud violates § 10(b) when the fraud involves significant conduct in the US that is material to the fraud’s success \textit{and} that fraud directly caused the plaintiff’s injury. This standard strikes the proper balance between advancing § 10(b)’s remedial objectives and conserving the scarce resources of US courts and law enforcement authorities for regulation of securities fraud that has a substantial connection to the US. The Solicitor General’s standard is also consistent with the presumption against extraterritoriality and the \textit{Charming Betsy} rule, and fits in neatly with the larger mosaic of recent Supreme Court securities fraud jurisprudence….” (citations omitted)).}

B. Matrixx Redux

In \textit{Matrixx}, of course, the Supreme Court spoke further on significance.\footnote{See Siobhan Innes-Gawn, \textit{The Significance of it All: Corporate Disclosure in Matrixx Initiatives, Inc. v. Siracusano}, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 174 (2011).} The decision was anticipated as an opportunity to adopt a bright line standard and to
greatly impact the active and charged realm of pharmaceutical class actions.\textsuperscript{118} No great guidance came forth. No enhanced parsing out of the materiality element generally resulted. Justice Sotomayor clarified for us that significance, at least in a context concerning the alleged loss of smell, or anosmia, resulting from use of certain cold medicine, Zicam (containing zinc), may in fact be found where information has “plausibly indicated a reliable causal link” and need not meet a standard of “statistical significance.”\textsuperscript{119} Yet, we are left in essence with broad circuit variation on precise definition of materiality.\textsuperscript{120} This intellectually and practically dissatisfaction jurisprudence leaves us still with a virtual tautology—materiality as significance.

\textit{Matrixx} presented a pharmaceutical industry fact scenario where a decision regarding the materiality of data about a pharmaceutical product was called into question in a class action brought under Rule 10b-5.\textsuperscript{121} The issue required a decision on whether to find a “bright line” rule that statistical significance equated with materiality. The Court rejected the bright line rule under \textit{Basic}’s total mix [standard of significance determining materiality], repudiating \textit{Carter-Wallace} and reasoning, “[g]iven that medical professionals and regulators act on the basis of evidence of causation that is not \textit{statistically significant}, it stands to reason that in certain cases reasonable investors would as well.”\textsuperscript{122} The Court went on:

\begin{quote}
[T]he mere existence of reports of adverse events—which says nothing in and of itself about whether the drug is causing the adverse events—will not satisfy this standard. Something more is needed, but that something more is not limited to \textit{statistical significance} and can come from “the source, content, and reports[].”\textsuperscript{123}
\end{quote}
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So materiality does not equate with a level of statistical significance (or need not be pleaded to equate with such a level). Materiality may be something other than (or be pleaded to be more than) one or more reports of adverse events known to an issuer in order for that issuer to be held liable in failing to disclose material information under Rule 10b-5.

Yet, in rejecting a bright line statistical significance standard of materiality, the Court went on to use “significant” more generally in considering the pleading:

*Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a *significant* risk to the commercial viability of a leading product. . . . Assuming the complaint’s allegations to be true, . . . Matrixx had information indicating a *significant* risk to its leading revenue-generating product.*

The Court continued to employ “significant” in *Matrixx*, other than as statistical significance, more broadly still, even in directly quoting the language from *Basic.*

“As in *Basic*, Matrixx’s categorical rule would ‘artificially exclud[e]’ information that ‘would otherwise be considered significant to the trading decision of a reasonable investor.’” This usage goes to the more general “total mix” analysis from *Basic* and *TSC* outside of the specifics of adverse events known about the drug at issue and more generally concerning the impact on those who might be trading on the issuer’s securities in the market. It appears to call for a fact based conclusion directly tied to the *Basic/TSC* language. It is the essence of the same tautological problem found in circuit court usage.

*Matrixx*, while rejecting the statistical significance bright line standard on materiality, has simply re-presented synonymous usage of significance practically constituting a tautology of significance qua materiality. This usage looks back to the often recited language of *Basic* derived from *TSC* and *Mills* that we have seen repeated in several circuit court opinions, supra. It may be the reflection of the
inevitable fact determinative nature of materiality, explicitly recognized in Basic. Yet, more so, it appears to reflect the inadequacy of language or language usage by the courts to capture a more measurable definition of materiality.132

Circuit court usage of significance ranges from this tautological usage to more nuanced uses—meaning degree or amount, probability, and even near certainty.133 The circuit courts’ various use of significance in defining materiality all have clear roots in Basic, if not TSC and Mills—witness “actual,” “important,” “substantial likelihood” can all be found in these Supreme Court precedents.134 Yet, none appears to give us an understanding of “significant” that truly sets it apart from a tautological trade off with the element of materiality itself—an element that is notoriously amorphous.135 Matrixx has done little or nothing to change or clarify this.

these statements, and they are certainly not specific enough to perpetrate a fraud on the market.”); Saxe v. Dlusky, 268 F. App’x 438, 442 (6th Cir. 2008) (“Based on the professional licenses required to offer professional services through PDS Planning and the compensation scheme employed by PDS Planning, Dlusky did not make a material misrepresentation to Saxe about the significance of her lack of professional licenses.”).

132. Compare United States v. Reyes, 660 F.3d 454, 470 (9th Cir. 2011) (“Taking into account the cumulative testimony of the witnesses regarding the materiality of the Company’s misstatement of its earnings, coupled with the information in the Company’s financial statements and SEC filings, and viewing the evidence in the light most favorable to the Government, a rational jury could find that Brocade’s significantly overstated net income and underreported losses were material to investors.”) with SEC v. Snyder, 292 F. App’x 391, 404 (5th Cir. 2008) (“We held in Fox that the fact that insiders had access to certain forecasts ‘would have supported a finding of materiality.’ In the present case, the jury was entitled to find that the predictions of significant shortfalls in the second quarter was information that a reasonable investor would have found important.” (internal quotation marks omitted)).

133. See supra Part II.A.3.

134. See, e.g., TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (“The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills’ general description of materiality as a requirement that ‘the defect have a significant Propensity to affect the voting process.’ It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”).

135. See Benzon v. Morgan Stanley Distrib., 420 F.3d 598, 609 (6th Cir. 2005) (“Given that the disclosures Plaintiffs propose are merely interpretations drawn from the facts presented in the prospectuses, and do not actually provide new information, they would not have significantly altered the total mix of the information already presented in the prospectuses.” (internal quotations and citations omitted)); see also Rockies Fund, Inc. v. Sec. Exch. Comm’n, 428 F.3d 1088, 1099 (D.C. Cir. 2005) (noting briefly that the misclassification of funds and allegedly improper valuation “would have been significant information for potential Fund investors”).

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C. Hindsight—The Ex Post Perspective on the Ex Ante Determination

Part of the challenge of clarifying the usage of significant qua materiality is bound up with the ex post/ex ante problem. Judgment by a court occurs after some event has led to litigation. In an action under Rule 10b-5, that judgment focuses, at least in part, on the quality of a decision made to disclose or not disclose certain information at a prior time. In making 10b-5 determinations, courts must look back, if you will, to judge that decision often quite some time after it was made—with changed knowledge making the decision look quite different. This looking back is what I am referring to as the ex post perspective on an ex ante determination. It is closely allied with a general problem of hindsight, a subset of which has been explored as the fraud by hindsight doctrine.

For an example of a court’s recognition of the hindsight issue in the securities fraud context, consider the Southern District of New York’s In re Sanofi-Aventis Securities Litigation. The Southern District commented that “[t]he omission of facts that may be material or significant by hindsight does not render their omission at a prior time misleading. This Court must engage in a statement-by-statement analysis to make such a determination at the pleading stage.”

Mitu Gulati, Jeffrey Rachlinski, and Donald Langevoort have traced the development of the fraud by hindsight doctrine since Judge Friendly’s 1978 Denny...
Thomas M. Madden

v. Barber opinion and discussed it together with hindsight bias. They have questioned the role of the fraud by hindsight doctrine as an influence on judges debiasing the effect of hindsight, with some particular attention to assessing materiality and scienter in securities fraud actions. Though their data suggests that the doctrine is most often applied to analysis of the scienter element in securities fraud actions, Gulati, Rachlinski and Langevoort also found ample discussion of the doctrine with regard to the element of materiality. Ultimately, in their “quasi-empirical” study, they found that the doctrine, in practice, is employed as justification for an effort to manage the procedure of securities law cases. That is, the doctrine—prohibiting a finding of fraud by hindsight—is applied by judges as a means to exert procedural control over a given case at the early stages of litigation. Relying on Gulati and company’s assessment, then, it appears that the doctrine is more of a justification for controlling case process leading to outcome, rather than a developed rule applied to substantive facts. Indeed, this scholarship concludes

143. See Rachlinski, supra note 137, at 796 (“The doctrine originates in 1978 with Judge Friendly’s opinion in Denny v. Barber. As with many of the early cases applying the FBH doctrine, Denny involved a bank and loans that turned out badly. As part of a securities fraud claim against the bank, plaintiffs alleged that the bank had engaged in unsound lending practices, maintained insufficient loan loss reserves, delayed writing off bad loans, and undertaken speculative investments. . . . Judge Friendly ruled that merely identifying the disclosure in late 1974 was inadequate to show that the defendants had the requisite state of mind in 1973 and early 1974.” (citations omitted)).
144. Id. at 788 (citations omitted) (“The hindsight bias implicates two distinct elements in securities fraud claims: scienter and materiality. Scienter refers to the state of mind the defendant must possess for there to be a valid fraud claim under the federal securities laws. . . . A material event is one that a reasonable investor would consider important. Here, given the occurrence of some bad event, the judge has to assess whether a prior warning sign should have been recognized (and disclosed).”).
145. Id. at 790–91 (“This distinction between scienter and materiality thus creates a testable prediction. If the FBH doctrine is an attempt to rid securities litigation of the hindsight bias, it should play a more important role in assessments of contingent materiality cases than assessments of scienter. In contrast, if case management is the true goal of FBH, judges would prefer to attack claims of scienter. If a court finds that no reasonable inference of scienter can be made against an individual, the case against that individual ends because the person lacked the intent to commit fraud.”).
146. Id.
147. Id. at 785 (“To restate, the case management hypothesis supposes that judges have developed the FBH doctrine as an attempt to gain control over securities fraud cases. The reference to the biasing effects of hindsight might thus provide only the ostensible justification for departing from the open notice pleading system laid down in the Federal Rules of Civil Procedure. Rather than as a careful effort to control bias, judges are using the real influence of the hindsight bias as a pretext for judging cases on the merits early in the litigation process.”).
148. See id. at 782 (“Despite appearances, it might be unrealistic to suppose that judges have developed this clever adaptation to resolve a psychological phenomenon. Instead, the references to hindsight might be little more than a pretext for legitimizing greater judicial control over securities fraud cases filed in federal court. The FBH doctrine might not really be a well-developed adaptation, but might serve merely as a judging ‘heuristic’ or
that the doctrine has been without any substantive development in the case law. 149

Jeffrey Rachlinski has previously considered in some further depth the nature of hindsight in assessing decision-making among judges. 150 Rachlinski’s scholarship convincingly asserts that,

[i]n hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable, but also to view it as having appeared ‘relatively inevitable’ before it happened. People believe that others should have been able to anticipate events much better than was actually the case. 151

How does this prevalence of hindsight bias among our judges impact the possibility of making fair assessments of decisions on disclosure under Rule 10b-5—i.e. judicial decisions—which must have been made ex ante and not biased by ex post knowledge?

After specifically looking at courts’ treatment of federal securities law issued and “fraud by hindsight,” Rachlinski notes that “[t]he federal courts have adopted a particularly vigorous prohibition against liability based solely on hindsight in cases alleging violations of federal securities laws.” 152 In reviewing securities fraud cases, he focuses on the heightened pleading standards under the PSLRA. He concludes, more generally, that courts do not utilize any generic debiasing strategy, but may have particular mechanisms for reducing or accommodating the bias. 153 The PSLRA legislation was an attempt to address the awareness of the difficulty of judging securities fraud and to mitigate against the ease of bringing frivolous suits. 154
Notwithstanding Rachlinski's recognition of the attempted mitigation, the body of his work leaves us unconvinced that federal courts judging decisions on disclosure in private rights of action under Rule 10b-5 are assessing, or can assess, those decisions on disclosure truly as made ex-ante. Rather, his data, together with others' related work, seems to suggest that some disturbing percentage of judicial decisions on fraud (and other issues) turn, in large part, on hindsight bias—the ex post reality that makes the ex ante decision at issue seem much clearer upon ex post judicial assessment.\(^{155}\)

On this ex post/ex ante notion, the element of materiality is at a nexus with the elements of reliance and causation with the fraud-on-the-market theory.\(^{156}\) While this much discussed and increasingly discredited theory \(^{157}\) is currently before the Court again in *Halliburton*, we are presently concerned with it only as it ties to our more general discussion of materiality.\(^{158}\)

In a fraud-on-the-market case, materiality is the other side of the same coin as reliance. Information that is not material does not affect the stock price or expected returns and so would not cause a reasonable investor to buy or sell a security. In other words, plaintiffs who cannot prove materiality cannot prove transaction causation. Under a fraud-on-the-market theory, transaction causation and reliance are collapsed; in an efficient market it is

Litigation Reform Act (the PSLRA, the Act, or the Reform Act). The Reform Act was designed to address a number of perceived abuses in these cases. In large part, its solution was to create a series of procedural hurdles that make it more difficult for plaintiffs' attorneys to bring and maintain nonmeritorious securities fraud class actions.\(^{155}\).


\(^{158}\) Booth discusses materiality both in terms of a reasonable investor and having a price impact vital in applying the fraud-on-the-market theory. Booth, supra note 1, at 520–21. He also notes that many circuit courts conflated the two meanings. Id. at 553.
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presumed that an investor would not knowingly buy a security at a price higher than its true value.\textsuperscript{159}

The elements of reliance, causation and materiality, then, are inextricably linked, particularly when applying the fraud-on-the-market theory.

The fraud-on-the-market doctrine helped make material information mean essentially the same thing as information that was likely to change the market price. In terms of giving management guidance on what to say, this meant that management could omit details that would not affect the price of its stock. \textit{One problem with this rule is that there is an expected, or ex ante effect versus an ex post effect.} Management may legitimately believe that information it did not report would have no effect on their employer’s stock price only to be surprised by a price decline upon its disclosure.\textsuperscript{160}

Assuming efficient markets under the efficient capital markets hypothesis (“ECMH”), once the market price has moved subsequent to disclosure, are we still able to judge the materiality or the related significance of information factored into the disclosure decision fairly, as though we do not have any altering subsequent knowledge as to how the market or stock price actually did or did not move? The hindsight problem is a real one in defining materiality in a meaningful way that sets a measurable standard.\textsuperscript{161} Materiality as significance is not enough. The reach of this tautological problem is so broad that it enters into the reliance and causation elements and further erodes the ECMH.\textsuperscript{162}

In \textit{Basic}, the Supreme Court concluded that “[t]he idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the open market price reflects as nearly as possible a just price.”\textsuperscript{163} This belief in the market achieving

\textsuperscript{159} Dunbar, supra note 156, at 507.

\textsuperscript{160} Id. at 511 (emphasis added).

\textsuperscript{161} Rachlinski, supra note 137, at 816 (“In cases in which contingent materiality is an issue (essentially all cases in which materiality is an issue in dispute), the contemporaneous evidence that courts assert they must assess is precisely the evidence that the hindsight bias will influence. The unripe information that plaintiffs allege to be material is always contemporary and hence always fair game for the courts to consider.”).

\textsuperscript{162} Dunbar, supra note 156, at 469 (“Because material information is defined as information that would affect the transaction decision, if that information is impounded in a stock price, then the stock price itself provides the evidence as to whether the information would generally affect transaction decisions. As has been noted by various courts, under the efficient market theory, materiality and transaction causation often blend together: if a stock price is statistically different from where it would be in the absence of fraud, then the relevant information was both material to the price and can be presumed to have caused the transactions at that price.”).

a “just price” is the assumption of the ECMH built into the fraud-on-the-market-theory. 164

Indeed, the Basic Court explained,

[we need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.] 165

We should keep in mind, however, that the presumption of reliance can be rebutted by a rather low threshold showing that “severs the link” between a disclosed misrepresentation and resultant price or decision to trade. 166

Since Basic, federal courts have conflated the Rule 10b-5 reliance element with causation as assumed in the adoption of the fraud-on-the-market theory and the ECMH, such that if market prices move in reaction to disclosure, reliance may be assumed. 167 Here, of course, our concern is not with the element of reliance, but with materiality, and our discussion of the fraud-on-the-market theory is conducted with only materiality in mind.

164. See Donald C. Langevoort, Basic at Twenty: Rethinking Fraud on the Market, 2009 WIS. L. REV. 151, 153 (2009) (“[The] fact-specific, ex post emphasis on assessing importance to the reasonable investor has been followed faithfully by the lower courts [since Basic], though critics still carp at its indeterminacy.” (citations omitted)); see also Dennis, supra note 163, at 419 (“The legal test of materiality is consistent with this Article’s suggested approach. Both TSC Industries and the efficient market model recognize that investors react to a total mix of information. The model quantifies the total mix concept. The price signaling mechanism represents the transmittal of a complete information set of publicly available data.”); Richard C. Sauer, The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws, 82 BUS. LAW. 317, 323–24 (2007) (noting that stock prices will change when investors receive material information).


166. Id. at 248 (“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. For example, if petitioners could show that the ‘market makers’ were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone.”).

167. Dunbar, supra note 156, at 458 (“The fraud-on-the-market theory left these requirements intact, but allowed for a presumption of reliance if the security traded in an efficient market. The reasoning behind this . . . was that all investors rely on the market price when making a purchase decision, so that if the market price reflected the effects of an omission or misstatement, then every investor could be presumed to have relied on information that incorporated that omission or misstatement.”).
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One manner in which to attempt a fair assessment of materiality ex post is to look at market reaction to disclosed information through an “event study.” Findings of abnormal returns in event studies are checked against statistical significance to determine the impact of chance or patterns on market pricing versus the disclosed information. Macey and company argue that market reaction should be measured regardless of market efficiency or inefficiency, though Basic limits the reliance presumption in the fraud-on-the-market theory to the context of efficient markets—adopting the ECMH.

Deciding whether or what to disclose post-Basic, assuming efficient markets, requires an ex ante decision as to what will move those efficient markets. It is akin to assessing whether the information at issue is likely to have a measurable effect on the market. Though it is bound up with the reliance and causation elements involved in the fraud-on-the-market theory, we can view this, again, as a decision about materiality. How can we fairly judge that an ex ante decision as to what will move the markets after the disclosure or nondisclosure, after a stock price has or has not moved?

In In re Merck & Co. Securities Litigation, the Third Circuit wrestled with the application of the efficient market hypothesis in considering the plaintiff’s allegation that change in market price “dropped significantly” in reaction to press attention to accounting practices relating to the wholly owned subsidiary Merck was spinning off in an IPO, and found that Merck’s disclosures or lack of disclosure did not leave “every analyst in the dark.” While the court delved into the materiality definition under its Section 11 discussion, its analysis is germane to Section 10(b): “in efficient markets materiality is defined as ‘information that alters

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168. See Jonathan R. Macey et al., Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of Basic v. Levinson, 77 VA. L. REV. 1017, 1029 (1991) (“The idea behind event studies is simple. To test whether and how much a stock price has reacted to news, the researcher examines to what extent the return on the stock in the period when the market receives the news (the actual return) differs from what the return would have been without the news (the predicted return).”).

169. Id.

170. See id. at 1027 (“Capital markets are almost surely inefficient. The market-efficiency hypothesis, that security prices fully reflect all available information, is an extreme null hypothesis, a point on a continuum, and so almost surely false. The interesting task is not to accept or reject market efficiency but to measure the extent to which the behavior of returns departs from its predictions. We can then make informed judgments about the scenarios where market efficiency is a good approximation and those where some other model is a better simplifying view of the world.” (citations omitted)).

171. Rachlinski, supra note 150, at 572 (“The [hindsight] bias can cause judges and juries to find liable even those defendants who attempted to avoid negligence by undertaking all reasonable precautions in foresight. Not only does this seem unjust, but it also might have adverse economic consequences. Any potential defendant who is aware of the implications of the hindsight bias might try to avoid liability by taking an excess of precautions. The hindsight bias thus suggests a problem with the law and economics of negligence.”).

172. 432 F.3d 261 (3d Cir. 2005).

173. Id. at 268–71.
The court reached this conclusion in two steps. First, the court noted that “reasonable investors” are the market. Second, information that is important to the market will be reflected in the stock’s price. Thus, “information important to reasonable investors . . . is immediately incorporated into stock prices.” The court further noted that the change in stock price could be looked at “post hoc.” The use of significant, here, assesses the move in the market. It really refers to an amount.

Perhaps the most criticized aspect of the fraud-on-the-market theory is that it assumes efficient markets. Many have taken issue with this assumption—at least with the form of it adopted in Basic—with some more recent substantive criticism of it coming from behavioral economists.

[T]he real question is whether the theories developed in behavioral finance present specific reasons why material news and significant stock price movements should not be considered as mirror images of one another. In an efficient market, one can measure the value that some information has to the average market participant by measuring the change in stock price caused when that information is revealed to the market. Because the stock price is the present value of future cash flows in an efficient market, changes

174. Id. at 274.
175. Id.
176. Id.
177. Id.
178. Id. (“If a company’s stock trades on an efficient market, we measure materiality under the Burlington (as ratified in Oran) standard. Thus, ‘the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm’s stock.’”).
179. See, e.g., Macey, supra note 168, at 1027 (“The market-efficiency hypothesis, that security prices fully reflect all available information, is an extreme null hypothesis, a point on a continuum, and so almost surely false.”).
180. See id. at 1018 (“We suggest that the focus of the Supreme Court’s holding in Basic is misplaced: what determines whether investors were justified in relying on the integrity of the market price is not the efficiency of the relevant market but rather whether a misstatement distorted the price of the affected security.”).
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in the expected level of those cash flows will impact the stock price, while news that does not matter to investors’ views about cash flows will not impact the stock price. Thus, there is a direct link between what is material to an investor and the way that a stock price responds to a disclosure of information in an efficient market. Unfortunately, that link does not necessarily hold if the market is not efficient. 182

Thus, the ex post/ex ante problem resides as well with assessing decisions about disclosure based upon the likelihood that that information will affect the efficient market. While this assessment links primarily to causation and reliance, it in essence invokes a materiality analysis as to market affect. 183 Judging any ex ante decision on disclosure is difficult to isolate after the ex post market movement or lack of movement has occurred. 184 Significance may enter into this conundrum, with materiality assessing the significance and/or materiality of market movement. 185 Indeed, the standard cited in Merck is difficult to comprehend other than as an entirely ex post judgment that retroactively determines materiality at the ex ante disclosure decision based on the significance of any subsequent market movement.

182. Dunbar, supra note 156, at 507–08.
183. See id. at 468 (“[O]ne can ask the economic question of how a change in investors’ decisions to trade at a given price could be observed. The straightforward answer is that if the information would cause more investors to want to buy at a particular price, the previous supply-and-demand equilibrium would be upset and the price would have to rise until the demand for the stock once again equaled its supply. This, of course, says that materially positive news causes a stock’s price to rise. If the information is not material, then investors’ decisions to buy or not are unaffected, and the previous supply-and-demand equilibrium will still hold. Therefore, there is an economic equivalence between information material to investors’ decisions to buy and sell and the price of a security.”).
184. Id. at 508 n.199 (“If underreaction is a general phenomenon, then news that will ultimately impact the stock’s price may sometimes turn out to have an understated impact in the short run, with the implication that some material news will have such an understated impact that the associated price movement is not statistically significant. Therefore, by examining only the short-run impact of the response to certain news, one would erroneously misclassify some material information as immaterial. To the extent that there is short-run overreaction, then the reverse would be true: some news that is generally immaterial would be erroneously classified as material by looking at the excessive short-run price movement.”).
185. Id. at 509 (“The other half of the story is the possibility that immaterial information causes a sharp decline in the price of an individual stock or an entire sector of securities. The definition of immaterial information in this analysis is that it is already known or, as before, it does not have a statistically significant effect on stock price in an efficient market. When the market is not efficient, however, the normal conditions for interpreting the valuation component of an event study are not present. If investors are not basing their price forecast on future cash flows alone, but instead they are, for example, herding after others or responding to momentum in the price, immaterial information about the issuer of the security may well have a significant effect on the price.”).
Materiality is an element of crucial importance in finding violations of Rule 10b-5. The Supreme Court’s *Matrixx* decision rejected a bright line standard equating statistical significance with materiality, and in doing so, passed not only on an opportunity to define a bright line standard apropos of statistics in pharmaceutical class actions, but also on the opportunity to provide more than a tautological definition of the element of materiality generally. Other Supreme Court and circuit court usage of significance indicates that significance, while a term central in case law defining materiality, has essentially been employed tautologically, with only some nuance.

Circuit court usage of significance ranges from that of pure definition or synonym; to meanings of importance, degree or amount, near certainty, probability and fact based actual significance—all uses having a clear lineage in *Basic* and back to *TSC* and *Mills*. *Matrixx* has reinforced the legitimacy of this general usage, but has not furthered any clarity in such usage. Until further clarity comes, usage of significance is likely to be recited in finding materiality, but remains tautological and subject to conclusory judicial finding.

The concern with ex post judgment on assessing the legality of ex ante disclosure or non-disclosure under Rule 10b-5 is a concern that many understand to be inherent in the nature of the elements of a 10b-5 private action. This problem is not likely to go away. Nor is it likely to be solved by the usage of forms of significance in finding materiality.

This discussion should call to our attention the use and the limits of language, particularly forms of significance, in fleshing out the rather amorphous element of materiality. Perhaps it may also contribute to greater care in avoiding the pitfalls of hindsight and applications of the fraud-on-the-market theory with greater attention to the ex post/ex ante problem.

We could do better by emphasizing the probability magnitude test component to the standard set out in *Basic*. This affirmed portion of the circuit court split that *Basic* addressed seems to have been slighted, if not buried, by the use of significance and the ubiquitous “reasonable investor” “total mix” language.
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The Second Circuit’s In re ProShares Trust Securities Litigation, together with a few other circuit opinions, which have made at least a passing reference to the test, show that emphasizing the probability magnitude language better captures the predictive notion of ex ante decision making about what is material and what need be disclosed.

We need a standard more measurable than “significant.” Rather than offering a mere tautology, a re-emphasis of the probability magnitude test phrasing would give better guidance and would direct the courts toward a careful assessment of facts that would contribute toward developing a more definite ex ante, if not bright line, standard.


194. See supra Part II.A.3.