On the Record with Robbins Geller Rudman & Dowd LLP

Spring 2018

Read the Latest Breaking News and Stories About Corporate Governance

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The Latest in the Nationwide Fight Against the Opioid Epidemic

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A Note from Samuel Rudman

We continue to advocate for investors and consumers around the world, obtaining several key precedents favorably impacting institutional investors. In *Cyan, Inc. v. Beaver County Employees Retirement Fund*, a case led by Robbins Geller, the U.S. Supreme Court recently issued a unanimous opinion holding that state courts continue to have jurisdiction over investor class actions asserting violations of the Securities Act of 1933. In addition, Robbins Geller's in-house appellate team recently obtained key decisions in the Second and Ninth Circuit Courts of Appeal preserving favorable class certification and loss causation standards that will help future classes of aggrieved investors and consumers.

We are also at the forefront of efforts to address the horrors of the nationwide opioid epidemic that public health officials have called the worst drug crisis in American history. Name partner Paul Geller is on the team of elite lawyers spearheading coordinated lawsuits related to the crisis and the Firm is honored to have been selected by dozens of cities and counties to lead the effort to prosecute these cases and construct a lasting solution to this scourge.

In January 2018 Robbins Geller was named as one of the nation's Top Securities Practice Groups – the only plaintiff's firm so recognized – by *Law360*. *Chambers USA* dubbed the Firm "the leader in the battle against corporate securities fraud." We are proud of the Firm's continued success on behalf of our clients.

That said, our ability to protect investors from corporate wrongdoers is currently threatened by a campaign spearheaded by the U.S. Chamber of Commerce to implement mandatory arbitration provisions in connection with the public offering of securities. The widespread adoption of mandatory arbitration provisions would effectively eliminate investors' ability to seek judicial redress for fraud and misrepresentations caused by corporate insiders. We urge each of you to inform yourselves about these efforts, which undermine the security of our public markets. It is important that you take action to ensure such measures designed to shield wrongdoing from public view do not become part and parcel of share ownership in the United States.

Robbins Geller looks forward to continuing to work with you to protect your plan's assets in the months and years to come.

FEATURES

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Robbins Geller's Client Achieves Unanimous Victory at U.S. Supreme Court

On March 20, 2018, the U.S. Supreme Court issued a unanimous opinion in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, No. 15-1439, holding that state courts continue to have jurisdiction over class actions asserting violations of the Securities Act of 1933. The Court's ruling secures investors' ability to bring 1933 Act claims in either state or federal court when companies fail to make full and fair disclosure of relevant information in offering documents. The Court confirmed that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") was designed to preclude securities class actions asserting violations of state law – not to preclude securities class actions asserting violations of federal law brought in state courts.

In the underlying case, Cyan, a telecommunications company, allegedly made false statements in its offering documents about the company's customer base and likely future sales. When the truth was subsequently disclosed, Cyan's stock lost almost half of its value. Consistent with state courts' longstanding jurisdiction, investors brought a class action in San Francisco Superior Court alleging that Cyan's false statements made in connection with its initial public offering violated Section 11 of the 1933 Act. Cyan moved to dismiss the case on the ground that SLUSA eliminated state court jurisdiction for such class actions. The trial court rejected this contention, relying on an earlier California Court of Appeal decision holding that the SLUSA provisions do not preclude the ability of state courts to hear 1933 Act class action cases – SLUSA's purpose, rather, was to thwart securities fraud class actions brought under state law that were being pursued as a way to evade certain restrictions imposed by the Private Securities Litigation Reform Act of 1995.

Cyan challenged the trial court's ruling by filing a writ in the California Court of Appeal and a petition for review in the California Supreme Court, both of which were rejected. It then sought review before the U.S. Supreme Court.

Through the opinion, the Supreme Court reaffirmed the ability of state courts to adjudicate 1933 Act class action cases, holding that "SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations."

At the time of its enactment, President Franklin D. Roosevelt explained that the 1933 Act was designed to "bring back public confidence" in securities offerings by "put[ting] the burden of telling the whole truth on the seller" in such offerings. Congress implemented this objective by allowing injured investors to file private actions under the 1933 Act in either state or federal court. The decision has affirmed the ability of investors to rely on state courts, as well as federal courts, as a legitimate forum for pursuing class action remedies when companies provide false and misleading information to investors.

"The Supreme Court's unanimous opinion makes clear that investors continue to have an important remedy in state courts when companies fail to come clean in connection with public offerings," noted Robbins Geller partner **Andrew S. Love**, who represented plaintiffs **Beaver County Employees Retirement Fund, Retirement Board of Allegheny County** and **Delaware County Employees Retirement System** in the U.S. Supreme Court and in the California appellate courts.

Robbins Geller attorneys **Darren J. Robbins**, **James I. Jaconette**, **James E. Barz**, **Andrew S. Love** and **Kenneth Black** are counsel to the plaintiffs/respondents in *Cyan Inc. v. Beaver County Employees Retirement Fund.*

Securities Group of the Year

In naming Robbins Geller as one of the nation's top Securities Practice Groups of the Year for 2017, *Law360* released a detailed profile on the Firm, noting its drive to obtain an "optimum result" for its clients, which "set[s] it apart from other securities litigation shops."

As the only plaintiff's firm named, the profile lauds Robbins Geller for "cement[ing] its reputation as a go-to firm for harmed investors" and recognizes certain of the Firm's recent cases, including those against Household International (now HSBC), Community Health Systems and Dana Corp., as demonstrating why the Firm is one of the nation's top securities practice groups.

Referencing the record *Household International* case, which yielded a $1.575 billion recovery, partner **Darren Robbins** explained that the case involved "spending more than $34 million [and] going toe-to-toe with a long list of prominent defense firms." The recovery is the largest ever following a securities fraud class action trial, the largest securities fraud settlement in the Seventh Circuit and the seventh-largest settlement ever in a post-PSLRA securities fraud case. Ultimately, the case encapsulates the Firm's strongest attributes and "our commitment to the clients, not giving up, not settling early, not settling on the cheap, and obtaining an optimal result," Robbins added.

Robbins Geller partner **Luke Brooks**, one of the lead attorneys on the *Household International* case, noted that at every turn, the trial team "demonstrated to [defendants] that this was something they couldn't escape with a nominal payment."

Law360 also highlighted Robbins Geller's excellent work in *Community Health Systems,* which provided unprecedented corporate governance reforms and a $60 million cash payment. Robbins pointed out to the publication that "settlements that call for corporate governance reforms have become a hallmark of [our] practice."

"Not only did investors get $60 million in the Community Health deal, but a stronger voice in the company's direction, with two directors on its board," wrote *Law360*. "The settlement required members of the board's compensation committee to be independent directors and created a clawback scheme that required the recovery of compensation paid to the company's top officers if its accounts were restated, among other changes."

Additionally, the publication noted the Firm's victory in securing a $64 million recovery for the class in *Plumbers & Pipefitters National Pension Fund v. Burns* (the *Dana Corp.* case), which included "two trips to the Sixth Circuit" and 11 years of hard-fought litigation.

"Robbins Geller attorneys also notched an important win in a fight with software maker Quality Systems Inc.," *Law360* noted, and explained that the Firm is currently "representing plaintiffs in potentially groundbreaking securities actions against Theranos and Uber Technologies Inc., both highly valued private companies that have seen their valuations drop in the wake of corporate scandals."

"As the defendants find new ways to commit fraud, we're going to find new ways to hold them accountable," Brooks stated, succinctly summarizing the Firm's ethos in protecting victims of securities fraud.

Robbins Geller Wins Appeal in the Second Circuit for High Frequency Trading Investors

On December 19, 2017, the U.S. Court of Appeals for the Second Circuit ruled in plaintiffs' favor in the so-called "High Frequency Trading" securities fraud case, reversing the district court's prior dismissal of the action and vacating the judgment that the lower court had entered in defendants' favor.

The underlying case charges assorted national securities exchange defendants with violating §10(b) of the Securities Exchange Act of 1934, alleging that they engaged in a scheme and wrongful course of business that was designed to, and did, manipulate the U.S. securities markets and the trading of equities on those markets. In a nutshell, the complaint alleges that the exchanges engaged in manipulative conduct by creating high-priced products and services specifically designed for their favored high-frequency trading customers. The manipulative conduct diverted billions of dollars annually from ordinary investors who bought and sold securities on the defendants' securities exchanges. **City of Providence, Rhode Island** and **Plumbers and Pipefitters National Pension Fund** are serving as lead plaintiffs, along with other institutional investors, in the action.

Following appellate briefing and oral argument in the summer of 2016, on August 25, 2016, the Second Circuit requested that the Securities and Exchange Commission ("SEC") file an *amicus curiae* brief setting forth the agency's views on (i) "whether the district court had subject-matter jurisdiction over the case," and (ii) "whether defendants-appellees have absolute immunity from suit arising from the challenged conduct." At the SEC's request, Robbins Geller attorneys, together with co-counsel, traveled to Washington, D.C. and presented arguments to the agency, urging it to support plaintiffs' case. Defendants were invited to argue their side as well. Following the presentations by both sides, the SEC filed its *amicus curiae* brief on November 28, 2016, answering both of the above questions in plaintiffs' favor. With regard to the first question, the SEC stated that it believes "the securities laws do not divest the district court of subject matter jurisdiction over this case." With regard to the second question, the SEC told the court that the defendant exchanges "are not entitled to absolute immunity from suit for the challenged conduct."

Agreeing with both the plaintiffs and the SEC, a three-judge Second Circuit panel reversed the dismissal on December 19, 2017 in a unanimous published decision spanning 35 pages. Writing for the court, Circuit Judge John M. Walker, Jr. stated: "We conclude that we have subject matter jurisdiction over this action and that the defendants are not immune from suit. We further conclude that the district court erred in dismissing plaintiffs' complaint for failure to state a claim." The appellate panel further stated that plaintiffs had sufficiently alleged that the defendant exchanges had engaged in manipulative or deceptive conduct forbidden by the Securities Exchange Act, and that the lower court had erred in holding that the exchanges' conduct rose, at best, to mere aiding-and-abetting. Instead, the panel held that plaintiffs had sufficiently pleaded that "the exchanges created a fraudulent scheme that benefited [high-frequency trading] firms and the exchanges" themselves, while "fail[ing] to fully disclose to the investing public how those products and services could be used on their trading platforms."

The Second Circuit then vacated the district court's entry of judgment for the defendants and remanded the case to the district court for further proceedings.

Robbins Geller appellate partner **Joseph D. Daley**, who briefed and argued the appeal, applauded the Second Circuit's ruling: "The win for our pension fund clients and other ordinary investors is especially gratifying because our team was able to convince not only the Second Circuit, but also the SEC, that our position was the correct one."

In addition to Daley, Robbins Geller attorneys **Samuel H. Rudman**, **Patrick J. Coughlin**, **David W. Mitchell**, **Brian O. O'Mara**, **Randi D. Bandman**, **Mary K. Blasy**, **Vincent M. Serra** and **Lonnie A. Browne**, along with co-counsel, obtained this result for investors.

City of Providence, Rhode Island v. BATS Global Markets, Inc., No. 15-3057, Opinion (2d Cir. Dec. 19, 2017).

Robbins Geller on the Front Line in the Fight Against the Opioid Epidemic

Public health officials have called the nationwide opioid epidemic the worst drug crisis in American history. According to the Centers for Disease Control and Prevention, "Overdose deaths involving prescription opioids were five times higher in 2016 than 1999," and sales of these prescription drugs have quadrupled. "From 1999 to 2016, more than 200,000 people have died in the U.S. from overdoses related to prescription opioids."[1] Several pharmaceutical companies, including Purdue Pharma, Teva Pharmaceuticals USA Inc., Johnson & Johnson and Endo Health Solutions Inc., are at the center of the crisis for allegedly using Big Tobacco-style marketing of prescription drugs to increase sales, leading to widespread addiction and otherwise avoidable deaths. Leading the fight against the pharmaceutical manufacturers, distributors and retail pharmacies responsible for creating and perpetuating this epidemic, Robbins Geller has been hired to represent municipalities and Taft-Hartley Plans throughout the nation, including several of the country's largest cities and counties. One of the Firm's founding partners, **Paul J. Geller**, has been appointed to the team of elite lawyers spearheading more than 450 coordinated lawsuits in the multi-district litigation captioned *In re National Prescription Opiate Litigation*. Recently, the presiding Judge, the Honorable Dan Aaron Polster, selected six of the lawsuits to serve as "bellwether" cases, placing them on an expedited schedule. Two of the six involve Robbins Geller clients – Broward County, Florida and Monroe County, Michigan.

"Our firm is committed to holding opioid manufacturers and distributers accountable for their fraudulent marketing of opioids, which has fueled the worst drug scourge ever," said partner **Mark J. Dearman**, who is working on the litigation seven days a week.

"The defendants' massive nationwide campaign of false marketing, and their failure to report suspicious sales as required by law, resulted in dramatic increases in prescribing which advanced in lockstep with overdose deaths," said partner **Aelish M. Baig** who, along with Geller and Dearman, leads the Robbins Geller opioid team. Robbins Geller and co-counsel filed the first lawsuit in Michigan regarding the crisis, on behalf of Wayne and Oakland County, as well as the first lawsuit in Arizona (on behalf of Phoenix) and the first federal lawsuit in Florida (on behalf of Delray Beach).

The team also filed on behalf of the City of Los Angeles. L.A. City Attorney Mike Feuer said he filed the lawsuit because manufacturers and distributors encouraged doctors to prescribe the potent painkillers while downplaying the addictive nature of the drugs, all while failing to report suspicious sales. "I will not let Los Angeles become the next West Virginia or Ohio when it comes to the devastating effects of the opioid crisis," he said at a May 3, 2018 news conference announcing the lawsuit. Most recently, Robbins Geller was hired by Marin County and a suit was filed in the U.S. District Court in San Francisco. The Marin County case will be transferred to the multi-district litigation.

In the United States, more than 47,000 people died in 2014 due to drug overdoses, and that number surpassed 52,000 in 2015 and 63,000 in 2016. Michigan healthcare providers wrote 11 million prescriptions for opioid drugs in 2015 and an additional 11 million in 2016 – more annual opioid prescriptions than Michigan has residents. "We see the devastation every day in our hospitals, in our jails and at the morgue, and it's getting worse. There has to be a price to be paid when corporations show such disregard for human life," said Executive Warren C. Evans of Wayne County, which saw opioid-related deaths increase from 478 to 506 between 2013 and 2015. In 2016, that number reached 817 – more than 32 overdose deaths for every 100,000 residents. Oakland County Executive L. Brooks Patterson added, "The opioid industry put profits over people and now people are paying the price, some with their lives."

Rising numbers of opioid-related deaths can easily be tracked throughout the cities and counties that have thus far retained Robbins Geller to represent them against these opioid manufacturers and distributors. According to *The Washington Times*, the Montgomery County Council's Office

[1] https://www.cdc.gov/drugoverdose/data/overdose.html

of Legislative Oversight conducted a study this summer, finding that the County has had "sharp increases" in drug-related deaths in recent years, and according to the Maryland Department of Mental Health and Hygiene, "there were 1,856 opioid-related deaths in 2016, a 70 percent increase over 2015," in Maryland.[2]

"The biggest thing we're looking for is an injunction against these distributors to force them to do what they're supposed to be doing," said Maryland's Talbot County Council President Jennifer Williams after selecting Robbins Geller to represent Talbot County in the lawsuit.[3] Talbot County Attorney Anthony Kupersmith noted that when selecting Robbins Geller, he and Assistant Attorney Mary O'Donnell looked for "experience, a track record of successful outcomes in these larger litigation cases, a firm that has the resources to fight this fight against a group that has very deep pockets and that has representation from their firm on the settlement committee and the executive committee of the MDL." Kupersmith added, "Several other Maryland counties also have decided to work with Robbins Geller, so we're very excited about the opportunity . . . ."

"Our investigation has revealed that manufacturers intentionally misled prescribers, patients and the public regarding the appropriate uses, risks, safety and efficacy of prescription opioids," Baig told *The Washington Times*.

Counties affected the most by opioid-related deaths also deal with significant financial consequences as a result of over-prescription and addiction, including increased law enforcement and judicial expenditures, increased jail and public works expenditures, increased substance abuse treatment and diversion plan expenditures, increased emergency and medical care services expenditures, and lost economic opportunity. For instance, according to a recent study by Urban Institute, "Between 2011 and 2016, spending on Medicaid-covered prescriptions used to treat opioid addiction and overdoses increased from $394 million to $930 million, an average annual increase of 19 percent. Spending grew faster in later years, with a 30 percent increase between 2015 and 2016."[4]

"Cities, like ours, face immeasurable human tragedies and escalating, multi-million dollar fiscal impacts due, in part, to the negligence and fraud of opioid manufacturers and distributors who reaped billions while knowingly, if not intentionally, spawning the current and next generation of opioid addicts," said Robbins Geller client Cary D. Glickstein, Mayor of Florida's Delray Beach. "We look forward to our day in court to redress the financial damages our taxpayers have been forced to shoulder."

The team of lawyers that was appointed by Judge Polster, including **Paul J. Geller**, "reads like a 'Who's Who' in mass torts," according to *The National Law Journal*. According to *Law360*, the smaller appointed group of negotiators is "split into two camps: seven attorneys representing local governments that allege grievous financial harm from the opioid crisis, and 11 attorneys representing opioid manufacturers and distributors. Their assignment is daunting: broker a quick and meaningful deal that earmarks money for health care and law enforcement, while also helping to curb opioid prescribing and abuse."[5]

> "The opioid epidemic is a public health crisis, and fighting the manufacturers and distributors who are largely responsible for it will be a privilege. Every day, 90 Americans die from an opioid overdose. It's time to put an end to that," said Geller.

When asked about his appointment, Geller said: "I'm honored to have been selected among this exceptional group of lawyers. The opioid epidemic is a public health crisis, and fighting the manufacturers and distributors who are largely responsible for it will be a privilege. Every day, 90 Americans die from an opioid overdose. It's time to put an end to that."

"I believe that (Robbins Geller) have what we need to be successful," Maryland's Talbot County Council Vice President Corey Pack succinctly told *The Star Democrat*.[6] "This problem is not going to go away. It's not all about dollars and cents, but it's about holding those companies accountable for the fraud they've perpetrated on the American people."

Robbins Geller partners **Paul J. Geller**, **Mark J. Dearman**, **Aelish M. Baig**, **Thomas E. Egler** and **Matthew S. Melamed**, along with associates **Dory P. Antullis**, **Carissa J. Dolan**, **Ricardo J. Marenco**, **Sabrina E. Tirabassi** and **Bailie L. Heikkinen**, are leading the Firm's litigation efforts on behalf of cities and counties around the country.

2 https://www.washingtontimes.com/news/2017/dec/13/robbins-geller-rudman-dowd-say-big-pharma-misled-c/
3 http://www.stardem.com/news/local_news/talbot-joins-opioid-lawsuit/article_8f68b1b4-d5c7-5a02-ac85-65b242cab4a4.html
4 https://www.urban.org/research/publication/rapid-growth-medicaid-spending-medications-treat-opioid-use-disorder-and-overdose
5 https://www.law360.com/articles/998904/meet-the-attys-at-the-opioid-mdl-s-negotiating-table
6 http://www.stardem.com/news/local_news/talbot-joins-opioid-lawsuit/article_8f68b1b4-d5c7-5a02-ac85-65b242cab4a4.html

CORPORATE GOVERNANCE ROUNDUP

After Parkland Shooting, CEOs Respond More Quickly than Politicians

Professor Jeffrey Sonnenfeld wrote in *Fortune* about what CEOs are doing and should do about their affiliation with the NRA.[1] He correctly sees it as only secondarily about "corporate citizenship." Primarily, it is about their brand. He compares it to the CEOs who quit President Trump's advisory committee after he refused to condemn the Nazis and KKK.

> Several fast-acting companies have severed ties with the NRA, but is addressing such a problem the role of business?
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> * * *
>
> Instead of fearing boycotts for snubbing the gun lobby, many business leaders now fear the opposite backlash, as those with continuing NRA ties are showcased by public safety advocates. And 66% of consumers believe it is important for brands to address socio-political issues like gun control. Nonprofits are taking to social media to encourage media and tech companies to block NRA ads. #BoycottNRA was the number one trending topic on Twitter Friday in the United States.
>
> Akin to the business leadership response to Merck's Frazier, the cracks in the dam spread slowly at first, and then there is a groundswell. Many corporate leaders are earning the business the old-fashioned way.

CNN also wrote about the companies that decided to end their NRA affiliations and discount programs.[2]

SEC and Disclosure of Dark Money Political Contributions

The Brennan Center reports that in part as a result of advocacy by shareholders, more than half of the S&P 500 companies have agreed to be more transparent about their political spending.[3] They now share information that would otherwise be opaque and untraceable, including money flowing through dark money trade associations and so-called social welfare organizations.

> But the trend toward transparency is still being met with resistance. Goldman Sachs wrote to the SEC in December to block its shareholders from voting on a lobbying disclosure proposal in part because the amount of money at issue "relates to operations that account for less than five percent of the Company's assets." The shareholders withdrew their proposal.

Ford Holds Annual Shareholder Meeting: (L-R) Carl Reichardt, Vice Chairman of Ford Motor Co.; Allan Gilmour, Vice Chairman and Chief Financial Officer; Nick Scheele, President and COO; Bill Ford, Chairman and CEO; William Clay Ford, retired Vice Chairman of Ford's Board of Directors; and Dennis Ross, Vice President and General Counsel.

> Ford Motor Company also complained to the SEC that two shareholder proposals (one on lobbying and one on electoral spending) were duplicative and that the latter should be excluded from Ford's annual proxy.

The SEC rejected Ford's argument, allowing both proposals to move forward to be voted on by shareholders.[4]

Mick Mulvaney, Director of the Office of Management and Budget

> The SEC's stance with Ford is a welcome change from last year's alarming decision which blocked a proxy question at ExxonMobil to disclose campaign spending because there was another to reveal how much money was spent on lobbying. At least in the view of the SEC back then, the two questions were "substantially duplicative," as if disclosing lobbying spending was the equivalent of disclosing campaign spending.[3]

The Fed Orders Wells Fargo to Replace Directors

In an unusual action, the Federal Reserve responded to "widespread consumer abuses" at Wells Fargo by imposing new sanctions prohibiting any growth in the bank's $2 trillion balance sheet, perhaps for the rest of the year.[5] According to Moody's Investors Service, such an order is unprecedented in the Fed's regulation of financial firms. The Fed also ordered Wells Fargo to replace four of its directors. Outgoing Chair Janet Yellen said, "We cannot tolerate pervasive and persistent misconduct at any bank and the consumers harmed by Wells Fargo expect that robust and comprehensive reforms will be put in place to make certain that the abuses do not occur again."

1 http://fortune.com/2018/02/27/parkland-florida-school-shooting-business-leaders/
2 http://money.cnn.com/2018/02/25/news/companies/companies-abandoning-nra-list/index.html
3 https://www.brennancenter.org/blog/fight-corporations-reveal-political-spending
4 https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/jamesmcritchie020618-14a8.pdf
5 https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm

SEC Considering Restrictions on Shareholder Lawsuits

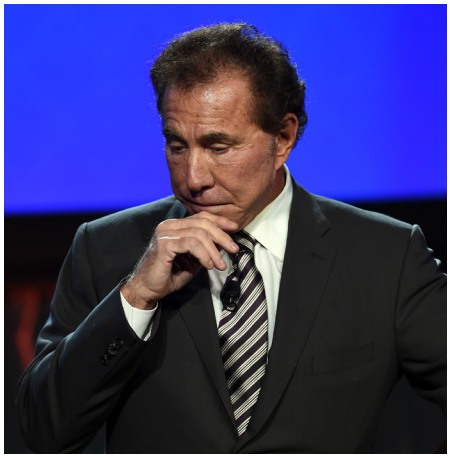
Bloomberg reports that as an inducement to increase the number of IPOs (though there is no evidence that an increase is a legitimate goal, especially if so heavily subsidized), the SEC is considering allowing binding arbitration to replace shareholder lawsuits.[6]

Is the Proxy Advisory Firm Bill that Passed the House Constitutional?

There are many troubling elements in HR 4015's "kill the messenger" bill passed by the House. But no one has questioned what to us seems the most glaring problem: consideration of this bill included no assessment of any kind of its potential for unconstitutional infringement of First Amendment freedom of speech and of the press. The proxy advisory firms publish reports that include facts, data, analysis, and opinion along the lines of a newspaper or magazine. No one is required to buy their reports or follow their recommendations. The bill's requirement that these reports include rebuttals from the corporations they are analyzing would be allowing the government to direct the content of their publications, like requiring *The New York Times* to publish op-eds by the individuals in their news stories.

How Expensive Is Executive Misconduct?

It can be quite expensive for the executive and the shareholders. Most recently, the publicity about Steve Wynn's sexual harassment of employees led to a $2 billion drop in value.[7]



Steve Wynn, Wynn Resorts former Chairman and CEO

Is There a Relationship Between Trades and Votes?

A new study by Sophia Zhengzi Li and Miriam Schwartz-Ziv looks at the connection between trading stock and voting proxies documents that "on the shareholder meeting date abnormal volume is equal to 19.4%," and that such large abnormal volume exists even around the dates of meeting that have only routine proposals on their agendas. This finding demonstrates that "shareholder votes are associated with significant trading activity" across the board. At the same time, they found that trading activity is particularly large on dates of particularly important meetings, *e.g.*, meetings that involve a vote on a merger, or meetings at which at least one proposal resulted in an outcome contradicting management's recommendation. They did not find a comparably "clear spike in abnormal volume around the record date, the date the proxy statement is filed, the date Institutional Shareholder Services (ISS) issues its recommendation, or the date the vote outcome is formally filed." These findings support the conclusion that, in most cases, "information on the vote outcome is released on the day of the meeting, and it is the release of this information that is associated with high abnormal volume."[8]

We first document that on the shareholder meeting date abnormal volume is equal to 19.4%, and that such large abnormal volume exists even around the dates of meeting

Harvey Weinstein

that have only routine proposals on their agendas. This finding demonstrates that shareholder votes are associated with significant trading activity across the board. At the same time, we find that trading activity is particularly large on dates of particularly important meetings, e.g., meetings that involve a vote on a merger, or meetings at which at least one proposal resulted in an outcome contradicting management's recommendation. We do not find a comparably clear spike in abnormal volume around the record date, the date the proxy statement is filed, the date ISS issues its recommendation, or the date the vote outcome is formally filed. These findings support the conclusion that, in most cases,

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6 https://www.bloomberg.com/news/articles/2018-01-26/trump-s-sec-mulls-big-gift-to-companies-blocking-investor-suits
7 https://blogs.wsj.com/moneybeat/2018/01/26/misconduct-report-shaves-nearly-2-billion-from-wynn-market-value/
8 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095745

Investor Activism News

What Does Shareholder "Engagement" Mean?

Sarah Krause writes in *The Wall Street Journal* about large institutional investors' differing views of "engagement," noting that they also differ on their analysis of particular engagement/activism opportunities:[1]

> The biggest passive money managers all like to use some version of the word "engage" when describing how they hold their portfolio companies accountable behind the scenes. They differ on how that engagement is measured.
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> * * *
>
> BlackRock's engagements, according to the company, can be "basic," "moderate" or "extensive." Basic can be one conversation on a "routine matter"; moderate "generally involves more than one meeting," while extensive can be "numerous meetings over a longer time frame."
>
> For Vanguard and State Street each phone call or meeting counts as an "engagement." State Street typically also sends hundreds of letters to its portfolio companies that it also classifies as "engagements," though they aren't included in the firm's count of 676 engagements.
>
> The three managers collectively oversee more than $13 trillion in assets, bigger than the size of China's economy, the world's second-largest.

We Are Seeing More Pushback from Investors on Excessive Pay Outside the United States[2]

Britain's Investment Association has called out 143 UK-listed companies that experienced shareholder rebellions of at least 20% in the last year. The list is made up of more than a fifth of the constituents of the FTSE All Share Index, including WPP, BT, Morrisons AstraZeneca, Thomas Cook, HSBC, Reckitt Benckiser, Ladbrokes, Man Group, Pearson, William Hill, Foxtons, Balfour Beatty, Sports Direct and Sky.

The list was made as a key component to the government's package of corporate governance reforms, which is largely driven by outrage over bosses' pay. For instance, the biggest shareholder revolt of the year in the United Kingdom over boardroom pay was at Pearson, an education publishing and assessment service, where almost two-thirds rejected the company's remuneration report.

On the Rise of Investor Activism in Europe, *The Economist* Reports:[3]

> Leave it to the Americans to besiege European companies in August, when the entire continent is on holiday. It emerged this month that Corvex Management, an American hedge fund, had built up a $400m position in Danone, a French food giant. AkzoNobel, a Dutch paints-and-chemicals firm which has been under heavy fire from Elliott Advisors, a subsidiary of another American activist fund, agreed to appoint three new directors to its board. An even bigger skirmish is under way in Switzerland, where Third Point, an American fund run by Daniel Loeb, is seeking to shake up Nestlé, the world's biggest food company. Ulf Mark Schneider, Nestlé's new boss, is under pressure to present bold plans to investors in September.
>
> Such tussles used to be relatively rare in Europe. But shareholder activism is on the rise, with restive investors demanding corporate overhauls. Armand Grumberg, a mergers lawyer in Paris, last year counted 70 such campaigns in continental Europe. He expects this year to be even livelier. "It is the new normal," he says.
>
> The surge in activism has several causes. As American activist funds jostle to find targets at home, some are seeking less well-trodden hunting grounds abroad. Relatively cheap European firms are tempting prey. Many Americans also see

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1 https://www.wsj.com/articles/at-blackrock-vanguard-and-state-street-engagement-has-different-meanings-1516449600

2 http://www.independent.co.uk/news/business/comment/bosses-pay-smackdown-a-fifth-of-ftse-companies-named-and-shamed-but-where-is-persimmon-a8118071.html

3 https://www.economist.com/news/business/21727086-third-point-corvex-and-elliott-are-just-beginning-investor-activism-surging

Mike Dowd Receives Trial Lawyer Excellence Award

John Kirkton, Editor, Jury Verdict Reporter (left) and Michael Dowd

The *Jury Verdict Reporter* recognized Robbins Geller's **Michael J. Dowd** with an award for the Highest Reported Illinois Verdict or Settlement at the 8th Annual JVR Awards for Trial Lawyer Excellence. Held at The Peninsula Chicago hotel, the event recognizes "superior outcomes and record verdicts achieved by individuals and teams of trial lawyers from both the plaintiff and defense bars." Dowd was honored at the reception and awards ceremony, which attracted more than 300 trial attorneys and judges.

The award is the result of Dowd's tireless work on the *Household International* (now HSBC Finance Corporation) securities class action, which yielded a record-breaking $1.575 billion recovery after 14 years of litigation. The $1.575 billion recovery is the largest ever following a securities fraud class action trial, the largest securities fraud settlement in the Seventh Circuit and the seventh-largest settlement ever in a post-PSLRA securities fraud case.

"I am proud to be part of a firm with so many great attorneys," said Dowd. "It is an honor to be recognized by the *Jury Verdict Reporter* for our record-breaking $1.575 billion recovery in *Household*, which was the product of hard-fought litigation. Robbins Geller excels because we have real trial lawyers. We never would have won without the sacrifices and outstanding efforts of our partners, **Spence Burkholz**, **Dan Drosman**, **Maureen Mueller** and **Luke Brooks**."

Dowd has been practicing securities litigation for more than 20 years, prosecuting dozens of complex securities cases and recovering billions of dollars for investors. In addition to *Household International*, his other notable cases include *UnitedHealth* ($925 million recovery), *WorldCom* ($657 million recovery), *AOL Time Warner* ($629 million recovery), *Qwest* ($445 million recovery) and *Pfizer, Inc.* ($400 million recovery). This award comes on the heels of several other notable recognitions for Dowd, including being named a Best Lawyer in America by *Best Lawyers®*, a Recommended Lawyer by *The Legal 500* and a Leading Lawyer in America by *Lawdragon*.

The National Law Journal Names Robbins Geller Partners Paul Geller, Jason Forge and Rachel Jensen as 2018 Plaintiffs' Lawyers Trailblazers

Paul Geller

Jason Forge

Rachel Jensen

On May 1, 2018, *The National Law Journal* recognized **Paul J. Geller**, **Jason A. Forge** and **Rachel L. Jensen** as Plaintiffs' Lawyers Trailblazers for its second annual issue. The publication honors select attorneys "who continue to make their mark in various aspects of legal work on the Plaintiffs' side. . . . [E]ach has shown a deep passion and perseverance in pursuit of their mission, having achieved remarkable successes along the way." After sifting through hundreds of nominations, the publication interviewed each honoree to discover their pioneer spirit, the trails they have blazed, and what they see for the future of litigation.

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Marvell Technology Investors Score Final Approval of $72.5 Million Recovery

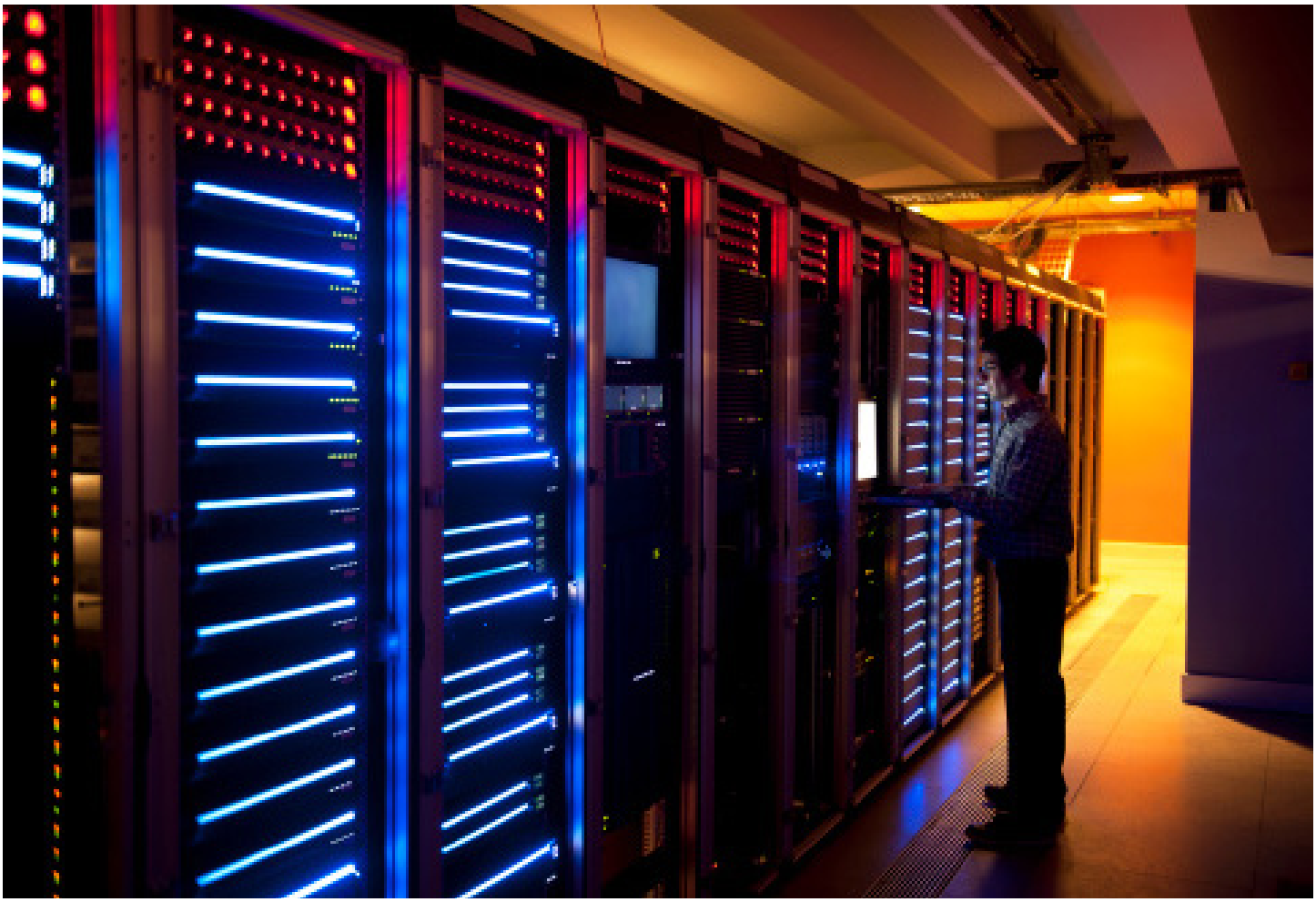
On April 20, 2018, the Honorable William Alsup, United States District Judge for the Northern District of California, granted final approval of a $72.5 million recovery in *Luna v. Marvell Technology Group, Ltd.* The recovery represents up to 50% of the best estimate of classwide damages suffered by investors who purchased shares during the February 19, 2015 through December 7, 2015 class period. **Plumbers and Pipefitters National Pension Fund** is serving as lead plaintiff.

Marvell Technology Group, Ltd. is a publicly traded company holding stakes in subsidiaries that produced and sold various semiconductor products. The case involved claims under the Securities Exchange Act of 1934. Specifically, Plumbers and Pipefitters National Pension Fund alleges that Marvell reported revenue and earnings during the class period that were misleading as a result of undisclosed pull-in and concession sales. As a result of this conduct, the price of Marvell common stock was artificially inflated, with its stock price reaching a class period high of over $16 per share.

In acknowledging lead plaintiff's and Robbins Geller's efforts in attaining this result for shareholders, the court noted that lead counsel "reviewed over two million pages of documents produced by defendants and third parties" and "took 10 depositions and defended three depositions" during the course of the case.

Robbins Geller attorneys **Scott H. Saham**, **Jonah H. Goldstein**, **Jason C. Davis** and **Matthew I. Alpert** obtained this result on behalf of Marvell investors.

Luna v. Marvell Technology Group, Ltd., No. 3:15-cv-05447, Order Granting Motion for Final Approval of Proposed Class Settlement and Granting in Part Motion for Attorney's Fees and Expenses (N.D. Cal. Apr. 20, 2018).



Medtronic Investors Score Class Certification and Overcome Motion for Summary Judgment in *Medtronic* Class Action

On January 30, 2018, the U.S. District Court for the District of Minnesota certified a class of investors in the *Medtronic* securities class action.

The case alleges that Medtronic and certain of its officers and directors violated federal securities laws by engaging in a scheme to defraud Medtronic investors by secretly drafting and editing medical journal articles, purportedly authored by physician consultants. These articles underreported or failed to report known adverse events associated with Medtronic's key bone growth treatment, INFUSE. Defendants' deception artificially inflated Medtronic's stock price, causing hundreds of millions of dollars in damages when the truth was revealed in June 2011. In December 2016, the United States Court of Appeals for the Eighth Circuit vacated the district court's 2015 summary judgment dismissal, finding that investors could not have discovered the facts regarding defendants' intentional involvement in the scheme until the U.S. Senate Finance Committee issued a Staff Report in October 2012. The case was remanded to the district court for further proceedings.

In certifying the class, the district court found that "the proposed class meets the threshold requirements of Rule 23(a) . . . [,] that common issues of law and fact predominate and that a class action is likely the superior way to adjudicate the claims." The court also found that "lead plaintiffs **Employees' Retirement System of the State of Hawaii**, **Union Asset Management Holding AG**, and **West Virginia Pipe Trades Health & Welfare Fund** are adequate class representatives" and that Robbins Geller, as co-lead counsel, "is well-qualified to serve as class counsel in this case."

Then, on March 2, 2018, the court denied in part defendants' motion for summary judgment, ruling that there is a genuine issue of material fact with respect to specific individual defendants.

Robbins Geller attorneys **Shawn A. Williams**, **Danielle S. Myers**, **Christopher M. Wood**, **Robert R. Henssler, Jr.**, **Susannah R. Conn** and **Hillary B. Stakem**, serving as co-lead counsel, obtained this result for investors.

West Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc., No. 13-cv-01686-JRT-FLN, Order Certifying Class (D. Minn. Jan. 30, 2018; and *West Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, No. 13-cv-01686-JRT-FLN, Memorandum Opinion and Order (D. Minn. Mar. 2, 2018).

Trump University Students Prevail in the Ninth Circuit

On February 6, 2018, the U.S. Court of Appeals for the Ninth Circuit commended Robbins Geller's "admirable" work on behalf of former Trump University students and affirmed a settlement that is expected to enable victims to recover over 90% of their "tuition." In a unanimous decision, the court dismissed the lone objection to the $25 million settlement, which will reimburse thousands of consumers, including senior citizens, who accessed retirement funds and maxed out credit cards to enroll in Trump University.

Writing for the court, Circuit Judge Jacqueline Nguyen observed that the settlement provided "terms highly favorable to class members [who] would receive between 80 to 90 percent of what they paid for Trump University programs." Turning to the objection, the court stated: "This appeal involves a lone objector, Sherri Simpson, who seeks to opt out of the class and bring her claims in a separate lawsuit, which would derail the settlement." Judge Nguyen recognized that Simpson had received a court-approved notice of her right to exclude herself from the class and chose not to do so by the deadline. As to the objector's claim that she should have a second opportunity to opt out at the settlement stage, or alternatively, that due process requires a second chance, the court held: "Neither argument is correct."

Last March, District Court Judge Gonzalo P. Curiel approved the settlement and hailed it as "extraordinary" and "all the more exceptional when viewed in light of the risk" of continued litigation. In approving the extraordinary settlement, the court commended Robbins Geller for prosecuting the case on a *pro bono* basis: "Class Counsel's exceptional decision to provide nearly seven years of legal services to Class Members on a *pro bono* basis evidences not only a lack of collusion, but also that Class Counsel are in fact representing the best interests of Plaintiffs and the Class Members in this Settlement. Instead of seeking compensation for fees and costs that they would otherwise be entitled to, Class Counsel have acted to allow maximum recovery to Plaintiffs and Class Members. Indeed, that Eligible Class Members may receive recovery of 90% or greater is a testament to

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First Solar and *Quality Systems* Shareholders Score Major Victories in Ninth Circuit

On January 31, 2018, the U.S. Court of Appeals for the Ninth Circuit issued an important opinion that clears the way for plaintiffs to proceed to trial in *Mineworkers' Pension Scheme v. First Solar Incorporated*, a securities fraud class action on appeal from the District of Arizona.

The district court largely denied defendants' motion for summary judgment, but nonetheless certified its ruling for immediate appeal to answer the question: "'[W]hat is the correct test for loss causation in the Ninth Circuit?'" Agreeing with Robbins Geller's clients, **Mineworkers' Pension Scheme** and **British Coal Staff Superannuation Scheme**, the Ninth Circuit ruled that the test for loss causation is a general "proximate cause" test, rejecting the imposition of a singular bright-line "revelation of the fraud" standard.

The opinion is a significant victory for investors, as it forecloses defendants' ability to immunize themselves from liability simply by refusing to publicly acknowledge their fraudulent conduct.

First Solar, Inc. is one of the world's largest producers of photovoltaic solar panel modules. In the underlying case, plaintiffs allege that First Solar violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Specifically, plaintiffs claim that between April 30, 2008 and February 28, 2012, First Solar discovered a manufacturing defect that caused its modules to suffer rapid power loss and a design defect that caused rapid power loss in hot climates. Plaintiffs allege that First Solar not only concealed these defects from shareholders, but also misrepresented the cost and scope of the defects and reported false information on the company's financial statements.

A three-judge Ninth Circuit panel affirmed the district court's partial denial of defendants' motion for summary judgment and held that the "general proximate cause test" is "the proper test" for loss causation. The Ninth Circuit specifically rejected defendants' argument that "'[s]ecurities fraud plaintiffs can recover only if the market learns of the defendants' fraudulent practices.'"

The Ninth Circuit held that the loss causation "inquiry requires no more than the familiar test for proximate cause . . . . To prove loss causation, plaintiffs need only show a 'causal connection' between the fraud and the loss . . . by tracing the loss back to 'the very facts about which the defendant lied . . . . Disclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss.'"

Robbins Geller attorneys **Michael J. Dowd**, **Daniel S. Drosman**, **Luke O. Brooks**, **Jason A. Forge**, **Susan K. Alexander**, **Andrew S. Love**, **Darryl J. Alvarado** and **Matthew S. Melamed** obtained this result for shareholders.

Mineworkers' Pension Scheme v. First Solar Incorporated, No. 15-17282, Opinion (9th Cir. Jan. 31, 2018).

First Solar comes on the heels of another significant appellate win by the Firm. In 2017, the Ninth Circuit ruled in favor of investors in *In re Quality Systems, Inc. Securities Litigation*. In that case, a three-judge panel reversed the district court's dismissal of the action in a unanimous decision.

The issue was one of first impression concerning "mixed" future and present-tense misstatements made by Quality Systems, Inc. The appellate court explained that "non-forward-looking portions of mixed statements are not eligible for the safe harbor provisions of the [Private Securities Litigation Reform Act of 1995]." While the court acknowledged that the safe harbor's purpose is "to protect companies and their officials from suit when optimistic projections of growth in revenues and earnings are not borne out by events," at the same time, that safe harbor does not protect defendants "when they knowingly make a materially false or misleading statement about current or past facts" or combine such a statement with a forward-looking one. Discussing the specific statements in question, the court stated that "Defendants made a number of mixed statements that included projections of growth in revenue and earnings based on the state of [Quality Systems'] sales pipeline." The court held that "both the non-forward-looking and the forward-looking portions of these statements were materially false or misleading."

Robbins Geller appellate partner **Joseph D. Daley**, who briefed and argued the *Quality Systems* appeal, applauded the Ninth Circuit ruling: "We felt very strongly that the district court had committed reversible error in allowing defendants to insulate their numerous misstatements as corporate 'puffery' and non-actionable forward-looking statements."

In addition to Daley, Robbins Geller attorneys **Darren J. Robbins**, **Robert R. Henssler, Jr.** and **Christopher D. Stewart** obtained this result for investors.

In re Quality Systems, Inc. Securities Litigation, No. 15-55173, Opinion (9th Cir. July 28, 2017).

Plaintiffs Move Forward with Case After Goldman Sachs's Second Circuit Appeal

On January 12, 2018, the U.S. Court of Appeals for the Second Circuit ruled in plaintiffs' favor in *In re Goldman Sachs Grp., Inc. Sec. Litig*. The court remanded the case to the district court to apply its recently articulated standard from another securities case regarding what defendants have to show to rebut plaintiffs' evidence relating to the *Basic* presumption of reliance in the context of class certification.

The securities class action alleges that Goldman failed to disclose conflicts of interest in connection with certain mortgage-backed-securities transactions, including betting against the very same securities it was selling its clients. The allegations in the complaint relate to several high-profile transactions, including the infamous Abacus transaction that resulted in Goldman paying $550 million in fines to the SEC.

The Second Circuit agreed with plaintiffs that to rebut the presumption of reliance, defendants must prove by a preponderance of the evidence that there was no price impact from defendants' misrepresentations, rejecting defendants' argument for a lesser standard. Notably, the Second Circuit also rejected defendants' argument that the misrepresentations themselves were mere puffery, *i.e.*, general statements upon which no reasonable investor would rely. The court held that this challenge was not appropriate at the class certification stage of the proceedings.

Following appellate briefing and oral argument, Judge Wesley noted that "the *Basic* presumption is a substantive doctrine of federal law that . . . altered the default rule and imposed a burden of persuasion on defendants seeking to rebut it." In remanding the case, the Second Circuit directs the district court to consider the evidence presented by the parties and determine whether defendants have met their burden by a preponderance of the evidence.

Spencer A. Burkholz, co-lead counsel and Robbins Geller partner, noted: "The court rejected Goldman's position on the standard for the court to apply at class certification, as well as Goldman's claim that the case should be dismissed in its entirety. We look forward to returning to the district court and preparing the case for trial."

Robbins Geller partners **Spencer A. Burkholz**, **Jonah H. Goldstein**, **Robert R. Henssler, Jr.**, **Eric I. Niehaus**, **Susan K. Alexander** and **Andrew S. Love**, serving as co-lead counsel, obtained this result for shareholders.

Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc., No. 16-250, Opinion (2d Cir. Jan. 12, 2018).

Climate Change News

Chicago Treasurer Pledges to Use the City's $8B Portfolio to Promote Sustainability

Chicago Treasurer Kurt Summers announced plans to use the city's $8 billion portfolio to help fight climate change and promote social progress. Summers is proposing to overhaul the city's investment strategy to ensure taxpayer dollars are directed to financially sound companies that make it a priority to protect the environment, encourage gender and racial diversity, uphold labor standards and operate ethically. He wants the portfolio to be carbon-neutral by 2020. The proposed changes would be rolled into the municipal code under an ordinance[1] introduced by Alderman John Arena[2] who last year persuaded 38 other members of City Council to sign a nonbinding resolution[3] calling on Chicago to divest from oil and gas companies. Summers wants to make a company's record on water usage, labor rights and diversity as important as creditworthiness when deciding how to invest its $8 billion operating budget.

Key Metrics Assessment of Climate Change Governance and Political Influence Spending in the Energy and Utility Sectors

A new report on 21 energy and utility companies from the non-profit 50/50 Climate Project finds:

Negligible board oversight of climate risk: 20 of the 21 companies do not mention climate change considerations in their corporate governance documents as a board obligation; Occidental Petroleum is the only firm to do so. 14 mention general environmental oversight, but six say nothing.

Paucity of climate expertise on boards: Just two directors out of 245 who serve on these boards have expertise relevant to dealing with the business implications of climate change; at ConocoPhillips and ExxonMobil. Seven companies have board members with some environmental background; the rest of the companies do not.

$673 million spent on influence: This report unveils, for the first time, a total political activity footprint for these 21 energy and utility companies over the last three election cycles, on lobbying and election spending.

Myriad ways to spend: Including newly available state lobbying data, the report delineates the many ways companies spend shareholder dollars to influence elections and public policy:

$524.3 million – Lobbying (three-quarters of it at the federal level)

$51.2 million – State ballot measures

$25.8 million – "527" political committees

$20.9 million – Candidates for state office

$14.4 million – Political party committees

$11.2 million – Super PACs

Corporate-sponsored political action committees, using executives' money and directed by executives, also spent $28.1 million on candidates for political office. These PACs transferred an additional $7.3 million to other PACs.

Over $50 million to block clean energy in 7 states. In addition to spending to prevent climate action at the federal level, companies covered in this report spent heavily to prevent states from enacting clean energy standards, improve energy efficiency, and close fossil fuel tax loopholes. States affected include Alaska, California, Florida, Michigan, Ohio, Oregon and Washington.

Limited board oversight of lobbying activity: Only half the 21 companies mention any board oversight of lobbying, although three-quarters discuss election spending. Oversight for these companies is more robust than in the S&P 500 as a whole, yet highlights the widespread reluctance by any companies to be more transparent about their efforts to influence public policy.

Lots of lobbying, little disclosure: Using corporate treasury money, all firms lobby and all but Kinder Morgan spend on elections. However, only six voluntarily report lobbying expenditures. Disclosure laws mean independent data are missing for more than half the states – even though environmental policy is heavily defined at the state level, and profoundly affects the landscape for companies and their investors.

Dark dollars block climate action: The report explores behind-the-scenes spending by the 21 companies to influence climate policy, largely in ways not reported to investors. The "known unknowns" are many but four companies clearly say one thing and spend money to do the opposite: Duke Energy, DTE Energy, Devon Energy and Southern. Some, such as Chevron and ExxonMobil, make no effort to hide their opposition to public policy to combat climate change. The report compares companies' public statements and their association with non-profit groups that legally can obscure their donors while working against climate-friendly policies.

Green Bonds on the Rise

The governance focus on sustainability is usually on disclosure, strategy, and board competence, but it is time to pay attention to debt instruments as well. Global green bond issuance passed $100 billion for the first time, up 68 percent from 2016,

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1 https://www.documentcloud.org/documents/4390964-Proposed-Chicago-ESG-Ordinance.html
2 http://www.chicagotribune.com/news/ct-met-chicago-social-climate-investing-20180227-story.html
3 http://midwestenergynews.com/2017/03/09/even-if-symbolic-chicago-fossil-fuel-divestment-could-send-powerful-signal/

Reining in Unicorns: Protecting Pensioners and Entrepreneurs From Fraud

Once upon a time, private companies with market valuations of more than $1 billion were so rare that they were dubbed Unicorns.

Unicorns are much less exotic today. In the United States, there are more than 100 such companies with a collective value of $360 billion, according to CB Insights. They have collectively raised over $73 billion.

Some of these Unicorns occupy the vanguard of technological advancement, exemplifying American ingenuity at its best by driving innovation and economic growth.

But as we've learned the hard way, being a Unicorn does not necessarily equate to being a model corporate citizen. Sometimes, Unicorns really are the stuff of fairy tales, using make-believe promises to raise billions of dollars from unsuspecting investors. And, equally unsurprising, when the truth about such companies is revealed, the value of those investments often evaporates.

Holding perpetrators of such frauds accountable is critical. This is not just about protecting sophisticated venture capital firms that choose to invest in Unicorns. It's about protecting the hard-earned retirement savings of public employees, teachers, firefighters and law enforcement officers.

How is that, you ask? Because many of the venture capital firms that invest in these startups often do so using workers' retirement savings. For example, one active investor in Unicorns, Union Square Ventures, has on its roster of investors public pension funds in California, Oregon and Wyoming.

The bottom line: far too often imploding Unicorns scorch the retirement savings of workers who watch while their life savings go *down* in flames.

Damaging Disclosures

The poster child for Unicorn hype is blood diagnostic company Theranos, Inc. At one point the company's market value reached a whopping $9 billion. Once fawned over and feted by the media, the company's story proved too good to be true after a 2015 *Wall Street Journal* investigation exposed its claims about proprietary blood-testing technology.

The Securities and Exchange Commission has since charged the company, its CEO Elizabeth Holmes, and former President Ramesh "Sunny" Balwani with an "elaborate, years-long fraud in which they exaggerated or made false statements about the company's technology, business, and financial performance." (Theranos and Holmes settled the charges.) A related criminal investigation is reportedly ongoing.

Ride-sharing company Uber Technologies Inc., once valued at nearly $70 billion—more than Ford Motor Company, General Motors, Twenty-First Century Fox and eBay—also tried its best to keep the darker side of its business from investors. However, it has now been widely reported that the ethical, progressive and socially responsible corporate citizen that Uber portrayed itself to be was sheer fantasy.

This romanticized image has been replaced by one stained with tales of executives fostering a toxic culture defined by sexual harassment and gender discrimination; of pilfered driver and rider data from its main competitor; of a covert "Greyball" program to evade law enforcement where it was operating illegally or facing opposition; and of renting recalled, unsafe vehicles to its drivers in Singapore.

No one expects that Theranos or Uber will be the last Unicorn conflagration. A recent paper by two business school professors studied legal filings from 135 Unicorns in the United States and concluded that on average, after each new valuation, they are worth half what is advertised. The paper did not accuse the companies of intentionally seeking to manipulate investors, but rather characterized the valuation of these Unicorns as a "black box," owing to the increasing complexity of their financial structures.

Investor Remedies

Shareholder class actions have long served as the most effective and efficient vehicle for investors in publicly traded companies who seek recourse when they are damaged by misstatements, omissions and other forms of corporate fraud. Just since the Global Financial Crisis of 2007-2009, courts have approved more than $29 billion of recoveries obtained for defrauded investors via shareholder class actions, according to Cornerstone Research.

But privately held companies, which do not list shares on public exchanges and do not have to regularly file financial information with the SEC, have not historically been held accountable for misconduct via investor class action lawsuits. With some companies now raising hundreds of millions of dollars or even billions of dollars before they even complete an IPO, it is no wonder that investors in these companies have started to rely on shareholder actions to

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Will the SEC Strip Investors of Protections Against Securities Fraud?

By Paul Bland

In a dramatic departure from decades of precedent, Jay Clayton, the new Chair of the Securities and Exchange Commission ("SEC"), has declared that he is undecided as to whether investors should continue to be able to bring class actions if they've been cheated in violation of the securities laws. For decades, when a corporation deceived its investors after selling securities through an initial public offering (or "IPO"), those investors could band together in a class action to seek accountability for this kind of fraud. Over the years, these class actions have recovered many billions of dollars for cheated investors, ranging from large pension funds for firefighters to regular American citizens holding IRAs and 401(k)s. This private enforcement has been central to holding the worst of the worst corporate actors accountable, as the leadership of the SEC (including chairs from both parties) have repeatedly recognized for decades.

The best known challenge to the SEC position came in 2012, when The Carlyle Group asked the SEC for permission to issue an IPO with an arbitration clause that would ban investors from bringing a class action. While there is a long history of arbitration for individual claims involving violations of the securities laws through FINRA, Carlyle's proposed clause would have gone much further, barring investors from pursuing class actions. The SEC expressed serious concerns that this move violated the securities laws, and Carlyle backed down.

But starting last summer, some began to challenge the historic rule. Last July, SEC Commissioner Michael Piwowar publicly urged corporations to ban class actions in a recent speech. Then, a few months later, the Treasury Department issued a lengthy report that (among many other initiatives) argued that it was harming the American economy for investors to bring securities class actions when they were deceived, and urged corporations to ban class actions.

For some time, in congressional hearings and other forums, Chairman Clayton refused to give straightforward answers about how he intended to deal with this issue. It appeared that the SEC might simply allow a corporation to quietly propose IPO documents that banned class actions, and let staff at the Corporate Finance Division approve those documents without a full public debate or vote. And it was not at all clear what the Chairman would do if there were a vote.

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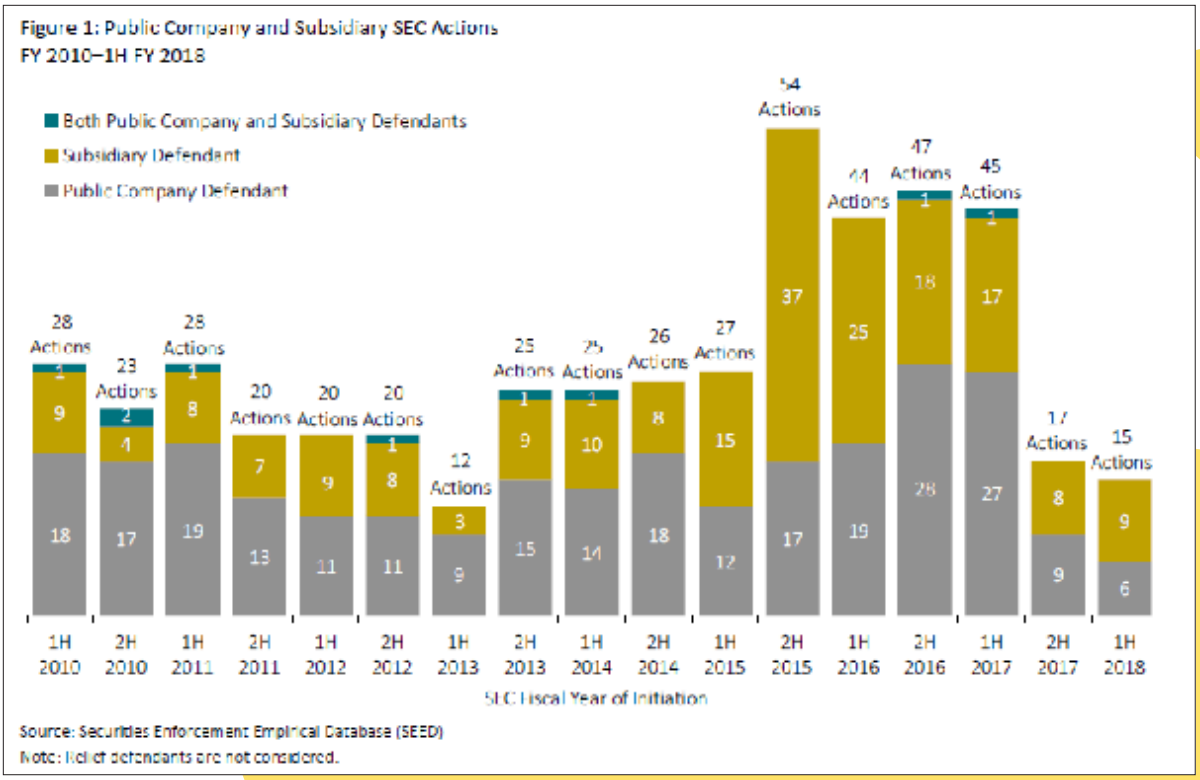


Source: Cornerstone Research SEC Enforcement Activity: Public Companies and Subsidiaries, Midyear FY 2018 Update

 (continued from page 19)

After an outcry from investor advocates – including strong speeches from SEC Commissioner Robert Jackson and the SEC's Investor Advocate Rick Fleming, and then most importantly a strongly worded letter from Rep. Carolyn Maloney and all of the Democratic members of the House Finance Committee – on April 24, 2018, Chairman Clayton responded more fully. As to the procedural question, Clayton *did* finally promise a public, open discussion before the SEC allows corporations to ban securities class actions, and he promised a public vote. On the important substantive issue, though, he stated, "I have not formed a definitive view on whether or not mandatory arbitration for shareholder disputes is appropriate in the context of an IPO for a U.S. company."If the SEC does allow corporations to eliminate securities fraud class actions, it will likely harm U.S. markets with foreign investors. At the time that the Carlisle IPO was before the SEC, a number of large foreign institutional investors joined together to express concerns. They explained that one of the main reasons foreign investors hold more than $6.2 trillion in stocks in U.S. corporations is that American markets are particularly well policed compared to those in many other countries.

Private enforcement of the laws against securities fraud is absolutely crucial to the safety of investors in America's markets. While the SEC does great work, it has a relatively modest staff, and over time it has been far less successful than private lawsuits in recovering monies for cheated investors. In the mid-2000s, there were a series of extremely egregious and well-publicized securities frauds in the United States, involving Enron, WorldCom, Tyco, Bank of America, and Global Crossing. In those five cases, the SEC's enforcement actions recovered penalties and fees of $1.8 billion. By contrast, private litigation by investors themselves – the exact kind of case that the SEC is now considering eliminating – recovered $19.4 billion for investors.

A more recent case, whose settlement is still being administered in a New York federal court, demonstrates exactly what is at stake here. In *In re Petrobras Securities Litigation*, a Brazilian

oil company made an IPO and sold other securities to investors. There were serious problems with the IPO. When litigation commenced about misleading statements about Petrobras's financial statements and business operations emerged, it turned out that there were two different sets of investors: those who purchased securities pursuant to U.S. transactions, and those who purchased securities via the Brazilian stock exchange.

Thanks to the protections of U.S. securities law, the first group of investors was able to bring class actions despite a forced arbitration clause banning them in Petrobras's bylaws. These investors are set to recover more than 90% of the $3 billion fraud settlement – meaning they will receive checks for over $2.7 billion.

The second group of investors, at the mercy of Brazilian law, were forced into arbitration on an individual basis and barred from joining a class action. These investors are still attempting to recover damages on their claims, and are doing so in uncharted waters.

In addition to protecting individual investors, securities class actions are often the only way bad actors are held accountable for fraud that weakens our entire financial system. These class actions are a necessary deterrent for the Enrons and Tycos of the world who might otherwise be able to run off with the profits from serious fraud.

If some company challenges the established policy with an arbitration clause that seeks to ban class actions, there will be a firestorm of controversy. In addition to an outcry from the public, institutional investors will need to speak out to protect their interests.

ABOUT THE AUTHOR

Paul Bland

F. Paul Bland, Jr., Executive Director, has been a senior attorney at Public Justice since 1997. As Executive Director, Mr. Bland manages and leads Public Justice's legal and foundation staff, guiding the organization's litigation docket and other advocacy.

information on the vote outcome is released on the day of the meeting, and it is the release of this information that is associated with large abnormal volume.

Weinstein Scandal Triggers Questions of Corporate Liability and Even Complicity

A long record of a CEO's sexual harassment and abuse, followed by a series of settlements and non-disclosure agreements, becomes a problem of corporate governance when there is reportedly an employment contract providing that the CEO cannot be fired for sexual harassment as long as he personally bears the costs of the settlements. The Weinstein Company is privately held, so some of the rules pertaining to public companies, like public disclosure of the employment contract, do not apply. In an October 2017 *Variety* article, ValueEdge Advisors Vice Chair Nell Minow

compared the situation to that of News Corporation/21st Century Fox:[9]

> Nell Minow, a longtime corporate governance expert, said the reports of the settlements, and what executives at Fox and Weinstein Co. knew about them, also raise questions of accounting. Earlier this year, there were reports that federal prosecutors were investigating how settlement payments involving claims against Fox News chieftain Roger Ailes were disclosed. Ailes departed last year, and died in May.
>
> "I'd point out that both of these companies are in essence controlled by dynamic founders, which makes independent oversight much less likely," Minow said.

A new survey on board gender diversity finds lip service for the benefits of a diverse board but a reluctance to support quotas.[10] We expect more focus on this issue as sexual harassment complaints continue to lead to immediate departures of high-profile figures.

Yet Another Study Shows that Overpaid Executives Underperform[11]

As we have been saying for more than 20 years, overpaying chief executives might be making companies worse. This study provides a look at compensation problems in the United Kingdom, the Netherlands, Sweden, Belgium, Germany, and France from 2010 to 2016:

> [O]verpaying executives can also be a sign of weaker corporate governance, [Xavier] Baeten said. Overall, companies whose chief executives are paid relatively less tend to have a higher return on assets, according to a study by Vlerick [Business School]. . . . As market capitalization increases, executive compensation also rises.
>
> Baeten says there's little-to-no correlation between higher executive pay and improving corporate performance. While that may be so, the strategy remains popular: In France, the median remuneration of CEOs running the 40 biggest public firms increased 31% last year from 2014.
>
> Execs are also well compensated in the UK, where Vlerick found that CEOs at the largest corporations take home 100-times more than the average employee at their firms, compared with 86-times for continental European companies in the study, which excluded Sweden.
>
> And women are almost entirely locked out of the executive suite: only 5% of European CEOs are female, according to the research. This imbalance, too, deserves scrutiny for many reasons, not least because research by Scandinavian bank Nordea has shown that women CEOs tend to beat the broader market, according to *Bloomberg*.

9 http://variety.com/2017/biz/news/harvey-weinstein-sexual-harassment-corporate-liability-21st-century-fox-1202598683/

10 http://www.igmchicago.org/surveys/board-quotas-for-women

11 https://qz.com/1167226/vlerick-research-overpaid-ceos-may-worsen-corporate-performance/

JP Morgan Fined by FINRA

The Financial Industry Regulatory Authority fined J.P. Morgan Securities, LLC $1.25 million for failing to conduct proper background checks on 8,600 new employees from 2009 to 2017.[12] J.P. Morgan's due diligence failures involved 95% of the firm's "non-registered associated persons."

Building a Better Board Book

The first question we like to ask directors is about the quantity, quality, and timing of the information they receive from the company. The late Tom Wyman, who served on the General Motors board in the 1990s, told us that the board materials were delivered "by forklift," but the board agenda never included time for questions or comments. More recently, complaints about over-emphasis on compliance rather than risk assessment and strategy have led to concerns that board briefing materials miss the forest for the trees.

A new analysis by Alex Baum (Value Act Capital), David F. Larcker (Stanford University – Graduate School of Business), Brian Tayan (Stanford University – Graduate School of Business), and Jacob Welch (Value Act Capital) assesses the current state of board books and suggests improvements.

The six significant shortcomings they identify are:[13]

- Data lacks important context
- Data focuses on results (outputs) rather than drivers (inputs)
- Data does not inform organic (P&L) investment decisions
- Unexplained outperformance is insufficiently investigated
- Accounting allocations obscure true economics
- Data does not match a manager's sphere of responsibility

The authors note:

> Having access to appropriate data is critical to making sound decisions on strategy, compensation, and capital allocation. However, evidence suggests some directors do not receive the information they need on important drivers of the business. In general, what is the quality of information that public company directors receive? Is it sufficient to make optimal decisions? If not, how widespread is this problem? In situations where the quality of data is lacking, what discussions should the board use with management to improve information quality and presentation?

Board Diversity

A new report from ISS underscores the concerns institutional investors have about "male, pale, and stale" boards of directors, as well as other governance issues like dual class voting stock and virtual annual meetings.[14] Key findings include:

- **Unequal Voting Rights.** ISS solicited respondents' views on multi-class capital structures that carry unequal voting rights. Among investors, a large minority (43 percent) indicated that unequal voting rights are never appropriate for a public company under any circumstances. An equal proportion of investors (43 percent) said unequal voting rights structures may be appropriate for newly public companies if they are subject to automatic sunset requirements or at firms more broadly if the capital structure is put up for periodic re-approval by the holders of the low-vote shares. Among non-investors, 50 percent responded that companies should be allowed to choose whatever capital structure they see fit, while 27 percent responded that a multi-class structure may be appropriate at a newly public company if subject to an automatic sunset provision or more broadly if reapproved on a periodic basis by the low-vote shareholders.

- **Board Gender Diversity.** ISS asked respondents if they would consider it problematic if there are zero female directors on a public company board. More than two-thirds (69 percent) of investor respondents said "yes." A large percentage of these respondents

12 http://www.fcpablog.com/blog/2017/11/27/finra-fines-jp-morgan-for-thousands-of-hr-due-diligence-fail.html
13 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047910
14 https://www.issgovernance.com/iss-announces-results-2018-benchmark-voting-policy-survey/

(43 percent) said that the absence of women directors could indicate problems in the board recruitment process, while 26 percent of investor respondents said that although a lack of female directors would be problematic, their concerns may be mitigated if there is a disclosed policy/approach that describes the considerations taken into account by the board or the nominating committee to increase gender diversity on the board. A majority (54 percent) of the non-investor respondents answered "yes" when asked if the absence of a single woman director on a board is problematic, although more than half of these respondents said their concerns might be mitigated by a company's disclosed policy or approach.

- **Virtual Meetings.** Survey respondents were asked to provide their views on the use of online mechanisms to facilitate shareholder participation at general meetings, i.e., "hybrid" or "virtual-only" shareholder meetings. About one out of every five (19 percent) of the investors said that they would generally consider the practice of holding either "virtual-only" or "hybrid" shareholder meetings to be acceptable, without reservation. At the opposite extreme, 8 percent of the investors did not support *either* "hybrid" or "virtual-only" meetings. More than one-third (36 percent) of the investor respondents indicated that they generally consider the practice of holding "hybrid" shareholder meetings to be acceptable, but not "virtual-only" shareholder meetings. Another 32 percent of the investor respondents indicated that the practice of holding "hybrid" shareholder meetings is acceptable, and that they would also be comfortable with "virtual-only" shareholder meetings if they provided the same shareholder rights as a physical meeting.
- **Pay Ratio Disclosures.** ISS asked respondents how they intend to analyze data on pay ratios. Somewhat surprisingly, only 16 percent indicated that they are not planning to make use of this new information. Nearly three-quarters of the investor respondents indicated that they intend to either compare the ratios across companies/industry sectors, or assess year-on-year changes in the ratio at an individual company or use both of these methodologies. Of the 12 percent of investors who selected "other" as their response, some of them indicated they would take a wait-and-see approach, while others indicated they were uncertain or had concerns regarding the usefulness of the pay ratio data. Among non-investor respondents, a plurality (44 percent) expressed doubt about the usefulness of such pay ratio data.

Ann Marsh of *Financial Planning* says that a new report documents conflicts of interest on the FINRA board, the self-regulatory body with jurisdiction over financial services.[15] The report "by a group of securities arbitration attorneys calls into question FINRA's ability to protect investors given alleged conflicts of interests on its board":

> The report was issued . . . by the Public Investors Arbitration Bar Association, whose members represent investors in legal disputes with FINRA member firms.[16] The group raises concerns about five of FINRA's 13 public governors and one recently departed governor who now sits on the Federal Reserve's Board of Governors.
>
> FINRA's board is comprised of 24 members. Among them, 10 have open industry ties consistent with the nonprofit's public-private status as a self-regulator of the financial industry. Another 13 seats are designated to public members, intended to represent investors. The remaining seat is for FINRA's CEO.

Johnston Press Deploys a Poison Pill

A discredited U.S.-created management entrenchment provision is being used in the United Kingdom.

Johnston Press has thwarted an attempted boardroom coup by using a poison pill:[17]

> Christen Ager-Hanssen, the activist shareholder plotting to oust chairman Camilla Rhodes and the company's senior management, has been forced to delay a call for an Extraordinary General Meeting after advisers discovered the tripwire in bond documents.
>
> This weekend Mr. Ager-Hanssen was in talks with lawyers at the City firm Mishcon de Reya on how to circumvent the mechanism, known as a "dead hand proxy put," in preparation for a new attack.
>
> Johnston Press inserted the dead hand proxy put into its bondholder agreements when it last refinanced its £220m debt pile three years ago. Such terms can secure lower interest rates but can also trigger a default if shareholders step in to appoint new directors.

In the United States, the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP says the following about these provisions:[18]

> Judicial concern about proxy puts in debt is based on their inherent potential entrenchment effect,

15 https://www.financial-planning.com/news/finra-board-rife-with-conflicts-of-interest-new-report-finds
16 https://piaba.org/piaba-newsroom/report-finra-governance-review-public-governors-should-protect-public-interest
17 http://www.telegraph.co.uk/business/2017/10/21/poison-pill-stops-presses-boardroom-coup-attempt-johnston-press/
18 http://www.friedfrank.com/siteFiles/Publications/FINAL%20-%206-5-2015%20-%20Dead_Hand_Proxy_Puts_What_You_Need_to_Know.pdf

because a triggering of the put could make a change in control of the board more costly – as the debt (and, through cross-acceleration provisions, possibly *all* of the company's debt) could be required to be refinanced if the put were triggered. Proxy puts with a dead hand feature are more inherently entrenching than non-dead hand proxy puts as they disable a board from approving a dissident slate to avoid the put being triggered.

Update on Uber

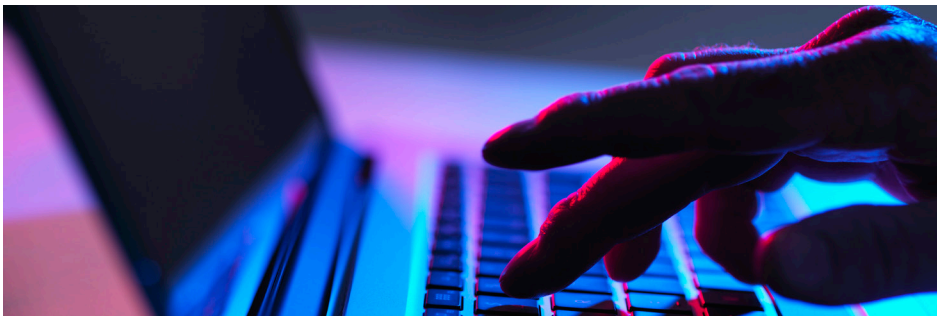
Uber seems to be running through a top 10 list of governance problems. The latest comes from a September 30, 2017 *New York Times* story highlighting a new ploy from founder and ousted CEO Travis Kalanick to regain power in the boardroom.[19] Mr. Kalanick is still a director and, more importantly, he still wields disproportionate voting power. The *Times* reports that the board retained Goldman Sachs to develop a plan to "shift the power on Uber's board by reducing Mr. Kalanick's voting clout, expanding Mr. Khosrowshahi's powers and imposing a 2019 deadline on the company to go public." Before that plan could be voted on, Kalanick used his voting power to add two new directors to the board, which went from eight members to 10. "That has now plunged Uber into another period of uncertainty and a corporate governance crisis, at a time when the company had been trying to move beyond its controversial past with a new chief executive on board."

Equifax Hack

The leak of millions of personal details, including social security numbers, is an unprecedented threat to the financial system, and the investigation into its causes and impact is just beginning. *Boardroom Resources* has a good initial take in "The Equifax Hack: More Questions Than Answers About the Board."[20] On paper, it looks good: "[M]ost of the prudent governance, risk, and organizational boxes are checked." But initial reports raise the most serious concerns. Is it possible that top executives, including the CFO, sold stock prior to the public announcement of the breach? That the executive in charge was not a specialist? And who was responsible for the bumbled follow-up that required customers to waive rights to sue in order to find out whether their information was at risk and sign up for an Equifax protection service in order to get the promised one year of coverage?

Fighting Corporate-Led "Reform" to Reduce Shareholder Proposals

James McRitchie takes apart the Chamber of Commerce's "fake news" advocacy of reducing the right of shareholders to file non-binding resolutions, a right that already excludes "ordinary business."[21] It is a must-read.



[19] https://www.nytimes.com/2017/09/30/technology/uber-travis-kalanick-dara-khosrowshahi.html?_r=0

[20] https://boardroomresources.com/insight/equifax-hack-more-questions-about-board-of-directors/

[21] https://www.corpgov.net/2017/08/chamber-releases-shareholder-proposal-reform/

INVESTOR ACTIVISM (continued from page 10)

continental models of corporate governance as ripe for disruption. Americans (and Britons) think that boards must prioritise shareholders' interests; Europeans, backed by courts, insist boards should also take the interests of staff, creditors and suppliers into account.

It is not just Americans who have sprung into action. A London-based group, The Children's Investment Fund, recently led a successful campaign to urge Safran, a French maker of aeronautical parts, to lower its offer price for Zodiac, a poorly run French producer of aeroplane seats and toilets. On the other side of the deal, a French fund called CIAM had invested in Zodiac and sought the Safran takeover.

IRRC and ISS Have Issued a New Report on the Relationship Between Activism and Board Composition[4]

> [L]ong-standing stereotypes appear to be outdated as activism has entered an era in which most dissident nominees have attenuated ties to their hedge fund patrons. The experience, qualifications, attributes, and skills of dissident nominees can appear indistinguishable from those of the incumbent directors whom they seek to supplant. Nominees' backgrounds and experiences can become even more interchangeable with those of incumbent directors when the latter transfuse their own ranks with new blood during, or in anticipation of, an activist campaign. This heightened competition can leave shareholders with a bounty of fresh-faced, highly-qualified, independent candidates on both nominee slates. Highlighting this narrowing divide, dissidents' "hand-picked" nominees have been known to reject their sponsors' wishes and strategic plans (witness Elliott Management's first tranche of candidates at Arconic, who were seated via a settlement, opposing the hedge fund's second attempt to gain board seats). Similarly, nominees selected by incumbent directors to face off against dissident candidates sometimes end up endorsing the very shifts in strategic direction that they were recruited to fend off (witness the DuPont board's "victory" over Nelson Peltz's Trian Partners, followed by board-recruited director-turned CEO Ed Breen's advocacy of a Peltzian-style breakup of the company).

[4] https://irrcinstitute.org/wp-content/uploads/2017/08/FINAL-Activism-and-Board-Refreshment-Trends-Report-Aug-2017.pdf

CLIMATE CHANGE (continued from page 16)

research by *Bloomberg New Energy Finance* shows.[4]

The market was mainly driven by new corporate debt issuance. Companies from a range of sectors sold green bonds to fund corporate sustainability measures, including development of renewable energy and energy efficiency measures. *See* Figure 1.

NOTE: Focus on disclosure, strategy, political contributions, and board competence relating to climate change continues. ValueEdge Advisors Vice Chair Nell Minow co-authored an article in the American Bar Association's *International Environmental Law Committee Newsletter* with 50/50 Climate Project Executive Director Edward Kamonjoh about "climate-competent directors."[5] The publication also includes an article by George Dallas on the governance challenges of climate change and an article by the issue's editor, Linda Lowson, called *FSB Guidance on Climate-Related Financial Reporting: Regulatory and Market Responses*.

NOTE also: Climate change concerns, traditionally considered progressive or Democratic issues, are increasingly being raised by political conservatives.[6] And Walden Asset Management has called on portfolio companies to oppose the Chamber of Commerce in its effort to roll back EPA rules.

ExxonMobil Breaks with ALEC on Climate Change

ExxonMobil Corp. opposed an American Legislative Exchange Council (ALEC) proposal that would push the Trump administration to rescind a federal finding that greenhouse gases are harmful. *The Hill* reports:[7]

> "As has been previously communicated to ALEC, we are concerned by the language of the resolution, especially relating to climate science, and do not support the resolution," Kenneth Freeman, ExxonMobil's manager of United States government relations, wrote in the Monday letter to ALEC's energy, environment and agriculture task force.
>
> "ExxonMobil will continue to oppose the resolution and will vote against it should it come before the taskforce or the board."

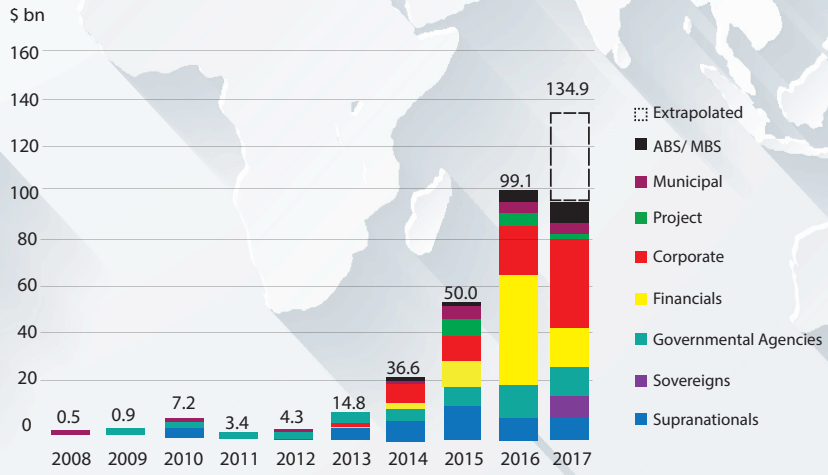
ExxonMobil's public dissent is part of a broader rift that the climate resolution is exposing within ALEC, a group funded by organizations like Koch Industries Inc. and coal miner Peabody Energy Corp., which pushes conservative policies in the state and federal governments.

Vanguard Seeks Better Disclosure on Climate Change

On August 14, 2017, Ross Kerber reported on *Reuters* that:[8]

> Vanguard Group on Monday said it has urged companies to disclose how climate change could affect their business and asset valuations, reflecting how the environment has become a priority for the investment industry.
>
> Under pressure from investors, Vanguard and other fund companies

Figure 1:



Source: Bloomberg New Energy Finance

4 https://about.bnef.com/blog/green-bond-issuance-will-soon-pass-100-billion-2017/

5 https://valueedgeadvisors.files.wordpress.com/2018/01/ic940000_newsletterpubs_aba_climate_change_sust_fin_rptg_publication_dec_2017.pdf

6 https://grist.org/article/climate-change-isnt-just-for-democrats-anymore-meet-the-eco-right-republicans/

7 http://thehill.com/policy/energy-environment/363389-exxon-opposes-alecs-attempt-to-fight-epa-climate-policy

8 https://www.reuters.com/article/us-vanguard-climate/vanguard-seeks-corporate-disclosure-on-risks-from-climate-change-

have pushed to pass several high-profile shareholder resolutions on climate risk at big energy firms like Exxon Mobil Corp and Occidental Petroleum Corp during the spring proxy season.

* * *

Vanguard, the biggest U.S. mutual fund firm by assets, had not supported climate activists on similar measures. But Glenn Booraem, Vanguard's investment stewardship officer, said in a telephone interview on Monday the issue as well as shareholder proposals have evolved.

"Our support for these proposals is not a matter of ideology, it's a matter of economics," he said. "To the extent there are significant risks to a company's long-term value proposition, we want to make sure there is long-term disclosure of those risks to the market."

 (continued from page 11)

Though Paul Geller has devoted his practice to the representation of consumers and investors for much of his career, he got his start by defending companies in high-stakes class action litigation. "In one of my first cases, I represented drug companies in actions brought by hemophiliacs, mostly children, who were given HIV-positive blood treatments," he told *NLJ*. "I realized I'd rather fight for these kids and their families. I learned a lot and worked under tremendous lawyers at that firm, but I was always more comfortable standing up to bullies than representing them."

NLJ highlights much of Geller's current litigation, including his recent work in the national opioid epidemic MDL. "I'm one of the court-appointed members of the leadership team, and also the court-appointed settlement team," he said. "Our goal is to reach a global resolution. Litigation may be the method to abate the nation's greatest national health crisis." Geller was also selected to serve in a leadership position on the Plaintiffs' Steering Committee on behalf of consumers in the massive *Volkswagen "Clean Diesel" Emissions* scandal. San Francisco legal newspaper *The Recorder* labeled the group that was appointed in that case, which settled for more than $17 billion, a "class action dream team."

Additionally, Geller is currently taking on Mylan in the *EpiPen* antitrust MDL, alleging that Mylan stifled its competition and raised the price of EpiPens. "I was as outraged as anyone," Geller remarked. "It's a very meaningful case to me. When my son, who is now in college, was two years old, he ate a cashew, had a reaction and was rushed to the hospital. Since then, he has never gone a day in his life without an EpiPen nearby."

When he isn't in the courtroom, *NLJ* noted that Geller "works to promote diversity and the next generation of top tier plaintiffs' lawyers." Telling the publication that he wants to "help prepare the next generation of lawyers," Geller has aided in the advancement of several Robbins Geller partners, including Jensen, who was recently appointed to the leadership team of the *Fiat Chrysler* MDL. Geller also sits on the Board of Emory University's Institute of Complex Litigation, which facilitates dialogue between judges and attorneys, including young attorneys. "You need experience and financial resources to run these cases, but younger lawyers can't get experience if they don't get appointments," noted Geller.

When discussing Wall Street being "rife with fraudsters," Geller told *NLJ* that he is "confident that shareholders will continue to have the right to hold Corporate America responsible for fraud," and that he expects "that traditional securities fraud will extend in the future to cryptocurrency."

Both senior partners at Robbins Geller, Jason Forge and Rachel Jensen have unique professional backgrounds that have shaped them into the attorneys they are today. For instance, Forge spent most of his career as a federal prosecutor. "I liked the challenge of being the aggressor and investigator trying to flesh out wrongdoing. The most righteous targets were those who had the power to get away with it," Forge told the publication. "When I decided to go into private practice, my goal was to continue to aggressively and creatively prosecute righteous fraud cases."

Jensen studied international human rights law and spent a year in Tanzania and the Netherlands working for the Prosecutor at the UN tribunals. She explained: "The work I did at the tribunals was at the cutting edge of establishing that sexual violence can be genocide and raised profound questions about the limits of human power and rights. But I didn't want to live the expat life, so I found plaintiff-side firms that took on human rights cases here in the U.S. Now I prosecute fraud cases against large corporations."

Forge and Jensen were "two of the lead attorneys who secured a global settlement of $25 million for former Trump University students in two class actions against President Donald J. Trump and his eponymous 'university.' The Ninth Circuit recently affirmed Judge Curiel's approval of the settlement, commending Robbins Geller's 'admirable' work." Robbins Geller litigated the case *pro bono*, allowing maximum recovery to plaintiffs and class members.

"One of the misperceptions is that the case was politically driven," Jensen clarified. "But when the case started in 2010, Trump wasn't a politician. The case did not become daily headline news until it was lobbed around on a Republican primary debate stage six years later."

Though Forge's involvement was supposed to be temporary, his role quickly changed after deposing a former student. "I really felt she had been manipulated. I called [Jensen] and told her that we should bring a RICO claim. A few months later, we started a whole new case with a single RICO claim that enabled us to bring together a nationwide class."

When it comes to the future of litigation, Geller, Forge and Jensen all see a great need to expose the truth. "There may be efforts to curtail the rights of shareholders, but I'm confident that shareholders will continue to have the right to hold Corporate America responsible for fraud," noted Geller.

"I totally understand why the public is so frustrated with the legal profession," Forge said. "I shake my head every day at lawyers' arguments, which are typically designed to prevent or postpone answers to a very simple question: 'What really happened here?' But with that frustration comes even more motivation to expose the truth. It's not easy, but it wouldn't be rewarding if it was."

Meet Robbins Geller's 2018 Leading Lawyers in America

Lawdragon recently announced that eight Robbins Geller partners have been recognized as Leading Lawyers in America for 2018. "These are lawyers who inspire with their public interest leadership, their vision of the rule of law and its relationship to our lives, our economies and our governance. They assess how to structure the most difficult deals, and how to counsel leaders who abuse, prevaricate and some who actually try to lead," states the publication. **Darren J. Robbins**, **Paul J. Geller**, **Samuel H. Rudman**, **Spencer A. Burkholz**, **Daniel S. Drosman**, **Shawn A. Williams**, **Randall J. Baron** and **Rachel L. Jensen** were all honored as Leading Lawyers in America for 2018. Additionally, **Michael J. Dowd** was elevated to the *Lawdragon* Hall of Fame, which is a permanent recognition.

Between these nine attorneys, tens of billions of dollars have been recovered on behalf of injured investors in such cases as *Enron* ($7.2 billion – the largest securities class action recovery), *Household International* ($1.575 billion – the largest securities class action recovery following a trial), *UnitedHealth* ($925 million – the largest stock option backdating recovery) and *WorldCom* ($657 million – the largest opt-out (non-class) securities action recovery).


Darren Robbins


Paul Geller


Samuel Rudman

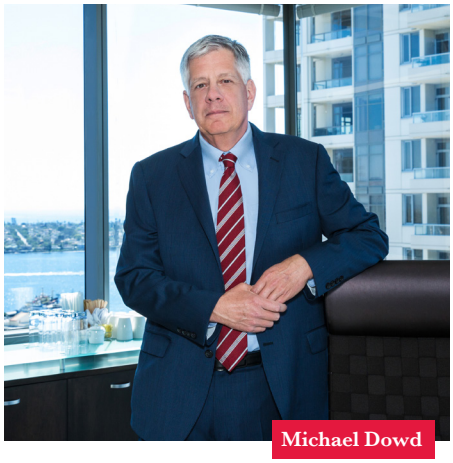

Spencer Burkholz


Daniel Drosman


Shawn Williams


Randall Baron


Rachel Jensen


Michael Dowd

48 Combined Leading Lawyer Wins

TRUMP (continued from page 13)

Class Counsel's representation and dedication to act in their clients' best interest."

The Robbins Geller trial team welcomed the confirmation of their hard work. "Justice doesn't always prevail, but when it does, it really propels the next pursuit," explained **Jason A. Forge**.

Robbins Geller partner **Rachel L. Jensen**, who has been litigating the case since its filing in 2010, stated: "With precious days slipping away for so many elderly Trump University students, the Ninth Circuit's decision provides a welcome light at the end of the tunnel for those who have struggled to pay off their debt for a decade."

Robbins Geller attorneys **Jason A. Forge**, **Rachel L. Jensen**, **Steven F. Hubacheck**, **Daniel J. Pfefferbaum** and **Patrick J. Coughlin** obtained this result on behalf of plaintiffs.

Simpson v. Trump University, LLC, No. 17-55635 (9th Cir. Feb. 6, 2018).

REINING IN UNICORNS (continued from page 17)

hold corporate fraudsters accountable.

Investment fraud is not just bad for investors. It is a menace to honestly innovative entrepreneurs because fraud undermines the integrity of our capital markets—the life blood of any startup. For these reasons, it is important to hold fraudsters accountable. I agree with former Securities and Exchange Commission Chair Mary Jo White who noted in a 2016 speech that "being a private company comes with serious obligations to investors and the markets." Defrauded investors deserve their day in court, regardless of whether the company in which they invest is publicly traded or not. Otherwise, pensioners and entrepreneurs alike will be relegated to living *un*happily ever after.


Darren Robbins

Darren J. Robbins is a founding partner of Robbins Geller Rudman & Dowd LLP. Over the last two decades, he has served as lead counsel in more than 100 securities class actions and has recovered billions of dollars for injured shareholders.

HOW TO CONTACT US

We welcome your letters, comments, questions and submissions.

Please direct all inquiries to:
David C. Walton
(619) 231-1058 or davew@rgrdlaw.com

Contributors

Annalisa Barrett
Richard A. Bennett
Paul Bland
Luke Brooks
Spencer A. Burkholz
Joseph D. Daley
Mark J. Dearman
Michael J. Dowd
Paul J. Geller
Tor Gronborg
Robert R. Henssler, Jr.
Rachel L. Jensen
Andrew S. Love
Danielle S. Myers
Darren J. Robbins
Samuel H. Rudman
Shawn A. Williams

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Robbins Geller Rudman & Dowd LLP is one of the world's leading law firms representing investors in securities litigation. With 200 lawyers in 10 offices, Robbins Geller has obtained many of the largest securities class action recoveries in history. For five consecutive years, ISS Securities Class Action Services has ranked the Firm in its annual SCAS Top 50 Report as one of the top law firms in both amount recovered for shareholders and total number of class action settlements. Robbins Geller attorneys have helped shape the securities laws and have recovered tens of billions of dollars on behalf of aggrieved victims. Beyond securing financial recoveries for defrauded investors, Robbins Geller also specializes in implementing corporate governance reforms, helping to improve the financial markets for investors worldwide. Robbins Geller attorneys are consistently recognized by courts, professional organizations and the media as leading lawyers in the industry. Please visit rgrdlaw.com for more information.

Atlanta • Boca Raton • Chicago • Manhattan • Melville
Nashville • Philadelphia • San Diego • San Francisco
Washington, D.C.

Robbins Geller Rudman & Dowd LLP
1800-449-4900
0808-238-9902


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