On the Record *with* Robbins Geller Rudman & Dowd LLP

SUMMER 2019

Summer 2019

A Note from Paul Geller

Robbins Geller has enjoyed an auspicious start to 2019. During the first six months of the year, we recovered billions of dollars for investors, consumers, and other victims of corporate fraud. In addition to the record settlement of over $6 billion in the *Visa/Mastercard* case (which, if final approval is granted at this November's hearing, will be the largest antitrust class action recovery in history), our attorneys obtained settlements of $160 million in *City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc.*, $108 million in *Knurr v. Orbital ATK, Inc.*, and $75 million in *Chicago Laborers Pension Fund v. Alibaba Group Holding Limited*, to name a few.

In addition to these settlements, our litigation teams have achieved many court victories. We defeated defendants' motion to dismiss in the high-profile "High Frequency Trading" securities fraud case. We are also continuing our work in using litigation to help state and local governments resolve the devastating nationwide opioid epidemic, seeking to hold manufacturers, distributors, and retailers of prescription opioids accountable for the crisis they perpetuated.

Our Firm's achievements and resources continue to be recognized by our peers, legal publications, and professional groups. Not only have a number of our attorneys been honored as trailblazers, but judges have commended the Firm and its lawyers for the "exceptional" and "extraordinary" work achieved with "skill, perseverance, and diligent advocacy."

While the first half of the year has been successful, our attorneys and staff never rest on their laurels. We will continue working hard and look forward to bringing our world-class teams of litigators wherever our clients need us while protecting investors throughout the nation and around the globe.

Paul Geller, Managing Partner of Robbins Geller's Boca Raton office.

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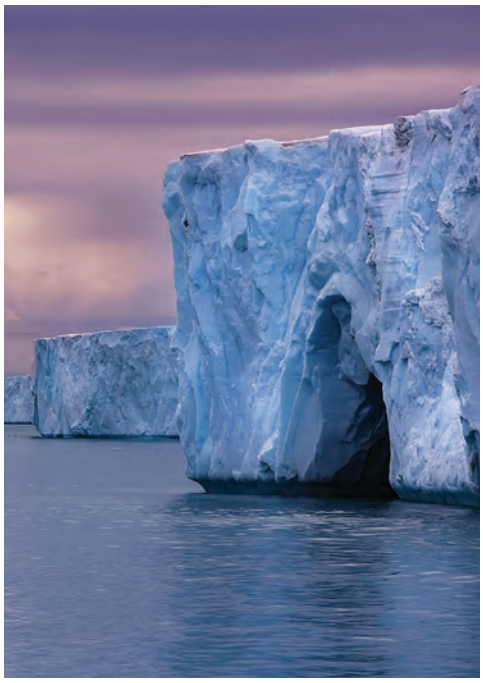

Awards and Recognition

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Corporate Governance Roundup

Shareholder Proposals

The most significant development of the 2019 proxy season occurred when the largest pension fund in the world supported a resolution submitted by an individual investor.

The support by the world's largest fund for a shareholder resolution calling for annual election of all directors filed by an individual investor is a development of enormous significance, especially since it was announced ahead of the vote in order to nudge other investors to vote in favor as well.

This is especially important because, as the proponent of this resolution, Jim McRitchie points out that corporate funded firms like the Spectrem Group[1] complain that a large number of shareholder proposals are submitted by a small group of individual investors with modest holdings.

This already well-documented data is not new or relevant. The only meaningful factor is the level of support for these resolutions from large, sophisticated financial institutions that may not be willing to file shareholder proposals, but are committed as fiduciaries to supporting them. We note that Spectrem, whose echo of "Main Street" in the title of its report suggests a likely connection to the dark money fake front group Main Street Investors Coalition,[2] purports to be speaking on behalf of individual investors in calling for "reform," but the paper is authored by a law school professor[3] whose program is funded by the Kochs, reportedly also backers of the Main Street Investors Coalition.

A Perverse Lawsuit

Oddball shareholder resolution of 2019:[4] "An enormous zeal for the overdog" is a good description of one professor's effort to force the shareholders of Johnson & Johnson

Continued on page 42

1. https://spectrem.com/Content_Whitepaper/exile-of-main-street-whitepaper.aspx
2. https://corpgov.law.harvard.edu/2018/06/14/the-main-street-investors-coalition-is-an-industry-funded-effort-to-cut-off-shareholder-oversight/
3. https://www.mercatus.org/j-w-verret
4. https://theintercept.com/2019/04/09/shareholders-rights-lawsuit/

New "U.S. Style" Collective-Damages Claims in the Netherlands

On March 19, 2019, the Dutch Senate adopted the Act on collective damages in class actions (*Wet afwikkeling massaschade in collectieve actie,* or the "Act"), which will make it easier to litigate mass damages through the Dutch courts. The Act increases the possibilities for collective actions in the Netherlands, and thus it is anticipated that the Act will have a significant influence on the litigation climate in the Netherlands and possibly Europe.

The Act confirms the pioneering role that the Netherlands has had in the field of collective actions in Europe since the 1990s, including the Dutch Act on collective settlements of mass claims (*Wet collectieve afwikkeling massaschade*, or the "WCAM"). Since that era, a claim organization representing a certain group of similar interests can start a class action to obtain declaratory relief. Such claim organization can only be a foundation (*stichting*) or association (*vereniging*) with full legal capacity. Current Dutch law, however, does not facilitate a class action for damages; the WCAM may be used only to settle claims on a class-wide basis, not to prosecute those mass claims. After entering into force, the Act will enable a class action for collective damages. The Act most likely will come into effect on September 1, 2019.

Brief History and Scope of the Act

In July 2014, the Ministry of Justice and Security published a draft legislative proposal for a new collective action for public consultation. The proposal aimed to extend the scope of the current Article 3:305a of the Dutch Civil Code (DCC) to enable collective actions for damages on an "opt-out" basis. The legislative proposal was met with considerable criticism from almost all stakeholders and interested parties. As a result of that criticism, the Ministry decided to involve various stakeholders and interested parties in the drafting of a new act. In November 2016, the Ministry of Justice and Security published a fully revised legislative proposal and submitted it to Dutch Parliament. After amendments, the Dutch House of Representatives and the Dutch Senate approved the legislative proposal in Spring of 2019, which created the Act.

The Act will apply to collective actions

for damages related to events that took place on or after November 15, 2016, *i.e.*, the date the legislative proposal was submitted.

Under the Act, a collective action for damages can be brought on behalf of both consumers and businesses and can be based on any type of legal infringement that affects a class, including breaches of contract, as well as breaches of antitrust, securities, or other laws. The Act includes provisions that are intended to introduce checks and balances to prevent frivolous litigation. The main elements of the Act are described below.

Standing to Bring a Collective Action

A claim organization has to meet enhanced criteria regarding standing and admissibility before it can bring a collective action. Those criteria include:

i. *Not-for-profit*: the claim organization must be not-for-profit; the objective of its founders must not be to make a profit by means of the claimant organization;

ii. *Good governance*: the claimant organization in principle is required to (a) have a supervisory board; (b) have a mechanism for decision-making by the persons whose interests are represented; (c) have sufficient financial means to fund a collective action; (d) be transparent about salaries paid to its officers and contributions claimed from class members (if any); and (e) have sufficient experience and expertise for the class action;

iii. *A publicly accessible website*: the website should contain information on items such as governance, purpose, and working method and how to join the claimant organization;

iv. *Reasonable attempt to settle*: under the existing and new Act, a collective action will be denied unless the claimant organization has made a reasonable attempt to settle the case. This rule has become more or less a formality, because the Act provides that a letter giving the defendant two weeks to respond will suffice.

Jurisdiction

Under the Act, a collective action can only be brought before the court if it has a sufficiently close connection to the Netherlands. Such connection

will exist if one of the following three conditions is met:

i. The majority of the individuals on behalf of whom the collective claim is brought (the "class") are Dutch residents; or

ii. The defendant resides in the Netherlands; or

iii. The events on which the collective action is based occurred in the Netherlands.

Dutch Style "Motion to Dismiss"

Collective action proceedings under the Act are begun by means of a writ of summons, which is analogous to a complaint. This document contains the facts on which the claim is based, the class of persons whose interests it seeks to protect, and the factual and legal issues that are similar to all class members. The court will go into the merits of the collective action brought if the court has decided the claimant organization meets the relevant criteria and the action is fit to be dealt with through collective action proceedings.

The court can halt the collective action when the action brought does not raise sufficient issues of fact or law that are similar to a "class"; the "class" is too small; the financial interests that are at stake are insufficient; or the claim is prima facie unfounded. This testing of the claim is comparable to the "motion to dismiss" stage of litigation in the U.S.

The Appointment of an "Exclusive Representative"

The Act introduces the appointment of an "Exclusive Representative," which is similar to the lead plaintiff in the United States. Within two days after the filing of the action, the claim organization has to register the class action in a central registry of collective actions, with a brief summary of the statement of claim. After the entry in the register, the court will stay the proceeding for three months. During this three-month period, other claim organizations can bring class actions for the same events. If multiple claimant organizations bring collective actions for the same events, the court will appoint an "Exclusive Representative" to represent the interests of the class.

Dutch Residents Can "Opt Out" and Non-Residents May "Opt In"

The Act provides two opportunities for claimants to "opt out." Claimants from the Netherlands who do not want to be in the collective action can opt out after the appointment of the Exclusive Representative. At the same time, non-Dutch claimants can voluntarily "opt in" to the collective action. Claimants have a second opportunity to "opt out" if a collective settlement is reached and declared binding. As in the United States, claimants will have to pursue their claims individually by initiating legal action promptly after taking the opportunity to "opt out" of the collective action.

Res Judicata – Binding Effect

As a general rule, a court decision granting or dismissing the collective action is binding on all members of the class who reside in the Netherlands and did not use their right to "opt out" of the action. The same applies to members residing abroad that joined the collective action by opting in. The decision is subject to appeal to the Amsterdam Court of Appeal and, ultimately, to the Dutch Supreme Court.

What About the Act on Collective Settlement of Mass Damages, the "WCAM"?

The WCAM, which has enabled the Amsterdam Court of Appeal to declare collective settlements binding between claim organizations and defendants since 2005, will remain in place. However, because the WCAM does not give claim organizations any means to force a defendant to engage in settlement negotiations, its utility in light of the Act is being called into question.

Outlook for U.S. Residents

This U.S.-style system for collective damages in class actions may create a big stick to wield. For U.S.-based members of the class, the system will bear a lot of resemblance to the United States, which might result in U.S. claimants electing to "opt in" and be represented in proceedings in the Netherlands. The Dutch courts are accustomed to rendering judgment in an international context and frequently work in foreign languages. Due to the modest "loser pays" rules in the Netherlands, at least compared to other legal systems, Dutch courts present a compelling venue to pursue damages. Although the Act will raise questions, it will bring about a major change in the Dutch and international class action landscape and is a valuable addition to the private enforcement possibilities around the world.

Written by **Koen Rutten**, Partner at Wijn & Stael Advocaten, and **Nathan Bear**, Partner at Robbins Geller Rudman & Dowd LLP. Wijn & Stael is a leading law firm in the Netherlands based in Utrecht. Koen Rutten specializes in securities litigation and was directly involved in the *Ageas* (formerly *Fortis*) settlement, the largest recovery ever for investors litigating in Europe. Nathan Bear represents institutional investors on a global basis, with a focus on investor litigation outside of the United States.

Recent Settlement News

Robbins Geller Obtains Final Approval of $108 Million Settlement in Orbital Securities Class Action

On June 7, 2019, the Honorable T.S. Ellis III granted final approval of a $108 million settlement in *Knurr v. Orbital ATK, Inc*. Believed to be the fourth-largest securities class action settlement in the history of the Eastern District of Virginia, the settlement provides a recovery for investors that is more than ten times larger than the reported median recovery of estimated damages for all securities class action settlements in 2018. The case was led by lead plaintiff **Construction Laborers Pension Trust of Greater St. Louis** and named plaintiff **Wayne County Employees' Retirement System**, which represented the §14(a) claims.

The case arises from Orbital ATK's announcement on August 10, 2016 that it would be restating its previously issued financial statements to record a loss of approximately $375 million on its largest contract. Plaintiffs alleged that defendants made false and misleading statements, both during the class period and in connection with the merger that formed Orbital ATK, that misrepresented the performance of the Lake City contract and concealed the massive loss. Plaintiffs maintained that defendants had no reasonable basis to report that the Lake City contract was profitable during the class period because the contract was bid far below historical manufacturing costs and the company was not achieving the savings necessary to make the contract profitable.

Robbins Geller succeeded in overcoming two successive motions to dismiss the case and during discovery was required to file ten motions to compel. All of the discovery motions were either negotiated to a resolution or granted in large part, which resulted in the production of critical evidence in support of plaintiffs' claims.

In approving the settlement, the court lauded Robbins Geller's efforts in achieving the $108 million settlement with "skill, perseverance, and diligent advocacy."

Robbins Geller attorneys **Darren J. Robbins**, **James E. Barz**, **Maureen E. Mueller**, **Kathleen B. Douglas** and **Frank A. Richter** achieved this recovery on behalf of investors.

Knurr v. Orbital ATK, Inc., No. 1:16-cv-01031 (E.D. Va.).

$75 Million Settlement in Alibaba Securities Case Gets Final Nod

On May 17, 2019, the Honorable Richard H. DuBois of the Superior Court of the State of California, County of San Mateo, granted final approval of a $75 million settlement in the *Alibaba Group Holding Limited* securities class action. The settlement, reached by a team of Robbins Geller attorneys and co-counsel, resolves investors' claims that Alibaba violated the Securities Act of 1933 in connection with its September 2014 initial public offering ("IPO"). **Chicago Laborers Pension Fund** served as a plaintiff in the action.

Alibaba Group Holding Limited is a large e-commerce company based in China. The case alleged that Alibaba's September 2014 IPO registration statement filed with the SEC failed to disclose known counterfeiting and other illicit activities being conducted on its e-commerce platforms and that such conduct could adversely impact the company's growth and business prospects. Plaintiffs also alleged that Alibaba failed to disclose that two months before the IPO, in July 2014, multiple Chinese regulators met with company executives and warned that such illegal practices, if not corrected, would result in fines and other regulatory action.

On January 28, 2015, China's State Administration for Industry and Commerce released a "White Paper Regarding Administrative Guidance Provided to Alibaba Group" detailing the very same illegal conduct that had been reported directly to Alibaba executives before the IPO in July 2014 by Chinese regulators. These January 2015 disclosures, reported by *The Wall Street Journal* and market analysts, triggered sharp declines in Alibaba's stock price. Later disclosures revealed the magnitude, scope and impact of the previously undisclosed facts, resulting in even further declines in the price of the stock to well below the $68.00 per share IPO price.

When granting final approval of the settlement, the court lauded Robbins Geller and co-counsel as "highly experienced and skilled" for obtaining a "fair, reasonable, and adequate" settlement in the "interest of the [c]lass [m]embers" after "extensive investigation."

Robbins Geller attorneys **Shawn A. Williams**, **Christopher P. Seefer** and **John H. George**, along with co-counsel, secured this excellent result on behalf of the class.

Chicago Laborers Pension Fund v. Alibaba Group Holding Limited, No. CIV535692 (Cal. Super. Ct., San Mateo Cnty.).

$50 Million Recovery Achieved for Purchasers of BHP U.S. ADRs

On April 10, 2019, the Honorable Naomi Buchwald of the U.S. District Court for the Southern District of New York approved a $50 million class action settlement in *In re BHP Billiton Limited Securities Litigation*.

As lead counsel, Robbins Geller achieved this result for lead plaintiffs **City of Birmingham Retirement and Relief System** and **City of Birmingham Firemen's and Policemen's Supplemental Pension System** on behalf of purchasers of the American Depositary Shares ("ADRs") of defendants BHP Billiton Limited and BHP Billiton Plc (together, "BHP") from September 25, 2014 to November 30, 2015.

BHP is an Australian-based mining company. By the start of the class period, BHP had approved a dramatic increase in iron-ore production at Samarco Mineração S.A. ("Samarco"), a joint venture operated in Brazil that BHP co-owned. This increase in production resulted in record volumes of mining waste, called tailings, which Samarco stored in three main dams. On November 5, 2015, Samarco's Fundão dam burst, "unleash[ing] a flood of tailings that destroyed the nearby town of Bento Rodrigues," "kill[ing] 19 people." *In re BHP Billiton Ltd. Sec. Litig.*, 276 F. Supp. 3d 65, 71 (S.D.N.Y. 2017). "The price of [the] ADRs declined substantially on news of the dam collapse and suffered further declines" as the truth was allegedly exposed regarding BHP's Brazilian operations and its purported disregard for safety and risk management (*id.*) – issues that BHP had repeatedly and positively addressed in public statements during the class period.

On August 28, 2017, the court upheld certain of the securities fraud claims asserted against BHP, concluding that "BHP made actionable misstatements regarding its commitment to safety and its risk management controls, and omissions of facts needed to make these statements not misleading." *Id.* at 94. The court further held that "[t]he detailed and well-sourced [complaint] alleges extensive, serious problems with the Fundão dam beginning in 2009, up to its collapse in November 2015," and that "BHP executives were aware of some of these problems and their potential consequences, yet did not address the problems effectively." *Id.* at 81. Ultimately, the parties embarked on fact discovery and, on August 6, 2018, they reached an agreement-in-principle to resolve this matter. On April 10, 2019, the court approved the settlement.

Robbins Geller attorneys **Samuel H. Rudman**, **Joseph Russello**, **Mario Alba Jr.** and **Michael G. Capeci** led the prosecution of this case on behalf of the class.

In re BHP Billiton Limited Securities Litigation, No. 1:16-cv-01445-NRB (S.D.N.Y.).

Robbins Geller Announces $73 Million Fund to Be Distributed to DHB Class Members

On May 6, 2019, Robbins Geller, as co-lead counsel for the class, announced the upcoming distribution of a fund of more than $73 million to DHB class members with previously recognized claims in *In re DHB Industries, Inc. Class Action Litigation*.

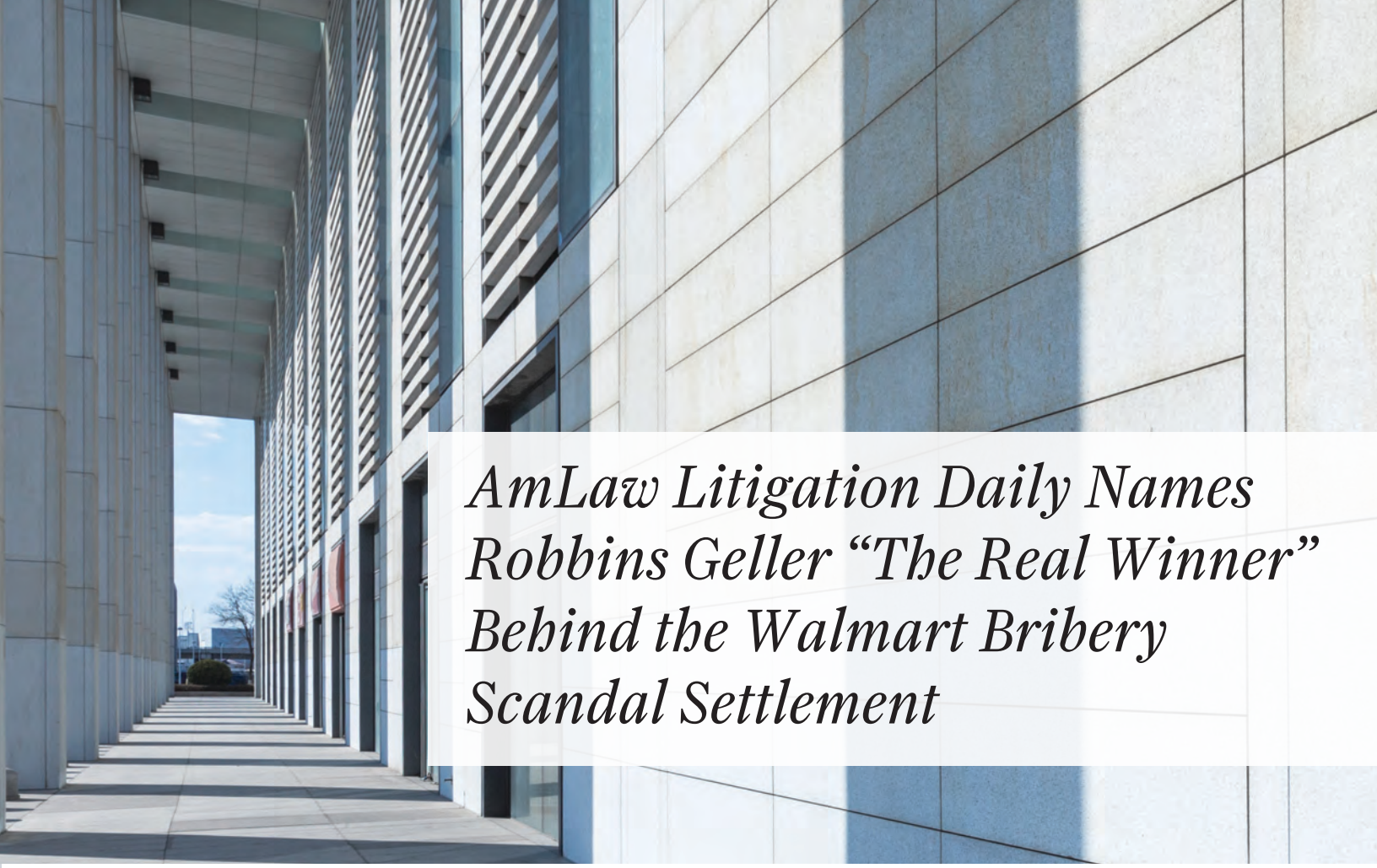
The case originally settled in 2008, resulting in a cash settlement fund of $34.9 million. A series of unanticipated events, however, threatened the viability of the original settlement and prevented its implementation. Those events included an appeal in a companion shareholder derivative action, DHB's bankruptcy filing, and the criminal prosecution of company founder David H. Brooks and other senior executives. The complications resulted in disagreements among the settling parties and numerous ancillary lawsuits and proceedings that interfered with the original settlement.

Over the past 11 years, Robbins Geller, with the assistance of co-counsel and bankruptcy counsel, have worked diligently to protect the interests of class members and improve the original settlement. The fund of more than $73 million represents more than 89.5% of more than $81.5 million in recognized claims in the original class action settlement. The case is currently pending in the U.S. District Court for the Eastern District of New York.

"We are pleased to announce this outstanding result for the class," said Robbins Geller partner **Samuel H. Rudman**. "Through hard work and perseverance over the course of more than a decade, we were able get investors a recovery of a high proportion of their recognized losses."

In addition to Rudman and co-lead counsel, Robbins Geller partner **Mark T. Millkey** obtained this result for the class.

In re DHB Indus., Inc. Class Action Litig., No. 2:05-cv-04296-JS (E.D.N.Y.).



AmLaw Litigation Daily Names Robbins Geller "The Real Winner" Behind the Walmart Bribery Scandal Settlement

On June 25, 2019, *AmLaw Litigation Daily* lauded Robbins Geller for its efforts in beating the feds to a $160 million settlement in *City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc.* and referred to the Firm as "the real winner" between Walmart, the Justice Department, and the SEC.

"Because while government officials in press releases were busy patting themselves on the back ('The Department of Justice will continue to aggressively investigate and prosecute foreign corruption,' 'Through our efforts, we delved through layers of transactions and uncovered the bribery of foreign officials,' and 'The FBI will hold corporations responsible when they turn a blind eye to corruption'), they neglected to mention one thing: Robbins Geller lawyers extracted a bigger settlement from Walmart than either the DOJ or SEC for the same underlying misconduct, and they did it more quickly," surmised the publication.

The case, which *AmLaw Litigation Daily* called a good example of efficacy for "those who might question the value of a private right of action in securities litigation," arose from allegations published by *The New York Times* in an article released on April 21, 2012 describing an alleged bribery scheme that occurred in Mexico.

"In December, Robbins Geller litigators led by **Jason A. Forge** hammered out a $160 million deal with Walmart ... for covering up suspected overseas corruption in Mexico," said the article. "Six months later, the SEC on June 20 announced that Walmart would pay $144 million to settle charges of violating the Foreign Corrupt Practices Act, while the DOJ settled FCPA criminal charges for $138 million. The federal cases also covered alleged wrongdoing in India, Brazil and China."

Even though Robbins Geller "had to build its case with less information than the feds" and despite the government having "far more leverage to exact settlement concessions," the Firm and its litigation team succeeded in obtaining a "generous" settlement that will provide "at least 50%" of damages to shareholders. "It was Walmart's first-ever securities class action settlement, as well as the largest confirmed settlement ever obtained in a single case against Walmart – a record that still stands after the SEC and DOJ cut their deals," stated the article.

"The DOJ and SEC might take a page from [Robbins Geller's] playbook."

Along with Forge, Robbins Geller attorneys **Scott H. Saham**, **Laura M. Andracchio** and **Michael Albert** achieved this result on behalf of the **City of Pontiac General Employees' Retirement System.**

CEOs Rake It In, Who Needs Results?

This is the time of year when we see the annual round-up of CEO pay stories. Some of the highlights:

The New York Times headline says it all: "The Highest-Paid C.E.O.s of 2018: A Year So Lucrative, We Had to Redraw Our Chart."[1] Last year's remarkable numbers, with two CEOs having been compensated more than $100 million each, was exponentially exceeded this year when Tesla CEO Elon Musk was paid over $2 billion, which is 40,668 times the average worker at his company. We note that Musk, with 33.7 million shares, or almost 20% of Tesla's outstanding stock (valued around $6,369,300,000), should already be sufficiently motivated to perform.

The conclusions one can glean from the *Times*' summary are: "C.E.O.s get paid regardless of logic," they "get paid extra to do the basics" (as with extra bonuses for doing mergers, when the pay should be about the results, not the deal), they "get paid regardless of scandal" (in other words, no incentive to follow the rules and prevent reputational damage to the brand), they "often get paid more than companies say" (Institutional Shareholder Services, for instance, estimated that the 2018 compensation granted to each of Oracle's co-CEOs had a value of $207 million, compared with the $108 million in the proxy), and they "get paid to invest in their companies" (the opposite of aligning their interests with those of investors).

Overall CEO pay increased at almost twice the rate of ordinary wages. So fears that the pay ratio disclosure would make gigantic pay packages more difficult for boards to approve seem to have been unfounded.

Disney

When the CEO is doing a great job, how much is too much? Well, filmmaker Abigail Disney, grandniece of Walt Disney and granddaughter of his brother and business partner Roy Disney, says that even though CEO Robert Iger is doing an outstanding

1. https://www.nytimes.com/interactive/2019/business/highest-paid-ceos-2018.html

job, his $65 million pay package is "insane."[2] That's 1,414 times the pay of the median employee. This is after a majority of Disney shareholders voted against Iger's pay package last year.

ValueEdge Advisors Vice Chair Nell Minow was quoted in *Fortune*:[3]

> "It's too much [money] and it's badly structured," she said. "I think of pay like any other asset expenditure of a company, with return on investment. I'm always very leery of retention-based pay, and I think that's how these stock grants are justified." A focus on retention can turn pay into a 'given' rather than an amount that is predicated on the CEO further improving company performance.

As You Sow Updates

The top public interest group examining CEO pay has added the latest to its annual report on the subject, particularly those CEOs who use accounting dodges to create metrics that would not otherwise allow them to get the maximum payout:

United Technologies

If United Technologies had used GAAP instead of non-GAAP accounting, the CEO's $3.5 million in bonuses would have been reduced.

Abbot

CEO pay increased more than 25% at Abbott by manipulating the company's accounting. Specifically, the financial benefits of acquisition are used to increase pay, but expenses related to acquisitions are not factored in.

Lennar

Lennar has three members of its executive team – including the CEO and the executive chairman – each paid over $15 million even as the stock price declined. This underlines the pay for performance disconnect at the company. Lennar also continues to calculate annual incentive awards of the Executive Chairman, the CEO, and President as a percentage of pretax income without an apparent cap.

Boeing

Boeing's chairman, president and CEO Dennis A. Muilenburg received total compensation of

2. http://fortune.com/2019/04/22/abigail-disney-bob-iger-salary-insane/
3. http://fortune.com/2019/04/23/iger-disney-pay-board/

$23.4 million for 2018. The proxy mentions multiple times its emphasis on "cost savings" as a performance feature to be rewarded. Did compensation metrics aimed at reducing costs play any role, however inadvertent, in some of the bad decisions made at the company?

Hasbro

Rosanna Weaver of As You Sow reports on the hidden excesses of CEO Brian Goldner's pay package at Hasbro.[4] We note the members of the Hasbro compensation committee: Edward M. Philip, Kenneth A. Bronfin, Sir Crispin Davis, Lisa Gersh, and Linda K. Zecher.

> While the reported compensation of Chairman and CEO Brian Goldner does not look particularly high this year at $8,499,623, there are significant reasons shareholders may wish to vote against the pay package. Goldner realized over $25 million through the exercise of options in 2018, and an addition[al] $8.8 million through the vesting of stock awards. Since 2013, Goldner has realized more than $97 million in options vested, and an addition[al] $83 million in stock awards vested. He owns fewer shares today than he did in 2013.
>
> This is at least the fourth year in a row in which Goldner's realized pay – cash he actually took home – has been considerably higher than reported pay. Since the most recent proxy was published media reports note that he sold at least an additional $32.5 million dollars of the stock.[5] The sale in early May 2019 came shortly after the stock price jumped following a higher-than-expected earnings report.[6] It has fallen since that time.
>
> On August 1, 2018, the company amended and extended Goldner's employment agreement to go through December 31, 2020, despite the fact that shareholders are increasingly objecting to such agreements. His base salary was increased from $1,500,000 to $1,600,000. Goldner's target annual long-term equity incentive award to 800% of his base salary, beginning with Hasbro's 2019 fiscal year. Typically annual incentive awards are targeted at 200% of base salary, so this figure is quite extraordinary.
>
> A large target is a way of awarding large bonuses even if performance is down. The company notes that in 2018, based on performance that "we achieved an aggregate weighted performance payout of only 43% of target under the annual management incentive plan." If the target had been 800% this year it would have meant that Goldner received a bonus of 300% of his salary despite failure to meet target; that's the sort of bonus most CEOs get when they achieve above target, not below.

Non-GAAP Reporting Leads to Higher Pay

A study documents the use of non-GAAP reporting to reach (or appear to reach) performance targets: "High Non-GAAP Earnings Predict Abnormally High CEO Pay":[7]

> These firms pay their CEO excessively despite (i) weak contemporaneous and future operating performance and (ii) lower contemporaneous stock returns relative to other firms in the S&P 500. As in prior research, we do not find that non-GAAP earnings mislead investors, nor do we find support for managers' typical assertion that non-GAAP earnings more accurately convey core performance. Specifically, non-GAAP earnings do not correlate more highly with contemporaneous stock returns or future performance than GAAP net income or operating income. Overall, our evidence suggests large non-GAAP earnings adjustments influence some boards of directors in approving a level of CEO pay that is otherwise not supported by the firm's stock price or GAAP earnings performance. We also note that although excessive pay for firms reporting high non-GAAP earnings is about 16% of total pay, the bulk of the pay represents reward for performance. Still, an economically meaningful fraction of CEO pay appears to be attributable to opportunistic non-GAAP reporting.

ISS Reports on Another Way to Distort Pay Numbers

In addition to fudging the numbers to make it look like CEOs met

4. https://www.asyousow.org/our-work/ceo-pay/blog/2019/5/14/hasbro
5. https://finance.yahoo.com/news/hasbro-inc-chairman-ceo-brian-191503913.html
6. https://www.cnbc.com/2019/04/23/hasbro-ceo-we-made-the-progress-we-wanted-to-make-in-the-quarter.html
7. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030953

performance targets, compensation committees have permitted some distortion of the numbers that are intended to inform investors just how much they are getting paid:[8]

> For years, companies have recognized this potential discrepancy; since even before the advent of say-on-pay, companies in perilous performance positions have turned to alternative measures of pay to demonstrate that executives have shared in the pain that investors feel in their portfolio values. These alternatives have included various forms of realizable and realized pay.

(Some) Schroders Shareholders Object to Pay

At May's annual meeting, Glass Lewis recommended that investors vote against the pay report at fund manager Schroders, as well as the election of Leonie Schroder, claiming she lacks the experience needed to challenge the firm's executive team. It also urged investors to block the re-election of Michael Dobson as chairman, who Glass Lewis says is responsible for the board's make-up and "should be held accountable for this failure."

The advisory group said it had "severe reservations" about supporting the pay report due to the size of the bonuses granted to chief executive Peter Harrison. Harrison, who has been at the helm since 2016, was given a £6 million bonus last year on a £500,000 salary.

"We remain concerned that the annual bonus plan has consistently led to unnecessarily high payouts," Glass Lewis said. "We cannot recommend that shareholders support this proposal."

Notwithstanding the recommendations, Dobson and Schroder were elected overwhelmingly and the pay package was approved with 88% support.

Wells Fargo

CEO Tim Sloan got a 5% increase in pay to over $18 million, as the company continued to struggle with scandal and a sinking stock price. He was also questioned by Congresswoman Alexandria Ocasio-Cortez for the bank's support of environmentally risky pipelines and facilities that house the separated families attempting to immigrate or get asylum. He abruptly terminated his employment on March 28, 2019.

A Million a Month

When Reg 162m was adopted in 1992 following political outcry over CEO compensation, it gave many CEOs an instant raise. The average back then was $750,000 a year in cash and the rule provided that only $1 million of cash pay would be deductible as a business expense, but there would be no limit on "performance-based" pay like stock options. So everyone got a cash raise up to a million a year. Many companies paid more and just took the tax hit, or, rather, their shareholders did.

Since, 162m has been rescinded and now *The Wall Street Journal* reports that many CEOs are getting a million a month.[9] "Most of these CEOs received substantial raises – the median was 6.4% – even though the December stock-market swoon meant most of the companies finished out the year posting sluggish shareholder returns."

U.K. Proposal to Curb Excessive Pay

Dina Medland reports:[10]

> The Business, Energy and Industrial Strategy (BEIS) report, *Executive Rewards: paying for success*,[11] calls for the country's biggest companies to link the pay of those at the top with the rest of the workforce, bringing to an end "huge differentials in pay between those at the top and at the bottom" which "remain the norm", and suggesting that they will be held to account if they do not.
>
> "Executive greed, fed by a heavy reliance on incentive pay, has been baked in to the remuneration system. With that comes a public perception of institutional unfairness that, if not addressed, is liable to foment hostility, accentuate a sense of injustice and undermine social cohesion and support for the current economic model . . . ." says the report in its conclusions and recommendations.[12]

8. https://corpgov.law.harvard.edu/2019/04/29/realizable-pay-insights-into-performance-alignment/
9. https://www.wsj.com/articles/many-s-p-500-ceos-got-a-raise-in-2018-that-lifted-their-pay-to-1-million-a-month-11552820400
10. https://www.dinamedland.me/board-talk/pk34vcqwzflrebnsjfuy6j6p58ze1j
11. https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/2018/201802.htm
12. https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/2018/201809.htm

ESG and Sustainable Investing

Fast Growth

Environmental, social, and governance ("ESG") continues to be the fastest-growing category in the investment industry, with mainstream players competing to offer the most attractive alternatives. Nuveen has an ESG exchange traded fund, and a recent news report noted that it benefited by minimizing its exposure[1] to "the Kraft Heinz bloodbath" because it did not meet the ESG criteria. Goldman Sachs' ESG ETF manager explains that ESG is not just about exclusion.[2] BlackRock's iShares introduced three different ESG exchange traded funds:[3]

- ESG: Evaluating and selecting companies based on their commitments to positive environmental, social and governance business practices. All iShares ESG funds also seek to track indexes that screen out civilian firearms, controversial weapons and tobacco.
- Thematic: Focus on a particular environmental, social, or governance issue, for example clean energy or the diversity of a company's workforce.
- Impact: A targeted investment that is geared toward achieving both a measurable sustainable outcome alongside a financial return.

Corporate executives have to respond to investor interest in ESG, which is especially important to younger shareholders. As a matter of strategy and marketing, ESG is becoming a standard element of risk management. According to Financial Executives International, that is usually within the purview of the CFO:[4]

> Here are a few reasons why ESG disclosures have not historically been aligned with risk disclosures:
>
> - **ESG-related risks have not typically been quantified in terms of dollars and cents.** When there is no attempt to monetize ESG risks, companies may find it challenging to allocate proper resources to addressing these risks.

1. https://www.barrons.com/articles/esg-nuveen-asset-management-kraft-heinz-stock-51550862080
2. https://www.etf.com/sections/features-and-news/inside-etfs-esg-isnt-all-about-exclusion
3. https://www.ishares.com/us/strategies/sustainable-investing
4. https://www.financialexecutives.org/FEI-Daily/February-2019/CFOs-Play-a-Key-Role-in-ERM-and-ESG-Oversight.aspx

- **Proper KPIs have not been identified for ESG risks.** Many companies discuss ESG risks, but have yet to identify the key performance indicators necessary for a successful, internal risk review process.

- **Silos can hamper communication about ESG issues.** Too often, sustainability practitioners and risk managers are not in the habit of regularly communicating with one another.

Once ESG risks are viewed in ways that make them more visible and easily comparable among peers and competitors, companies can identify which ESG risks are material and how these material risks should be managed.

Even governments are considering non-traditional economic and accounting standards. New Zealand Prime Minister Jacinda Ardern, for example, wants the country's financials to reflect a more holistic look at value and values.[5]

Opioids

In an unusual case of personal criminal liability for corporate actions, a federal jury found the top executives of pharmaceutical company Insys Therapeutics guilty of criminal racketeering for orchestrating an elaborate scheme of bribes and kickbacks to doctors to boost the prescribing of an opioid painkiller it manufactured.[6] Insys founder and former chairman John Kapoor is the first drug company CEO convicted in the federal government's pursuit of those responsible for fueling the deadly opioid crisis. Kapoor and other executives at the Arizona-based company could face prison sentences that run as long as 20 years for the felony convictions. Insys Therapeutics said it may now seek bankruptcy protection after paying out tens of millions of dollars on legal settlements and the costs of defending former executives convicted of bribing doctors to prescribe the company's ultra-powerful opioid painkiller.

Note: A shareholder proposal from United Church Funds on lobbying disclosures at pharmaceutical company Mallinckrodt generated 79.7% support from the company's shareholders.[7]

One reason for the high vote was the support of the corporate leadership, which also recommended votes in favor of two other shareholder resolutions, one on board oversight of opioid risks, and one on clawing back executives' compensation when controls fail and financial restatement occurs.

Fair Treatment

Trillium has five resolutions on upper management gender diversity and Walden has proposals on LGBTQ diversity (reflecting inconsistency in the range of state laws) and board diversity.

Guns

Majority Action has taken the lead with a successful past resolution at Sturm, Ruger & Company "to improve the board of directors and get better information about safety measures and mitigation of harm associated with company products, including efforts to improve gun safety and assessment of the corporate reputational and financial risks related to gun violence in the U.S. The proposal was successful, with 7.2 million votes in favor and 3.3 million votes cast against."

Most recently, Majority Action "published a new Shareholder Advisory about another gun company, calling American Outdoor Brands' (AOBC) investor disclosures 'incomplete and potentially misleading.'"[8]

Renaming at CalSTRS

There is no better indicator of the increased role of ESG than this: the CIO of CalSTRS has proposed that the fund's corporate governance unit change its name to the "sustainable investment and stewardship strategies group."[9] This reflects an overall move toward an organic, holistic notion of engagement by investors as encompassing all elements of sustainability, including governance, environment, and other strategic elements that are too often dismissed in favor of short-term returns. Other developments underscore this as well.

Apex and ISS Announced a New ESG Ratings Service

"Apex, the world's fifth largest fund administrator, and ISS, a provider of end-to-end governance and responsible investment solutions have joined forces to deliver ESG reporting capabilities to asset managers worldwide. . . . The reports will allow Apex clients to measure the ESG performance of each of their portfolio companies through accessing ISS' Governance QualityScores, company carbon footprints, and conduct norms-based screening through a simple and intuitive system."[10]

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5. https://www.linkedin.com/feed/update/urn:li:activity:6496596294956650496/
6. https://www.nytimes.com/2019/05/02/health/insys-trial-verdict-kapoor.html
7. https://ucfunds.org/2019/05/ucf-leads-a-resolution-that-generates-79-7-support-from-shareholders/
8. https://valueedgeadvisors.com/2018/09/16/can-shareholders-make-guns-and-gun-companies-safer/
9. https://www.ai-cio.com/news/calstrs-cio-proposes-rebranding-corporate-governance-unit/
10. https://www.institutionalassetmanager.co.uk/2019/01/24/272362/apex-and-iss-jointly-launch-new-esg-reporting-services

No Body to Kick, No Soul to Damn, Again

Facebook has violated its agreement about protecting the private data of its users with the Federal Trade Commission. What penalty can make a difference?

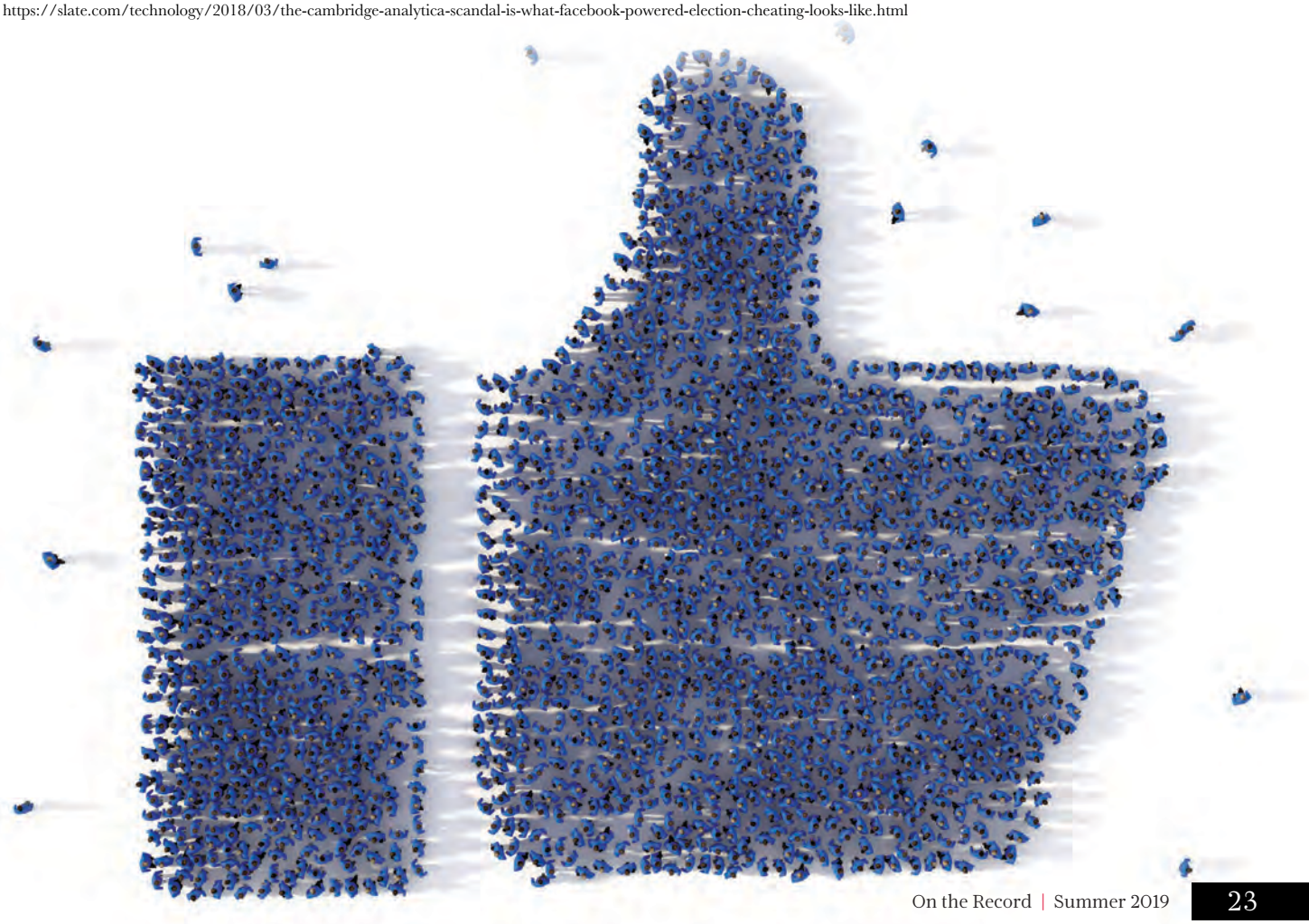
In an article for *Slate*, April Glaser recently wrote about the prospect of a record-setting fine that was then likely to be imposed on Facebook by the Federal Trade Commission (FTC).[11] (Subsequently, Facebook was fined $5 billion.) It brought up the usual issue raised memorably by Edward Thurlow, 1st Baron Thurlow: Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?

> If the idea is to punish bad – and promote good – behavior, what size fine *should* Facebook receive? It's first worth clarifying that Facebook really did mess up. The company had a 2011 agreement with the FTC not to share its users' data without consent, but it wasn't until 2014[12] that Facebook actually changed its data-sharing policy, which allowed developers to access not only the data of users who downloaded or agreed to use their apps, but also their friends' data. From the looks of it, Facebook violated its consent decree – and because of its loose policies, one of those third-party developers was able to slip a massive amount of user data to Cambridge Analytica.
>
> Certainly, Facebook should face consequences for its actions. But it's hard to imagine an amount of money the feds would consider that would even give the company reason to flinch – there's just no history of the FTC leveling such high fines. Theoretically, the U.S. could issue a European Union-size slap on the wrist, *a la* the $5 billion regulators levied at Google in 2018 for anticompetitive practices in the Android smartphone market.

Professor Jennifer Taub points out that it is the shareholders who end up paying the fine. ValueEdge Advisors Vice Chair Nell Minow says that the government should insist on more than money when a company violates a consent order it had agreed to:

> "What the government needs to do is insist that there be very significant changes in corporate governance structure," says Minow. "That's the only thing that will make a difference here. They need independent directors."

11. https://slate.com/technology/2019/01/facebook-fine-ftc-how-much-mark-zuckerberg.html
12. https://slate.com/technology/2018/03/the-cambridge-analytica-scandal-is-what-facebook-powered-election-cheating-looks-like.html



Robbins Geller Rudman & Dowd LLP is a leading law firm that has recovered billions of dollars for defrauded investors in global securities litigation. With 200 lawyers in 9 offices, Robbins Geller consistently outperforms other law firms by attaining greater investor recoveries in more resolved cases year after year, including many of the largest securities class action recoveries in history. Beyond the Firm's unmatched results, Robbins Geller also specializes in implementing meaningful 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.

What's Happening in the Battle Against the Nationwide Opioid Epidemic?

Robbins Geller continues to engage at the vanguard of the litigation stemming from the nationwide prescription opioid epidemic. According to the Centers for Disease Control and Prevention, 130 Americans die each day from an opioid-related overdose.[1] In response, more than 2,000 entities, including states, counties, cities, Native American Tribes, third party payers, and hospitals have filed lawsuits seeking massive industry changes and billions of dollars in damages against the pharmaceutical manufacturers, distributors, and retail pharmacies responsible for creating and perpetuating this tragedy (including Purdue Pharma, Teva Pharmaceuticals USA Inc., Johnson & Johnson, Endo Health Solutions Inc., Allergan PLC, Mallinckrodt PLC, Cardinal Health, Inc., McKesson Corporation, and AmerisourceBergen Corporation).

Robbins Geller has been retained by many entities at the forefront of the litigation. Among others, the Firm is proud to represent the State of Maryland, the District of Columbia, the City of Los Angeles, and the City and County of San Francisco, as well as numerous counties and municipalities throughout Florida, Michigan, Arizona, and North Dakota. Additionally, Robbins Geller founding partner **Paul J. Geller** was appointed by

1.https://www.cdc.gov/drugoverdose/epidemic/index.html

the Honorable Dan Aaron Polster to the team of lawyers spearheading the coordinated lawsuits in the multi-district litigation ("MDL"), *In re National Prescription Opiate Litigation*. The litigation team, including Geller, "reads like a 'Who's Who' in mass torts," according to *The National Law Journal*. Geller is also part of a smaller appointed group of negotiators that *Law360* reported as having a daunting task: "broker a quick and meaningful deal that earmarks money for health care and law enforcement, while also helping to curb opioid prescribing and abuse."

Most recently, the Robbins Geller team is working with a very small group of firms and law professors in proposing an innovative idea to help jumpstart a global settlement.[2] The novel proposal, which was first presented to Judge Polster by Geller and his co-counsel on June 25, 2019, is scheduled for a further hearing on August 6th. Geller will be asking the court to certify a type of class under Federal Rule 23, the class action rule, that has never been certified before. Rather than the common "settlement class," which considers settlements *ex post*, Geller will be seeking the certification of a "negotiation class" to help negotiate a class settlement *ex ante*. The motion seeks the appointment of approximately 50 local governmental entities to serve as class representatives, including several Robbins Geller clients, to negotiate on behalf of all of the nation's cities and counties. During a hearing in June, the negotiating class concept was previewed to Judge Polster and the defendants. Judge Polster remarked that the "negotiation class that has been presented by the plaintiffs' motion is a novel idea; it has never been tried, but that doesn't make it wrong or illegal or incorrect. There's never been a constellation of cases like this, so to settle them requires a novel approach."

After obtaining input from all stakeholders, the court scheduled another hearing for August 6, 2019. As reported nationally in *Law360*, in discussing the reason why another hearing has been scheduled for August, Geller said: "Lawyers are comfortable with what they are familiar with, and novel ideas tend to invite skepticism. Rather than get defensive and entrenched, our preference was to consider the input and viewpoints carefully and thoughtfully, even of the biggest skeptics, and then refine and improve things. [The first] hearing was a step in the right direction, and we look forward to refining the motion, taking into consideration the input we've received, and presenting it to the court soon."

"The idea for a negotiating class is novel, but it is consistent with the traditional use of Rule 23. If accepted, it could be a useful vehicle for negotiating a voluntary settlement," said Geller. "We realized we needed a way to achieve a global resolution that covers the thousands of litigating entities and also the thousands of local governments that are impacted but have not filed suit. And the defendants realistically need to know that if they enter serious settlement discussions, they can achieve a global resolution that ends the litigation."

Many of the drug companies under fire are continuing to deny culpability for the deadly epidemic. With an October 21 "bellwether" trial scheduled in Judge Polster's courtroom on behalf of Ohio's Summit and Cuyahoga Counties, some defendants have lodged summary judgment motions, hoping to defeat, or at least narrow, the plaintiffs' claims before the trial. As reported by *Law360*, Geller described the companies' motions as "an avalanche of BigLaw briefs with repetitive arguments that could have been written on half the paper."

"But I assure you," Geller added, "that the plaintiffs have amassed a deep and talented legal briefing team, and we've already started separating the wheat from the chaff and will respond directly and forcefully."

Along with Geller, Robbins Geller attorneys **Mark J. Dearman**, **Aelish M. Baig**, **Thomas E. Egler**, **Matthew S. Melamed**, **Lea M. Bays**, **Dory P. Antullis**, **Carissa J. Dolan** and **Ricardo J. Marenco** are leading the Firm's litigation efforts on behalf of cities and counties around the country.

In re National Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio).

2. https://www.law360.com/articles/1172224/opioid-mdl-judge-seems-open-to-novel-deal-approach

Climate Change News

Regulatory Action

A Trump Executive Order has directed the Department of Labor to report on pension fund fiduciary obligations "to identify whether there are discernible trends with respect to such plans' investments in the energy sector." This is a reference to climate change issues. ValueEdge Advisors Vice Chair Nell Minow has filed a comment letter and adapted it as an article on the Harvard Law School Forum on Corporate Governance and Financial Regulation.[1] An excerpt:

> Representatives of the pension fund community and other institutional investors as well have been making the case for many years that the Department should continue to support the obligation of fiduciaries to consider all elements of investment risk and return "for the exclusive benefit of plan participants," as the statute requires.
>
> For example, over the past few years, the market has become much more sensitive to the impact of climate change on both risks and opportunities for portfolio companies. This is reflected by the fastest growing sector in the investment world, ESG (environment, social, governance, sometimes also known as sustainability), a market-driven response from every major financial institution, not just in the US but throughout the world.
>
> ***
>
> The Department of Labor policies for investment professionals have always been about process, the only substantive requirement being the statutory obligation of diversification. We encourage the Department to continue with this approach. It would be a mistake to substitute its own judgment for that of the professional money managers who are in the best position to make those decisions. The Department's job is to ensure

1. https://corpgov.law.harvard.edu/2019/05/25/president-trumps-executive-order-and-shareholder-engagement-on-climate-change/

the independence and freedom from conflicts of interest of those professionals, and that includes not allowing the insiders at their portfolio companies to tell them what to do.

We expect the Department to conduct wide-ranging research to prepare their response to the directive in the Executive Order, reaching out to institutional investors to better understand how they are incorporating their assessment of climate change and other environment-related investment and liability risk in their proxy votes and other shareholder rights, including litigation and nomination of dissident candidates for the board.

Note: "Green" investments have now reached more than $10 trillion globally, according to Ethical Markets' Green Transition Scoreboard.

Corporate Management Strikes Back

It's like a game of Whack-a-Mole with the energy companies and other businesses working to limit shareholder access to independent research and voting rights.[2] The SEC allowed ExxonMobil to omit a shareholder resolution about greenhouse gas emissions from its proxy. The Commission is still considering possible action restricting shareholder proposals and proxy advisors following the November 15, 2018 "proxy plumbing" hearing.

The Senate held a similarly slanted hearing clearly orchestrated by the same group of corporate insiders, and President Trump has now issued an Executive Order that addresses regulatory barriers to financing new energy infrastructure.[3] It calls on the Department of Labor to determine whether retirement plans engaging with energy companies on ESG issues comply with the fiduciary obligations of ERISA. The White House said in a statement that the Executive Orders are designed "to address regional and local energy supply constraints and to promote an efficient energy market."

The ERISA review portion of the order notes that "companies owe a fiduciary duty to their shareholders to strive to maximize shareholder return, consistent with the long-term growth of a company." That section also calls on the Labor secretary to review guidance on proxy voting "to determine whether any such guidance should be rescinded, replaced or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets."

This appears to be a smokescreen for another attack on shareholder proxy votes and initiatives relating to climate change. Any investigation on the merits should reveal that shareholder concerns about climate change, purely from a financial perspective, are not only consistent with fiduciary obligation, but required by it. For example:

1. The Environmental Protection Agency published a 150-page document about coping with the debris from natural disasters across the country: Start planning for the fact that climate change is going to make these catastrophes worse.[4] This is an essential issue for every element of corporate strategy, from supply chain issues to core operations and risk management.

2. A study published in *Sustainability Accounting, Management and Policy Journal* by Michael Magnan and Hani Tadros found that better disclosure of environmental performance correlated with better performance at the 78 companies in environmentally sensitive industries that they examined.[5]

> In this paper, we aim to bridge the gap in the literature about the association between environmental disclosure and environmental performance by analyzing the motivation of firms with high or low environmental performance to disclose proprietary environmental information that could compromise the firm's competitive position or have direct impact on its cash flow. Consistent with some prior research, we argue that economic- and legitimacy-based incentives both drive a firm's environmental disclosure. However, revisiting prior research, we put forward the view that a firm's environmental performance (either high or low) moderates the effects of these incentives on environmental disclosure in a differential fashion.

Of course you do not have to be an economist to conclude that companies will be more transparent

2. https://www.climateliabilitynews.org/2019/04/11/most-oil-giants-still-fighting-shareholder-pressure-to-address-climate
3. https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-paving-way-energy-infrastructure-development/
4. https://www.epa.gov/homeland-security-waste/guidance-about-planning-natural-disaster-debris
5. https://www.emeraldinsight.com/doi/full/10.1108/SAMPJ-05-2018-0125

when there is good news to report. What matters here is what investors can conclude from the level of transparency in these disclosures, and what it means about the potential – or necessity – for engagement.

Note: Since July 2017, following the release of the Task Force on Climate-Related Disclosures (TCFD) guidelines, more than 500 large businesses, investors and industry groups have signed on to provide this type of forward-looking financial disclosure. Companies in the financial services industry are leading the way in their support of the TCFD recommendations, including BlackRock, State Street and S&P Global, along with the Association of Chartered Certified Accountants.

It's not limited to the financial services industry. Other sectors are signing on, including Statoil and Shell in the energy sector, consumer product companies such as H&M and Nestlé, materials companies such as BASF and DowDuPont, as well as industrial companies such as Saint-Gobain and Ingersoll Rand.

3. The Bank of England takes note of climate risk:[6]

> [A] speech by Sarah Breeden, head of international banks supervision, suggests a degree of sympathy with the points being made by the protesters: that time is running out to prevent catastrophic climate change and previous efforts to combat the problem have been nowhere near vigorous enough.
>
> Breeden's message to the financial sector was that they need to incorporate climate change into their corporate governance, their risk management analysis, their forward planning and their disclosure policies or face the prospect of losing a heck of a lot of money.[7]
>
> The financial markets have a term for a sudden drop in assets prices known as a Minsky moment (after the economist Hyman Minsky). Breeden said a climate Minsky moment was possible, in which losses could be as high as $20tn (£15.3tn).

If the Bank of England is calling on companies to address the risks of climate change, then the Department of Labor should recognize that pension fund managers' similar assessment of risk is consistent with their obligation as fiduciaries.

Grantham Steps Up

Renowned investor Jeremy Grantham is putting $1 billion into contributions and investments to "decarbonize" the economy.[8] He says climate change and the efforts to adapt to and minimize it will bring about "the biggest reshuffling of the economy since the Industrial Revolution."

Net Zero by 2050

The 50/50 Climate Project founded by the late Rich Ferlauto is now a part of Majority Action, the group that has been very effective in pursuing shareholder initiatives on guns,[9] and it has been renamed The Climate Majority Project.[10]

Their report, dedicated to Ferlauto, was produced with the support of the Nathan Cummings Foundation, Partners for a New Economy, the Arca Foundation and the Silberstein Foundation.[11]

> In recent years, institutional investors worldwide have won substantial advances in corporate disclosures and engagement on climate change. Companies across a range of industries have set emissions reductions targets, undertaken scenario planning, and made meaningful disclosures of climate-related risks. Moreover, despite the Trump Administration's announced plan to withdraw from the 2015 Paris Agreement, investors joined with mayors, governors, and business leaders across the United States in the "We Are Still In" coalition, re-doubling their commitment to meeting the agreement's goals of keeping warming to well below 2°C above pre-industrial levels, and pursuing efforts to limit warming to 1.5°C.

6. https://www.theguardian.com/business/2019/apr/15/bank-of-england-begins-climate-enforcement-with-a-velvet-glove
7. https://www.bankofengland.co.uk/speech/2019/sarah-breeden-omfif
8. https://www.bloomberg.com/news/articles/2019-01-17/jeremy-grantham-s-1-billion-plan-to-fight-climate-change
9. https://medium.com/@cranberries/can-shareholders-make-guns-safer-15c1e3029b40
10. https://www.climatemajority.us/about-full
11. https://www.climatemajority.us/net-zero-report

What is especially important in this report is the way it frames climate change as both risk and opportunity for investors. For example:

> Decarbonization of the economy and electrification of other sectors create unprecedented opportunities and challenges for utilities and their investors. Utilities are facing stagnant demand, with increases in usage from economic growth offset by increased efficiencies and development of distributed generation.[12] Economy-wide decarbonization has the potential to drive a dramatic expansion of electricity usage as transportation, heating, and industrial activities are electrified.

The risks the report covers include financial, regulatory, competitive and physical. It concludes with a plan of action for a shift to net zero carbon emissions by 2050, including transparency on political and lobbying expenditures and meaningful transitional milestone goals for incentive compensation.

Proxy Season Highlights

As You Sow reports on this year's shareholder resolutions:[13]

> Proponents have filed at least 386 shareholder resolutions on environmental, social and sustainability issues for the 2019 proxy season, with 303 still pending as of February 15. Securities and Exchange Commission (SEC) staff have allowed the omission of only six proposals so far in the face of company challenges, far fewer than the 27 omitted at this point last year because the SEC was included in the recent six-week government shutdown. Companies have lodged objections to at least 54 more proposals that have yet to be decided.
>
> Proponents have already withdrawn more proposals than they had last year – 71, up from 62 in mid-February 2018. Usually these are a sign that proponents and companies have reached an agreement.

The topic of climate change and other environmental issues undergirds many other corners of shareholder activity this proxy season.

The number of proposals specifically concerned with climate change has dropped to 60, down from 83 last year, although, as in the past, climate change is also raised in other proposals about sustainability disclosure and in a few on lobbying.

Last year, the SEC upended years of precedent when it told EOG Resources on February 26, 2018 that a resolution asking it to adopt greenhouse gas goals concerned ordinary business – an effort to "micromanage" the company – and so could be omitted from the proxy.

A new resolution at three banks asks them to limit their financing on "extreme fossil fuel projects" in the Arctic, Canada's oil sands and for coal; two challenges are outstanding.

Note: High-profile New York Congresswoman Alexandria Ocasio-Cortez grilled then-Wells Fargo CEO Tim Sloan about the bank's financial ties to two oil pipeline projects, suggesting that the bank should consider the relation of environmental risk to liability and financial risk.

12. https://www.bloomberg.com/news/articles/2017-04-25/u-s-power-demand-flatlined-years-ago-and-it-s-hurting-utilities
13. https://corpgov.law.harvard.edu/2019/04/01/proxy-preview-2019/

Recent Litigation Victories

High Frequency Trading Securities Class Action Motion to Dismiss Defeated

On May 28, 2019, the Honorable Jesse M. Furman of the U.S. District Court for the Southern District of New York denied defendants' motion to dismiss in the "High Frequency Trading" securities fraud case.

The case alleges that the exchanges engaged in manipulative conduct by creating high-priced products and services specifically designed to favor 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. **The State of Rhode Island, City of Providence** and **Plumbers and Pipefitters National Pension Fund** are serving as lead plaintiffs, along with other institutional investors, in the action.

Previously, the district court dismissed the action, leading plaintiffs to appeal to the Second Circuit. Following appellate briefing and oral argument, on August 25, 2016, the Second Circuit requested that the SEC provide its 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." With regard to the first question, the SEC stated that "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." As a result, on December 19, 2017, the Second Circuit reversed the district court's prior dismissal of the action.

Upon remand to the district court, defendants again filed a motion to dismiss plaintiffs' existing complaint, targeting some issues that had not yet been ruled upon. In denying defendants' numerous arguments, the court ruled that plaintiffs had successfully established Article III standing and are entitled to a presumption of reliance, had adequately alleged loss causation, had pleaded fraud with particularity, and had satisfied the scienter requirement for a Section 10(b) claim.

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. 14-cv-2811, Opinion and Order (S.D.N.Y. May 28, 2019).

Robbins Geller Again Awarded Band 1 Rankings for Its "Excellent Track Record" from Chambers USA

For the tenth consecutive year, *Chambers USA* recognized Robbins Geller with several Band 1 rankings, the highest available rating, for having "an excellent record of high-value recoveries for clients including institutional investors, financial institutions and pension funds." The Firm achieved the ranking in the area of "Securities: Litigation: Mainly Plaintiff" nationwide, as well as in the areas of "Litigation: Mainly Plaintiff" and "Litigation: Securities Mainly Plaintiff" for California. Robbins Geller was additionally ranked highly in the "Litigation: Securities Mainly Plaintiff" for New York.

Chambers lauded the Firm for being "[w]idely respected as a top-notch plaintiff firm with considerable strength in the class action space" and having "several former prosecutors among its roster of trial attorneys, with deep expertise in trial and appellate litigation." The publication quoted several commentators as describing Robbins Geller as a "top-tier plaintiffs' firm" and a "strong player in the securities litigation market." Further, Robbins Geller attorneys were lauded for representing "quality at every level" and being "really, really good at what they do and very professional."

Robbins Geller attorneys **Darren J. Robbins**, **Samuel H. Rudman**, and **Randall J. Baron** were individually recognized for their work in securities litigation, while **Lea M. Bays** was recognized for her work in e-discovery.

Commended in the California category, this recognition marks the sixth consecutive year that **Darren Robbins** has been selected by *Chambers*. The

publication noted that he is regarded as "one of the best plaintiff-side litigators around" and is "known for his strong track record in securities class actions, with peers describing him as 'a force to be reckoned with in the securities practice.' He is also described . . . as 'a really smart guy' and 'a very smart advocate.'" Over the last two decades, Robbins has served as lead counsel in more than 100 securities class actions and has recovered billions of dollars for defrauded shareholders. Notably, Robbins led a shareholder derivative action brought by several pension funds on behalf of Community Health Systems, Inc., which yielded a $60 million payment to Community Health (the largest recovery ever in a shareholder derivative action in Tennessee and the Sixth Circuit), as well as groundbreaking corporate governance reforms.

Also receiving the top rating for the sixth consecutive year, **Sam Rudman** "offers a wealth of experience acting for plaintiffs in securities fraud actions." The publication also noted that he "comes recommended as an 'outstanding' lawyer who is 'top when it comes to deal-making and positioning a case.'" A former attorney with the U.S. Securities and Exchange Commission, Rudman has practiced securities litigation for more than 20 years. He has recovered hundreds of millions of dollars for shareholders, including a $200 million recovery in *Motorola*, a $129 million recovery in *Doral Financial*, and an $85 million recovery in *Blackstone*. Rudman also obtained a $55 million recovery in the *Intercept Pharmaceuticals* securities litigation, amounting to $27.5 million for each day in the class period – an amount that is unprecedented and represents a decisive victory for investors.

Marking the fourth consecutive year that **Randy Baron** has been recognized by *Chambers*, he is described by his peers as among "the most important plaintiffs' lawyers in the country in the M&A space." *Chambers* noted that Baron "is especially knowledgeable about breach of fiduciary duty" and quoted a source as saying, "He knows the law so well and he knows how to try a case." For almost two decades, Baron has worked to advance the practice of shareholder merger and acquisition litigation to achieve substantial monetary recoveries for shareholders. Not only did Baron help obtain $148 million for shareholders in the *Dole Food* case, the largest trial verdict ever in a class action challenging a merger transaction, he also served as co-lead counsel in the *Rural/Metro* case, leading former shareholders to a rare victory with a nearly $100 million award against Royal Bank of Canada Capital Markets LLC, which had acted as financial advisor to Rural/Metro's lowball buyout. Baron was also involved in the record-breaking *Kinder Morgan* case, which yielded a $200 million recovery for investors, the largest M&A class action recovery in history.

Marking the first year that **Lea Bays** has been recognized by *Chambers USA*, she "offers plaintiffs comprehensive e-discovery counsel in a wide array of contentious proceedings." The publication commended her for being "held in high regard by [interviewees], one of whom reports: 'She is passionate, hard-working, focused and has done great work.'" Bays not only focuses on e-discovery issues, from preservation through production, but she also provides counsel to the Firm's multi-disciplinary e-discovery team consisting of attorneys, forensic analysts and database professionals. She is a member of the San Diego ESI Forum Steering Committee, which puts on monthly CLE programs on e-discovery, and the Advisory Board for the ASU-Arkfeld eDiscovery and Digital Evidence Conference, which focuses on the practical and cutting-edge issues affecting electronic information, information governance and data analytics. Most recently, Bays was appointed to the Sedona Conference Working Group 1 Steering Committee, which works to develop principles, guidance, and best practice recommendations for information governance and electronic discovery in the context of litigation, dispute resolution and investigations.

Chambers & Partners identifies the most outstanding law firms and lawyers in over 180 jurisdictions throughout the world. Its annual publication, *Chambers USA*, ranks the attorneys and law firms that have a global presence and are widely considered to be the nation's best in their areas of practice. *Chambers* rankings range between Band 1 and Band 6 for each area of law, with Band 1 being the highest ranking a firm and/or individual lawyer can receive. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment and other qualities most valued by the client. The editors speak to both attorneys and clients, conducting in-depth interviews, and also take into account information submitted by law firms, which allows them a wide range of material on which to base their rankings. For more on *Chambers USA*'s methodology, visit its website.

The National Law Journal Names Robbins Geller Attorneys Shawn Williams, Tor Gronborg, and Patrick Coughlin as 2019 Plaintiffs' Lawyers Trailblazers

From left to right: Shawn A. Williams, Tor Gronborg, and Patrick J. Coughlin

Recently, *The National Law Journal* selected Robbins Geller attorneys **Shawn A. Williams**, **Tor Gronborg**, and **Patrick J. Coughlin** as 2019 Plaintiffs' Lawyers Trailblazers. The publication reviewed hundreds of nominations before naming the 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." *NLJ* then interviewed the honorees to discover their pioneer spirits, the trails they have blazed, and what they see for the future of litigation.

Before becoming the managing partner of the Firm's San Francisco office, **Shawn Williams** served for five years as an Assistant District Attorney in the Manhattan District Attorney's Office, where he tried over 20 cases to New York City juries and led white-collar fraud grand jury investigations. Williams didn't always want to be a plaintiffs' lawyer: "[I]t just developed that way. I had a friend who was doing plaintiffs' securities work, and we would talk a lot about it. It seemed like something I could get interested in, and I felt it was the right side of the law. It's similar to being a prosecutor, but on the civil side."

"Our Firm primarily handles securities cases, and they all tend to allege facts under the Securities Act of 1933 and Securities Exchange Act of 1934," Williams told *NLJ*. "The Firm has prosecuted big cases against big financial firms, and . . . [m]any have resulted in hundreds of millions of dollars for investors. We continue to break new ground as a team, and the vigilance by which we go about prosecuting these cases, especially considering we do the work on a contingency basis, is outstanding."

NLJ also highlighted Williams's litigation achievements in cases such as *Chicago Laborers Pension Fund v. Alibaba Group Holding Limited*, in which he led the litigation team to a $75 million settlement that was approved in May 2019. The court concluded that the settlement was "fair, reasonable, and adequate" for the class. Likewise, the publication commended Williams for his work in *West Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, in which he obtained a $43 million settlement after the Robbins Geller team, along with co-lead counsel, litigated the case for more than five years. "The team obtained extensive discovery, achieved certification of the class, successfully appealed the district court's summary judgment decision in the Court of Appeals for the Eighth Circuit and then defeated defendants' renewed motion for summary judgment," the publication noted.

Williams is currently serving as co-lead counsel in *In re Facebook Biometric Info. Privacy Litig.*, a case against Facebook that arises out of the company's use of facial recognition software to extract unique biometric identifiers from photographs uploaded to its online social network. "The case blends law and technology and will have an enormous impact on consumers going forward. The questions are around biometric data and how it can be collected, used and safeguarded. These cases are burgeoning all over the country, though Illinois is the only state that has an effective statute," Williams explained to *NLJ*. "If your facial image gets stolen, we haven't figured out how to fix that. You can't just change it like your credit card number. But when the

lawsuits arise, such as cases like this where Facebook allegedly collected faceprints without permission, there is a question on whether you can sue for that even if you haven't been harmed and they haven't lost your face data. The courts are grappling with this. The case has tested me as a lawyer in terms of whether the law can keep up with technology in a way that will be effective for consumers. It's developing so fast, no one knows where it is heading."

Williams went on to note that how law and technology reconcile will be a major challenge going forward: "[I]t's unpredictable. More states will likely attempt to regulate social media companies, the vast amount of data they collect, how that data can be used, whether it can be sold and whether consumers should participate in the profits."

One of the Firm's top securities litigators and a managing partner, **Tor Gronborg** has served as lead or co-lead counsel in numerous securities fraud cases that have collectively resulted in billions of dollars for investors. "I judge people by their enemies," Gronborg said when speaking about his noted history in law, including his prepared pleadings and briefings in *Broudo v. Dura Pharmaceuticals, Inc.* "It was a seminal case that went to the U.S. Supreme Court on loss causation. When it came back to the district court, we continued to litigate and establish the ground rules for pleading and proving loss causation," he told the publication. *NLJ* commended his work, noting that in that case, "the Supreme Court held that to plead loss causation a plaintiff needs to allege the causal connection between the loss and the alleged fraud."

NLJ lauded Gronborg's pleadings in *In re Daou Systems, Inc.*, which were upheld by the Ninth Circuit, and his work as co-lead for the trial team in *Hsu v. Puma Biotechnology, Inc.*, which ended with a verdict in favor of plaintiffs after a two-week jury trial in January 2019. "The verdict found that Puma Biotechnology and its CEO Alan H. Auerbach committed securities fraud and awarded shareholders up to $100 million in damages. The *Puma* case is only the 15th securities class action tried to a verdict since the Private Securities Litigation Reform Act was enacted in 1995," noted the publication.

Gronborg's other reputable cases yielded "significant recoveries against corporations such as Cardinal Health ($600 million), Motorola ($200 million), Duke Energy ($146.25 million), Sprint Nextel Corp. ($131 million), Prison Realty ($104 million), CIT Group ($75 million), Wyeth ($67.5 million) and Intercept Pharmaceuticals ($55 million). The recovery for Intercept is believed to be the largest per-day recovery in the history of securities litigation," according to *NLJ*, which went on to highlight Gronborg's work with e-discovery and ESI. "I've worked on the standards and litigating the issues from the outset of email discovery to today where discovery and e-discovery are almost synonymous," said Gronborg.

When discussing the future of law and the continued efforts to bar plaintiffs from the courthouse, Gronborg explained that "[w]hen you are on the plaintiffs' side, it does not take long to realize that 'calls for reform' are really just calls to limit the rights of individuals. We will continue to see efforts to denigrate the work that plaintiffs' firms do, and we will have to continue to be vigilant in dealing with this. Part of our job is making sure people recognize that one of the values of living in a country like ours is that you don't have to be rich or famous or a corporation to assert your rights and get your day in court."

Patrick Coughlin was an Assistant U.S. Attorney in the District of Columbia and the Southern District of California, has been lead counsel for several major securities matters at the Firm, including one of the earliest and largest class action securities cases to go to trial, *In re Apple Computer Sec. Litig.*, and most recently, along with Gronborg, led the Firm's trial team in *Hsu v. Puma Biotechnology, Inc.* "I was trying a murder-for-hire case under a new federal statute in San Diego," and "it seemed a lot more interesting to me to be suing big corporations for fraud, rather than construction defect defense or something else. I had two cases in the first year – one versus Nationwide and one against Apple."

Since then, Coughlin has been lead counsel for several major securities matters. "I handled the largest securities recovery class action on behalf of the University of California Regents in the *Enron* case. We recovered $7.2 billion for the class," he noted. Coughlin is currently representing merchants in the antitrust case *In re Payment Card Interchange Fee and Merchant Discount Litig.*, in which a settlement of up to $6.26 billion was recently preliminarily approved by the Eastern District of New York. Thought to be the largest antitrust class action case in history, the case charges Visa, Mastercard and the country's major banks with violating federal law for the allegedly collusive manner in which rules are set in the industry, including rules requiring payment of ever-increasing interchange fees by merchants.

NLJ also spoke with Coughlin about the case he is the most proud of, the Joe Camel cartoon ad campaign that targeted children. "The campaign was about getting kids to smoke, and we got R.J. Reynolds to stop it. I got involved when there was an article in the *American Journal of Medicine* that found Joe Camel was more recognizable to six-year-olds than Mickey Mouse, even though the campaign was only four years old," explained Coughlin.

When speaking to the future of litigation, which will always be full of corporate and securities fraud and antitrust violations, Coughlin noted: "There will always be that fraud. We have the strongest markets in the world, but people are always trying to pass laws to weaken our securities regulations and the private attorney general powers."

NLJ used Coughlin's work in *Hsu v. Puma Biotechnology, Inc.* as an example, which resulted in a verdict in favor of the plaintiffs after a two-week jury trial in January. "I could never understand why people misrepresent what's going on. So I enjoy trying those cases, and that is where the future is for me," noted Coughlin.

The Recorder Names Robbins Geller Partners Rachel Jensen and Aelish Baig as 2019 California Trailblazers

On June 24, 2019, *The Recorder* selected Robbins Geller partners **Rachel L. Jensen** and **Aelish M. Baig** to its inaugural list of 2019 California Trailblazers. The special supplement spotlights "a handful of individuals that are truly agents of change . . . [and] who have made significant marks on the practice, policy and technological advancement of their practice."

For 16 years, **Rachel Jensen** has developed a track record of success in helping to craft impactful business reforms and recover billions of dollars on behalf of individuals, businesses and government entities injured by unlawful business practices, fraudulent schemes and hazardous products. Naturally, she has a lot of hard-earned wisdom to impart to young lawyers looking to reach her level: "When you're preparing for a deposition, prepare as if you're taking the deposition of the next president of the United States, because you may have to live with that transcript for a long time."

"In September 2012, she did exactly that, questioning Donald J. Trump over allegations that his Trump University had defrauded its students," noted *The Recorder*. "Trump, four years away from his election as president, threatened to sue Jensen . . . But the transcript of that deposition lives on, often cited as evidence of the president's uneasy relationship with truthfulness. The case, which ended when Trump agreed to pay a $25 million settlement, illustrates [Jensen]'s mission to use the power of class-action litigation to cure society's ills. 'I was always interested in how you can leverage the power of the consumer to combat very serious human rights and civil rights abuses. That's what led us to the *Greyhound* case.'"

In the *Greyhound* case, Jensen is representing California passengers against Greyhound for voluntarily subjecting its paying customers to discriminatory immigration raids. "Within five weeks, Greyhound provided some relief, announcing on its website and at its stations that passengers could be questioned about their immigration status, nationality or documentation and that they have legal rights if that occurs. Those disclosures tell consumers they have the right to remain silent, to ask an immigration agent if they are being detained, to ask for an attorney." In fact, in just a few short months, Jensen's work has forced Greyhound to change its practices, not only in California, but nationwide.

Jensen "comes by her dedication to human rights honestly," lauded *The Recorder* when highlighting her work before joining Robbins Geller. "Before entering private practice, focusing on plaintiffs' class actions, she worked for two United Nations tribunals that examined war crimes and genocide in Rwanda and the former Yugoslavia. She was attracted to Robbins Geller because of its representation of garment workers in the Northern Mariana Islands. Since her arrival in the firm's San Diego office, she has put that experience to work for consumers who have experienced systematic abuse, fraud or injury at the hands of large corporations and other institutions."

"I am thrilled to be in practice doing something that I had been thinking about for a very long time – the nexus between human rights and civil rights and consumer law," Jensen told the publication when discussing future explorations. "How do we leverage the power of the consumer to address very serious ills? It's not just that the widget doesn't work, it's that the widget was made by slave labor."

Aelish Baig has been at the forefront of a wide array of complex securities and consumer fraud cases for many years and has litigated a number of cases through jury trial, resulting in multi-million dollar awards and settlements for her

From left to right: Rachel L. Jensen and Aelish M. Baig

clients. Right after joining Robbins Geller, she "went right to work on a lawsuit against the nation's largest cell-phone companies, one of the most complex consumer-fraud cases of its time," noted *The Recorder*.

Baig has also been leading the fight against those responsible for the nationwide opioid epidemic. "In one example defendants 'dumped 9 million pills into a town with just 392 residents over the course of two years. Towns that size cannot absorb that number of pills.' Scheduled for trial in October, the case is so all-consuming that [Baig] is trying to squeeze more time out of every day; she jokes that she and her team are working '25/7,'" stated the publication, adding that "the multi-district litigation combines almost 2,000 cases from across the country and will be heard in Cleveland."

The article specifically highlights Baig's role in the opioid litigation, which is to "show the range of impacts caused by the use of prescription opioids: not just the deaths, but also the increased costs associated with responding to overdoses, putting children in foster care, serving homeless populations and increased burdens on first responders, law enforcement and the penal system. 'It impacts everything.'"

The opioid case is often compared to the Big Tobacco litigation, in which Robbins Geller attorneys also played a major role. "But proceeds from that case's record settlement ended up funding an array of government services, many of them unconnected to the public health impacts of cigarette smoking," stated *The Recorder*. "With 150 opioid-related deaths in America each day, [Baig] hopes this case is different."

"The opioid epidemic is so vast and it's not slowing down," Baig summed up. "It's crazy, the opioid death rates increased in 2017 over 2016. It's still going up and in places where it is not, it is staying the same."

Titan of the Plaintiffs Bar: Robbins Geller Partner Shawn Williams on Making a Difference

On May 14, 2019, *Law360* released an in-depth interview with Robbins Geller partner **Shawn A. Williams** after recognizing him as a 2019 Titan of the Plaintiffs Bar. The ten attorneys who earned a spot on *Law360*'s Titans of the Plaintiffs Bar list were chosen for being "champions in the courtroom who not only capture massive settlements and go up against [well-heeled] companies, but also take on leadership roles at their offices and elsewhere." The interview covers a wide array of topics, including why Williams was drawn to the plaintiffs side of the bar, the reason why it is important for him to be "in the room where it happens," and some of his biggest cases.

"Growing up as the son of Jamaican and Panamanian immigrants in New Rochelle, New York, [Williams] fantasized about being an athlete or a pilot, but his insatiable intellectual curiosity eventually led him down the path of the law," wrote *Law360*. "As one of the few black plaintiffs lawyers he knows of in securities litigation, [Williams] said it was important to him to have a seat at the table that was leading the conversation, rather than reacting to it when choosing his path within the legal industry."

"There's something to be said for being 'in the room where it happens,' being in the room where decisions are made as opposed to hearing them afterward and responding to them," Williams noted, referencing the hit musical "Hamilton" to explain what initially drew him to plaintiffs law.

After graduating from the University of Illinois College of Law, Williams served for five years as an Assistant District Attorney in the Manhattan District Attorney's Office, where he tried over 20 cases to New York City juries and led white-collar fraud grand jury investigations. "Some friends always asked why I would want to work as a prosecutor in light of the general belief that many prosecutions, especially in big cities, unequally affect minorities and particularly black men," he said. "I always felt like if I was going to make a difference in that area, I could make a difference being on that side."

Since joining Robbins Geller nearly 20 years ago, Williams has recovered hundreds of millions of dollars for corporations and shareholders that were victims of fiduciary failures and has negotiated the implementation of comprehensive corporate governance enhancements. To gain a better understanding of his work, *Law360* spoke with Robbins Geller partner **Travis E. Downs III**, who has worked closely with Williams on numerous shareholder derivative cases.

Downs noted that while writing, arguing, and analysis are some of Williams's "strongest lawyering skills," it is what Downs calls "the intangibles" that make Williams "about the best lawyer I know. He has this incredible sense of timing and ability to read people. I've seen him do this multiple times in negotiations; getting a person to walk themselves out on a limb and knowing when to end that conversation so you've got the high ground. It's an

instinctual, situational awareness."

Williams's lawyering skills have been put to the test in many litigations that have resulted in "major breakthroughs," as seen in cases like *Alibaba Group Holding Ltd.*, in which he reached a $75 million settlement agreement that is currently pending final approval.

The publication also lauded Williams for obtaining final approval of a "$43 million cash settlement from Medtronic, ending five years of securities fraud allegations over its payments to researchers to hide the risks of its bone graft technology, culminating in the loss of hundreds of millions of dollars in a 2011 stock drop."

When looking to the future of law, Williams "expects to see an expansion in litigation revolving around the intersection of technology and the law, particularly concerning data collection and privacy." An example of this can be found in the ongoing *Facebook Biometric* litigation, in which the Ninth Circuit recently upheld the class certification. The case arises out of Facebook's use of facial recognition software to extract unique biometric identifiers (*i.e.*, graphical representations of facial features, also known as facial geometry) from photographs uploaded to its online social network.

"That case has elements of what we will see more of in the future; the cross section of law and technology, and the question of whether the law can really keep up with technological innovation," Williams said. "That case really presents some law and technology issues that haven't really been developed yet, so we'll see how that plays out."

"I just do what I do," Williams summarized at the end of the interview. "I believe in all of the cases that we are involved in, I believe that our clients are deserving of recovery, of some restitution, and that is motivating. Some people don't believe in their work, but I believe in my work."

("J&J") to waive their right to file shareholder lawsuits – permanently.

> Over the past two years, some senior officials at the Securities and Exchange Commission have indicated that they would be open to corporations foisting mandatory arbitration on their shareholders, and now a team of pro-corporate players are ready to put them to the test. Two lawyers have joined with a high-profile Harvard professor on a pivotal case [*The Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*] that could strip away shareholders' rights to sue public companies.[5] The Harvard professor, Hal S. Scott,[6] runs a Wall Street advocacy group supporting deregulation. The lawyers both made their names busting labor unions; one of them, Jonathan Mitchell, is a current Trump nominee, and social media posts link the other, Wally Zimolong, to discriminatory views.
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> A trust run by Scott, an emeritus professor at Harvard Law School, sued Johnson & Johnson in a New Jersey federal court last month, seeking to force the company to allow shareholders to vote on a proposal that would take away their right to sue the company in court. Johnson & Johnson, relying on a determination[7] by the SEC that such a measure would risk violating New Jersey state laws, declined to present the proposal to shareholders in advance of its April 25 annual meeting. On March 26, the trust sought a court injunction to force the company to include the proposal. [Recently], U.S. District Court Judge Michael A. Shipp denied the injunction but allowed the litigation to proceed.
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> The Doris Behr 2012 Irrevocable Trust lawsuit is in some sense perverse: a shareholder is seeking to restrict shareholder rights. But Scott has long decried[8] class-action shareholder lawsuits as a boondoggle for lawyers and a burden on shareholders who bear the costs of defending and settling the suits. As president[9] of the Committee on Capital Markets Regulation, he was an early proponent of rescinding shareholders' rights to sue, suggesting[10] in 2006 that shareholders be allowed to decide whether the companies they invest in should force arbitration. The Committee, according to a 2010 nonprofit filing, has been funded by such Wall Street titans as Goldman Sachs, Citigroup, Fidelity Investments, Deloitte, Pricewaterhouse Coopers, and hedge fund billionaire Kenneth Griffin. In an op-ed[11] in February, Scott said that most shareholder class actions "have no merit, damage shareholder interests, and tarnish the attractiveness of our public capital markets."
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> Scott, who did not respond to an email query, has taken strong, sometimes curious, positions against other forms of corporate accountability. In a 2015 op-ed,[12] he disparaged the idea of forcing companies to admit wrongdoing when they settle a regulatory case. What does an admission of guilt accomplish "other than again imposing additional penalties, by perhaps damaging the reputation of a firm?" he asked.

SEC Chairman Jay Clayton endorsed exclusion of a shareholder proposal on mandatory arbitration of shareholder claims against a public-traded company.[13]

> A domestic, publicly-listed company has received a shareholder proposal that would require the company to take steps to adopt mandatory arbitration provisions. The company has asked the staff of the Division of Corporation Finance for informal guidance on whether the company may exclude the proposal from its proxy statement. Specifically, the request seeks the staff's view on whether, under Rule 14a-8(i)(2), the company may omit from its proxy statement a shareholder proposal relating to mandatory

5. https://www.pacermonitor.com/public/case/27535645/The_Doris_Behr_2012_Irrevocable_Trust_v_JOHNSON__JOHNSON
6. https://hls.harvard.edu/faculty/directory/10781/Scott
7. https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf
8. https://www.capmktsreg.org/2017/08/21/op-ed-shareholders-deserve-right-to-choose-mandatory-arbitration/
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12. https://www.cnbc.com/2015/06/09/why-elizabeth-warren-is-wrong-about-the-sec-commentary.html
13. https://corpgov.law.harvard.edu/2019/02/12/statement-on-shareholder-proposals-seeking-to-require-mandatory-arbitration-bylaw-provisions/

arbitration of shareholder claims arising under the federal securities laws. Rule 14a-8(i)(2) permits exclusion of a proposal that, if implemented, would cause the company to violate any state, federal or foreign law to which it is subject. The company has argued that the proposal, if implemented, would result in a violation of both federal and state law.

This is a complex matter under both federal and state law, and it has been interpreted differently by the company (arguing that such a clause would violate both state and federal law) and the proponent (arguing that such a clause would not violate state or federal law). The staff considered in its analysis the arguments made by the company, the proponent and the Attorney General of New Jersey, the state's chief law enforcement officer and legal advisor. The staff issued a response stating that it would not recommend enforcement action should the company decide to exclude the proposal on the grounds that it would violate New Jersey state law. In the context of Rule 14a-8, the staff does not independently adjudicate the legality of any provision of state law, and it is not doing so in this matter. Here, the parties have each asserted different interpretations of state law, neither party has identified New Jersey case law precedent directly on point, and the Attorney General has provided an opinion that implementation of the proposal would violate state law. In light of the submissions, and in particular the letter of the Attorney General of New Jersey, I believe the approach taken by the staff – to not recommend enforcement action in this complex matter of state law – is appropriate.

Stock Buybacks

The record-setting trillion dollars of stock buybacks in 2018 have raised some concerns.

Senators Chuck Schumer and Bernie Sanders have a proposal to restrict stock buybacks by requiring companies to have a $15/hr minimum wage before they can buy back stock.[14]

First, stock buybacks don't benefit the vast majority of Americans. That's because large stockholders tend to be wealthier. Nearly 85 percent of all stocks owned by Americans belong to the wealthiest 10 percent of households. Of course, many corporate executives

14. https://valueedgeadvisors.com/2019/02/04/opinion-schumer-and-sanders-limit-corporate-stock-buybacks-the-new-york-times/

are compensated through stock-based pay. So when a company buys back its stock, boosting its value, the benefits go overwhelmingly to shareholders and executives, not workers. Second, when corporations direct resources to buy back shares on this scale, they restrain their capacity to reinvest profits more meaningfully in the company in terms of R&D, equipment, higher wages, paid medical leave, retirement benefits and worker retraining….

That is why we are planning to introduce bold legislation to address this crisis. Our bill will prohibit a corporation from buying back its own stock unless it invests in workers and communities first, including things like paying all workers at least $15 an hour, providing seven days of paid sick leave, and offering decent pensions and more reliable health benefits.

In other words, our legislation would set minimum requirements for corporate investment in workers and the long-term strength of the company as a precondition for a corporation entering into a share buyback plan. The goal is to curtail the overreliance on buybacks while also incentivizing the productive investment of corporate capital.

Some may argue that if Congress limits stock buybacks, corporations could shift to issuing larger dividends. This is a valid concern – and we should also seriously consider policies to limit the payout of dividends, perhaps through the tax code.

ValueEdge Advisors Vice Chair Nell Minow responded on the Harvard Law School Blog:[15]

> We may not need a government solution to the issue of excessive corporate stock buybacks. We most certainly do not need the solution proposed by Senators Chuck Schumer and Bernie Sanders,[16] requiring companies to adopt minimum wage requirements for hourly workers before buying back stock. What we need is a capitalist solution, removing misaligned incentives, moral hazards, and diversion of assets to make sure the market's buyback decision is the right one.

The conventional thinking about stock buybacks is that when corporate managers and directors believe the stock is

15. https://corpgov.law.harvard.edu/2019/02/22/a-capitalists-solution-to-the-problem-of-excessive-buybacks/
16. https://www.nytimes.com/2019/02/03/opinion/chuck-schumer-bernie-sanders.html

undervalued and do not have a better use for excess capital they should return it to shareholders. No one can argue with that; it is vastly preferable to the usual alternative, overpaying for acquisitions that are not core to the company's business. That's a whole different discussion of misaligned incentives.

But as we have often seen, most recently with mortgage-backed derivatives, good ideas can be abused and become destructive. In this case, the excess cash was not the result of operating efficiencies but a windfall from President Trump's tax bill. The corporate tax cuts were sold as a way to increase compensation for workers and support strategic initiatives[17] like research and development. Instead, 2018 saw record buybacks, over $1 trillion worth, much of it at the top of the market, so it was difficult to justify an argument that the stock was undervalued or that there was no better strategic use for the money.

A study by Tim Swift in the Academy of Management Proceedings[18] found that stock buybacks suppress innovation. A real-world example is Sears, where $6 billion buying back stock that was collapsing into bankruptcy could have been deployed to improve operations. And a 2017 study[19] reached a troubling conclusion that companies are not clear with their boards or their investors about the basis for the decision to buy back stock. "Few companies publicly disclose details about buyback decision-making and very few state the reasons for a specific buyback program."

Why would directors and executives approve buybacks when the stock is not undervalued and there are worthwhile opportunities to invest the cash in support of long-term strategies? One reason is revealed in another study of buybacks,[20] this one conducted by SEC Commissioner Robert Jackson, who found that "right after the company tells the market that the stock is cheap, executives overwhelmingly decide to sell." And it is almost unheard of for companies to adjust their EPS targets for incentive compensation to reflect the reduction in shares from a buyback. There are two ways to reach earnings per share goals, by increasing earnings or reducing outstanding shares. But only one of those has real long-term benefits to shareholders. Executives do better from buybacks than retail investors, the exact opposite of what incentive compensation is supposed to accomplish. This is not just bad for the long-term viability of the corporations; the agency costs involved undermine the credibility of our system of capitalism.

Therefore, the solution is to re-align the incentives. And that is the job of the corporate boards, especially their compensation committees.

First, compensation committees should not allow a stock buyback unless the incentive compensation EPS goals are adjusted accordingly. Indeed, this is yet another reason that all stock and option awards should be indexed to the peer group or the market as a whole to prevent just this kind of manipulation.

Second, compensation committees should require all insiders – executive or director – to hold all of their shares, including exercised options, until three years after the most recent buyback.

And if they do not, then it is up to the investors, meaning the large institutional investors, to vote against compensation committee members who fail to insist on these provisions, and, if necessary, run their own candidates to replace them.

Shareholders may need to remind boards of directors that their decisions should be based on what will benefit shareholders over the long term. The key metric is not whether corporate insiders think their stock is a good investment; the key is whether the outside shareholders do.

17. https://www.nytimes.com/2018/11/12/business/economy/trumps-tax-cut-was-supposed-to-change-corporate-behavior-heres-what-happened.html
18. https://journals.aom.org/doi/abs/10.5465/AMBPP.2018.12955abstract
19. https://corpgov.law.harvard.edu/2016/09/20/buybacks-and-the-board-director-perspectives-on-the-share-repurchase-revolution/
20. https://www.sec.gov/news/speech/speech-jackson-061118

The artificial inflation of stock prices via buybacks is by definition a short-term boost and a trick that cannot be endlessly repeated. We have discussed this in detail many times[21] and will continue to raise our concerns. An article in CNBC states:[22]

> Buybacks have gotten a bad rap from both Republican and Democratic lawmakers this year. But the stock market would be trading at a much lower level without them.
>
> Data compiled by Ned Davis Research shows the S&P 500 would be 19% lower without buybacks. The firm looked at the S&P 500's performance between the first quarter of 2011 and the first three months of 2019. Then they subtracted the amount of net monthly repurchases to arrive to that conclusion. The broad market is up more than 125% in that time while net buybacks have totaled about $3.5 trillion.
>
> "Without focusing too much on numbers, we can say that the S&P 500 index would probably be lower today if not for buybacks versus other uses of cash," Ed Clissold, chief U.S. strategist at Ned Davis Research, wrote in a note last month.

Corporate Reform

Lawyer Michael Peregrine writes in *Forbes* about how the upcoming political season may raise more issues about the role of corporations than any other in history:[23]

> Progressive oriented politicians – including several who are running for President – are promoting a series of bold, innovative, ambitious and thoroughly controversial policies and legislative proposals intended to recast elements of the economy and address perceived social imbalances.
>
> These proposals are being injected into the 2020 political campaign and may become "litmus test" issues in individual races. They are also eliciting substantial skepticism from politicians and media on the opposite end of the policy spectrum.

The four areas he highlights are: social/environmental, health care, accountability ("these include legislative proposals for the federalization of large corporations; statutory board diversity quotas, corporate public benefit requirements, and the right of employees to select a portion of a corporation's board directors"), and income/opportunity equality (which he calls "rebalanced wealth distribution").

Corporate Political Activity

Lobbying, political contributions and dark money are the key distortion factors in the United States and increasingly in other places as well, such as the Mercer family's involvement in the Brexit campaign.

Reporting/Remuneration

Proposals to link pay metrics to SASB reporting or other ESG indicators.

"Ideological Diversity"

Conservative groups have submitted a few shareholder proposals to support corporate lobbying expenditures, object to corporate backing of environmental regulation, and promote "ideological diversity" like a proposal at Apple, arguing that its directors do not display "diversity of thought" but instead "operate in ideological hegemony that eschews conservative people, thoughts, and values. This ideological echo chamber can result in groupthink that is the antithesis of diversity. This can be a major risk factor for shareholders." The proposal received only a 1.7% vote in favor.

Fiduciary Standard

The House of Representatives' subcommittee on Investor

21. https://corpgov.law.harvard.edu/2019/02/22/a-capitalists-solution-to-the-problem-of-excessive-buybacks/
22. https://www.cnbc.com/2019/05/25/the-stock-market-would-be-much-lower-if-it-werent-for-companies-buying-back-their-own-shares.html
23. https://www.forbes.com/sites/michaelperegrine/2019/02/14/why-progressive-politics-matter-to-corporate-governance/#3ca9a73569ff

Protection, Entrepreneurship and Capital Markets held a hearing on the SEC's proposed Regulation Best Interest for broker-dealers, and all but one of the witnesses were opposed, often scathingly critical. "The brokerage business model, with all of these and other perverse incentives, is set up to pit broker against client. These incentives reward bad advice that harms investors. What's truly shocking is that brokers are allowed to engage in harmful conflicts of interest all while leading investors and policymakers to believe they are trusted financial advisors who will do what's best for investors," Dina Isola, investment advisor representative at Ritholtz Wealth Management, said at the hearing. She added that the broker-dealer industry is "caught up in a web of toxic incentives."[24]

Board Chair/CEO Splits

"The percentage of S&P 500 companies whose chief executives also serve as chairman reached 45.6% in 2018, compared with 48.7% the year before and the lowest percentage in at least a decade, according to data compiled for *The Wall Street Journal* by ISS Analytics, the data intelligence arm of proxy adviser Institutional Shareholder Services Inc."[25]

Activism in 2018

Lazard's review of shareholder activism in 2018 has some striking data. Some of the highlights:[26]

• A record 226 companies were targeted in 2018, as compared to 188 companies in 2017.

• A record 131 investors engaged in activism in 2018, reflecting the continued expansion of activism as a tactic.

• 40 "first timers" launched activist campaigns in 2018, as compared to 23 "first timers" in 2017.

• Activist investors won 161 Board seats in 2018, up 56% from 2017 and 11% higher than the previous record of 145 seats in 2016.

24. https://financialadvisoriq.com/c/2226863/269083/broker_dealers_rebuked_toxic_incentives_congressional_hearing?referrer_module=topicBox&module_order=5
25. https://www.wsj.com/articles/more-u-s-companies-separating-chief-executive-and-chairman-roles-11548288502
26. https://corpgov.law.harvard.edu/2019/01/28/2018-review-of-shareholder-activism/

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