ON THE RECORD with Robbins Geller Rudman & Dowd LLP

1st Quarter 2017

Robbins Geller Achieves Unprecedented Corporate Governance Reforms and Recovery in *Community Health Systems*

After more than five years of hard-fought litigation, on January 17, 2017, the Honorable Kevin H. Sharp of the United States District Court for the Middle District of Tennessee approved the settlement of *In re Community Health Systems, Inc. Shareholder Derivative Litigation*. The settlement provides for a $60 million cash payment to Community Health and the implementation of pervasive corporate governance reforms.

The settlement resolves allegations that Community Health's directors and officers breached their fiduciary duties by developing and condoning a policy in which patients were systematically steered into medically unnecessary inpatient admissions when they should have been treated as outpatients. These fraudulent billing practices violated Medicare and Medicaid regulations and caused Community Health to artificially inflate reimbursement payments, ultimately resulting in the company being forced to pay more than $98 million to resolve federal and state investigations into its Medicare compliance practices.

The action was filed in 2011 by plaintiffs **Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund** and **Roofers Local No. 149 Pension Fund**. After defeating defendants' motion to dismiss and motion for reconsideration, Robbins Geller and co-counsel pursued vigorous and expansive discovery, ultimately reviewing and analyzing over 2.5 million pages of documents and deposing 35 percipient witnesses to develop the evidence necessary to support plaintiffs' claims.

Just days before the end of fact discovery, defendants agreed to settle the action by (i) paying $60 million to Community Health; and (ii) causing the company to agree to adopt corporate governance reforms designed to directly address the underlying compliance concerns raised in the action. The $60 million payment represents the largest shareholder derivative recovery ever in the Sixth Circuit and equates to more than 60% of the $98 million Community Health was required to pay to settle the government's allegations regarding the company's improper Medicare compliance practices. The governance reforms obtained are equally extraordinary and include shareholder nomination of two independent directors, the appointment of an independent director as the Board's Lead Director, a requirement that the Board's Compensation Committee consist solely of independent directors, the

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Samuel H. Rudman

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A Note to Institutional Investors from Samuel H. Rudman

The first few months of 2017 saw the inauguration of a new president and the transition to an administration that has promised to significantly alter the regulatory landscape in the United States. Regardless of the magnitude and timing of such changes, Robbins Geller remains firmly committed to protecting your rights as investors and consumers. Our recent results illustrate this commitment. In late January, after more than five years of litigation, we successfully concluded the *Community Health Systems* shareholder derivative litigation. The settlement in that case yielded a $60 million cash payment and corporate governance reforms that include two shareholder-nominated directors, the creation of a Healthcare Law Compliance Coordinator, the implementation of an automatic compensation clawback provision, the establishment of an insider trading controls committee, and the adoption of a political expenditure disclosure policy.

The Firm's mergers & acquisitions department stood out again in 2017, obtaining a $30 million recovery in *Onyx Pharmaceuticals*, one of the largest post-merger common fund settlements ever in California state court. Then, just three weeks later, we broke our own record by settling the *Websense, Inc.* shareholder merger action for $40 million. The Firm's appellate department continued its success in 2017 too, with a recent victory in the Eighth Circuit Court of Appeals, where plaintiffs obtained an opinion reversing a trial court dismissal of the *Medtronic* shareholder class action. Additionally, *Law360* recently named the Firm as one of the top Securities Practice Groups in the nation.

We look forward to working with our clients in obtaining similar achievements throughout 2017. ■

Robbins Geller: The Nation's Top Plaintiffs' Securities Firm

In the past year, Robbins Geller has been characterized by courts, professional organizations and the press as "nationally recognized leaders in complex securities litigation class actions," "gladiators," an "800-pound gorilla," and "a real force on the plaintiff side."

For the second year in a row, ISS ranked the Firm first among all securities class action firms in its SCAS Top 50 Report, recognizing that the Firm recovered 50% more than any other law firm. While ISS has not yet reported its 2016 rankings, Robbins Geller's class action recoveries increased yet again, as the Firm recovered more than $2.7 billion for investors in 2016.

For the third consecutive year, *The National Law Journal* selected Robbins Geller as one of the nation's Elite Trial Lawyers and named the Firm the Securities category winner for 2016 out of 35 finalists. In naming Robbins Geller the Securities winner, *The National Law Journal* highlighted the Firm's achievements in *Household International*, stating that the "litigation team beat back several attempts by the defendants to invalidate the verdict, including objections to thousands of claims by injured class members, and an appeal to the U.S. Court of Appeals for the Seventh Circuit." Appropriately describing the Firm as "tireless," founding partner **Paul J. Geller** commented to *The National Law Journal* that the result in *Household International* "took 14 hard-fought years, 130,000 hours, more than 85 depositions, a six-week jury trial, and an appeal of the verdict.… Simply put, the result is unprecedented."

Chambers USA also awarded the Firm a Band 1 ranking, the highest rating available, writing that Robbins Geller is "[w]idely respected as a top-notch plaintiff firm with considerable strength in the class action space [that] [s]pecializes in complex securities fraud disputes, with an excellent record of high-value recoveries for clients."

The Firm was also selected by *Law360* as one of the nation's top Securities Practice Groups of the Year for 2016. In its detailed profile on the Firm, *Law360* commended Robbins Geller for its recovery of more than $1.5 billion in the *Household International* case, calling it a "[r]ecord-breaking win[]." **Daniel S. Drosman**, trial counsel on the *Household International* case, succinctly summed up the Firm's reputation to *Law360* by adding, "At the end of the day, the defendants don't pay our clients hundreds of millions because they think we're nice; they do it because we put them in a box."

Finally, *Benchmark Litigation* not only named Robbins Geller one of the Top 10 Plaintiff Firms in America, the publication also selected the Firm as a "Highly Recommended" plaintiffs firm in California for 2017 and recognized several of the Firm's partners as Litigation Stars, Top Litigators Under 40 and Future Stars.

The Firm's achievements in 2016 confirm Robbins Geller's "commitment to excellence," said founding partner **Darren J. Robbins**. "Whenever we take a case, we're willing to prepare to take it to trial." ■

Climate Change and Corporate Governance

PRI and the 50/50 Climate Project Webinar on Investor Engagement on Climate-Competent Boards

A webinar sponsored by PRI (Principles for Responsible Investment) and the 50/50 Climate Project featured speakers from some of the most active investors working with portfolio companies to improve strategic focus on sustainability and climate change and is now available for replay.[1] Nell Minow, Vice Chair of ValueEdge Advisors, co-founder of GMI Ratings and The Corporate Library, moderated the panel that originally streamed on January 18, 2017, and included:

- Anne Simpson, Investment Director, Sustainability, California Public Employees' Retirement System (CalPERS)
- Kirsty Jenkinson, Managing Director and Sustainable Investment Strategist, Wespath Investment Management
- Rakhi Kumar, Managing Director, Head of Corporate Governance, State Street Global Advisors
- Michelle Edkins, Managing Director, Global Head of Investment Stewardship, BlackRock
- Edward Kamonjoh, Executive Director, The 50/50 Climate Project

Participants discussed what it means to be "climate competent" and techniques for engagement. State Street Global Advisors' letter to portfolio company boards says:[2]

> [A]s part of our stewardship review, we classify companies according to how they have: 1) identified material environmental and social sustainability issues; 2) assessed and, where necessary, incorporated the implications into their long-term strategy; and 3) clearly communicated their approach to sustainability and its influence on strategy. We also include a list of questions that boards can use as a starting point to begin to work with management to focus on ESG issues.

More on Shareholder Initiatives and Climate Change

In a significant step forward, possibly in response to shareholder pressure, Exxon announced that Dr. Susan K. Avery had been elected to its board, effective February 1, 2017. Avery is an atmospheric scientist and the former president and director of the Woods Hole Oceanographic Institution.

Rich Ferlauto wrote about the importance of climate-competent boards in *Pensions & Investments*:[3]

> Despite the anticipated rollback of climate related governmental policies such as the Environmental Protection Agency's Clean Power Plan and limits on methane emissions by the Trump administration, investors still need to understand the risks that climate change poses to their portfolios. Unequivocal disclosures and boards equipped to manage and govern climate risk will be more important than ever. Now, however, it appears investors will not be able to rely on federal regulatory standards or policy interventions to manage climate risk related to greenhouse gas emissions and the emphasis on fossil fuel production. They will be left to their devices to understand the very real financial impacts that climate issues could have on their portfolios.
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> Regime change in Washington does nothing to affect the science and reality of increased climate risk and the need for long-term strategic planning that accounts for potentially crippling financial, ecological and technological disruptions at the companies most susceptible to climate risks.

Evan Harvey, Nasdaq's Director of Corporate Responsibility, called on boards to prioritize sustainability across three critical areas:[4]

- **Environmental** ("Issues we readily associate with sustainability") – Emissions, carbon usage, recycling, waste water, water usage, etc.
- **Social** ("How you treat people") – Benefits, programs, human resources, policies that attract a diverse and innovative talent pool, etc.
- **Corporate Governance** ("The structure of your corporation") – Rules, checks & balances to ensure shareholder needs are being met, etc.

> Sustainability is everything that helps your company sustain itself – its people, its profits – well into the future. It's a long-term approach. Anything you can't see in a financial statement that contributes to that long-term mission is *sustainability*.

In January 2017, more than 600 businesses with more than $1 trillion in annual sales signed an open letter that demanded President Donald Trump's administration uphold U.S. commitments to low-carbon policies and urged the President to keep the United States in the Paris Climate Agreement – which Trump has threatened to quit. Some of the first companies to sign the letter were eBay and Starbucks, with others like SolarCity, Tesla and Johnson & Johnson now on the list. The letter states:

> We want the U.S. economy to be energy efficient and powered by low-carbon energy. Cost-effective and innovative solutions can help us achieve these objectives. Failure to build a low-carbon economy puts American prosperity at risk. But the right action now will create jobs and boost U.S. competitiveness. We pledge to do our part, in our own operations and beyond, to realize the Paris Agreement's commitment of a global economy that limits global temperature rise to well below 2 degrees Celsius. ■

[1] https://unpri.adobeconnect.com/_a1148430508/p97ie5q6qis/?launcher=false&fcsContent=true&pbMode=normal
[2] https://www.ssga.com/investment-topics/environmental-social-governance/2017/Letter-and-ESG-Guidelines.pdf
[3] http://www.pionline.com/article/20170125/ONLINE/170129925/the-growing-need-for-boardroom-climate-competency
[4] http://boardroomresources.com/episode/three-steps-boards-should-take-to-monitor-sustainability/

Governance Roundup

Significant Pension Shortfall Worldwide

MSCI issued a report after examining the pension funding status of nearly 5,300 companies across North America, Western Europe, Asia-Pacific and Japan.[1] The report identifies severe underfunding of pensions worldwide, finding:

- ***The underfunded ratio is worse in North America at 9.2%***, followed by Europe at 4.7%, Japan at 3.7%, and Asia at only 1.8%.
- With a few country-level exceptions, ***the underfunded ratio increased across all four regions between 2015 and 2016.***
- Of the top ten companies with the highest underfunded ratios, six are U.S. companies: ***DuPont, Hess, Dun & Bradstreet, Delta Airlines, Centurylink, Entergy***, and ***Raytheon*** (U.S. companies account for 24.5% of MSCI ACWI Index constituents).
- On a sector-level basis, ***Utilities and Banks exhibit the worst funding ratios in the aggregate***, although there is some variation by region.

BlackRock's Fink Calls on CEOs for Adjusted Strategies, Pension Fix

In his recent annual letter to CEOs, Larry Fink once again put corporate leadership on notice that BlackRock is watching and will act, particularly in these turbulent times.

Fink, the head of BlackRock, the world's largest asset manager, reminded CEOs that just because investors are thinking long term does not mean that they have infinite patience. Investors are looking for corporate leadership in the boardroom and the C-suite to deploy assets for sustainable value creation – including investments in people – not just to boost short-term stock prices:

> Companies have begun to devote greater attention to these issues of long-term sustainability, but despite increased rhetorical commitment, they have continued to engage in buybacks at a furious pace. In fact, for the 12 months ending in the third quarter of 2016, the value of dividends and buybacks by S&P 500 companies exceeded those companies' operating profit. While we certainly support returning excess capital to shareholders, we believe companies must balance those practices with investment in future growth. Companies should engage in buybacks only when they are confident that the return on those buybacks will ultimately exceed the cost of capital and the long-term returns of investing in future growth.

In addition to investing in internal training, Fink called on companies to step forward and provide new solutions to our inadequate retirement system, which now increasingly places the burden of retirement savings on the employee rather than the employer:

> [A]s major participants in retirement programs in the U.S. and around the world, companies must lend their voice to developing a more secure retirement system for all workers, including the millions of workers at smaller companies who are not covered by employer-provided plans. The retirement crisis is not an intractable problem. We have a wealth of tools at our disposal: auto-enrollment and auto-escalation, pooled plans for small businesses, and potentially even a mandatory contribution model like Canada's or Australia's.
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> . . . If we are going to solve the retirement crisis – and help workers adjust to a globalized world – businesses need to hold themselves to a high standard and act with the conviction that retirement security is a matter of shared economic security.

Center for Audit Quality 10-Year Look Back and Forward

The Center for Audit Quality celebrated its 10th anniversary with a conference that included a discussion on upcoming developments and an assessment of the organization's progress since it was first created as a response to the Enron-era series of accounting failures.[2] Committed to the notion that accounting

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[1] https://www.msci.com/documents/10199/904da30f-d851-4c48-bcfc-5e5f76d3335b
[2] http://www.thecaq.org/

is "a force for good," director Cindy Fornelli emphasized the profession's commitment to "independence, objectivity, and skepticism." Many participants discussed the need for cybersecurity experts and greater sustainability (including non-GAAP reporting) disclosure, as well as the importance of maintaining international collaborations.

Though the speakers generally agreed that the Sarbanes-Oxley Act of 2002, which created the Public Company Accounting Oversight Board, has been successful, it is not without fault. Former SEC Chair Mary Schapiro said, "In terms of the outcomes of the law, it's been highly successful, though that doesn't mean there aren't things you need to tweak." Former SEC Chair Harvey Pitt supported the legislation when it passed, but stated he would have preferred making it a part of the Securities Exchange Act of 1934. Some speakers expressed concern about overloading the board, especially the audit committee, and the consensus was that with issues like cybersecurity, the committee should be responsible for ensuring a system is in place, not for performing the checks itself.

Many participants voiced apprehension regarding the new administration's more insular, protectionist approach to international affairs, which might lead to withdrawal from essential international coordination efforts, leaving a gap in leadership. Pitt said, "If we do not participate, it will diminish our impact . . . and our ability to compete in a global marketplace."

JPMorgan Chase to Pay $264 Million to Settle Foreign Bribery Case

JPMorgan and its Hong Kong subsidiary agreed to pay $264 million to settle charges relating to a vast foreign bribery scheme. The case involved JPMorgan's hiring practices in China, where it gave jobs to the children of Chinese leaders to win business. The government charged that some of those hired were not qualified and were paid in excess of their abilities and assignments. Banks, including HSBC, Goldman Sachs and Deutsche Bank, have hinted that they face investigations into their hiring practices in China, but it is unclear whether or how the Trump administration will pursue further cases.

CEO Turnover Increases

In *The New Yorker*, James Surowiecki explains why boards are increasingly willing to fire CEOs:[3]

> Business professors once talked about "the imperial C.E.O.," but, increasingly, we're in the era of what Marcel Kahan, a law professor at N.Y.U., calls "the embattled C.E.O." He told me, "Big shareholders and boards of directors have more power, and are more willing to use it. And C.E.O.s have been the net losers." The breakdown of the old order began more than thirty years ago, but things have accelerated since the turn of the century. The Sarbanes-Oxley Act, passed in 2002, required greater disclosure to investors, and increased the independence of corporate boards. "In the old days, boards were often loyal to the C.E.O.," Charles Elson, a corporate-governance expert at the University of Delaware, told me. "Today, they're more loyal to the company." The rise of activist investors – who campaign aggressively for change when they're not satisfied with performance – has exacerbated the trend. One study found that when activist investors succeed in winning seats on the board of directors the probability that the C.E.O. will be gone within a year doubles.
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> The information revolution has created other dangers for C.E.O.s. In the social-media era, damaging stories travel fast, and boards take public relations very seriously. P.R. disasters have sealed the fate of top executives at no fewer than five advertising companies this year. (The most notorious example was at Saatchi & Saatchi: the chairman resigned after telling a reporter that he didn't think gender inequality in the industry was a problem.)

Teamsters Pension Fund Asks the McKesson Board to Claw Back CEO Pay

General Secretary-Treasurer Ken Hall of the International Brotherhood of Teamsters wrote to the board of McKesson asking them to get back millions of dollars of incentive compensation from chief executive John H. Hammergren, citing damage to the company's reputation caused by its role in the opioid crisis.[4] Hall said that under Hammergren, the company "repeatedly [fell] down on its number one priority," the safety and integrity of its supply chain. He called on the board to establish a special committee to investigate the claims made by West Virginia that the company's actions were "illegal, reckless, and malicious" in "flooding" the state with 100 million illegal opiate doses over a five-year period.

British Prime Minister Theresa May Promises Corporate Governance Reform

Prime Minister May is expected to release a proposal in the near future to implement some of her promised corporate governance reforms, including "advisory" employee representatives on board compensation/remuneration committees, binding votes on executive pay, and the mandatory publication of pay ratios.

Tata Governance Upheaval Raises Question About Independence of Boards in India

Without following its own procedures, Tata Sons abruptly ousted independent Chairman Cyrus Mistry, who claims there was "a total lack of corporate governance" at the family-dominated company, with two of its independent directors "reduced to mere postmen," acting as a rubber stamp for whatever the insiders wanted. One of these directors is Harvard Business School Dean Nitin Nohria. Tata Sons is now seeking the removal of another independent director at some of its separately listed operating companies who has backed Mistry. As top proxy advisory firm IiAS notes, allowing large block shareholders to remove independent outside directors undermines the purpose of having independent directors and any benefit they provide to minority shareholders. Lawyers Tejesh Chitlangi and Puneet Shah write:[5]

> The Tata-Mistry row unveils the sad state of corporate governance in the country. The current scheme of things should give sleepless nights to a regulator such as the Securities and Exchange Board of India (Sebi) which, along with the stock exchanges, seemingly had no clue of the wrongs (if the concerns highlighted in Cyrus Mistry's letter are even partially true) being perpetuated for the past many years.
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> A strong framework of listing regulations, disclosure requirements and securities laws alone cannot safeguard investor interest if implementation is missing. Sebi and the stock exchanges, as first-line regulators, should have been pro-active and stepped in to control the damage. Even in the aftermath of the Tata-Mistry spat, no strong message has been conveyed by the regulator to restore investor confidence. The regulator must chip in before the situation worsens.

Call for Update to U.K. Corporate Governance

In a letter to the *FT*, Mazar Board Practice head Anthony Carey calls for an update to the now quarter-century-old Corporate Governance Commission best practices:[6]

> The research by academics at Lancaster University ("'Negligible' link between CEO

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[3] http://www.newyorker.com/magazine/2016/11/07/why-c-e-o-s-are-getting-fired-more
[4] https://teamster.org/sites/teamster.org/files/gstmckessonletteropioid.pdf
[5] http://www.livemint.com/Opinion/RFpq2bL7kvEYsgQKjVSVVM/Time-to-fortify-corporate-governance.html
[6] https://www.ft.com/content/d703af88-c922-11e6-8f29-9445cac8966f

Women on Corporate Boards

Shareowners around the world have been calling on companies to increase gender diversity in corporate boardrooms. Despite the increasing number of studies that show that companies with female directors perform better, there is still a very long way to go before gender parity is reached among corporate directors. This article presents some of the most recent research on the topic and highlights legislative efforts in the United States.

Current Research Findings

Over the past several years, numerous studies have examined links between gender diversity in the boardroom and financial performance. Most recently, MSCI followed a number of U.S. companies over a five-year period (2011-2016) that began the period with three or more female directors. In the five years tracked, the companies with female directors saw median gains in Return on Equity (ROE) of 10% and Earnings Per Share (EPS) of 37%, compared to median changes of -1% in ROE and -8% in EPS of companies with no female directors. The differences in numbers could be attributed to more diversity within the group of directors, which often results in better decision-making overall.[1] In 2014, Credit Suisse created a proprietary database from its global company research coverage, including more than 3,000 companies across 40 countries and all major sectors. Credit Suisse found that companies with at least one woman on the board had an average ROE of 12.2%, compared to 10.1% for companies with no female directors. Additionally, the price-to-book value was 2.4 times for those companies with women on their boards compared to 1.8 times for boards with no women.[2]

Other studies have focused on the less quantitative features of corporate performance. For example, a 2012 study shows that companies with more women on their boards are more likely to "create a sustainable future" by instituting strong governance structures with a high level of transparency and implementing programs and policies that avoid corrupt business dealings.[3] Importantly, one study found that female directors have significantly improved board governance, risk management and the board's willingness to "hold CEOs accountable," and that "CEO turnover is more sensitive to stock return performance in firms with relatively more women on boards."[4]

Efforts to Increase Gender Diversity in the United States

Despite these research findings and pressure from regulators and the media, progress has been slow in the United States. Fewer than 20% of the board seats of S&P 1500 companies are held by women. In fact, a study recently found that just 17.8% of the board seats held by directors serving on S&P 1500 boards in 2016 were filled by women, compared to 11.9% in 2008.[5] In December 2015, a report by the U.S. Government Accountability Office found that, assuming women join boards in equal proportion to men, this number will likely not reach 50% – gender parity – before the year 2054.[6]

So what is being done to encourage U.S. companies to increase the number of women on their boards? While other countries have implemented, or are contemplating, quotas to address the issue of gender diversity in the corporate boardroom, the United States has been reluctant to do so. At the federal level, a bill introduced last year in the House of Representatives called on the Securities and Exchange Commission to, among other things, "establish a Gender Diversity Advisory Group to study and make recommendations on strategies to increase gender diversity among the members of the board of directors of issuers."[7]

In addition, a few U.S. states have taken on the issue by passing resolutions calling on companies in their states to set the standard for board diversity. The first state to act was California, whose legislature passed a resolution (CA SCR-62) in 2013, calling for the boards of publicly traded companies in the state to have:

- at least one female director if the board has fewer than five total directors;
- at least two female directors if the board has five to eight total directors; or
- at least three female directors if the board has nine or more total directors.[8]

Of course, CA SCR-62 was only a resolution, so companies in the state faced no legal ramifications if they did not fulfill the resolution's goal by the end of the proposed three-year period; however, it did set a precedent that other states have been following. In 2015, the House of Representatives in Illinois passed HR 0439 and the Senate of the Commonwealth of Massachusetts passed S1007, both of which are resolutions that closely mirror the California resolution.

Unfortunately, only about 20% of the companies in the Russell 3000 index with headquarters in California met the goals established by CA SCR-62. While the boards of companies based in Illinois and Massachusetts have until 2018 to meet the gender diversity goals outlined in their respective state's resolutions, it is likely that many will not do so.

Nevertheless, the increasingly public efforts of institutional investors and diversity advocacy groups are sure to have a positive impact. As more and more companies reap the financial and nonfinancial benefits of having a diverse board, others will surely follow. ■

1 https://www.msci.com/www/blog-posts/the-tipping-point-women-on/0538249725
2 https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=8128F3C0-99BC-22E6-838E2A5B1E4366DF;see also http://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=5A7755E1-EFDD-1973-A0B5C54AFF3FB0AE
3 http://www.haas.berkeley.edu/groups/online_marketing/facultyCV/papers/Women_Create_Sustainable_Value_FINAL_10_2012
4 http://personal.lse.ac.uk/FERREIRD/gender.pdf
5 https://irrcinstitute.org/wp-content/uploads/2017/01/IRRCI-Board-Refreshment-Trends-FINAL.pdf
6 http://www.gao.gov/products/GAO-16-30
7 https://www.congress.gov/bill/114th-congress/house-bill/4718
8 http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0051-0100/scr_62_bill_20130711_introduced.pdf

Litigation Update

Class Certification Scored in *J.C. Penney* Securities Class Action

In an order dated March 8, 2017, Judge Robert W. Schroeder III of the United States District Court for the Eastern District of Texas certified a class in a securities fraud action against J.C. Penney Company, Inc. The court considered and rejected defendants' claims that the Magistrate Judge erred in finding that the action is maintainable under Rule 23(b)(3). Agreeing with the Magistrate Judge's findings and conclusions, Judge Schroeder ordered that the Report be adopted and the class be certified.

J.C. Penney is a retailer that operated 1,102 department stores in 49 states and Puerto Rico as of January 28, 2012. J.C. Penney's business consists of selling merchandise and services to consumers through its department stores and through its internet website. J.C. Penney sells family apparel and footwear, accessories, fine and fashion jewelry, beauty products through Sephora inside J.C. Penney, and home furnishings.

The case alleges that between August 20, 2013 and September 26, 2013, J.C. Penney and its senior officers and directors made misstatements and omissions regarding the company's financial position that artificially inflated the company's stock price. Plaintiffs allege violations of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. After considering defendants' objection that the Magistrate Judge failed to resolve whether the alleged corrective disclosures were corrective, the court agreed "with the Magistrate Judge's finding that the Defendants did not meet their burden of production to establish that the opinions in the GS Report had been previously disclosed to the market." In addressing defendants' last objection – the contention that the Magistrate Judge erroneously concluded that numerous markets for different J.C. Penney securities (including stock and options) were efficient without analyzing them separately and without considering evidence of market inefficiency – the court concluded that "[f]irst, the Court is not required to focus on the market for each security separately," and "[s]econd, the opinion of Defendants' Expert . . . does not establish market inefficiency."

In addition, the court appointed the **National Shopmen Pension Fund** as class representative and Robbins Geller as class counsel.

Robbins Geller attorneys **Jonah H. Goldstein**, **Robert R. Henssler, Jr.**, **Danielle S. Myers**, **Austin P. Brane**, **Hillary B. Stakem** and **Rachel A. Cocalis** obtained this result for shareholders.

Marcus v. J.C. Penney Company, Inc., et al., No. 6:13-cv-736, Order Adopting Report and Recommendation of the United States Magistrate Judge (E.D. Tex. Mar. 8, 2017).

Big Lots Shareholder Class Certified in Securities Action

On March 17, 2017, the Honorable Michael H. Watson of the United States District Court for the Southern District of Ohio certified a class of investors in a securities fraud action against Big Lots, Inc. and denied defendants' motion to exclude plaintiffs' expert. In certifying the class, the court stated that Robbins Geller is "qualified" and "experienced" to represent the class. In denying defendants' motion to exclude plaintiffs' proposed expert, the court concluded that plaintiffs' expert is "qualified and that his opinions are both relevant and reliable."

Big Lots is a closeout retailer that sells a variety of merchandise, including perishables, furniture, clothing and electronics. Plaintiffs are pursuing claims for securities fraud and insider trading against Big Lots and Big Lots' former Chairman and CEO, Steven Fishman, former CFO, Joe Cooper, former General Counsel, Charles Haubiel, and former VP of Finance and current CFO, Timothy Johnson. Initially filed by Robbins Geller in July 2012, the case alleges defendants provided misleading sales and earnings figures that allowed 17 Big Lots officers and directors to engage in a $36 million insider-selling spree while Big Lots' stock was trading at artificially inflated prices. After the complaint was filed, numerous regulatory agencies launched their own investigations into potential insider trading and securities fraud regarding Big Lots' securities, including the SEC, the U.S. Attorney's Office for the Southern District of New York, and the regulatory authority for the New York Stock Exchange.

In certifying the class, Judge Watson commented that "there can be no serious dispute that Robbins Geller is qualified, experienced, and generally able to conduct litigation. As noted in the Court's Opinion and Order appointing Robbins Geller as lead counsel, the firm secured the largest recovery to date in a shareholder Continued on p. 8

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class action while serving as lead counsel in *In re Enron Corp. Securities Litigation*, 2005 U.S. Dist. LEXIS 39867 (S.D. Tex. Dec. 22, 2005)." He succinctly concluded: "To say the least, Robbins Geller has extensive experience in handling class actions."

Robbins Geller attorneys **David W. Mitchell**, **Lucas F. Olts**, **Austin P. Brane**, **Brian E. Cochran** and **Kevin A. Lavelle** were appointed as class counsel representing class representatives **City of Pontiac General Employees' Retirement System** and **Teamsters Local 237 Additional Security Benefit Fund**.

Willis v. Big Lots, Inc., et al., No. 2:12-cv-604, Opinion and Order (S.D. Ohio Mar. 17, 2017).

Medtronic Investors Win Appeal in Eighth Circuit

On December 28, 2016, in a victory for plaintiffs **Employees' Retirement System of the State of Hawaii**, **Union Asset Management Holding AG** and **West Virginia Pipe Trades Health & Welfare Fund**, the United States Court of Appeals for the Eighth Circuit vacated the district court's summary judgment order in the *Medtronic* securities class action.

Plaintiffs filed suit on June 27, 2013 in the United States District Court for the District of Minnesota, alleging that Medtronic and certain of its top executives violated §§10(b) and 20(a) of the Securities Exchange Act of 1934 by engaging in a scheme to mislead investors regarding Medtronic's true financial condition. Specifically, plaintiffs alleged that defendants secretly drafted and edited medical journal studies authored by doctors with lucrative financial ties to Medtronic. Those studies and journal articles overstated the efficacy of INFUSE, Medtronic's key biologics product, while simultaneously underreporting – or omitting altogether – adverse events associated with the use of the product. Medtronic's deception drove sales of INFUSE and generated billions of dollars in profits for the company. Defendants' scheme artificially inflated Medtronic's stock price, which caused plaintiffs to suffer hundreds of millions of dollars in losses during the class period.

Plaintiffs' complaint survived defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Then, just as discovery was getting underway, defendants moved for summary judgment. They claimed the two-year statute of limitations barred plaintiffs' claims because publicly available information alerted plaintiffs to the alleged scheme no later than June 27, 2011. Plaintiffs opposed the motion, arguing that while industry observers had expressed concern over some academics' financial ties with Medtronic, there were no facts to suggest Medtronic's knowing participation in the scheme. Plaintiffs argued that without facts upon which to allege defendants' scienter (a necessary element of the claim), neither they nor any reasonably diligent plaintiff would have been able to plead a securities fraud claim more than two years before June 27, 2013. The district court agreed with defendants, and entered summary judgment in their favor on September 30, 2015.

Plaintiffs appealed the ruling to the Eighth Circuit. As they did in the lower court, plaintiffs again argued that nothing in the public domain informed them of defendants' fraudulent scheme more than two years before they filed suit. The Eighth Circuit agreed. After reviewing the public articles and commentary that defendants claimed informed plaintiffs of their claims, the Court of Appeals concluded that, although plaintiffs "may have had reason to be suspicious of Medtronic's conduct concerning INFUSE prior to June 27, 2011, . . . a reasonably diligent plaintiff would not have discovered facts sufficient to plead scienter based on public information existing prior to June 27, 2011." Accordingly, the appellate court found that plaintiffs "brought their complaint within the two-year statute of limitations," and the summary judgment order was vacated.

"We are pleased that the Eighth Circuit Court of Appeals reversed the dismissal of the action and affirmed that the statute of limitations did not run until the lead plaintiffs **Employees' Retirement System of the State of Hawaii** and **Union Asset Management Holding AG** could discover facts sufficient to constitute a violation of law," stated Robbins Geller partner **Shawn A. Williams**.

The case has now been returned to the district court. Robbins Geller attorneys **Shawn A. Williams**, **Danielle S. Myers**, **Christopher M. Wood**, **Susannah R. Conn** and **Nadim G. Hegazi**, along with co-counsel, will continue to prosecute the claims.

West Virginia Pipe Trades Health & Welfare Fund, et al. v. Medtronic, Inc., et al., No. 15-3468 (8th Cir. Dec. 28, 2016). ■

Settlement Update

Two Largest Post-Merger Common Fund Settlements in California State Court History Achieved

Late last year, Robbins Geller made history with the *Onyx Pharmaceuticals* settlement of $30 million. At the time, it was believed to set the record for the largest post-merger common fund settlement in California state court history. Just three weeks later, in December 2016, the Firm broke its own record by resolving the *Websense, Inc.* case for $40 million.

On November 18, 2016, the Honorable Marie S. Weiner of the Superior Court of the State of California, County of San Mateo, approved a $30 million settlement in *In re Onyx Pharmaceuticals, Inc. Shareholder Litigation*. Plaintiffs alleged that the former Onyx Pharmaceuticals, Inc. Board of Directors breached its fiduciary duties in connection with Amgen Inc.'s acquisition of Onyx for $125 per share. Plaintiffs alleged that the Onyx Board acted disloyally and in bad faith by excluding competing bidders who offered more than $125 per share. Robbins Geller also argued that the Onyx Board concealed material information from stockholders that indicated that Onyx was worth more than its sale price.

Over the case's three years, Robbins Geller defeated defendants' motions to dismiss, obtained class certification, took over 20 depositions and reviewed over one million pages of documents. The settlement was reached just days before a hearing on defendants' motion for summary judgment was set to take place, yielding what was believed to be, at the time, the largest post-merger common fund settlement in California state court history.

"This is not a case where it was settled early on simply after the pleading and some preliminary discovery," stated Judge Weiner regarding the case's complexity. "[T]his was a very mature and hotly-contested case at the time of its resolution, and time needed to be put in to bring it to that maturity."

On December 9, 2016, only three weeks after the *Onyx* settlement was approved, Robbins Geller obtained court approval of a $40 million settlement in *Laborers' Local #231 Pension Fund v. Websense, Inc.* Much like *Onyx*, it took Robbins Geller three years of vigorous prosecution to bring the case to a successful conclusion.

The *Websense* shareholder action challenged Vista Equity Partners' May 2013 buyout of Websense for $24.75 per share, alleging breach of fiduciary duty against the former Websense board of directors and aiding and abetting against Websense's financial advisor, Merrill Lynch, Pierce, Fenner & Smith, Inc. Robbins Geller pursued claims in both California and the Delaware Court of Chancery.

As alleged, the merger agreement between Websense and Vista was the product of a materially conflicted process. John McCormack, Websense's CEO, favored his own interests and those of company insiders over the interests of Websense shareholders. By aligning himself with Vista, he negotiated and secured material benefits for himself (and his management team) at the cost of shareholder value. As part of the merger, McCormack obtained a $10.6 million cash payout and continuing employment as CEO with Vista. In addition, as reported by *Bloomberg*, Robbins Geller uncovered facts in discovery indicating that Merrill Lynch bankers were simultaneously advising the buyer, Vista, on other deals while overseeing the Websense buyout. When confronted with this evidence at deposition, John Schaefer, a Websense director, said he was unaware Merrill Lynch had conflicting interests in the buyout and added that he would have wanted to know about the bank's dealings with Vista when considering the offer. As also reported by *Bloomberg*, Schaefer testified, "I assume they're not representing Continued on p. 12

Trustee Spotlight: Lieutenant Jeremy Burke of Austin Fire Fighters Relief & Retirement Fund

As a 17-year veteran of the Austin Fire Department, Lieutenant Jeremy Burke has the type of résumé civilians want from their firefighters. Trained to respond immediately, Lt. Burke has repeatedly thrown himself into burning structures without hesitation. Recently, Lt. Burke was in the news when he survived a dangerous ceiling collapse in a three-alarm fire in an Austin condominium complex.

Fires are categorized based on, among other things, the number of firefighters needed on the scene. A more severe fire will call for a higher number of alarms and more units, including engines and firefighters. The three-alarm fire that broke out at the Dry Creek West Condominiums one October morning called for 20 trucks and 90 firefighters, including Lt. Burke. After receiving reports that a resident may have been trapped inside the condominium, Lt. Burke and two other firefighters (William Cook, a 16-year veteran, and Jimmy Casares, a 4-year veteran) entered the building on a rescue mission. While the firefighters were inside the structure, the second floor collapsed and briefly trapped them underneath. Lt. Burke and Cook were able to extricate themselves from the debris, while additional firefighters went to Casares's aide. All three firefighters were taken to UMC Brackenridge with second-degree burns. Luckily, it turned out that the resident was not in the building and was not harmed.

In addition to being an active member of Local 975, Lt. Burke is also a trustee of the Austin Fire Fighters Relief & Retirement Fund. The defined benefit plan was established by the 45th Texas Legislature in 1937 and provides retirement, disability, death and survivor benefits to approximately 1,700 active and retired participants and their eligible beneficiaries. On September 30, 2016, Lt. Burke was elected to his third three-year term on the board and was officially appointed at the pension board meeting in January 2017. ■

PROXY ACCESS UPDATE

Reaching the Tipping Point

By December 31, 2016, the 251st company of the S&P 500 adopted a proxy access provision allowing shareholder-nominated board candidates to be included in the company's proxy. A report from the Sidley law firm includes detailed information about which companies have adopted proxy access and the specific requirements for eligibility – most commonly 3% for three years for up to 20% of the board (at least two directors), with a nominating group size limit of 20.[1] It also notes that:

> The 2015 proxy season saw a significant increase in the number of shareholder proxy access proposals and shareholder support for such proposals, as well as an increased frequency of negotiation and adoption of proxy access via board action – including an accelerating trend towards board adoption without receipt of a shareholder proposal. This trend continued in 2016 and appears to be continuing into 2017.

The report concludes that proxy access proposals are submitted by (and supported by) shareholders as a way of addressing substantive concerns, primarily:

- Climate change (*i.e.*, carbon-intensive coal, oil and gas and utility companies);
- Board diversity (*i.e.*, companies with little or no gender, racial or ethnic diversity on the board); and
- Excessive executive compensation (*i.e.*, companies that received significant opposition to their 2014 say-on-pay votes).

Going from Theoretical to Actual

As noted above, after the SEC rule was successfully challenged in court, investors have been successful at persuading more than 300 companies, including just under 40% of the S&P 500, to accept proxy access provisions voluntarily. Typically they provide that if 3% of the shareholders who have held stock for at least three years submit a candidate for the board, that candidate must be included on the company's proxy circulated to all shareholders. For the 2017 proxy season, proponents of proxy access have begun to submit so-called "fix-it" proposals, seeking to amend specific features of adopted bylaws that they believe limit the ability of shareholders to use proxy access effectively. Opening the door to these "fix-it" proposals, the SEC staff denied no-action relief to seven of the nine companies that sought exclusion.

GAMCO Investors, Inc. became the first shareholder to take advantage of a proxy access provision by nominating a candidate. On November 10, 2016, GAMCO and its affiliated funds filed a Schedule 14N disclosing their nomination of a proxy access candidate for election to the board of directors of National Fuel Gas Company pursuant to the company's recently adopted proxy access bylaw. National Fuel has a nine-member classified board and its access bylaw has a 3/3/20/20 formulation, which refers to a group of up to 20 shareholders that own at least 3% of the shares for three years and are able to nominate up to 20% of the board. GAMCO disclosed in its Schedule 14N aggregate beneficial ownership of 7.8% of National Fuel's common stock and that it has beneficially owned more than 3% for more than three years. In 2015, GAMCO submitted a shareholder proposal, which did not pass, requesting that the company engage an investment bank to effectuate a spin-off of the company's utility segment.

However, as noted in the Sidley report, this first attempt to make use of a proxy access proposal, by activist Mario Gabelli's GAMCO funds, was quickly dropped because the company at issue, National Fuel, had a proxy access provision that specifically required any nominee to be put forward by shareholders who had not acquired the stock holdings with activism in mind. ■

[1] http://www.sidley.com/~/media/update-pdfs/2016/12/proxy-access-corporate-governance-report-december-2016.pdf

pay and investor value boosts case for shake-up," December 28[7]) raises challenging questions, for instance on how to set the criteria for executive bonuses. But it would be best for any review to look at corporate governance in its broader context.

It will be a quarter of a century next year since the publication of the Cadbury report and the development of the UK's first corporate governance code. Progress has been made on a number of areas since then, but it would be timely for a corporate governance commission to be set up to look at reforms needed to enable companies to achieve long-term sustainable success that benefits all their direct stakeholders and wider society. The commission would build on the work of the parliamentary inquiry under way and the recent green paper on corporate governance reform, and should be made up of representatives of all key stakeholders – independent and executive directors, other employees, investors, consumers and civil society.

It would have a full agenda: the merits of companies having an inspiring purpose and clearly articulated values; board composition; setting the right "tone from the top"; engagement with, and the fair treatment of, stakeholders including setting remuneration across the business; ensuring investors have due regard to the interests of the ultimate beneficiaries of the shares they hold; the promotion of innovation and building the societal license to operate.

Remuneration has dominated the dialogue in the UK between boards and investors for the past 20 years since the publication of the Greenbury report. For the next two decades it will be in the interests of business and the society of which it is an integral part for the discussions to range more widely and more deeply.

Nine Democratic Senators Ask the Wells Fargo Board for More Information

Members of the Senate Committee on Banking, Housing, and Urban Affairs have written to the Wells Fargo board of directors to ask for further information about the systemic fraud that led to the opening of millions of unauthorized accounts and a settlement that included a $185 million fine.[8] Noting that former CEO John Stumpf failed to answer many questions when he appeared before the committee, the letter says that "continued failure to answer questions . . . does nothing to restore the trust of Wells Fargo's customers and shareholders." The requested information includes the members of the special board committee leading the independent investigation, the reasons for delay in launching the investigation, the scope of the investigation (including the time period and issues covered), the board's involvement in the company's responses to the questions and requests for information at the hearing, and the date on which Wells Fargo's auditors raised the unacceptable sales practices with a board member. It is significant that this letter is addressed to the board and not the new CEO, staff, or counsel.

President Trump's First 100 Days

With a new President and Republicans in the majority of both the House and Senate, we can expect to see several pieces of new legislation passed very quickly. We will be looking carefully at efforts to roll back the post-Enron and post-meltdown reforms, with many corporations preparing alterations to consumer and employee protections under the new administration and the Republican-controlled Congress. Look for them to be disguised as "reform," as pointed out by Adam J. Levitin in *American Banker*:[9]

> The financial services industry is pushing hard for Congress to change the single director Consumer Financial Protection Bureau into a multimember commission under the guise of "good government." Let there be no mistake what this is really about: the proposal for a commission structure is a backdoor attack on the very existence of the CFPB as an agency.
>
> The financial services industry doesn't have the courage to attack the CFPB, an immensely popular agency, directly. So instead, the strategy is to try to render it ineffective by changing it from a single-director structure to a five-member commission.

What Will Exxon Do About Rex Tillerson?

Now that Exxon CEO Rex Tillerson is the new Secretary of State, many important issues about conflicts of interest have been raised given Exxon's extensive international operations – especially those in Russia. It also raises questions about Tillerson's holdings and departure package, similar to the concerns raised regarding Dick Cheney's departure from Halliburton. In Cheney's case, his exodus was characterized as a retirement rather than a resignation so that his options would be vested immediately. In December 2016, Jena McGregor reported in *The Washington Post*:[10]

> As CEO of one of the largest and most powerful public companies in the world, Tillerson received compensation valued at $24.3 million in 2015, and he ranked 29th on a list of the 200 highest paid CEOs compiled by the executive compensation research firm Equilar. The pension benefits he will receive, accumulated over more than 40 years at the company, have been valued at $69.5 million. And in a company document filed earlier this month, ExxonMobil said Tillerson has direct ownership of more than 2.6 million shares of ExxonMobil stock, which executive compensation experts say Tillerson will presumably have to divest if he is confirmed as the nation's chief diplomat.
>
> Yet the majority of those shares – 2 million of them, valued at nearly $185 million based on ExxonMobil's closing share price Friday [December 9] – are not yet vested. That means that the shares have been granted to Tillerson but that he doesn't yet have outright access to them. ExxonMobil has an unusually long vesting schedule and clearly states in its filings that retirement does not speed up the vesting of those shares, meaning many of them aren't currently due to be under Tillerson's control for years.
>
> Now that the company has announced Tillerson will retire at year's end and be succeeded Jan. 1 by Darren Woods as chairman and CEO, its board is faced with a nine-figure dilemma: Should it accelerate the vesting of those shares, rewarding Tillerson for his 41 years of service just before he could take a job that has enormous influence over the geopolitics that will affect his former employer? Or should it stick to the terms in its filings, which have been cited for their good governance standards? ■

[7] https://www.ft.com/content/abc7085e-c857-11e6-9043-7e34c07b46ef
[8] https://www.warren.senate.gov/files/documents/2016-12-22Letter_to_Wells_Board.pdf
[9] https://www.americanbanker.com/opinion/what-the-cfpb-commission-debate-is-really-about
[10] https://www.washingtonpost.com/news/on-leadership/wp/2016/12/14/the-188-million-question-about-exxon-ceo-tillerson-joining-trumps-cabinet/?utm_term=.4f5461409c48

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Community Health Systems continued from page 1

establishment of insider trading controls, the adoption of a political expenditure disclosure policy, and the implementation of an automatic clawback provision to recover compensation improperly paid to the company's CEO or CFO.

"The landmark corporate governance reforms achieved are a huge step forward for Community Health and its shareholders," commented Robbins Geller partner **Benny C. Goodman III**.

In commending Robbins Geller attorneys at the final approval hearing, Judge Sharp concurred with Goodman's assessment, stating: "I think y'all have done a great job pulling this [settlement] together. It was complicated, it was drawn out, and a lot of work clearly went into this [case]. . . . I appreciate the work you all did on this." The judge further lauded the settlement as providing "benefit to the shareholders" that went "above and beyond money."

Robbins Geller attorneys **Darren J. Robbins**, **Benny C. Goodman III**, **Randall J. Baron**, **Travis E. Downs III**, **John Herman**, **Erik W. Luedeke** and **Juan Carlos Sanchez**, serving as co-lead counsel, obtained this settlement on behalf of shareholders.

In re Community Health Systems, Inc. Shareholder Derivative Litigation, Master Docket No. 3:11-cv-00489, Order Approving Derivative Settlement and Order of Dismissal with Prejudice (M.D. Tenn. Jan. 17, 2017). ■

Onyx Pharmaceuticals and Websense, Inc. continued from page 9

Vista on a pro-bono basis, so they're being compensated by both sides, and it's an intolerable situation."

"This was a good settlement after everything was said and done," remarked Judge Joan M. Lewis at the final approval hearing. "So good job . . . . It was a difficult one . . . ."

"In my view, the unprecedented rarity of these two results really speaks to the risk that we undertook when litigating these cases. Neither *Websense* nor *Onyx* was a case with a clearly established path to liability at the outset, but we dug into the facts and found that the rose-colored descriptions in the public documents regarding both transactions omitted crucial details. It is gratifying to know that our hard work paid dividends to stockholders, in historic fashion," said Robbins Geller partner **David A. Knotts**, one of the lead attorneys prosecuting the cases.

The *Onyx Pharmaceuticals* and *Websense* cases were litigated by Robbins Geller attorneys **Randall J. Baron**, **David A. Knotts** and **David T. Wissbroecker**.

In re Onyx Pharmaceuticals, Inc. Shareholder Litigation, No. CIV523789 (Cal. Super. Ct., San Mateo Cnty.).

Laborers' Local #231 Pension Fund v. Websense, Inc., et al., No. 37-2013-00050879-CU-BT-CTL (Cal. Super. Ct., San Diego Cnty.). ■