ON THE RECORD with Robbins Geller Rudman & Dowd LLP

4th Quarter 2015

Robbins Geller Obtains $272 Million Recovery in Groundbreaking RMBS Action

After seven years of hard-fought litigation, a $272 million settlement has been presented to the court in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, which was brought on behalf of purchasers of residential mortgage-backed securities ("RMBS") offerings structured and sold by Goldman Sachs. Although the case was initially dismissed by the district court, lead plaintiff **NECA-IBEW Health & Welfare Fund** ("NECA") made the important decision to appeal the case to the Second Circuit. That appeal – which was briefed and argued by Robbins Geller attorneys – resulted in a landmark decision that changed the face of RMBS litigation.

NECA had alleged that the shelf registration statement and the prospectuses for the RMBS offerings contained false and misleading statements and omissions as to the true nature, risk (including borrowers' ability to repay the loans pooled therein), and overall quality of the certificates. While NECA had purchased certificates in two of the offerings, it sought to represent purchasers in all 17. The district court held that NECA could, at best, only represent those purchasers who bought not only in the same specific offerings, but also in the same specific tranches that the fund had purchased.

The Second Circuit reversed the district court and reinstated NECA's claims against defendants where they were made on behalf of purchasers who shared "the same set of concerns" over securities originating from the same lenders whose mortgage pools also made up NECA's purchases (and which would share any misstatements as to the underlying mortgages' quality). This allowed NECA to sue over seven of the offerings, and not just in the specific tranches that the fund had purchased. The defendants petitioned the Supreme Court for a writ of certiorari, with Goldman claiming that the Second Circuit's decision presented massive new liability concerns for Wall Street: "The stakes implicated by the Second Circuit's new and expansive standard for class standing are difficult to overstate," wrote Goldman. "[T]he decision will effectively increase by tens of billions of dollars the potential liability that financial institutions face in this and similar class actions." The Supreme Court denied Goldman's writ.

As a result of the *NECA* decision, the entire landscape of RMBS-related litigation changed for the benefit of investors. Prior to this action, at least a dozen district courts had dismissed investors' claims for certificates the named plaintiffs had not purchased. In the wake of *NECA*, many of these decisions were overturned, and claims for hundreds of millions of dollars of RMBS were reinstated. An example is the recent record-breaking $388 million settlement achieved by Robbins Geller in the *Fort Worth Employees' Retirement*

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Paul J. Geller

A Note to Institutional Investors from Paul J. Geller

Another quarter brings both new successes and professional acknowledgment of hard work by the Firm's attorneys. We were pleased to again see district courts granting certification of classes in shareholder litigation, this time on behalf of investors in Barclays ADSs and Goldman Sachs common stock, adding to our growing list of certified classes after the Supreme Court's ruling in *Halliburton II*. Meanwhile, after years of hard-fought litigation, two more cases reached milestones, with a $272 million settlement against Goldman Sachs on behalf of RMBS purchasers and a $148 million verdict against the orchestrators of the low-balled buyout of Dole Food Co.

Reaching such milestones in past quarters has not gone unnoticed. The Firm was named as one of *Law360's* "Most Feared Plaintiffs Firms" and recently topped the year's SCAS *Top 50* by recovering more money for aggrieved shareholders than any other securities law firm. In addition, *The National Law Journal* not only named the Firm to its "Elite Trial Lawyers" list for the second consecutive year, but also cited more of the Firm's attorneys as "trailblazers" for their stellar antitrust and M&A work. We are proud to be able to offer the Firm's world-class litigators and resources to our clients in the pursuit of corporate wrongdoers. ■

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Robbins Geller Named One of the Nation's Most Feared Plaintiffs' Firms

Law360 named Robbins Geller as one of the nation's Most Feared Plaintiffs Firms for the third consecutive year, recognizing the Firm's recent case victories from July 1, 2014 to July 1, 2015. The publication noted that while "[g]oing the distance in high-risk battles with the nation's top defense firms and their well-heeled clients may seem daunting to some firms, [Robbins Geller] has made a name for itself by plunging headfirst into such challenges," recovering "more than $2 billion for institutional investors around the world" over the past year.

The publication commended the Firm's $400 million recovery achieved for shareholders in a class action against Pfizer Inc. regarding its off-label marketing of drugs. The settlement was reached just days before trial and after more than five years of litigation. Partner **Michael J. Dowd**, lead trial counsel on the case, said *Pfizer* "was a good example of a case where a lot of firms shied away from it since it was going to be a tough fight, but we took it on."

Robbins Geller also achieved a $388 million recovery in the *J.P. Morgan* RMBS class action, one of the last remaining RMBS purchaser class actions arising out of the global financial crisis. Attorneys **Daniel S. Drosman**, **Luke O. Brooks** and **Darryl J. Alvarado** "spearheaded" the case, which "involved six years of fierce litigation, an extensive investigation and 40 depositions, and resulted in the highest percentage-of-face-value recovered out of the 16 [now 17, *see* Goldman Sachs, pages 1, 10] comparable RMBS purchaser class action settlements to date," the publication said. The settlement also represents, on a percentage basis, the largest recovery ever achieved in an RMBS purchaser class action.

Also of note were the several settlements totaling $590.5 million in the antitrust class action that involved some of the world's largest and most powerful private equity firms, "accusing them of conspiring to keep the price of leveraged buyouts low." The settlement is the largest antitrust class action settlement ever in which no civil or criminal government antitrust action was taken. **Patrick J. Coughlin**, co-lead counsel on the case, noted that "[h]istorically, these firms had fiercely competed against each other. We had to show how these natural competitors were colluding, and that was hard to do and very complicated."

Last but not least, *Law360* praised the Firm's recoveries totaling "$930 million [secured] in 35 shareholder class action settlements, [ranking the Firm first] among law firms in terms of total amount recovered as well as number of deals," according to Institutional Shareholder Services' SCAS *Top 50* report for 2014. The report also highlights that Robbins Geller has recovered $15 billion of "the top 100 [settlements] of all time," which includes the largest securities class action recovery (*Enron* - $7.3 billion), the largest antitrust class action settlement (*Visa/MasterCard* - $5.7 billion), the largest securities class action judgment (*Household* - $2.46 billion), the largest stock option backdating recovery (*UnitedHealth* - $925 million), the largest opt-out (non-class) securities action recovery (*WorldCom* - $657 million), and the largest RMBS purchaser class action recovery (*Countrywide* - $500 million), to name a few.

"I think that the reason you see us at the top year after year is that the largest and most respected institutions around the globe choose the firm because of our depth of financial and human resources and willingness to prosecute cases in a manner that doesn't cut the litigation short," commented partner **Darren J. Robbins**.

Law360 concluded that "[a]mong the reasons Robbins Geller has been able to secure a multitude of record-breaking recoveries for clients is the firm's steadfast willingness to take complex cases all the way to trial, along with a deep bench of talented lawyers and the financial means to take cases on contingency." ■

Robbins Geller Sweetens Dole Deal by $148 Million After Trial

On August 27, 2015, following two years of vigorous prosecution of stockholders' claims by Robbins Geller and co-counsel, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery issued his post-trial ruling in the litigation challenging the 2013 buyout of Dole Food Company, Inc. by its billionaire Chief Executive Officer and Chairman, David H. Murdock. In a blistering 108-page decision, Vice Chancellor Laster ruled that Murdock and fellow director C. Michael Carter – who also served as Dole's General Counsel, Chief Operating Officer and Murdock's top lieutenant – are liable to Dole's former stockholders for over $148 million, the largest post-trial award ever in a class action challenging a merger transaction.

As explained in the court's ruling, Murdock and Carter's misconduct was "not innocent or inadvertent, but rather intentional and in bad faith." After Murdock appointed himself as CEO and Carter as COO in December 2012, they executed a calculated plan to deliver the company to Murdock at an unfair price. As an initial step, Carter began issuing public earnings guidance for the first time in Dole's history in early January 2013.

Rather than giving the market a fair assessment of the company's financial outlook, Carter intentionally understated Dole's business prospects and expected earnings. Then, in May 2013, Carter suddenly cancelled a recently adopted share repurchase program that had lifted the company's stock price. As the court explained, these actions "primed the market for the freeze-out by driving down Dole's stock price" in advance of a buyout proposal from Murdock.

On June 10, 2013, Murdock delivered a letter to the board of directors offering to buy the remainder of Dole's stock that he did not already own and take the company private. In response, Dole formed a subcommittee of outside directors that would evaluate Murdock's offer and negotiate the terms of a potential buyout. But rather than letting the committee members do their job, Carter undermined their efforts at every opportunity.

As is typically done by directors considering a potential merger transaction, the committee requested current financial projections for Dole so they could independently assess the value of the company and fairness of Murdock's offer. In what proved to be fatal to the legitimacy of the negotiations, Carter knowingly provided "lowball" forecasts to mislead the committee for Murdock's benefit. Specifically, Carter's projections understated by tens of millions of dollars the annual earnings impact of certain cost-savings initiatives and farm purchases that the company had planned to undertake.

While Carter provided intentionally understated financial information to the committee, he gave more positive and accurate data to Murdock's lenders. In a secret meeting that violated the committee's instructions on financial due diligence, Carter and senior members of Dole's international management team advised Murdock's lenders that the company could "upsize" the financial projections provided to the special committee by $18-$19 million and gave candid information about the cost-savings initiatives and farm purchases. Although the committee later learned of the meeting, Dole's management team had already dispersed throughout the world, leaving the committee unable to obtain equivalent information for itself. Only through litigation did the committee and its advisors learn the full scope of the meeting, including the more accurate information about Dole's financial prospects and business plan.

When the committee was nearing a final agreement with Murdock, Carter attempted to conceal his fraudulent conduct. As the court explained, in early August 2013, while negotiations were ongoing, Carter initiated the company's annual budgeting process and instructed Dole's divisions to correct the inaccuracies contained in the financial projections that were provided to the committee just weeks earlier. Pursuant to Continued on p. 10

The Urgency of Fiduciary Leadership

On July 28, 2015, President Carter summarized the state of the union in light of recent Supreme Court decisions in *Citizens United* and *McCutcheon*: "It violates the essence of what made America a great country in its political system. Now it is just an oligarchy with unlimited political bribery being the essence of getting the nominations for president or being elected president."[1] Last month, the Bank of England's chief economist suggested that the very concept of the public limited liability company should be reexamined. In August 2015, the United States Department of Labor held hearings on a ruling – five years and hundreds of thousands of comment letters in the making – that essentially required that brokers stop the practice of cheating their customers. In early September 2015, *Financial Times* senior editor, John Plender, published a book explaining change as "increasing financialisation not only of the economy, but of everything from public services to the arts…. To put it crudely, capitalism has been hijacked by the banks."[2]

These recent harsh verdicts require us to rethink the parameters of corporate governance and the role of shareholders. Unaccountable corporate power, I contend, has brought us perilously close to President Carter's reality. Just as the American political system is legitimated by a belief in the sanctity of the ballot, so the American corporate system, which vests control largely in the hands of privately appointed managers, is legitimated on three major bases.

- The first is a belief that the shareholders, as the owners of the corporation, have the ultimate right to control it.
- The second is a belief that corporate managers are accountable for their performance.
- The third is a belief that placing control of the factors of production and distribution in the hands of privately appointed corporate managers, who are accountable for their performance and who act in the interest and are subject to the ultimate control of those who own the corporation, achieves a more efficient utilization of economic resources than that achievable under alternative economic systems.

None of these components of "legitimacy" are operative today.

We have barely begun the process of persuading managements that their best interests lie in encouraging a system of involved and effective ownership. Until we can achieve this objective, full success will elude our efforts. Our reality checks are not geographic progress, but institutional ones. How far we have to go can most pertinently be understood through the lens of executive compensation. The persistent increases disconnected from any objective measures of success are an ugly and well-recognized part of our culture – and a major contributor to the broader economic and social problem of inequality.

Corporate language and priorities have captured the American Republic. The allocation of government resources is directed by the imperatives of short-term profit maximization and by a vocabulary of cost/benefit rather than concern for flesh and blood citizens. While we watched, chief executive officers have acquired autocratic control of the levers of corporate power, which in turn has given them accelerating political power. They are accountable to no one as they direct lobbying and the "legal corruption" of sponsoring political conventions, inaugurations, Presidential debates, and congressional self-monuments, not to mention the "bread and butter" of political campaigns.

More alarming still, these lobbying efforts are increasingly "off the books." One might take heart in the fact that the number of registered lobbyists in Washington, D.C. has actually declined in recent years — until one realizes that the amount spent on lobbying has grown dramatically thanks to an ever-expanding network of stealth lobbyists taking advantage of ever-weakening lobbying regulations. This has been nowhere more true than in the finance, insurance, and real-estate sector, which has spent somewhere between $450 million and $500 million annually on lobbying ever since the finance-sector driven crisis of 2007-08. Not coincidentally, one suspects, not a single high-ranking executive of any major finance firm has yet been prosecuted for the malfeasances that rocked the entire global financial structure, but that is the subject of another discussion. Nor did the government remove financial executives as it did with General Motors.

Suffice it for now to note that, while ownership has awakened to the challenge, CEO accountability remains largely a myth. Shareholders can neither nominate, remove, nor communicate with directors. The tendency is for the largest corporations to become "drones" in the sense of having no effective owners – that is, no owner with more than 10% of the total. What's more, ownership is increasingly represented by index and algorithm selection in which human decisions as to purchase and sale of particular companies have no relevance. As one might expect, drone corporations on the whole pay fewer taxes, incur larger criminal fines, reward their CEOs with higher compensation, and externalize more liabilities onto society than do corporations having effective owners. That latter point, by the way, includes externalizing onto shareholders fines sometimes in the billions of dollars imposed in civil actions undertaken as the direct result of management actions.[3]

Eighty years ago, Adolph A. Berle warned that granting management free rein brought with it "the corresponding danger of a corporate oligarchy coupled with the probability of an era of corporate plundering." Today, this corporate "capture" has found its fullest expression in the decision of the United States Supreme Court in *Citizens United*. That a Supreme Court Justice could actually argue, as Anthony Kennedy did, that there exists "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy'" shows how far we have sunk into a Never-Never Land of convenient "truths" and rosy shibboleths.

Instead of corporate governance, we have devised a kind of shadow play – Kabuki — in which the various constituents act out their assigned roles, culminating in the Kabuki festival we know as the annual meeting.[4] Even shareholder activism, rather than undermining the legitimacy of the current system, serves a legitimating function at these yearly events by maintaining the illusion that reform for the better is possible and that shareholders have power.

The inescapable fact is that corporations cannot be effectively monitored or controlled by elements external to the corporation. Simply, corporations can lobby more effectively, can hire better lawyers to control the process of converting laws into public policy, and now – thanks to *Citizens United* – can commit almost limitless corporate funds to turning the political process in their favor. As Louis Brandeis once put it: "We believe that no method of regulation ever has been or can be devised to remove the menace inherent in private monopoly and overweening commercial power." The only internal component of the corporate system with the power, motivation, and interest sufficient to act as an effective monitor is ownership.

At the 2015 Public Funds Forum in September, panels discussed effective governance, corporate social responsibility and fiduciary duty, using litigation to hold corporations accountable. The Continued on p. 5

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reality is that it is the institutional investors who must instigate change – asset owners and asset managers must bring corporations and managers to accountability. Attendees gathered to discuss how to act effectively. And when the conference convenes again next year, panelists can discuss successes and failures.

Ownership needs to expand its agenda for the future. In the globalized world of commerce, effective and legitimate corporate functioning will require leadership from the business community and cooperation from governments. The future agenda must deal with at least the following issues:

A – Corporations must have a legal domicile importantly connected with its operations. "Domicile shopping" for the least effective governance regime must stop. A corporation is a creature of the state. The earliest ones were created by specific statutes and governed by an explicit social contract – what business, what term, what invested capital – that grounded them in time and place. Until the modern era, corporations were also associated with physical assets whose location made sense of the venue chosen for incorporation – the legal domicile — and juxtaposed the physical impact of corporate functioning with the law-making power of the state where it was domiciled. Thus, questions of legitimacy concerning corporate power could be debated by individuals directly affected by their impact and with the power to make legal changes to alter existing conditions.

No more. The evolution of corporate "assets" from the physical to the intellectual – patents, know-how, brands, good will, etc. – has severed the old physical connection between business and location. Simultaneously, a four-decade "race to the bottom" has left corporations free to domicile in whatever place offers the most imaginative solutions as to how their earnings are to be taxed and under what rules of governance they will function, an unregulated "discretion" that all but compels abuse.

Bottom line: Corporations must be perceived as functioning according to rules compatible with human welfare. There must be a reasonable — and just as important, a perceived-to-be reasonable — code underlying corporate domicile. But don't look for management to lead the way on this. Only ownership can make it happen.

B – All constituencies need to cooperate on developing a system of integrated accounting so that corporations stop having incentive to pursue societally destructive practices, and shareholders and customers stop being enablers of conduct that they personally deplore. What is critical is that there exists within the corporate framework an energy capable of dealing with such issues as the permissible level of environmental impact and involvement in politics.

Because the GAAP model prevails, we have made no meaningful effort to describe a corporation's "intangible assets," even when they comprise more than 100% of its value. Because of GAAP, we have also ducked the question of appropriate "costing" of corporate externalities. Instead, each purchaser of goods and stocks "ratifies" the social costs as they are recorded under conventional accounting practice. To pick one ready example, purchasers of coal company stocks and users of electricity generated in part or primarily by coal "enable" the humongous health consequences of coal mining. Coal would no longer be the "cheap" fuel for generating electric power if we added to the resource costs the further expense of black lung, orthopedic horrors, and death.[5]

Had GAAP been applied by Moses to the Ten Commandments handed to him on Mount Sinai, it seems unlikely a single one of them would have survived, yet GAAP remains the guiding "ethic" of corporate functioning, a conceptual grotesquerie with profound social costs.

The solution: integrated accounting standards that factor in both intangible assets and externalized costs *and* that are applied universally. No corporate executive would be affronted by a fair and comprehensive economic accounting system so long as his competitors, domestic and foreign, had to comply with the same rules. That, indeed, is the great virtue of using accounting as the organizing language for legitimate business: the culture and institutions exist for a global system. But again, only ownership can make this happen.

C – In the end, it all comes down to ownership. Active, involved and responsible owners. All publicly traded companies must have "real owners" – obviously, defining the requisite characteristics will require much flexibility, as there is no shoe that fits every foot.

Ultimately, corporate power can be "legitimate" in a free society only if managers are required to answer to some person, entity, or force in a meaningful way. This person or persons must be motivated, empowered both economically and with information, and capable of requiring accountability.

Power without accountability is totalitarianism. This would appear to be a self-evident truth of governance, but in reality, the huge money managers – the largest five own more than 10% of all traded companies – are themselves ensnared by conflicts involving their own interest, the interest of their investors, and the interest of the entities they invest in.

So it falls to the institutional fiduciaries to take up the task. Only the community of institutional investors have the volume of ownership to effect real change. Only they can act as fiduciaries. And only they can hold managers and boards accountable.

The suggested solutions here are many: time-weighted voting power, segregated voting shares, and the like. What is certain, though, is that change will come only through owners willing to exercise their "skin in the game" to create standards that can be tested against all public companies. Not all shareholders need to be activists in all companies. Specifically, it is the responsibility of institutional fiduciaries to ensure that there exists in each public company some owner or owners capable of and willing to discharge the responsibilities of stewardship. ■

[1] Jimmy Carter on "The Thom Hartmann Program," July 28, 2015 (http://www.thomhartmann.com/bigpicture/president-jimmy-carter-united-states-oligarchy).
[2] John Plender, *Capitalism: Money, Morals and Markets* (Biteback Publishing, July 2015).
[3] Robert A.G. Monks, *Citizens DisUnited: Passive Investors, Drone CEOs, and the Corporate Capture of the American Dream* (Miniver Press, 2013).
[4] "The Kabuki Theater of Corporate Governance," May 18, 2015 (http://www.ragm.com/blog/The-Kabuki-Theater-of-Corporate-Governance).
[5] "A True Tale About the True Cost of Coal," June 4, 2014 (http://www.ragm.com/blog/A-True-Tale-About-the-True-Cost-of-Coal185).

Serving as a Fund Trustee: Effective Governance for Public Pension Funds

As a trustee for a public pension fund, you serve as a fiduciary over fund assets often including shareholdings in thousands of publicly traded companies. The members of the boards of directors of each of those companies, in turn, act as fiduciaries for their shareholders. Although there are copious resources regarding the governance of these companies, there is less guidance for you regarding governance practices for public pension funds. *This article is the first in a series of articles dedicated to providing you, as a fund trustee, insights into those best practices in corporate governance that may also apply to fund governance.*

Similar to the role of a corporate board member, your role calls for you to oversee valuable assets for the benefit of others. In the case of corporate directors, the assets are physical and intangible assets owned by the company for the benefit of a group: the corporation's shareholders. While you oversee a different type of asset – an investment fund rather than physical and intangible assets – you also do so for the benefit of a group: the fund beneficiaries. Therefore, you both must fulfill fiduciary duties to the group for which you are serving.

In order to fulfill your fiduciary duties, just as a corporate director, you must work within the board structure to make difficult decisions, often involving large sums of money that will impact thousands of people. While serving in the role of trustee, you must work effectively within a team environment while drawing on your experience and background. You must also be courageous enough to voice your opinions among a group and have the integrity to act independently in all circumstances.

Board Responsibilities. In this article, we will examine the general responsibilities you have as a fund trustee and compare them to those of a corporate director. In future articles, we will consider the structure, leadership, and overall best practices for both corporate boards and pension fund boards in order to provide you insights into the corporate governance practices that should be considered by your board as well.

While the specifics differ, the roles and responsibilities of a corporate board and a pension fund board overlap quite a bit. Both boards have responsibility to oversee the management, strategy, risk management, governance and culture of the organization.

Management Oversight. Corporate and pension fund boards have the responsibility to identify and hire the chief executive officer of the entity. They must also evaluate his or her performance on both a short-term and long-term basis. In turn, the boards are responsible for establishing the compensation programs for the senior executives and overseeing the design of incentive plans that reward executives for implementing the agreed-upon strategy. These boards must also stand ready to fire the chief executive if the circumstances warrant. Best practices call for both types of boards to maintain a leadership succession plan for the entity. This often requires involvement in management development in order to identify potential leaders within the organization who could serve as the next chief executive.

Strategy and Risk Management. Another key responsibility of both types of boards is the oversight of the strategy or the mission of the organization. While executives are responsible for the day-to-day execution of the strategy or mission, the board members must ensure that this is done effectively. Along these lines, the boards also make sure that management has effective risk management policies in place, and that such policies are sufficient to address the various and ever-changing risks that face both types of entities. While the missions, strategies, and risk management processes differ significantly between corporations and pension funds, the responsibilities to oversee them are similar for both directors and trustees.

Governance. Of course, corporate directors and pension fund trustees must also govern themselves. Determining the leadership structure that will guide the board is one important factor here. Self-governance also often includes the development of a committee structure that allows Continued on p. 7

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directors and trustees the time needed to examine issues in depth, while still allowing for sufficient discussion at the board level before final board decisions are made. It is also suggested that self-evaluations are conducted regularly to ensure that the board is working effectively as a team to fulfill its fiduciary duties.[1]

Culture. Most importantly, both types of boards are responsible for establishing the appropriate culture and "tone at the top" for the organizations they oversee. Both corporations and pension funds are large, complex entities with many people involved in making decisions every day that impact not only the shareholders or beneficiaries, but often employees and members of the broader community as well. As members of the governing bodies of each of these types of entities, corporate directors and fund trustees must always consider this responsibility when making any board-level decision. ■

[1] Rick Funston, Keith Johnson, Randy Miller & Mark Barrott, *Public pension fund governance: alignment of responsibility with authority*, Pensions & Investments, August 1, 2012.

The National Law Journal Names Randall J. Baron, Patrick J. Coughlin and David W. Mitchell as M&A and Antitrust Trailblazers

The National Law Journal named **Randall J. Baron**, **Patrick J. Coughlin** and **David W. Mitchell** to its 2015 Trailblazers series on Mergers & Acquisitions and Antitrust. The publication recognizes attorneys who have "moved the needle in mergers & acquisitions and antitrust law[,] recognizing excellence in deal making, restructuring and financing," and honors their achievements.

Baron, recognized in the area of mergers & acquisitions, has worked to advance the practice of shareholder merger and acquisition litigation to achieve substantial monetary recoveries for shareholders for almost two decades. The publication noted that "[t]he top 15 settlements in this area have all been since 2002, and [Baron and the Firm have] been involved in 10 of them, including the largest," *Kinder Morgan*, which yielded a $200 million recovery.

As demonstrated by his trial win in *Rural/Metro*, Baron led former shareholders of Rural/Metro Corp. to a rare victory against Royal Bank of Canada Capital Markets LLC (RBC), which had acted as financial advisor to Rural/Metro's lowball buyout. The decision established important precedent by finding a financial advisor liable for aiding and abetting a Delaware corporation's board's breach of fiduciary duty. Serving as co-lead counsel, Baron showed that RBC, motivated by undisclosed conflicts of interest, "created the unreasonable process and informational gaps" that resulted in violations of law. *Reuters* reported that the opinion "means the litigation risk to financial advisors in M&A deals just got very real." On October 10, 2014, the Vice Chancellor awarded shareholders $75.7 million in damages, which *The Wall Street Journal* called a "crowning achievement" for Baron and "one of, if not the largest against a bank over its role as a deal adviser." *TheStreet.com* described the award as "stunning" and "one of the largest in the history of the Court of Chancery."

Most recently, Baron went to trial in the Delaware Court of Chancery on claims of breach of fiduciary duty on behalf of Dole Food Co., Inc. shareholders (*see* page 3). The litigation challenged the 2013 buyout of Dole by its billionaire Chief Executive Officer and Chairman, David H. Murdock. On August 27, 2015, the court issued a post-trial ruling that Murdock and fellow director C. Michael Carter – who also served as Dole's General Counsel, Chief Operating Officer and Murdock's top lieutenant – had engaged in fraud and other misconduct in connection with the buyout and are liable to Dole's former stockholders for over $148 million, the largest trial verdict ever in a class action challenging a merger transaction.

Coughlin and Mitchell, both recognized in the area of antitrust, led the litigation teams in two recent antitrust class action lawsuits that resulted in historic settlements and led to significant industry changes. First, in the *Interchange Fee* litigation, two of the world's biggest credit card companies implemented rule changes as part of a settlement that drew high praise from the judge overseeing the case. Coughlin and Mitchell served as co-lead counsel for retailers that brought a class action against Visa and MasterCard targeting the "swipe fees" the two companies charge when a customer pays with a credit or debit card and the limited negotiating power merchants have in the matter. Under the settlement, Visa and MasterCard will pay a combined $5.7 billion and implement significant rule changes regarding the acceptance of these credit cards. This settlement is the largest antitrust class action settlement in history.

Second, in the *Private Equity* case, club deals – in which private equity firms pool their assets to suppress the acquisition price of a publicly listed company – fell out of favor as Coughlin and Mitchell put the unlawful, conspiratorial practice under a microscope, even as regulators declined to take action in the area. They served as co-lead counsel and obtained several settlements totaling $590.5 million in a suit that involved some of the world's largest and most powerful private equity firms and altered the way private equity firms do business. The settlement is the largest antitrust class action settlement ever in which no civil or criminal government antitrust action was taken. ■

Randall J. Baron ▪ Patrick J. Coughlin ▪ David W. Mitchell

Governance Roundup

Bank of America combines CEO/Chairman positions over objections of shareholders.

In 2009, following the financial meltdown, Bank of America ("BOA") agreed not just to appoint an outside independent chairman of the board but to institutionalize the split with a bylaw amendment. This year, without consulting shareholders, BOA re-combined the two positions and then asked for retroactive approval of the amended bylaw, despite the objections of investors like CalSTRS, which wrote a strong letter outlining its concerns.[1] Despite a substantial vote against it, the amendment was approved. The stock responded by falling 1.27%.

The CalSTRS initiative at BOA is especially noteworthy because, as they acknowledge in their letter explaining why they want BOA's board to split the Chairman and CEO roles, the directors have already volunteered to adopt proxy access, only one of nine companies to do so. And the board proposed a bylaw that would provide for either a split Chairman/CEO or a lead director, an option many shareholder advocates consider acceptable and which CalSTRS itself acknowledges may be adequate in the future.

CalSTRS explained in its letter why it was so insistent on splitting the two roles now:

> We believe the roles of CEO and Chair of the Board have inherent conflicts which require the two posts to be separate and independent. Since Mr. Moynihan's appointment as CEO in January 2010, the Company has continued to underperform, has failed important Fed stress tests, and has perpetuated a sub-par engagement with its shareholders. Given these missteps, we do not believe now is the time to reduce oversight of management by combining the roles of CEO and Chair.
>
> We understand some shareholders have views that allow more flexibility regarding Company leadership structures. In fact, some shareholders may support the concept of a lead director at Bank of America at some point in the future, but we hope they agree now is not the time to grant your Board that flexibility.

They also noted that while, as BOA argues, 80% of the directors have changed since 2009, when shareholders voted to split the CEO/Chairman positions, most of the shareholders have not changed, and the rationale remains the same, given the company's underperformance.

DC Appeals Court ruling on conflict minerals disclosure calls into question the government's right to impose any disclosure requirements on publicly held companies.

A disturbing decision from the DC Circuit Court of Appeals overturned the conflict minerals disclosure regulations from the SEC that were required by the Dodd-Frank legislation. Dodd-Frank directed the SEC to issue rules that would require companies to make certain disclosures about their supply chains, to give consumers and investors information they would find useful in evaluating a company's products and stock. Specifically, companies would have to disclose whether their products contained any tin, tungsten, tantalum or gold from mines in the Democratic Republic of Congo ("DRC") that were controlled by armed gangs engaged in human-rights abuses. Companies would be required to track the source of all relevant raw materials in their products, then file annual reports stating whether those goods were DRC conflict-free, conflict "undeterminable" (an interim category permitted for at least the first two years), or "not found" to be conflict-free.

The challenge was brought by the U.S. Chamber of Commerce and National Association of Manufacturers. The 2-1 ruling found that the rule was not sufficiently justified. What is particularly disturbing is that in dicta (non-binding commentary) the majority decision suggested that, while acknowledging that the standard is different for advertising than for securities filings, the entire foundation of disclosure requirements imposed by the government on corporations could be a violation of companies' First Amendment rights.

Shareholders push portfolio companies to object to Chamber of Commerce action against climate change rules.

In the wake of the Obama Administration's August 3, 2015 announcement of its Clean Power Plan to combat climate change, over 60 investors and organizations sent a letter to approximately 50 companies that are on the board or are prominent members of the U.S. Chamber of Commerce, a vigorous opponent of the plan that is orchestrating a broad-based strategy to block new regulations.

SEC settlement with Citigroup results in a fine, but no action against the responsible parties.

As Gretchen Morgenson noted recently in *The New York Times*: "How can we expect Wall Street's me-first culture to change when regulators won't pursue or even identify the me-firsters who are directly involved? That question came to mind after reading the terms of a settlement struck on Aug. 17 between the Securities and Exchange Commission and two units of Citigroup. It is a deal that holds no one at the bank accountable for behavior that caused investors to lose an estimated $2 billion."

Six big U.S. banks called for a "strong global climate agreement."

On September 28, 2015, Bank of America, Citi, JPMorgan Chase, Goldman Sachs, Morgan Stanley and Wells Fargo said in a joint release that government action, in addition to private business investment, is needed to address climate change.[2] The release explained:

> Scientific research finds that an increasing concentration of greenhouse gases in our atmosphere is warming the planet, posing significant risks to the prosperity and growth of the global economy. As major financial institutions, working with clients and customers around the globe, we have the business opportunity to build a more sustainable, low-carbon economy and the ability to help manage and mitigate these climate-related risks.
>
> Our institutions are committing significant resources toward financing climate solutions. These actions alone, however, are not sufficient to meet global climate challenges. Expanded deployment of capital is critical, and clear, stable and long-term policy frameworks are needed to accelerate and further scale investments.
>
> We call for leadership and cooperation among governments for commitments leading to a strong global climate agreement. Policy frameworks that recognize the costs of carbon are among many important instruments needed to provide greater market certainty, accelerate investment, drive innovation in low carbon energy, and create jobs. Over the next 15 years, an estimated $90 trillion will need to be invested in urban infrastructure and energy. The right policy frameworks can help unlock the incremental public and private capital needed to ensure this infrastructure is sustainable and resilient.
>
> While we may compete in the marketplace, we are aligned on the importance of policies to address the climate challenge.

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Litigation Update

Robbins Geller has obtained seven post-*Halliburton II* class certification victories in securities cases – more than any other plaintiffs' firm. They include *Questcor*, *Regions*, *Bridgepoint Education*, *Barclays*, *Best Buy*, *Goldman Sachs* and *Prudential*.

Class Certification Granted in *Barclays*

On August 20, 2015, United States District Judge Shira A. Scheindlin issued an opinion and order granting lead plaintiffs' motion for class certification pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. In this securities class action, lead plaintiffs allege that defendants Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc. (collectively, "Barclays") and certain Barclays officers and directors violated the federal securities laws by engaging in a widespread fraud whereby Barclays submitted false LIBOR rates to the market over a multi-year period in order to benefit individual Barclays trading positions and to protect the perception of Barclays' liquidity by the market. On June 27, 2012, Barclays admitted the false LIBOR submission scheme to the market for the first time and announced that it had entered into settlement agreements with the U.S. Department of Justice, U.S. Commodity Futures Trading Commission, and U.K. Financial Services Authority, and had agreed to pay over $450 million in fines. As a result of these revelations, Barclays' American Depositary Shares ("ADSs") dropped over 12%, from $12.33 to $10.84 per ADS on June 28, 2012.

Lead plaintiffs' motion for class certification was one of the first decisions rendered in the Southern District of New York addressing the issues of market efficiency and price impact under Fed. R. Civ. P. 23(b)(3) since the landmark decision in 2014 by the Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"). In *Halliburton II*, the Supreme Court ruled that PSLRA plaintiffs could continue relying on the *Basic* fraud-on-the-market presumption of reliance for purposes of class certification, but clarified that defendants could submit evidence rebutting the *Basic* presumption by showing lack of price impact, *i.e.*, that the claimed misstatements had no effect at all on the share price declines during the class period. Under *Halliburton II*, if defendants can establish lack of price impact, then the *Basic* presumption cannot apply.

Here defendants did not submit their own evidence of price impact, but instead pointed to the findings of lead plaintiffs' expert, Dr. John D. Finnerty, as demonstrating a lack of price impact. In addition, defendants challenged lead plaintiffs' expert's finding that the market for Barclays' ADSs was efficient during the July 10, 2007 to June 27, 2012 class period, and made a *Daubert* motion to exclude the findings of lead plaintiffs' expert. The court rejected defendants' tactics out of hand, and found that lead plaintiffs' expert had established that the market for Barclays' ADSs was efficient during the class period, that defendants' failure to provide any evidence of their own concerning price impact was fatal to their argument, and denied defendants' *Daubert* motion because lead plaintiffs' expert's testimony was both relevant and reliable. Specifically, the court held as follows:

> I conclude that in the ordinary case of a high volume stock followed by a large number of analysts and traded on a national exchange, whether a plaintiff can satisfy *Cammer* 5 is not dispositive. Nor is an event study always necessary. Not even the *Cammer* court said that an *event study* was required to satisfy the fifth factor, and defendants have not cited to any controlling authority that holds that an event study is the only means to satisfy *Cammer* 5. In the usual case of common or other highly traded and analyzed stock, there is no reason to burden the court with review of an event study and the opposing expert's attack of it. The exception, and this was also made clear in *Halliburton II*, is when defendants present evidence of lack of price impact or that the market was inefficient. In those cases, an event study or

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Fund v. J.P. Morgan Chase & Co. RMBS litigation. After the *NECA* decision, plaintiffs successfully moved for reconsideration of the district court's earlier dismissal in *J.P. Morgan*, resulting in the reinstatement of claims for hundreds of additional investors that purchased billions of dollars worth of faulty RMBS who would have been denied recovery.

The $272 million settlement serves as a bookend to the long and complex series of RMBS class action lawsuits filed by Robbins Geller's clients that began with the first RMBS case against Countrywide Financial Corp. (now owned by Bank of America), which was filed by Robbins Geller in 2008 and settled in 2013 for $500 million. Robbins Geller was sole or co-lead plaintiff's counsel on half of the major RMBS actions, more than any other law firm, and has recovered in excess of $1.25 billion for RMBS investors worldwide.

In March, the plaintiff asked U.S. District Judge Miriam Goldman Cedarbaum to certify a class of more than 400 investors, paving the way for a settlement.

"Our trial team and appellate lawyers worked tirelessly for seven years to get to this point for our clients," said Robbins Geller partner **Darren J. Robbins**. "We take pride in having been the first firm to commence an MBS purchaser class action arising out of the global financial crisis. In the intervening years, our lawyers obtained settlements that will return more than a billion dollars to investors."

The Robbins Geller team responsible for this achievement consisted of partners **Darren J. Robbins**, **Arthur C. Leahy**, **Joseph D. Daley**, **Susan G. Taylor**, **Thomas E. Egler**, **Lucas F. Olts** and **Nathan R. Lindell** and associates **Angel P. Lau** and **Michael Albert**, as well as a team of other highly skilled and dedicated attorneys and support staff.

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., et al., No. 1:08-cv-10783 (S.D.N.Y.). ■

Dole continued from page 3

Carter's instructions, Dole's controller sent a memo and budgeting materials to senior management, which emphasized that the revised financial information was "not to be circulated outside of this distribution group."

Nonetheless, on August 11, 2013, the committee's advisors learned that senior management had scheduled a meeting to discuss the revised budget and told the committee to hold off on approving the buyout. When he was then asked about the upcoming budget meeting, Carter falsely claimed that there were no changes to the budget, and that there was no reason to delay the approval of the buyout. The committee was also unaware that Carter had been secretly advising Murdock on negotiations over the terms of the merger agreement and had helped plan a potential hostile offer in the event that the committee rejected his proposal. Lacking material information, the committee met that afternoon and approved the sale to Murdock.

As the court explained in its ruling, Murdock's buyout was not merely unfair to stockholders, it was the product of pervasive "fraud, misrepresentation . . . [and] gross and palpable overreaching."

"This excellent result, after years of litigation and trial, demonstrates our Firm's resolve to vindicate the rights of investors," commented Robbins Geller partner **Randall J. Baron**, plaintiffs' co-lead counsel. "The *Dole* case epitomizes why management buyouts need to be highly scrutinized. Because members of management control the company, they can easily abuse their positions for purely self-interested reasons."

Robbins Geller attorneys **Randall J. Baron**, **A. Rick Atwood, Jr.**, **David T. Wissbroecker** and **Maxwell R. Huffman** obtained this result for shareholders.

In re Dole Food Co., Inc. Stockholder Litigation, C.A. No. 8703-VCL (Del. Ch.). ■

> "Murdock and Carter's conduct throughout the committee process, as well as their credibility problems at trial, demonstrated that their actions were not innocent or inadvertent, but rather intentional and in bad faith."
>
> - Vice Chancellor J. Travis Laster, Delaware Court of Chancery, *In re Dole Food Co., Inc. Stockholder Litigation*

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other rebuttal evidence is required and class certification becomes a battle of competing expert studies. Defendants here chose not to submit their own event study. . . . Defendants' *Daubert* challenge focuses almost exclusively on Dr. Finnerty's event studies. These attacks provide an insufficient basis to exclude Dr. Finnerty's testimony.

In addition, as have many other courts in assessing class certification for PSLRA cases, the court rejected defendants' damages-related arguments made in light of the Supreme Court's 2013 ruling in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

In granting class certification, Judge Scheindlin appointed lead plaintiffs **Carpenters Pension Trust Fund of St. Louis** and **St. Clair Shores Police & Fire Retirement System** to represent a plaintiff class defined as all purchasers who purchased or otherwise acquired Barclays ADSs during the class period and who were damaged thereby. Robbins Geller was appointed as lead counsel for the class.

Robbins Geller attorneys **Samuel H. Rudman**, **David A. Rosenfeld**, **Robert R. Henssler, Jr.**, **Michael G. Capeci**, **Christopher M. Barrett** and **Christopher T. Gilroy** are prosecuting this action on behalf of lead plaintiffs and the class.

Carpenters Pension Trust Fund of St. Louis, et al. v. Barclays PLC, et al., No. 12-cv-05329-SAS, Opinion and Order (S.D.N.Y. Aug. 20, 2015).

Class Certification Achieved for Goldman Sachs Investors

On September 24, 2015, the Honorable Paul A. Crotty of the Southern District of New York certified a class in *In re Goldman Sachs Group, Inc. Securities Litigation*, comprised of all persons or entities who, between February 5, 2007 and June 10, 2010, purchased or otherwise acquired the common stock of The Goldman Sachs Group, Inc. ("Goldman") and were damaged thereby. Lead plaintiffs are **West Virginia Investment Management Board**, **Plumbers and Pipefitters National Pension Fund** and **Arkansas Teachers Retirement System**. The case alleges that Goldman and several senior executive officers made materially false and misleading statements about Goldman's business practices and conflicts of interest, reassuring investors that their "clients' interests always come first" and that Goldman had "extensive procedures and controls that are designed to . . . address conflicts of interest." When the marketplace learned of Goldman's conflicts in CDO transactions, resulting in SEC and DOJ investigations and enforcement actions (including one over the structuring and marketing of the Abacus CDO, for which the SEC brought and settled fraud charges for $550 million), plaintiffs alleged that Goldman's statements to investors, now revealed as untrue by the "corrective disclosures," triggered a decline in Goldman's stock that injured the putative class.

Defendants employed three expert witnesses in their opposition to class certification, insisting that plaintiffs had not demonstrated predominance, or whether the proposed class was sufficiently cohesive to warrant being represented as a group. With respect to the predominance inquiry under Rule 23(b)(3), the court considered and rejected defendants' attempt to prove lack of price impact – which would have eliminated the presumption of reliance – pursuant to the Supreme Court's decision in *Halliburton II*. In doing so, the court determined that plaintiffs' expert, Dr. John D. Finnerty, sufficiently established the market efficiency for Goldman stock. In addition, Judge Crotty determined that "Defendants have failed to demonstrate a complete lack of price impact," and "cannot show that the total decline in the stock price on the corrective disclosure dates is attributable simply to the market reaction to [non-culpable reasons]." In sum, the court held that "where Defendants cannot demonstrate a complete absence of price impact, and where Plaintiffs have demonstrated an efficient market, the *Basic* presumption applies, and Plaintiffs have demonstrated classwide reliance and predominance."

The court also rejected defendants' assertion that the Supreme Court's decision in *Comcast* precluded certification, finding that plaintiffs' damages model properly measured damages that resulted from the class's asserted theory of injury.

Where defendants argued that plaintiffs could not link Goldman's statements to declines in Goldman's stock price, Judge Crotty wrote, "Dr. Finnerty demonstrated that, on the corrective disclosure dates, information revealing the misstatements to the market was released, and the stock price dropped. The link is obvious, and Defendants have failed to conclusively sever this link."

Robbins Geller attorneys **Samuel H. Rudman**, **Spencer A. Burkholz**, **Jonah H. Goldstein**, **Robert R. Henssler, Jr.**, **Eric I. Niehaus** and **Brian E. Cochran**, serving as co-lead counsel, obtained this result for shareholders.

In re Goldman Sachs Group, Inc. Securities Litigation, No. 10 Civ. 3461 (PAC), Opinion & Order (S.D.N.Y. Sept. 24, 2015). ■

"Among the reasons Robbins Geller has been able to secure a multitude of record-breaking recoveries for clients is the firm's steadfast willingness to take complex cases all the way to trial, along with a deep bench of talented lawyers and the financial means to take cases on contingency."

- *Most Feared Plaintiffs Firm: Robbins Geller*, Law360, October 8, 2015

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Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or the "Firm") represents plaintiffs in litigation involving securities fraud, corporate takeovers, shareholder derivative claims, intellectual property, consumer and insurance fraud, and antitrust claims, as well as whistleblower protection and qui tam suits. With 200 lawyers in 10 offices, Robbins Geller has obtained many of the largest securities class action recoveries in history and was ranked number one in both the amount and number of shareholder class action recoveries in ISS's *SCAS Top 50* report for 2014. The Firm not only secures recoveries for defrauded investors, it also works hard to implement corporate governance changes, helping to improve the financial markets for investors worldwide. Please visit rgrdlaw.com for more information.

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In partnership with our clients and customers, we will provide the financing required for value creation and the vision necessary for a strong and prosperous economy for generations to come.

This is enormously significant for many reasons. First, it makes the business case for investments in sustainable and climate-restoring business opportunities. Second, it does not recognize any legitimacy to denying the impact of our current activities on climate. Third, it acknowledges that business cannot solve this problem alone and calls on governments internationally to work together as they have done. If they back this up with their political contributions – campaign and lobbying – it will be a powerful, even decisive counterweight to the money from anti-science, anti-environmental groups. If politicians need Wall Street money, this resolution may have as big an impact on the political world as it does on the business side.

Japanese Prime Minister Shinzo Abe pledged to push for further improvements in corporate governance.

In a speech on September 29, 2015, Japanese Prime Minister Abe made a commitment to new targets for expanding the economy by 20% and making governance changes a top priority, including more transparent selection of CEOs and board members and unwinding the traditional system of cross-held shares.

CalSTRS partners on an energy productivity index for portfolio companies.

The first global energy productivity benchmark for listed industrial companies is a partnership between CalSTRS, ClimateWorks Australia and the U.S.-based ClimateWorks Foundation. CalSTRS is participating in the project as lead investor. The index will quantify companies' energy risks and the financial value of improving energy productivity, helping investors to assess investment risk and make more informed decisions about engagement priorities.

Volkswagen CEO Martin Winterkorn resigns amid scandal over emissions-rigging "defeat device."

After shocking revelations that as many as 11 million cars were specifically engineered to register on emissions-testing devices as compliant when in fact they were adding perhaps a hundred million additional tons of toxic pollutants to the atmosphere, Volkswagen's CEO resigned. But it did not take long for the focus to turn to the company's notoriously insular board, so controlled by one family that one member's fourth wife, formerly the nanny for his children, was made a director. The announcement that Winterkorn will continue to play a role, including supervising the investigation into the "defeat devices," has led Hermes and others to call for a major overhaul on the board and in the executive suite.

It has also led to commentary from investors and those who chose not to invest in the company specifically due to the governance risk about what role governance should play in securities analysis. As the *Financial Times* noted: "There is one group of people who lost very little as a result of Volkswagen's cheating on emissions tests — namely German institutional investors, who at the end of last year held just 2.1 per cent of the capital. That makes an interesting comparison with the 26.3 per cent stake held by foreign institutions. Clearly German investors were more sensitive to the governance issues for which VW had long been notorious than their foreign counterparts…. This underlines an important truth with important investment consequences: at the root of most corporate scandals lie governance failures. And while the focus of much governance comment and analysis is on the board and the role of institutional shareholders, what happens below board level can be quite as important as behavior in the board room, especially in relation to the incentive structures that mold the actions of employees."

Executive sentenced to 28 years in prison for conspiracy, obstruction of justice, and wire and mail fraud in food poisoning case.

Stewart Parnell, the former head of Peanut Corporation of America, was recently sentenced to 28 years in prison for his role in concealing a 2008 and 2009 salmonella outbreak that sickened more than 700 people and killed nine. This is a very rare case of an executive being held personally responsible for corporate crime. The company has now gone out of business. ■

[1] http://valueedgeadvisors.com/2015/09/03/calstrs-letter-to-bank-of-america-on-chairmanceo-split/
[2] https://www.ceres.org/files/bank-statement-on-climate-policy