ON THE RECORD with Robbins Geller Rudman & Dowd LLP

1st Quarter 2015

Robbins Geller Recovers $400 Million

for Pfizer Inc. Shareholders

A $400 million settlement for shareholders in the securities fraud class action, *Jones v. Pfizer Inc.*, was presented to the court in February. The resolution of the case was achieved on the eve of the February 10, 2015 trial date.

The settlement represents a significant recovery for the class achieved by lead plaintiff **Stichting Philips Pensioenfonds** from Eindhoven in the Netherlands and class representative **Mary K. Jones** from Fayetteville, Arkansas. "We are pleased that Pfizer has agreed to resolve investors' claims on the eve of the trial for $400 million, subject to court approval. We are grateful to our lawyers, Robbins Geller Rudman & Dowd LLP, for their expert counsel in this case," said Jasper Kemme, Managing Director at Stichting Philips Pensioenfonds.

Pfizer is the world's largest pharmaceutical manufacturer, and like many other manufacturers was subject to intense scrutiny regarding the legality of its marketing practices. In fact, during the early 2000s, the U.S. government increasingly began cracking down on illegal off-label promotion when a pharmaceutical company itself promotes a drug for unapproved uses, doses, or to unapproved populations. In the early 2000s, Pfizer was forced to settle certain off-label marketing investigations, but always insisted that it was the marketing practices of companies that Pfizer acquired that resulted in the settlements. Pfizer and its officers insisted publicly that the company itself did not engage in off-label promotion. Unbeknownst to investors, however, Pfizer was illegally promoting several of its own drugs off label to boost sales.

Robbins Geller's attorneys and forensic accountants uncovered convincing evidence that Pfizer insiders were keenly aware of the enormous returns Pfizer earned through off-label promotion. In addition, the investigation revealed that Pfizer was aware that its actions would subject it to enormous fines, penalties, and exclusion from government programs. Despite these risks, Pfizer and its officers concealed from investors that it was earning substantial revenue from illegal promotion and was subject to an enormous government investigation into Pfizer's off-label promotion of Bextra and other drugs.

Ultimately, Pfizer agreed to pay a $2.3 billion fine to resolve the off-label marketing investigations.

Robbins Geller's litigation team included partner **Trig Smith** who, through his tenacious efforts and thorough investigation, continuously fought off defendants' attempts to have the case dismissed on loss causation grounds. "The fact that Pfizer attempted to muddy the loss causation issue by simultaneously announcing the $2.3 billion fine, which included the largest criminal fine in U.S. history, with the Wyeth merger, did not deter Trig Smith in the pursuit of the truth," said **Henry Rosen**, one of the partners running the case. Continued on p. 6

A Note to Institutional Investors from Samuel H. Rudman

Samuel H. Rudman

As we head to press, the proposed $400 million settlement announced with Pfizer just days before trial was to commence stands out. The result, against the largest pharmaceutical manufacturer in the world, is a testament to both the unswerving diligence of our investigation team in guiding the case over years of litigation and the threat posed by our trial counsel when the defendants knew what they had to work with – an excellent result in a case no other firm filed.

In other good news, Robbins Geller obtained settlements where trials were fast approaching in cases against Psychiatric Solutions and the massive private equity antitrust class action. The action against Psychiatric Solutions (settled for $65 million) involved five years of litigation, including multiple unsuccessful attempts by defendants to have district court decisions reconsidered or overturned by an appellate court. The private equity case settlements, ultimately totaling over $590 million, culminated years of hard-fought litigation against some of the biggest names in private equity finance with a string of settlements and preparations for trial against one final defendant, who settled as trial loomed. Again, a solid showing by the teams of attorneys dedicated to those cases.

In still-pending actions, we note post-*Halliburton II* class certification decisions in two securities cases, as well as certification of a RICO consumer class action. We look forward to litigating in the upcoming quarter in these and many other cases, and are confident we have the resources to represent our clients' interests wherever needed. ■

In This Issue:

Features

Proxy Access in 2015

New York City Comptroller Scott M. Stringer, on behalf of the $160 billion New York City Pension Funds, has submitted proposals to 75 companies to request access to their proxies to nominate candidates to the boards in 2015.[1]

Proxy access is the ability for shareowners to nominate directors to run against a company's chosen slate of director candidates on a corporate ballot. This past fall, Stringer filed 75 proposals requesting that companies amend their bylaws to provide for proxy access.

The Dodd-Frank Act of 2010 affirmed the Securities and Exchange Commission's ("SEC") authority to issue its proxy access rule; however, a lawsuit filed in 2010 in the Federal District Court for the District of Columbia successfully vacated the rule on procedural grounds.[2] Despite the loss of universal proxy access, the SEC separately allowed "private ordering," the ability to file individual shareholder proposals requesting proxy access, to remain. The standards for private ordering were initially proposed under former SEC Chairman William Donaldson in 2003.[3]

Stringer's proposals would give shareholders who own at least 3% of a company's shares outstanding for three or more years the right to list their director candidates, representing up to 25% of the board, on a given company's ballot.

The 75 proposals were filed based on three priority issues according to Stringer: climate change, board diversity and excessive CEO pay. Based on these screening criteria, resolutions were filed at 33 carbon-intensive coal, oil and gas, and utility companies; 24 companies with few or no women directors, and little or no apparent racial or ethnic diversity; and 25 companies that received significant opposition to their 2014 advisory vote on executive compensation.

Since then, at least seven companies have submitted no-action letters to the SEC to exclude the proposals because they will "directly conflict" with the company's own proxy access proposal, which has higher ownership and holding thresholds.

The practice began when Whole Foods Market Inc. was recently successful in obtaining SEC relief from a proposal submitted by investor James McRitchie.[4] Whole Foods said that McRitchie's shareholder proposal conflicts with its own proposal to provide proxy access for any shareholder owning 9% of company shares for five years.

Whole Foods has since lowered the ownership threshold to 5% after criticism from shareholders.[5]

Cabot Oil & Gas Corp. has submitted a no-action letter to the SEC seeking to exclude Stringer's proposal on similar grounds.[6] Cabot Oil's board said it is submitting its own proxy access proposal to permit any shareholder owning 5% or more of Cabot's stock for three years to nominate candidates to the board.

Other companies seeking to exclude Stringer's proposal by submitting their own proposal are Exelon Corp., with thresholds of 5% for five years;[7] Apache Corp., with thresholds of 5% for three years; Chipotle Mexican Grill Inc., with thresholds of 8% for five years;[8] Noble Energy, Inc., with thresholds of 5% for five years;[9] SBA Communications Inc., with thresholds of 5% for five years;[10] and Peabody Energy Corp., with thresholds of 7% for five years.[11]

At least one group has spoken out against this trend. The Council of Institutional Investors sent a letter to the SEC asking it to alter its interpretation of "counterproposals" as a basis for exclusion of shareholder proposals.[12]

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Shareholders Obtain Record $590 Million Recovery Against Private Equity Firms

"This excellent result, after years of fierce litigation where there were no charges or allegations made by governmental authorities, demonstrates our Firm's resolve to vindicate the rights of shareholders."

David W. Mitchell, Partner at Robbins Geller Rudman & Dowd LLP

U.S. District Judge William G. Young held a final approval hearing on February 11, 2015 regarding a series of settlements totaling $590.5 million for shareholders in the antitrust class action against some of the world's largest and most powerful private equity firms. After almost seven years of litigation, Robbins Geller attorneys successfully altered the way private equity firms do business. The aggregate settlement is the largest class action antitrust settlement ever in which no civil or criminal government antitrust action was taken.

The settlements, obtained from Bain Capital Partners, Goldman Sachs, The Blackstone Group, Kohlberg Kravis Roberts & Co., TPG Capital, Carlyle and Silver Lake Technology Management, resolve claims that these private equity firms suppressed competition in certain leveraged buyouts ("LBOs") from 2003-2007, and as a result, paid shareholders less per share for their stock holdings. As part of the settlements, defendants have agreed to compensate shareholders who sold or exchanged stock in connection with some of the largest LBOs in history, including the $45 billion TXU, $32 billion HCA, and $17.5 billion Freescale LBOs.

First filed in the District of Massachusetts in December 2007, plaintiffs alleged that the world's largest private equity firms violated the Sherman Act, 15 U.S.C. §1, by conspiring to suppress the prices paid to shareholders in large LBOs, where purchasers, often private equity firms, acquire most of a company's outstanding shares with a substantial amount of debt financing, subsequently take the company private by withdrawing its shares from the public exchange, operate it for a period of time, and thereafter sell it or conduct an IPO. The settlements are the culmination of years of intense litigation in the face of defendants' repeated and steadfast attempts to defeat plaintiffs' claims.

After the court denied defendants' motion to dismiss, concluding that plaintiffs had sufficiently pled their Sherman Act claim, plaintiffs obtained discovery as to nine LBOs. As the case proceeded, the parties fought numerous battles over the scope of discovery. Plaintiffs filed two successful motions to expand discovery into additional phases, which allowed plaintiffs to uncover further conspiratorial conduct in an additional 18 transactions. Plaintiffs obtained and reviewed over 13 million pages of documents and took the depositions of 48 fact witnesses, including many of defendants' senior-most executives.

Defendants next filed individual and omnibus summary judgment motions on the overarching conspiracy claim, and certain defendants filed a separate motion on the HCA claim. After extensive briefing totaling over 1,000 pages, the submission of nearly 2,500 exhibits, and a two-day hearing, the court denied summary judgment on both claims and narrowed the overarching conspiracy to an overarching agreement between defendants to refrain from "jumping" each other's announced proprietary deals. The court found that TPG's statement regarding the Freescale LBO that "KKR has agreed not to jump our deal since no one in private equity ever jumps an announced deal," the fact that no announced proprietary LBOs were ever "jumped," and other incriminating evidence "suggests that the practice was not the result of mere independent conduct."

Defendants then filed renewed motions for summary judgment as to their participation in the redefined overarching conspiracy, which the court largely denied on July 18, 2013. The court found the evidence as to each of the seven settling defendants sufficient "to exclude the possibility that each of the . . . [d]efendants [was] acting independently when choosing not to 'jump' announced proprietary deals." Silver Lake subsequently moved for reconsideration of the July 18 order, which the court summarily denied. Carlyle filed a motion to amend the court's order to permit interlocutory review, which was also denied. Additionally, the court rejected Goldman Sachs, Carlyle, TPG, and Blackstone's attempt to seek reconsideration of the denial of summary judgment as to the HCA claim.

With a hearing fast approaching on plaintiffs' motion to certify the classes, trial scheduled for November 2014, and in the wake of numerous mediations and further informal settlement discussions, Continued on p. 8

Shareholders Obtain $65 Million Settlement in *Psychiatric Solutions*

On January 16, 2015, Robbins Geller obtained final approval of a $65 million settlement in the securities class action lawsuit *Garden City Employees' Retirement System v. Psychiatric Solutions, Inc. et al.*, filed in the United States District Court for the Middle District of Tennessee before Chief Judge William J. Haynes, Jr. The settlement, which Judge Haynes described as a "highly favorable result achieved for the [c]lass" through Robbins Geller's "diligent prosecution," represents the third largest securities recovery ever in the Middle District of Tennessee and the largest in more than a decade. The case was not settled until just days before trial and after Robbins Geller relocated a team of 19 attorneys and staff to Nashville, Tennessee to try the case. "This is an excellent recovery for the class in a contentious and difficult case," said Robbins Geller partner **Dennis J. Herman**. "We were able to achieve this result only because we once again demonstrated that Robbins Geller is prepared to take these cases to a jury when necessary to obtain fair compensation to defrauded investors."

The case was filed on September 21, 2009, on behalf of purchasers of Psychiatric Solutions, Inc. ("PSI") stock during the February 21, 2008 through February 25, 2009 class period. Investors were represented by **Central States, Southeast and Southwest Areas Pension Fund**. The complaint names as defendants PSI, its former President and CEO Joey Jacobs, its former Executive Vice President and Chief Accounting Officer Jack Polson, and its former Executive Vice President, Finance and Administration, Brent Turner.

The complaint alleges that PSI, which operated more than 95 psychiatric facilities for at-risk children and teens, deceived investors about the strength, financial condition and sustainability of its business, the quality of care it delivered to patients, and manipulations of its malpractice reserves. The complaint alleges that PSI failed to sufficiently staff its facilities, resulting in alarming incidents of abuse, neglect, and even the death of its patients, and downplayed the significance of these events when they became public. After raising its earnings guidance throughout the class period, on February 25, 2009, PSI stunned investors by missing earnings guidance due to rising malpractice costs and regulatory expenses related to an investigation at its Riveredge Hospital in Chicago, Illinois. On this news, PSI's stock fell $9.79 per share (35%), causing damage to members of the class. In April 2009, Illinois regulators issued a scathing report describing "egregious quality failures" at Riveredge Hospital and other PSI facilities, causing another 8% decline in the value of PSI stock and further harm to investors.

Central States and Robbins Geller aggressively litigated this action for more than four years – up to the eve of trial, which was scheduled to commence on September 16, 2014. Central States overcame defendants' motion to dismiss on March 31, 2011, and defeated defendants' subsequent motion for reconsideration or certification to the Sixth Circuit Court of Appeals. Central States then successfully obtained an order certifying this case as a class action on March 29, 2012, and overcame a petition to the Sixth Circuit for appellate review. During this time, the attorneys from Robbins Geller were engaged in expansive discovery, spanning more than three years, developing evidence that would demonstrate fraud at trial. Robbins Geller attorneys analyzed more than seven million pages of documents obtained from PSI's corporate headquarters and from its facilities across the country and deposed more than 40 fact witnesses to develop the evidence needed to prove the class's claims at trial. "Defendants threw everything they could at us to prevent or limit discovery or dismiss the case short of trial," recounted Robbins Geller partner **Daniel J. Pfefferbaum**. "Our team responded at every turn with the strength and determination needed to demonstrate that we had both the facts and the law needed to take these claims to trial."

Confronted with the extensive evidence of fraud that Robbins Geller developed in discovery, and facing a seasoned team of litigators primed to take this case to trial, PSI finally agreed to settle the action by making a substantial payment to investors harmed by the fraud perpetrated by defendants. Robbins Geller attorneys **Dennis J. Herman**, **Daniel J. Pfefferbaum**, **Tor Gronborg**, **Jonah H. Goldstein**, **James E. Barz**, **Jerry E. Martin**, **Christopher M. Wood** and **Brian E. Cochran** obtained this settlement for the class.

Garden City Employees' Retirement System v. Psychiatric Solutions, Inc. et al., No. 3:09-cv-00882 (M.D. Tenn.). ■

Global Class of Shareholders Certified by Ontario Court in *Canadian Solar* Securities Class Action

The curious case of *Abdula v. Canadian Solar* turned heads again in a January ruling granting class certification on behalf of a global class of shareholders. Previously, in 2012, the case had garnered attention when the Ontario Court of Appeal confirmed that alleged market misrepresentations filed with the United States SEC were actionable claims in Canada even though the company, Canadian Solar, traded solely on the NASDAQ exchange and its principal place of business was China.

Despite the company's shares trading on a foreign exchange, on January 5, 2015, The Honourable Mr. Justice G. E. Taylor noted that a number of factors connected the company to Ontario. A "Prospectus Supplement … implicitly provides that a claim for an oppression remedy would be by way of an action in Canada." Press releases at issue were released in Ontario, and two directors were identified in an annual report as Canadian directors.

Accordingly, in what the presiding judge wrote was "the first case in which it is sought to certify a global class action which includes all shareholders of a corporation regardless of their residency who purchased their shares on a foreign exchange," Judge Taylor certified the negligent misrepresentation and statutory claims of a global class of Canadian Solar shareholders in the Ontario Superior Court of Justice.

Abdula v. Canadian Solar, Inc., Court File No. C-710-10, Ruling on Certification (Jan. 5, 2015). ■

Shareholder Class and Subclass Certified in Litigation Against Questcor

On November 12, 2014, United States District Judge Dolly M. Gee issued an order granting plaintiffs' motion for class certification pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. In the consolidated securities class action, plaintiffs allege that defendants Questcor Pharmaceuticals, Inc. and certain of its officers violated the federal securities laws by disseminating false and misleading statements to the investing public about the effectiveness and outlook for Questcor's primary product, H.P. Acthar Gel ("Acthar"), as a treatment for indications other than infantile spasms ("IS"), making it impossible for shareholders to gain a meaningful or realistic understanding of the drug's prospects and marketing success. For all indications other than IS there exists no meaningful scientific or medical basis for an increase in the drug's use. As a result of defendants' false statements, Questcor's stock traded at artificially inflated prices during the class period. Questcor insiders then seized the opportunity to capitalize on the inflated price of Questcor's stock created by their fraud by dumping unprecedented amounts of their own Questcor shares.

Other investors who relied on defendants' false statements were, however, not so lucky. On September 19, 2012, investors learned that Aetna, Inc., one of the nation's largest insurers, had engaged in a review of the 19 indications for which the U.S. Food and Drug Administration ("FDA") had approved Acthar and determined that clinical research only supported Acthar as a treatment for IS. Then, on September 24, 2012, Questcor disclosed that the company's promotional practices were being investigated by the U.S. government. As a result of these revelations, Questcor's stock plummeted from a class period high of $57.64 per share on July 9, 2012 to close at $19.08 per share on September 24, 2012.

In granting class certification, Judge Gee appointed lead plaintiffs **West Virginia Investment Management Board** and **Plumbers and Pipefitters National Pension Fund** to represent a plaintiff class defined as "[a]ll persons or entities who, between April 4, 2011 and September 21, 2012, inclusive, purchased or otherwise acquired the common stock of Questcor … and were damaged thereby." Judge Gee also certified a plaintiff subclass defined as "[a]ll persons or entities who, between April 4, 2011 and September 21, 2012, inclusive, purchased or otherwise acquired the common stock of Questcor contemporaneously with defendant Don M. Bailey's sales of Questcor common stock between April 4, 2011 and September 21, 2012, inclusive, and were damaged thereby." Robbins Geller was appointed as class counsel for both the class and subclass.

Discovery continues in the case as it moves toward trial. The Robbins Geller attorneys litigating the case are **Andrew J. Brown**, **Thomas E. Egler**, **Robert K. Lu** and **Erik W. Luedeke**.

In re Questcor Securities Litigation, No. 12-cv-01623 DMG(JPRx), Order Granting Plaintiffs' Motion for Class Certification (C.D. Cal. Nov. 12, 2014).

Robbins Geller Obtains Class Certification on Behalf of Trump University Students

In an opinion dated October 24, 2014, the Honorable Gonzalo P. Curiel, United States District Judge, certified a nationwide class against Donald J. Trump for violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c), on behalf of thousands of consumers across the United States who were induced to purchase live courses from "Trump University" from January 1, 2007 to the present. *See Cohen v. Trump*, No. 13-cv-02519-GPC-WVG, 2014 U.S. Dist. LEXIS 152076 (S.D. Cal. Oct. 27, 2014). Previously, Judge Curiel had certified state unfair competition and false advertising claims in a related class action against Mr. Trump and his so-called "Trump University" in California, Florida and New York, with additional penalties for Californians aged 65 or older and Floridians aged 60 or older. *See Makaeff v. Trump University, LLC*, No. 3:10-cv-0940-GPC-WVG, 2014 U.S. Dist. LEXIS 22392 (S.D. Cal. Feb. 21, 2014). Judge Curiel has appointed Robbins Geller to serve as class counsel in both related class actions.

In certifying *Cohen* as a class action, Judge Curiel found that plaintiff had put on evidence that Mr. Trump misrepresented his enterprise as a "university" and promised, but failed to deliver, his substantive participation in the Trump University live events. The court held that the alleged representations of Trump's involvement and of receiving a university-level education were such core features, and were so prominently featured in advertising, that a "common sense inference" that consumers relied on these misrepresentations arose. Specifically, the court held:

> Plaintiff has introduced evidence that Defendant marketed the Trump University Live Events with prominent pictures and quotes from Defendant [Trump] as well as the allegedly ubiquitous use of the name "Trump University" as well as a coat of arms and educational language. The Court is satisfied that Plaintiff has produced evidence of uniform marketing of the alleged misrepresentations such that a common sense link between the misrepresentations and putative class members' reliance on those representations is appropriate.

Cohen, 2014 U.S. Dist. LEXIS 22392, at *25.

Judge Curiel's class certification order in *Cohen* clears the way for students of "Trump University" all around the country to potentially obtain full refunds from the defendants. And because the claim is under the RICO statute, those students may be entitled to "treble" (or triple) damages. Similarly, with respect to *Makaeff*, consumers in California, Florida and New York may be entitled to refunds, with extra penalties for senior citizens in California and Florida.

Since plaintiffs filed their case, the New York Attorney General has sued Mr. Trump and Trump University, along with others, for their role in these events.

Robbins Geller attorneys **Jason A. Forge**, **Rachel L. Jensen**, **Daniel J. Pfefferbaum** and **Maureen E. Mueller** are prosecuting the *Cohen* and *Makaeff* class actions for the Firm.

Class Is in Session in Shareholder Suit Against Bridgepoint Education

On January 15, 2015, Judge Jeffrey T. Miller of the U.S. District Court for the Southern District of California granted certification to a class of investors who purchased Bridgepoint Education, Inc. ("Bridgepoint") common stock between May 3, 2011 and July 13, 2012.

Bridgepoint, a San Diego-based for-profit education company, provides post-secondary education services via Ashford University and University of the Rockies. The case alleges that defendants made materially false and misleading statements concerning Ashford's efforts to improve student retention and completion and student-progress tracking. The complaint alleges Bridgepoint had emphasized throughout the class period that it had implemented student-support initiatives in 2010 and 2011 and that student persistence had improved. But the Western Association of Schools and Colleges ("WASC"), the accrediting commission reviewing Ashford's application for accreditation, found that a "concerted and systematic approach to improve retention, persistence and completion, with evidence-based plans, targets, and time lines, *[were] not in place and the impact of recent changes cannot yet be measured."* These facts supported a plausible claim regarding student persistence and initiatives because WASC's findings suggested that defendants could not have concluded that student persistence was improving, and defendants' comments could have led an investor to assume that Bridgepoint was analyzing Ashford's student persistence and finding that the numbers had actually improved.

In granting class certification, the court determined that each of the Rule 23(a) factors – numerosity, commonality, typicality and adequacy – and Rule 23(b)(3) were satisfied. Specifically, the court concluded that the lead plaintiffs, **City of Atlanta General Employees Pension Fund** and **Teamsters Local 677 Health Services & Insurance Plan**, are adequate because they "have every incentive to actively litigate this case," and their counsel, Robbins Geller, "has documented its experience in litigating securities-fraud class actions."

With respect to the predominance inquiry under Rule 23(b)(3), the court considered the impact of the Supreme Court's recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, __ U.S. __, 134 S. Ct. 2398, 2417 (2014), "which held that defendants in a securities-fraud action 'must be afforded an opportunity before class certification to defeat the presumption [of reliance] through evidence that an alleged misrepresentation did not actually affect the market price of the stock.'" The court determined, based upon plaintiffs' evidence, that "the market was efficient, and [d]efendants have not offered any contrary evidence or otherwise suggested that the market was inefficient."

Nonetheless, defendants attempted to truncate the class period, arguing that it should end on July 9, 2012 instead of July 13, 2012, "because the July 13 disclosure was unrelated to student persistence, and the July 9 disclosure fully revealed the alleged truth related to student persistence, so that 'Plaintiffs cannot use the fraud-on-the-market presumption of reliance to establish predominance for any investors who purchased Bridgepoint stock after July 9, 2012.'" The court denied this contention for two reasons. First, the court determined that it was "not clear that the July 13 disclosure was entirely unrelated to student persistence, as part of the message was that [the Higher Learning Commission of the North Central Association of Colleges and Schools] was concerned that Ashford's resource allocations were not 'sufficiently aligned with educational purposes and objectives in the areas of student completion and retention.'" And second, the court held that "a truth-on-the-market defense cannot be used to rebut the presumption of reliance at the class-certification stage because the defense 'is a method of refuting an alleged representation's *materiality*,' and it is well established that 'a plaintiff need not prove materiality at the class certification stage to invoke the presumption.'" Importantly, the court noted that "*Halliburton* did not change that" (citing *Halliburton*, 134 S. Ct. at 2416 ("[M]ateriality . . . should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3).")).

The Robbins Geller attorneys litigating the case are **Jonah H. Goldstein**, **Laurie L. Largent**, **Regis C. Worley** and **Austin P. Brane**. The Firm is continuing to prepare this case for trial, which is scheduled to commence on January 25, 2016.

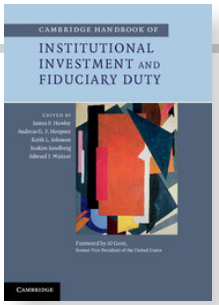
In re Bridgepoint Education, Inc. Securities Litigation, No. 12-cv-1737 JM (JLB), Order Granting Motion for Class Certification (S.D. Cal. Jan. 15, 2015). ■

Pfizer continued from page 1

"With the investigating team, Trig was able to determine that Pfizer's attempt to circumvent loss causation was stymied when news of the Wyeth merger leaked 72 hours before Pfizer planned to announce the merger and that Pfizer suffered a huge reputational impact when it announced the fine."

By the time lead trial counsel **Michael J. Dowd** joined the team, Robbins Geller's investigation, spearheaded by partners **Henry Rosen**, **Willow E. Radcliffe** and **Ryan Llorens**, had spanned more than two years and included the review of more than 25 million pages of documents and the depositions of 45 fact witnesses knowledgeable about Pfizer's marketing practices, internal controls, accounting procedures and public disclosures. "The outstanding result in this case would not have been achieved but for the tenacious investigation of our trial team," according to Dowd. "The addition of trial counsel **Jason A. Forge** really helped move the case forward in response to defendants' formidable reliance-on-counsel defense. This case is a testament to our Firm's resources, experience and tenacity, which make it a leader in securities fraud litigation. No other firm filed this case for 15 months following the January 2009 announcement of the fine. Few other firms could have achieved this result in the face of the complicated loss causation, falsity and reliance-on-counsel issues."

Jones v. Pfizer Inc., No. 1:10-cv-03864-AKH (S.D.N.Y.). ■



Recommended Reading

Michael Perino, *Have Institutional fiduciaries improved securities class actions? A review of the empirical literature on the PSLRA's lead plaintiff provision, in* Cambridge Handbook of Institutional Investment and Fiduciary Duty (Cambridge University Press, 2014).

Reviewed by Robert A.G. Monks

The health of corporate governance in the United States depends on the good functioning of shareowner litigation rights. Justice Kennedy in *Citizens United* affirmed Chief Justice Rehnquist dissenting in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978): "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect [435 U.S. 765, 795] the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intra-corporate remedies, *minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management." Bellotti*, 435 U.S. at 794-95 (emphasis added).

Michael Perino refreshingly reviews the history of the Employee Retirement Income Security Act (ERISA) and the subsequent emergence of the "lead plaintiff" doctrine arising out of the Private Securities Litigation Reform Act of 1995 (PSLRA). He notes, "The story that emerges from a review of these studies is of a largely successful statutory innovation that has markedly improved the conduct of these cases." However, one of the failures observed has been the failure of most categories of institutions to participate: "Private institutions, including hedge and mutual funds, appear far less frequently; each type is lead plaintiff in less than 1% of cases." This really is a story about union and public pension funds as plaintiffs and a demonstration that the public pension funds have had a more spacious and rich record.

The author sticks to his point and demonstrates persuasively the "value" of institutional plaintiffs and the unique contribution of public pension funds – not only with size of recovery and lower fees, but with corporate governance improvements. "In a 2008 settlement with UnitedHealth Group involving option backdating, a public pension fund, in addition to obtaining a $925 million recovery, negotiated for 'a process for election of a shareholder-nominated director, enhanced standards for director independence'...." He is here referring to remarkable results in the *UnitedHealth* case achieved by CalPERS and their attorneys at Robbins Geller.

The article's concluding sentence raises all manner of useful questions: "In the end, fiduciaries must weigh the costs and benefits to their beneficiaries of the various options available for pursuing legal claims." Does this apply to the 80% to 85% of institutions – foundations, university endowments, private pension plans, mutual funds – who do not choose to participate in litigation? Is it legally permissible for these fiduciaries to decline to consider a management alternative that plainly has the potential to increase the value of the trust estate? Is there any existing mechanism to hold these shirking owners to account? ■

The American Lawyer Recognizes Robbins Geller Partners Michael J. Dowd and Jason A. Forge

In January, Pfizer revealed in a regulatory filing that it will pay $400 million, subject to court approval, to investors to avoid a class action trial. The pharmaceutical giant is accused of misleading investors about an alleged off-label drug marketing scheme. Former assistant U.S. Attorneys Michael J. Dowd and Jason A. Forge, two of the team of Robbins Geller attorneys representing the plaintiffs, were set to try the case before a federal jury in Manhattan in late January. In naming the duo Litigators of the Week, the publication commended the Robbins Geller attorneys, saying they "kept the case alive until the threat of [impending] trial…finally helped convince the drug maker to make a deal."

Other key players on the trial team were partners Henry Rosen, Willow Radcliffe, Trig Smith, Ryan Llorens, associate Ivy Ngo and forensic accountant Heather Jennette. In addition, another 10 Robbins Geller employees, including staff attorneys, paralegals, litigation support specialists and administrative assistants, relocated to Manhattan for approximately three weeks of pre-trial preparation and hearings. Over the past five years, the Firm devoted thousands of hours to the case, took 65 depositions, and reviewed 23.8 million pages of documents. This is a testament to Robbins Geller's willingness and ability to shoulder the burden of sustained litigation and see a case through on behalf of its clients.

Mr. Dowd, a founding partner of Robbins Geller, served as lead trial counsel in *Jaffe v. Household International* in the Northern District of Illinois, which resulted in a judgment of $2.46 billion in favor of members of the shareholder class, making it the largest securities class action judgment to date. He also served as the lead trial lawyer in *In re AT&T Corp. Sec. Litig.*, which was tried in the District of New Jersey and settled after only two weeks of trial for $100 million.

Mr. Forge has conducted dozens of jury and bench trials in federal and state courts, including the month-long trial of a defense contractor who conspired with Congressman Randy "Duke" Cunningham in the largest bribery scheme in congressional history. In his three years at Robbins Geller, Mr. Forge has led litigation teams that have investigated, charged and prevailed on motions to dismiss against Wal-Mart Stores, Inc., Donald J. Trump (charging violations of civil RICO statutes, in which the court recently certified a national class), and Scotts Miracle-Gro (one of nation's largest civil RICO cases). ■

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plaintiffs secured their first settlements with Bain and Goldman Sachs for $54 million and $67 million, respectively, in June 2014. The following month, plaintiffs reached a settlement with Silver Lake for $29.5 million, and in mid-July settled with Blackstone, KKR and TPG for $325 million.

Carlyle, the lone remaining defendant, moved for summary judgment yet again, and moved to strike plaintiffs' expert witnesses. In advance of trial, plaintiffs and Carlyle exchanged trial exhibits, witness lists, deposition designations and multiple expert reports. With trial only two months away, plaintiffs obtained a $115 million settlement with Carlyle, bringing the total settlement amount with all defendants to $590.5 million.

"This excellent result, after years of fierce litigation where there were no charges or allegations made by governmental authorities, demonstrates our Firm's resolve to vindicate the rights of shareholders," said **David W. Mitchell**, one of Robbins Geller's lead trial attorneys.

Attorneys **Patrick J. Coughlin**, **David W. Mitchell**, **Randi D. Bandman**, **Phong L. Tran** and **Vincent M. Serra** led Robbins Geller's team on behalf of the plaintiffs.

Kirk Dahl, et al. v. Bain Capital Partners, LLC, et al., No. 07-12388 (D. Mass.). ■

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The SEC has not yet decided whether to grant the companies no-action relief to exclude the proposals. McRitchie has since requested an appeal to the full Commission of the decision to grant Whole Foods a no-action letter permitting the omission of his proposal. [13]

In a dramatic turn of events, the SEC then reversed course. The SEC's Division of Corporation Finance wrote to McRitchie, "The Division has reconsidered its position. On January 16, 2015, Chair [Mary Jo] White directed the Division to review the Rule 14a-8(i)(9) basis for exclusion. The Division subsequently announced, on January 16, 2015, that in light of this direction, the Division would not express any views under 14a-8(i)(9) for the current proxy season."

Comptroller Stringer responded with alacrity. In a statement Stringer said, "The playing field for shareowners just got a lot more level. The SEC's review means that the nearly 100 companies that received proxy access proposals this year can no longer exploit an overly-broad interpretation of the competing proposal rule to disenfranchise shareowners. Boards that decide to exclude these proposals anyway not only face opposition to their director nominees from institutional investors, including the city's pension funds, they now also do so without the cover of SEC no-action letters."

However, the SEC's action on the proxy access counter-proposals will affect all other counter-proposals in 2015 as well. "There are a bunch of other (i)(9) letters beyond proxy access (*e.g.* special meeting and pro rata vesting proposals) and it looks like those are collateral damage for this proxy season," wrote TheCorporateCounsel.net's Broc Romanek. ■

[1] http://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-pension-funds-launch-national-campaign-to-give-shareowners-a-true-voice-in-how-corporate-boards-are-elected/
[2] http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf
[3] http://www.sec.gov/rules/proposed/34-48626.htm
http://www.sec.gov/news/speech/spch100803hjg.htm
[4] http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/jamesmcritchie120114.pdf
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